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The History and Problems of Utah's Sex Offender Registry: Why a Move from a Conviction-Based to a Risk-Assessment Approach Better Protects Children

Teresa L. Welch and Samuel P. Newton***

We keep getting sidetracked with issues like castration and pink license plates for sex offenders, as if they can't borrow or drive another car . . . Don't get me wrong, we need extreme vigilance for some. But these people are coming from us—society—and we have to stop the hemorrhage. We have to stop pretending that these people are coming from other planets.[1]

INTRODUCTION

During the last couple of decades, sex offender registration laws have been enacted with increasing severity. Legislators continually require more of convicted sex offenders and harsher penalties exist for noncompliance from those needing to register. The number and types of sex offenders needing to register has also multiplied as the umbrella of registrable crimes expands with each legislative session. Fueling the momentum of sex offender registration laws at both federal and state levels is a public frenzy about sex offenders initiated by high profile cases portrayed on the evening news. In seeking to assuage this social panic, legislators are applying a conviction-based approach rather than a risk-assessment analysis when determining who must register and the mechanics of registration requirements. The

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[1]Nancy Sabin, executive director of the Jacob Wetterling Foundation. See Laura J. Zilney & Lisa Ann Zilney, Perverts and Predators: The Making of Sexual Offending Laws ch. 5 (2009).

conviction-based approach states that if one has a conviction for a registrable offense, one must register, and no other inquiry is held. On the other hand, a risk-assessment approach is one that allows an inquiry into a number of factors before any registration determinations are made.

The history of Utah's sex offender registration laws reveals that it shares the same momentum towards stricter requirements and harsher penalties as seen in other state and federal sex offender registration laws. Recently, constitutional challenges against Utah's sex offender registration legislation were raised in both the Utah Supreme Court, in *State of Utah v. Briggs*[2] and in a federal district court in the Tenth Circuit in *Doe v. Shurtleff*.[3] While the findings of these courts have arguably slowed down the momentum of Utah's sex offender registration laws, more action is required in order to correct the problems embedded in these laws. The purpose of this Article is to take a critical examination of Utah's sex offender registration laws and procedures. In doing so, it will: 1) describe the history of Utah's sex offender registry and the legislative debates addressing these laws, 2) examine the problems fueling and arising from Utah's sex offender registry and propose solutions to these problems, and 3) outline and asses the constitutional challenges to Utah's sex offender registry as presented in the *Briggs* and *Shurtleff* cases. Ultimately, the social panic generated by high profile cases undermines society's goal of protecting our children. A revamping of Utah's sex offender registry towards implementing a risk-assessment approach is needed if we are to best protect Utah's children as well as protect the constitutional rights of sex offenders who are required to register.

I. THE HISTORY OF UTAH'S SEX OFFENDER REGISTRY

> *My intent personally is to make it so onerous on those that are convicted of [sex] offenses . . . they will want to move to another state.*[4]
>
> *Is there anything left we can do to sex offenders with a few days left in the session?*[5]

[2] *State v. Briggs*, 2008 UT 83, 199 P.3d 935 (Utah 2008).

[3] *Doe v. Shurtleff*, 2008 WL 4427594 (D. Utah 2008).

[4] Peter Whoriskey, Georgia House Majority Leader. Jerry Keen, Some Curbs on Sex Offenders Called Ineffective, Inhumane, Wash. Post, Nov. 22, 2006, at A01.

[5] Louisiana State Representative Danny Martiny. Kerry Howley, Erogenous Zoned: Sending Sex Offenders into Exile, Reason Mag. June 30, 2006, available at http://reason.com/archives/2006/06/30/erogenous-zoned.

There's only a certain amount you can do besides taking them out and shooting them in the street—which is illegal.[6]

In tracing sex offender registries back to their origins, the first state in the nation to create a sex offender registry was California, in 1947.[7] While most other states did not create sex offender registries until the 1990s,[8] the State of Utah created its own sex offender registry in 1983 when the Utah Legislature enacted Utah Code Annotated § 77-27-21.5. At the time of its inception, the Utah sex offender registry was not intended for public access but for law enforcement use only.[9] Information contained in the registry was disclosed only to law enforcement agencies, education licensing authorities, and the Department of Corrections.[10]

The national mood shifted in the late 1980s and early 1990s toward increasing restrictions on sex offenders. In 1990, the State of Washington created a community notification registry and was the first to venture into notifying the public about sex offenders in their community.[11] The impetus for Washington's Community Protection Act of 1990 was the occurrence of several high-profile cases in which children were sexually abused and in some instances murdered, notably one case involving Earl Shriner, a convicted pedophile who, after completing his probation, kidnapped and sexually assaulted a seven-year old boy.[12]

The high profile child kidnapping of eleven-year-old Jacob Wet-

[6]Florida Senator Nancy Argenziano, Many Sex Predator Bills Run Into Resistance (2007), available at http://www.tbo.com/news/metro/MGBUEF3871F.html.

[7]Abril R. Bedarf, Examining Sex Offender Community Notification Laws, 83 Cal. L. Rev. 885, 887 n.4 (1995).

[8]Elizabeth A. Pearson, Status and Latest Developments in Sex Offender Registration and Notification Laws, in National Conference on Sex Offender Registries 45 (U.S. Bureau of Justice Statistics ed., 1998), available at http://www.ojp.usdoj.gov/bjs/pub/pdf/ncsor.pdf.

[9]Utah Code Ann. § 77-27-21.5 (1983).

[10]Utah Code Ann. § 77-27-21.5 (12) (1987).

[11]Wash. Rev. Code Ann. § 4.24.550 (West 2005).

[12]Michael Petrunik et al., American and Canadian Approaches to Sex Offenders: A Study of the Politics of Dangerousness, 21 Fed. Sent. R. 111 (2008). The State of Washington was particularly victimized in 1989. A self-proclaimed sociopath, Westley Dodd, was convicted of killing at least three young boys and admitted that he "enjoyed every minute of it." Brittany Ennis, Quickly Assuaging Public Fear: How the Well-Intended Adam Walsh Act Led to Unintended Consequences, Utah L. Rev. 697 (2008) (citing W. Paul Koenig, Does Congress Abuse Its Spending Clause Power by Attaching Conditions on the Receipt of Federal Law Enforcement Funds to a State's Compliance with "Megan's Law"?, 88 J. Crim. L. & Criminology 721, 724 (1998)).

terling was another case capturing significant media attention. In 1989, in St. Joseph, Minnesota,[13] Jacob Wetterling was walking with his friend and younger brother when a masked gunman kidnapped Jacob and ordered the other two boys to run.[14] Jacob's body has never been recovered.[15]

In 1994, as a reaction to the public outcry resulting from Jacob's disappearance, President Clinton signed the Jacob Wetterling Crimes Against Children Sex Offender Registration Act ("the Wetterling Act")[16] that required all states to create sex offender registries.[17] The Act, part of the Crime Bill of 1994, did not require states to have a community notification element as part of their registries.[18] The Act did, however, require states to verify offenders' addresses annually for ten years.[19] Under the Act, sexually violent offenders' addresses must be verified every quarter for life.[20] States who failed to comply with the Act faced the loss of ten percent of law enforcement grant money.[21] By 1996, forty-nine states had complied with the Act by creating registries.[22]

Soon after passage of the Wetterling Act, a seven-year old girl, Megan Kanka, was kidnapped, brutally raped and strangled to death by her neighbor, a twice-convicted violent sex offender.[23] The resulting outrage spread across the nation,[24] starting in Megan's home state of

[13]Jessica Ramirez, The Abductions That Changed America, Newsweek, Jan. 29, 2007, at 54–55. See also Zilney & Zilney, supra note 1, ch. 5.

[14]Brittany Ennis, Quickly Assuaging Public Fear: How the Well-Intended Adam Walsh Act Led to Unintended Consequences, Utah L. Rev. 697, 698 (2008).

[15]Ennis, supra note 14, at 697–98.

[16]42 U.S.C.A. §§ 14071 to 73 (2009); Pub. L. No. 103-222, 108 Stat. 1796, 2038 (1994).

[17]42 U.S.C.A. § 14071(a)(1), supra note 16.

[18]42 U.S.C.A. § 14071(e)(1), supra note 16.

[19]42 U.S.C.A. § 14071(b)(3); § 14071(b)(6); § 14072(d), supra note 16.

[20]42 U.S.C.A. § 14071(b)(3), supra note 16.

[21]42 U.S.C.A. § 14071(g)(2), supra note 16.

[22]Mona Lynch, Pedophiles and Cyber-predators as Contaminating Forces: The Language of Disgust, Pollution, and Boundary Invasions in Federal Debates on Sex Offender Legislation, 27 Law & Soc. Inquiry 529, 538 (2002).

[23]Cori A. Harbour, Sex Offender Legislation and the Constitution: Striking a Balance for Practical, Productive and Promising Legislation, 21 T. Marshall L. Rev. 99 (1996).

[24]Ryan A. Boland, Sex Offender Registration and Community Notification: Protection, Not Punishment, 30 New Eng. L. Rev. 183, 183–85 (1995).

New Jersey.[25] Congress soon jumped into the foray with its own attempts to fortify the Wetterling Act.[26]

President Clinton, in promoting the Federal Omnibus Crime Bill in 1996, specifically mentioned Megan Kanka and her case as justification, in part, for increased regulation of sex offenders.

> Nothing is more important than keeping our children safe. We have taken decisive steps to help families protect their children, especially from sex offenders, people who according to study after study are likely to commit their crimes again and again. We've all read too many tragic stories about young people victimized by repeat offenders. That's why in the crime bill we required every state in the country to compile a registry of sex offenders, and gave states the power to notify communities about child sex offenders and violent sex offenders that move into their neighborhoods.
>
> But that wasn't enough, and last month I signed Megan's law [sic]. That insists that states tell a community whenever a dangerous sexual predator enters its midst. Too many children and their families have paid a terrible price because parents didn't know about the dangers hidden in their own neighborhood. Megan's law [sic], named after a seven-year-old girl taken so wrongly at the beginning of her life, will help to prevent more of these terrible crimes.[27]

Congress focused on requiring states to add a community notification element to their registries.[28] The penalties and deadlines were similar: states had until September 1997 to comply with the Wetterling Act or lose the 10% block grant for criminal justice.[29] By 1996, all fifty states and the District of Columbia provided for community notification.[30] Since 1996, these statutes have been referred to as "Megan's Laws."[31]

Prior to 1996 in Utah, only law enforcement officials investigating sex crimes or attempting to apprehend sex offenders were allowed to

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[25]Ron Marsico, Megan's Law, Domestic Abuse Bills are Advanced by the Legislature, Star Ledger (New Jersey), Sept. 13, 1994, at 1, 9.

[26]Robert R. Hindman, Megan's Law and Its Progeny: Whom Will the Courts Protect?, 39 B.C. L. Rev. 201, 201 (1997).

[27]CNN, President Clinton's Weekly Radio Address (June 22, 1996), cited in Maureen S. Hopbell, Balancing the Protection of Children Against the Protection of Constitutional Rights: The Past, Present and Future of Megan's Law, 42 Duq. L. Rev. 331, 338–39 (2004). See also Zilney & Zilney, supra note 1, ch. 5.

[28]42 U.S.C.A. § 14071(d) (2002). See also Megan's Law, May 17, 1996, P.L. 104-145, § 2, 110 Stat. 1345 (codified as amended at 42 U.S.C.A. § 14071).

[29]42 U.S.C.A. § 14071(g)(2) (2002).

[30]Maureen S. Hopbell, Balancing the Protection of Children Against the Protection of Constitutional Rights: The Past, Present and Future of Megan's Law, 42 Duq. L. Rev. 331, 339 (2004).

[31]Hopbell, supra note 30, at 336–37.

have access to the registry.[32] Utah's first opportunity to comply with the Wetterling Act came in 1996 when the Utah Legislature debated House Bill 15 regarding community notification of sex offenders.

The bill's sponsor, Brian R. Allen, mentioned that this legislation came primarily out of his prior experience in law enforcement working with sex offenders and victim advocate groups.[33] The 1996 bill required the Department of Corrections to include more information in the registry: offenders' physical descriptions, vehicles they drive, and primary targets.[34] The Utah Legislature was aware of Congress' mandate of community notification,[35] yet they took a measured approach by limiting community access on a "need to know" basis.[36]

According to House Bill 15, citizens would have to submit a written request to the Department of Corrections who would then make a determination on whether that person had a legitimate need to know the identity of sex offenders.[37] Several Utah legislators expressed deep concerns that if the public were to find out this information, it could be used with some sort of mob mentality to harass offenders.[38] The sponsor's response was that these concerns would be addressed by having a written record and written petitions that would be

[32]Sex Offender Name Change, ch. 297, § 1, 1995 Utah Laws 981, 981 (amended 1996).

[33]Utah H.R. Deb., Utah H.R. Bill 15, 1996 General Leg. Sess., Jan. 25, 1996. See also Mary Westby, Recent Developments in Utah Law, Criminal Law, Sex Offender Notification Law, Utah L. Rev. 1367 (1996).

[34]Utah H.R. Bill 15, 1996 General Leg. Sess. (amending Utah Code Ann. § 77-27-21.5 (Supp. 1995)).

[35]Utah H.R. Deb., Utah H.R. Bill 15, 1996 General Leg. Sess., Jan. 25, 1996. The bill's sponsor referenced the federal legislation in his opening remarks, commenting that unfortunately, Utah did not have a name like Megan to associate with the bill. The bill passed both chambers by unanimous vote. Ch. 221, § 1.

[36]Utah H.R. Bill 15, supra note 34.

[37]Utah H.R. Bill 15, supra note 34.

[38]Utah Sen. Deb., House Bill 15, 1996 General Leg. Sess., Feb. 8, 1996. One representative commented that "wackos" could take this information and ruin an innocent person's reputation. She referenced her own neighborhood, where individuals had circulated pamphlets listing a neighbor, incorrectly, as a convicted sex offender. Id. The bill's sponsor specifically mentioned the need of victims to know where the person who offended against them would be residing. Utah H.R. Deb., House Bill 15, 1996 General Leg. Sess. Jan. 25, 1996. One senator mentioned a case in Texas in which a neighborhood killed a man, wrongfully thinking he was a sex offender. Several specific concerns were raised as to how broad the request could be. For example, could someone request the entire state or county? Utah Sen. Deb., House Bill 15, 1996 General Leg. Sess., Feb. 8, 1996. The bill's sponsor indicated that the Department of Corrections would have to make decisions on a case-by-case basis. Id.

supervised and maintained by the Department of Corrections.[39] One legislator asked what sort of constitutional violations would exist since "we don't do this . . . with bank robbers or other crimes."[40] The bill's sponsor did not answer this specific question.[41] The bill's sponsor summed up, that although these were tough and serious concerns affecting constitutional liberties, "how could we say to a child that we overlooked letting somebody find out that the guy that did that to you, it could have been prevented? If I'm going to err, I'm going to err on the side of the child."[42]

Although the Utah Legislature had the opportunity to open the figurative floodgates and allow open community access, they opted for a more measured approach by restricting access to the sex offender registry on a need-to-know basis.[43] Members of the public seeking information were required to indicate that they were either a victim of a sex offense or resided in an area where one suspected a sex offender resided.[44] The Department of Corrections would only grant the request of persons living within the offender's zip code or an adjoining one.[45] In addition, a person requesting information had to file a GRAMA ("Government Records Access and Management Act") petition.[46]

The 1996 amendment specifically stated that it was not to apply retroactively.[47] This provision was short lived, however, as the Utah Legislature, in 1998, eliminated the retroactive prohibition.[48] Thus, the Utah registry applies to any sex offender regardless of when he or she committed the crime.

In 1997, the Utah Legislature expressly brought its sex offender registry into compliance with one part of the Jacob Wetterling Act.[49] The 1997 legislation required the Utah Department of Corrections to notify an out-of-state agency if an offender planned to relocate to

[39]Utah Sen. Deb., House Bill 15, 1996, supra note 38.

[40]Utah Sen. Deb., House Bill 15, 1996, supra note 38.

[41]Utah Sen. Deb., House Bill 15, 1996, supra note 38.

[42]Utah Sen. Deb., House Bill 15, 1996, supra note 38.

[43]Utah Sen. Deb., House Bill 15, 1996, supra note 38.

[44]Utah Sen. Deb., House Bill 15, 1996, supra note 38.

[45]Utah Sen. Deb., House Bill 15, 1996, supra note 38.

[46]Utah Sen. Deb., House Bill 15, 1996, supra note 38.

[47]Utah Sen. Deb., House Bill 15, 1996, supra note 38.

[48]Utah H.R. Bill 362, Sex Offender Public Records, 1998 Gen. Sess. (Utah 1998).

[49]Utah H.R. Deb., 1997 General Leg. Sess., Feb. 28, 1997 (comments by Representative Allen).

their jurisdiction.[50] The Department of Corrections also had a duty to verify lifetime offenders' addresses every sixty days.[51] The duty to comply, at least at this point, was on the Department of Corrections, and not on the offender.[52]

Several frustrations emerged with the registry the next year, in 1998, particularly among the Boy Scouts, who complained it would take them nearly ten years to process their 100,000 volunteers for sex offenses under the registry.[53] According to the bill's sponsor, the registry was becoming "too popular" and that the Department of Corrections was overwhelmed with requests.[54] As a result, the Utah legislature opted to strike language in the statute that limited registry access to law enforcement, the Department of Education, and those who file petitions. For the first time, Utah legislators opened the sex offender registry to the public.[55] Accordingly, all of the sex offender's registration information was made available for anyone to view at any time and for any reason.

Not all Utah legislators were in favor of opening the registry to the public and two primary concerns were raised. The first concern revolved around the identification of victims. Several legislators were worried that a victim could be further victimized if his or her offender's information and offense were a matter of public record.[56] The response given to this concern was that specific victim information would not be included in the registry.[57] The second concern about the community notification bill focused on the possibility of "witch-hunts"[58] by the

[50]Utah H.R. Bill 348, Sex Offender Notification Amendments, 1997 Gen. Sess. (Utah 1997).

[51]Utah H.R. Bill 348, supra note 50.

[52]Utah H.R. Bill 348, supra note 50.

[53]Utah Sen. Deb., 1998 General Leg. Sess., Utah H.R. Bill 362, Mar. 3, 1998 (comments by Senator Mansell); Utah H.R. Deb., 1998 General Leg. Sess., Feb. 25, 1998, Utah H.R. Bill 362 (comments by Representative Allen).

[54]Utah Sen. Deb., supra note 53 (comments by Senator Mansell).

[55]Utah H.R. Bill 362, 1998 General Sess. (striking language from Utah Code Ann. § 77-27-21.5 (2)(b) and (c)).

[56]Utah H.R. Deb., 1998 General Leg. Sess., Feb. 25, 1998, Utah H.R. Bill 362 (comments by Representative Nelson); Utah Sen. Deb., 1998 General Leg. Sess., Mar. 3, 1998, Utah H.R. Bill 362 (comments by Senators Taylor and Evans).

[57]Utah Sen. Deb., supra note 56 (comments by Senator Mansell).

[58]Utah Sen. Deb., supra note 56 (comments by Senator Hillyard).

public that would target innocent people, incorrectly listed offenders,[59] and convicted offenders and their families.[60]

The 1998 bill's sponsors had several responses to the concern about the potential for public harassment created by community notification. First, they argued that there would be a paper trail of those who made requests for information.[61] This statement, however, was not accurate. Nothing in the bill required the Department of Corrections to collect or disseminate the identities of the requestors.[62]

Second, they responded that the registry information would not be placed on the Internet. Senator Mansell, the Senate sponsor of the bill, stated that

> I would hate to see this particular registry ever put on the Internet. I think that's really a bad place for this type of information. If somebody cares enough to get this information, they ought to care enough to request it in one form or another. Go down and get it, whatever. But not have kids playing with the computer at home one day and fall into this registry. . . . There are no intents to do that now, but I think by next session we'll have something to make sure that won't happen.[63]

Lastly, the bill's sponsors responded that the bill prohibited the harassment of offenders or the dissemination of information beyond the requestor, and that people who harassed offenders or their families could be pursued "to the fullest extent."[64] This, also, was not accurate,

[59]Utah H.R. Deb., supra note 56 (comments by Representative Adairi). Representative Adair told a story from his district in which a sex offender moved from a residence and new owners moved in. The neighborhood posted signs around the home incorrectly indicating that a sex offender lived at that home. These innocent victims were frustrated at being labeled as sex offenders because the Department of Corrections had out of date information.

[60]Utah H.R. Deb., supra note 56 (comments by Representative Nelson and Senators Evans and Taylor). One representative, not named, mentioned a case in Texas in which an innocent person was killed by his neighbors because he shared a name with a listed sex offender. Id.

[61]Utah Sen. Deb., supra note 56 (comments by Representative Allen and Sen. Mansell). According to Representative Allen and Senator Mansell, the paper trail would make it easier to track down people who were potentially abusing the information or using it to harass offenders.

[62]Utah H.R. Bill 362, 1998 General Sess. (amending Utah Code Ann. § 77-27-21.5 (21), new section (§ 19)).

[63]Utah H.R. Deb., supra note 56 (comments by Sen. Mansell). Representative Allen stated that the bill would not "prohibit" the Department of Corrections from placing the registry on the Internet. He mentioned that thirteen states already did so, but that this bill did not mandate it. Id.

[64]Utah H.R. Deb., supra note 56 (comments by Representative Allen and Senator Mansell).

as there were no provisions in the bill prohibiting harassment or dissemination.[65]

Senator Mansell summed up his feelings about the concerns raised by other senators by asserting that detractors of the bill have paid "very little attention to the rights of the victim. We need to make sure that that's what we're protecting more so than the other. If we're going to err, let's err on the victim's side."[66]

The comments made by Representative Errant, in support of the bill, were demonstrative of the opinions of the majority of legislators, who ultimately voted to pass the bill.

> Repeat sexual abusers are compulsive offenders. And they're generally in constant search for victims. It is difficult to convict these people. We need to look at who we are trying to protect. We need to protect our public. . . . One study reported that each offender that had been arrested had had over 600 separate incidents with 200 victims. One other study reported a hundred separate victims per offender. These are people who unfortunately are not easily cured. These are people that we need to know about in our community, particularly with our scout leaders. We need to know who is working with our youth.[67]

Senator Mansell's 1998 concern about keeping Utah's sex offender registry off the Internet was quickly forgotten by the 2000 General Session when legislation unanimously passed both houses allowing the Department of Corrections to post the registry on the Internet.[68] The bill required the Department to post a disclaimer, which users must acknowledge, stating: 1) that the information comes from offenders and may not be accurate, 2) that members of the public may not publicize the information or use it to harass offenders or their families, and 3) that harassment, stalking or threats against offenders are prohibited and may violate Utah's criminal laws.[69]

The 1998 bill's sponsor discussed one provision of the bill in which State employees would be immune from civil liability if they were to accidentally enter an innocent person on the registry.[70] One senator expressed concern that the bill would not protect innocent people

[65]Utah H.R. Bill 362, 1998 General Sess. (amending Utah Code Ann. § 77-27-21.5).

[66]Utah H.R. Deb., supra note 56 (comments by Senator Mansell).

[67]Utah H.R. Deb., supra note 56 (comments by Representative Errant).

[68]Utah Sen. Bill 270, 2000 General Sess. (amending Utah Code Ann. § 77-27-21.5).

[69]Utah Sen. Bill 270, supra note 68, § (20)–(21).

[70]Utah Sen. Bill 270, supra note 68, § (22).

whose lives had been ruined by an incorrect listing on the registry.[71] Another senator asked what criminal penalties a person could be subject to for harassing or threatening an offender.[72] After a long pause, the bill's sponsor mentioned that he wasn't sure if he had an answer to that, and speculated that the offender could obtain a restraining order.[73] Perhaps most surprising was the lack of legislative debate.[74]

In 2001, the Utah Legislature again revisited the registry. On that occasion, they amended the statute to require lifetime registration for offenders who had been previously convicted of a registrable offense or to those who had committed one of the following five crimes: 1) rape of a child, 2) object rape of a child, 3) forcible sodomy, 4) sodomy on a child, and 5) aggravated sexual assault.[75] In addition, these "aggravated" offenders would have to notify the Department of Corrections of a change of address within 10 days.[76] The bill's sponsor commented in the House that this bill was passed in order to comply with the Jacob Wetterling Act and that although this was a "matter of money," it was also good public policy.[77] This bill passed both houses unanimously without debate.[78]

In 2001, the Utah Legislature also expanded the scope of registrable crimes, added further requirements for sex offenders, and removed some of the responsibilities required of the Department of

[71]Utah Sen. Deb., 2000 General Leg. Sess., Feb. 21, 2000, Utah Sen. Bill 270 (comments by Senator Steele).

[72]Utah Sen. Deb., supra note 71 (comments by Senator Allen).

[73]Utah Sen. Deb., supra note 71 (comments by Senator Waddoups).

[74]Utah Sen. Deb., supra note 71. Other than the sponsor's introduction, the House did not discuss this legislation. It passed unanimously without discussion or debate. Id. The Senate discussed the bill for less than five minutes. Id. In 1998, both houses debated the public access bill for close to an hour. Utah Sen. Deb., 1998 General Leg. Sess., Mar. 3, 1998, Utah H.R. Bill 362. Utah H.R. Deb., 1998 General Leg. Sess., Feb. 25, 1998, Utah H.R. Bill 362.

[75]Utah H.R. Bill 22, Sex Offender Lifetime Reporting Amendments, 2001 General Sess. (amending Utah Code Ann. § 77-27-21.5(b)(i)).

[76]Utah H.R. Bill 22, supra note 75.

[77]Utah H.R. Deb., 2001 General Leg. Sess. Jan. 16, 2001, Utah H.R. Bill 22 (comments by Representative Bowman).

[78]Utah H.R. Deb., supra note 77; Utah Sen. Deb., 2001, supra note 77. See also Kenneth W. Birrell, Recent Developments in Utah Law, Criminal Law and Procedure, 2001 Utah L. Rev. 1112, 1114 (2001) ("Therefore, in order to maintain full Byrne Formula Grant funding, it was necessary for Utah to require lifetime registration of repeat and "aggravated offense" sex offenders.").

Corrections.[79] Specifically, the legislature added incest, lewdness involving a child, and aggravated exploitation of a child to the registry.[80] They also removed the requirement that the underlying offense be a felony.[81] Additionally, the bill required any person who entered the State of Utah, who had been convicted of an offense that would be a registrable offense in Utah, to register if they were to be in the state for longer than fourteen days, regardless of whether they intend to remain.[82] The bill required the Department of Corrections to inform offenders whose sentences expired or terminated of the offender's continual duty to register.[83] The bill also removed the requirement that the Department post charges on the registry, limiting it only to convictions for sex offenses.[84] Finally, the bill removed the requirement that the Department post an offender's "method of offense."[85] The method of offense required the Department to speculate how an offender committed an offense and as the bill's sponsor put it, "We don't want to add ideas to people who already have too many bad ideas."[86] This bill also passed both the House and the Senate unanimously without debate.[87]

In 2002, the Utah statute was amended in an attempt to conform to the federal statute known as the Campus Sex Crimes Prevention Act of 2000.[88] That Act required sex offenders to notify law enforcement agencies of their enrollment or employment at an institution of higher

[79]Utah H.R. Bill 237, Sex Offender Registry, 2001 General Sess. (amending Utah Code Ann. § 77-27-21.5).

[80]Utah H.R. Bill 237, supra note 79, § (1)(d)(i).

[81]Utah H.R. Bill 237, supra note 79, § (1)(d).

[82]Utah H.R. Bill 237, supra note 79, § (1)(d)(ii)(B).

[83]Utah H.R. Bill 237, supra note 79, § (10).

[84]Utah H.R. Bill 237, supra note 79, § (12)(a). Prior to 2001, several legislative sponsors indicated the registry would only list convictions and not charges, which ultimately was not correct. Utah Sen. Deb., 1998 General Leg. Sess., Mar. 3, 1998, Utah H.R. Bill 362 (comments by Senator Mansell); Utah H.R. Deb., 1998 General Leg. Sess., Feb. 25, 1998, Utah H.R. Bill 362 (comments by Representative Allen).

[85]Utah H.R. Bill 237, supra note 79, § (12)(c).

[86]Utah Sen. Deb., 2001 General Leg. Sess., Feb. 15, 2001, Utah H.R. Bill 237 (comments by Senator Waddoups).

[87]Utah H.R. Deb., 2001 General Leg. Sess., Feb. 5, 2001, Utah H.R. Bill 237.

[88]Utah H.R. Bill 245, Amendment to Sex Offender Registry, 2002 General Leg. Sess. (amending Utah Code Ann. § 77-27-21.5). Congress also threatened a loss of ten percent of federal criminal justice funds for a failure to comply. James B. Jacobs, Exploring Alternatives to the Incarceration Crisis, 3 U. St. Thomas L.J. 387, 398–99 (2006). All states are in compliance. Id.

education.[89] It also required the institution to make its campus aware of these offenders.[90] Utah's bill specifically required offenders to tell the Department of Corrections the schools they attend or at which they are employed. The schools must also be notified.[91]

Utah did not make any modifications to the sex offender registry until 2006. Since then, however, the statute has been modified thirteen times.[92]

House Bill 56 addressed concerns with serious juvenile sex offenders.[93] According to the bill, if a juvenile commits the offense of rape of a child, object rape of a child, forcible sodomy, sodomy on a child, or aggravated sexual assault, and the juvenile is committed to secure detention until age twenty-one, then that juvenile will be placed on the registry for a period of ten years.[94] The motivation behind this bill, according to the sponsor, involved a specific young man who concerned the Department of Corrections.[95] The sponsor claimed that when House Bill 56 failed to pass in 2005, this young man, who had been following the legislation, indicated in an "in your face" way that they would not be able to "do anything" to him.[96] No other reason was given to justify the legislation other than the bill concerned "hard core" juvenile offenders.[97] The legislation again passed both houses unanimously.[98]

House Bill 158, Substitute 1 also passed in the 2006 General Session. This bill required the Driver License Division to ensure that

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[89]Jacobs, supra note 88, at 398–99.

[90]Bonnie S. Fisher et al., Making Campuses Safer for Students: The Clery Act as a Symbolic Legal Reform, 32 Stetson L. Rev. 61, 71 (2002).

[91]Fisher et al., supra note 90.

[92]Utah H.R. Bill 56 (2006), Utah H.R. Bill 158 (2006), Utah H.R. Bill 410 (2006), Utah H.R. Bill 31 (2007), Utah H.R. Bill 375S (2007), Utah H.R. Bill 34 (2008), Utah H.R. Bill 492 (2008), Utah H.R. Bill 109 (2008), Utah H.R. Bill 176 (2008), Utah H.R. Bill 29 (2009), Utah H.R. Bill 41 (2009), Utah H.R. Bill 136S (2009), Utah H.R. Bill 247 (2009).

[93]Utah H.R. Bill 56, Sex Offender Registration, 2006 General Leg. Sess. (amending Utah Code Ann. §§ 62A-7-104, 77-18-12, and 77-27-21.5).

[94]Utah H.R. Bill 56, supra note 93.

[95]Utah H.R. Deb., 2006 General Leg. Sess., Jan. 27, 2006, Utah H.R. Bill 56 (comments by Representative Lawrence).

[96]Utah H.R. Deb., supra note 95.

[97]Utah H.R. Deb., supra note 95.

[98]Utah H.R. Deb., supra note 95; Utah Sen. Deb., 2006 General Leg. Sess., Feb. 10, 2006, Utah H.R. Bill 56.

sex offenders' driver's licenses expire annually.[99] The offender would need to verify his address annually with the Driver License division.[100] According to the sponsor, the bill arose out of a concern that law enforcement lacked the manpower to verify offenders' addresses.[101] Specifically, he stated the legislation was crafted to "put some bite" in law enforcement's ability to track offenders, and to put more responsibility on the offender.[102] Nonetheless, he asserted that the bill would not create a "scarlet letter" since nothing on the offender's license would indicate his or her status as a sex offender.[103]

House Bill 158 made several other changes to the statute, none of which were discussed in the legislative debates.[104] The bill reduced the time period offenders had to update their addresses or to register. First, the bill required out-of-state offenders to register with the state of Utah if they were in the state longer than ten days.[105] Offenders also had an obligation to notify the department within five days if they changed their residence.[106] Finally, the bill added an additional six offenses to the "lifetime registry" requirement—child kidnapping, sexual abuse of a child, aggravated sexual abuse of a child, incest, rape, and object rape.[107]

In 2006, the legislature also imposed an additional requirement that offenders pay $75 annually to support the costs of maintaining the

[99]Utah H.R. Bill 158S01, Sex Offender Amendments, 2006 General Leg. Sess. (amending Utah Code Ann. §§ 53-3-205, 53-3-214, 53-3-216, 53-3-804, 53-3-807, 76-3-402, 77-18-12, 77-27-21.5).

[100]Utah H.R. Bill 158, supra note 99.

[101]Utah H.R. Deb., 2006 General Leg. Sess., Feb. 16, 2006, Utah H.R. Bill 158S01 (comments by Representative Dee) ("[T]here were sex offenders that we couldn't locate. Where are these people? They're supposed to be reporting to us, but we don't have the manpower to search the entire list, which might be the entire registry. We'd have to go to every address.").

[102]Sex Offender amendment, supra note 99. A failure to comply with this statute constituted a class A misdemeanor.

[103]Utah H.R. Deb., 2006 General Leg. Sess., Feb. 16, 2006, Utah H.R. Bill 158S01 (comments by Representative Dee). Representative Dee asserted that 15% of all offenders were "trying to hide" and that by requiring them to register or drive, he believed would enable law enforcement to be better equipped to locate offenders. Id.

[104]Utah H.R. Deb., supra note 103; Utah Sen. Deb., 2006 General Leg. Sess., Feb. 28, 2006, Utah H.R. Bill 158S01.

[105]Utah H.R. Bill 158S01, supra note 99 (amending Utah Code Ann. § 77-27-21.5(1)(ii)((B)). The previous requirement was fourteen days. Id.

[106]Utah H.R. Bill 158S01, supra note 99 (amending Utah Code Ann. § 77-27-21.5(9)(a)). The previous requirement was ten days. Id.

[107]Utah H.R. Deb., supra note 95 (amending Utah Code Ann. § 77-27-21.5(9)(c)(ii)).

registry.[108] The bill's sponsor indicated that the fee would help to solve two financial problems, the costs of maintaining the list, and the monies required in tracking offenders who are off probation or parole.[109]

One particularly strict bill was introduced, but did not pass, in the 2006 general session.[110] The bill would have required out of state sex offenders to register within twelve hours of entering the state.[111] The bill also proposed to modify a failure to register violation from a misdemeanor to a felony, and proposed mandatory incarceration of at least a year for sex offenders found guilty of failing to register. While this proposal failed to pass, the Utah legislature did pass another bill in 2006 that increased the penalty associated for certain failure to register violations from a class A misdemeanor to a third degree felony, and required judges to impose a minimum mandatory penalty of ninety days jail for registry violations.[112]

In 2007, the Utah legislature responded to a concern raised after the driver's license bill was passed the previous year requiring sex offenders to renew their licenses annually.[113] Calling that bill "wonderful,"[114] the 2007 bill's sponsors indicated that not all of the nearly 2,000 registered sex offenders in Utah possessed driver's licenses.[115] As a result, the legislature amended the statute to require sex offend-

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[108]Utah H.R. Bill 410, Sex Offender Registration Fee, 2006 General Leg. Sess. (amending Utah Code Ann. § 77-27-21.5, adding new § 25).

[109]Utah H.R. Deb., 2006 General Leg. Sess., Feb. 24, 2006. The bill passed unanimously.

[110]Utah H.R. Bill 310, Sex Offender Registration Revisions, 2006 General Leg. Sess. (proposing to amend Utah Code Ann. § 77-27-21.5).

[111]Utah H.R. Bill 310, supra note 110 (proposing to amend Utah Code Ann. § 77-27-21.5 (e)(ii)(b)).

[112]Utah H.R. Bill 310, supra note 110 (proposing to amend Utah Code Ann. § 77-27-21.5 (13)(a) (from 90 days previously)). See also Utah H.R. Bill 158S01, supra note 99.

[113]Utah H.R. Deb., 2007 General Leg. Sess., Utah H.R. Bill 31, Jan. 17, 2007.

[114]Utah H.R. Deb., 2007 General Leg. Sess., Utah H.R. Bill 31, Jan. 17, 2007 (comments by Representative Ray). Representative Ray said that offenders who did not want to comply with the driver's license requirement could simply "drop a driver's license." Id.

[115]Utah Sen. Judiciary Comm. Hearing on Utah H.R. Bill 31, Jan. 26, 2007 (comments by Senator Greiner). Utah Sen. Deb., 2007 General Leg. Sess., Utah H.R. Bill 31, Feb. 1, 2007 (comments by Senator Greiner). One Senator raised a relevant concern with the statute, which would subsequently be amended; he indicated the difficulty with putting people who urinate, in public on the sex offender registry. Id. (comments by Senator Hillyard).

ers to possess either a driver's license or an identification card, both of which would have to be renewed and updated annually.[116]

The most controversial bill of the 2007 general session involved restricting sex offenders' ability to be on foot or in a vehicle near certain "protected areas."[117] According to the bill, any sex offender convicted of an offense involving a person under the age of eighteen may not be in any of the following protected areas: 1) a licensed day care or preschool facility, 2) a swimming pool that is open to the public, 3) a public or private elementary or secondary school, 4) a community park open to the public, or 5) a playground or place "intended to allow children to engage in physical activity."[118] The bill also allowed a child-victim's parent to petition the Department of Corrections to order the offender to stay over 1,000 feet away from the child's residence.[119] It is a class A misdemeanor for the offender to be in a protected area, except when necessary to drop the offender's child off for school, or when a school is holding a community function at which children under the age of eighteen would not be present, or if a daycare is located in a government building where the offender has business.[120]

The 2007 bill's sponsor called it a "compromise bill" because it was subject to several revisions before final passage.[121] The original bill proposed prohibiting offenders from residing within 1,000 feet of these protected areas.[122] It also proposed prohibiting offenders from attending trade schools or being near any day care or preschool.[123] These proposals did not pass.

Two motions to amend the 2007 bill also failed to pass. Representative Hutchins submitted the first amendment. He proposed that if an

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[116]Utah H.R. Bill 31, Driver License or Identification Card Requirement for Sex Offenders, 2007 General Leg. Sess., enacting Utah Code Ann. § 53-3-806.5. Identification card required if sex offender does not have driver license (amending Utah Code Ann. § 53-3-807 (2006)).

[117]Utah H.R. Bill 375S01, Sex Offender Restrictions, 2007 General Legislative Session.

[118]Utah H.R. Bill 375S01, supra note 117, § (1)(a).

[119]Utah H.R. Bill 375S01, supra note 117, § (1)(b).

[120]Utah H.R. Bill 375S01, supra note 117, § (2). If the offender must be in the government building in which a daycare is located, he may not be near the daycare or preschool itself. Id. at § (2)(c)(ii).

[121]Utah H.R. Deb., Sex Offender Restrictions, Utah H.R. Bill 375S01, Feb. 23, 2007 (comments by Representative Hughes).

[122]Utah H.R. Bill 375, Sex Offender Restrictions, 2007 General Legislative Session.

[123]Utah H.R. Bill 375, supra note 122. These changes were amended by the House during its debate on motions by Representatives Wyatt and Biscupski. Id.

offender had temporary employment at a location in a protected area, that he be exempted from the statute.[124] His amendment, however, was vigorously opposed. Representative Wimmer recounted the following anecdote:

> I'm aware of a particular case where a person was working as a grocer and he was arrested and during an interview he was asked, "How many victims do you think you have had as a child molester?" He said at least 1,300. . . . He said that it would take him less than two minutes—the kid was separated from their parents—it would take him less than two minutes to get them talked into going to the bathroom with him where then he'd have complete control. Whether they are there for a job or they are there for whatever reason, if they are tempted and they have that opportunity, then I don't want to give it to them.[125]

Representative Anderson also opposed the amendment, stating that "I have observed that many sex offenders choose jobs that will put them in a position to be available, whether temporarily or permanently, to that kind of temptation, and I would not, also, like to give them that opportunity for any reason."[126]

Senator Romero sought to limit the new protected areas requirements to those already on probation or parole.[127] The senator was concerned that these new requirements would unfairly burden those who had already completed probation or parole by changing their requirements mid-stream.[128]

Senator Hillyard expressed a concern about the lack of risk-analysis being done.

> There may be people tagged who may be registered as sex offenders because one particular night they were intoxicated, they did something horrible, wrong, but they're really not predators. And it's sometimes hard to tell which category they go into. I would feel much better with this bill if it provided that when you're released from parole that the parole department would have the right to certify that you were not a predator based on the information that they have. . . . But I'm concerned that it goes a little bit too far. . . . I can see someone . . . who is put in prison for six years, or ten years—he now gets out [of prison], he wants to get some training program, he wants to now try to resume a life. He's been

[124]Utah H.R. Bill 375S01, supra note 121.

[125]Utah H.R. Bill 375S01, supra note 121.

[126]Utah H.R. Bill 375S01, supra note 121.

[127]Utah Sen. Deb., Sex Offender Restrictions, Utah H.R. Bill 375S01, Feb. 28, 2007 (comments by Senator Romero).

[128]Utah Sen. Deb., supra note 127 (comments by Senator Romero).

through treatment. Everything in his life would indicate this was situational and yet we put this burden, just like he was a predator.[129]

In the House debate, Representative Litvak also highlighted the lack of risk-analysis supporting the bill.

My concern with this bill is we are taking every sex offender that is registered, including those that are juveniles and putting this onto them. I don't think that's how we should be managing sex offenders in terms of safety for our community. This, to me, will provide a false sense of security. In my opinion, the better direction to head is that we empower those that have the expertise, those that are trained, corrections, the therapists that are working with sex offenders—we give them the resources, we give them the tools to decide on a case-by-case basis those that are the greatest risk to our community and invest the resources and place those restrictions on those we are most worried will reoffend. A common misperception with sex offenders is that treatment does not work. Treatment actually does work. Those sex offenders that have treatment are much, much, much, less likely to reoffend. And so, I think, by taking a broad sweep, we're . . . providing this false sense of security, that no sex offender can go to a McDonald's playground, that no sex offender can go to a park. I don't think that we're really achieving or accomplishing what the intent is by that broad sweep.[130]

The representative also raised concerns about the bill's enforcement in the future, given the Adam Walsh Act.

There is one other area that we need to be cautious about and that is when we talk about juvenile sex offenders. Currently, there's only a small segment of our population of juvenile sex offenders that have to register—the most dangerous—and they should. . . . Over the next couple of years, there's a good possibility with the Adam Walsh Act that we will be forced to register all juvenile sex offenders. Now that is something that's going to come down as a mandate from the federal government. . . . All juvenile sex offenders would not be able to go to these areas. I urge some caution in the ultimate effect of this.[131]

The 2007 bill's sponsors and supporters defended its implementation as "trying to make safer places for our children from these people."[132] In fact, the bill's Senate sponsor worried that diluting or not passing this legislation would end up making Utah a "safe haven" for

[129]Utah Sen. Deb., supra note 127 (comments by Senator Hillyard).

[130]Utah H.R. Deb., Sex Offender Restrictions, Utah H.R. Bill 375S01, Feb. 23, 2007 (comments by Representative Litvak).

[131]Utah H.R. Deb., supra note 130 (comments by Representative Litvak).

[132]Utah Sen. Deb., supra note 127 (comments by Senator Dayton, the bill's senate sponsor).

out of state offenders.[133] Senator Dayton said that law enforcement would not be actively checking for offenders, but rather, it would be a complaint-driven process.[134]

Despite the fairly vigorous debate, the 2007 bill passed both houses by substantial majorities.[135]

In 2008, the legislature passed a bill requiring sex offenders to provide to the Department of Corrections their "online identifiers," or usernames and passwords, for all Internet sites that they use with the exception of sites used for their employer or for their financial records.[136] The information collected from offenders would have to be updated yearly and, at least with passwords, was not to be made available to the public.[137]

The 2008 bill's sponsor indicated this bill resulted from a couple of cases, one in which a convicted sex offender called a young woman using an identifier, and from another case where a convicted sex offender was located in a motel room using a laptop and officers were unable to verify what identifiers he was using.[138] Representative Bird revealed his motivation for the bill by stating: "If one of my daughters comes up missing and Charlie Brown123 was the last person talking with her, then he would know where my daughter is."[139]

At the 2008 committee hearing, one convicted sex offender spoke

[133]Utah Sen. Deb., supra note 127 (comments by Senator Dayton, the bill's senate sponsor).

[134]Utah Sen. Deb., supra note 127 (comments by Senator Dayton, the bill's senate sponsor). "[Y]ou're concerned about someone loitering in an area, and law enforcement is called in, they can check their status on the sex offender registry. If they're in a place that's inappropriate for them . . . [then] this is a benefit for those people who are dealing with those kind of enforcement issues all the time." Id.

[135]The bill passed with twenty-four yes votes and four no votes in the Senate and with sixty yes votes and eight no votes in the House. Utah H.R. Deb., Sex Offender Restrictions, Utah H.R. Bill 375S01, Feb. 23, 2007.

[136]Utah H.R. Bill 34, Email Information Required of Registered Sex Offenders, 2008 General Leg. Sess. (amending Utah Code Ann. § 77-27-21.5 (2007)).

[137]Utah Code Ann. § 77-27-21.5 (2)(c). Several legislators expressed concerns that by not requiring a more frequent update to this information, offenders could create new identifiers every year and avoid prosecution. See, e.g., Utah H.R. Deb., Email Information Required of Registered Sex Offenders, Utah H.R. Bill, Jan. 29, 2008 (comments by Representative Shurtleff). The sponsor's response was that attempting to circumvent the system counted as a third degree felony. Id. (comments by Representative Bird).

[138]Utah Sen. Judiciary Comm. Hearing, Feb. 12, 2008 (comments by Representative Bird). Neither person was alleged to have reoffended.

[139]Utah Sen. Judiciary Comm. Hearing, supra note 138. The Representative indicated that Adult Probation and Parole has the ability to put a disc in someone's computer and find see whether they had been using that online identifier. Id.

up against the bill.[140] He spoke of having to turn over email accounts, web histories, online shopping practices, library cards, and student information, among other things.[141] This bill, he opined, was not based on any actual finding that it would help in either the investigation or prevention of offenses, and he further argued that its implementation would result in an immense loss of civil liberties for registrants.[142] This person also emphasized that the judicial warrant process, which is already well established, would better serve most of these investigations.[143]

A few legislators expressed concerns that this legislation was "unenforceable"[144] because offenders could simply "game"[145] the system by opening up other email accounts and accessing them from public sites. One senator summed up the problem.

> There's a universe of folks who are going to be on the registry who are good people, who are trying to put their lives back together, who most likely would comply with this and say, "here's my stuff." The folks who are going to be reoffending are not going to be complying with this law. Let's be serious. They're not going to turn over all that information and log on with all that information and start chatting with young individuals. We can require it, but the bad actors are going to use false names. They're not going to report the names. During an investigation, if they reoffend, the real show there is that they reoffended, and not that they failed to disclose.[146]

The most common justification for the bill was its ability to be yet another "tool" to enable law enforcement to catch offenders and

[140]Utah Sen. Judiciary Comm. Hearing, supra note 138 (comments by person who identified himself as "Jay" to protect his identity).

[141]Utah Sen. Judiciary Comm. Hearing, supra note 138 (comments by person who identified himself as "Jay" to protect his identity).

[142]Utah Sen. Judiciary Comm. Hearing, supra note 138 (comments by person who identified himself as "Jay" to protect his identity).

[143]Utah Sen. Judiciary Comm. Hearing, supra note 138 (comments by person who identified himself as "Jay" to protect his identity).

[144]Utah H.R. Deb., Email Information Required of Registered Sex Offenders, Utah H.R. Bill 34, Jan. 29, 2008 (comments by Representative Shurtleff).

[145]Utah Sen. Judiciary Comm. Hearing, supra note 138 (comments by unnamed senator).

[146]Utah Sen. Judiciary Comm. Hearing, supra note 138 (comments by another unnamed senator). One senator questioned whether the bill was reasonable by analogizing that we would not require a burglar to give us advance notice of every burglary then arrest him for a failure to give notice for the burglary. Id.

prevent them from reoffending.[147] Representative Bird said that because sex offenders' re-offense rate was "abnormally high," this bill would enable law enforcement officers to "reach these people before they get into the reoffending mode. This is about looking around in their accounts."[148]

During the committee hearing, one senator asked for a background on the registry and Scott Carver, Executive Director of the Sentencing Commission, obliged, also giving a justification for the current bill.

> The registry was created as an investigative tool. It was not meant to be public at the time that it was first developed. It was a database of information on sex offenders that could be accessed by law enforcement for the purpose of investigating crimes. Every bit of information that is collected by the sex offender registry is identifier information. It is meant to be able to narrow down the field of potential suspects and hone in on the few and eventually the one. At the time that it was created there was not the immense use of the Internet and chat rooms and means of communicating with potential victims that there exists today. This fills that void and it is an additional means of identification. Just as the requirement of identifying all the vehicles that a sex offender has access to can be used by law enforcement, the identification can indeed be used by the public to harass a sex offender. . . . There are warnings against that. Not all the offenders are bright enough to use a new name to commit a new offense. It does give law enforcement the ability to have this as another means of investigative measures . . . and can be queried.[149]

This 2008 bill passed both houses by large margins.[150]

Under pressure from Congress, Utah also passed a 2008 bill to come into compliance with the Adam Walsh Act.[151] The bill's sponsor indicated that as a result of this legislation, Utah's rules will "be as

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[147]Utah Sen. Judiciary Comm. Hearing, Feb. 14, 2008 (comments by Representative Bird).

[148]Representative Bird added that while this bill could have gone further, he felt it had gone "as far as we think it could." Id. He also stated that it allowed probation officers to "get in and look around a little." At the Senate debate, Senator Jenkins added that the bill "allows [probation] agents more tools . . . [to] catch him before he reoffends." Utah Sen. Deb., Email Information Required of Registered Sex Offenders, Utah H.R. Bill 34, Feb. 20, 2008 (comments by Representative Shurtleff).

[149]Utah Sen. Judiciary Comm. Hearing, Feb. 14, 2008 (comments by Scott Carver).

[150]It passed the house with a 67 yes vote and 3 no vote. It passed the senate by a unanimous vote.

[151]Utah H.R. Bill 492, Sex Offender Notification and Registration, 2008 General Leg. Sess. (amending Utah Code Ann. §§ 53-3-216, 53-3-807, 62A-7-104, 76-3-202, 77-18-12, 77-27-21.5). The bill's sponsor mentioned that the bill was "strictly" to be in compliance with Adam Walsh. Utah H.R. Deb., Sex Offender Notification and Registration, Feb. 26, 2008, comments by Representative Ray).

stringent, if not more stringent, than other states,"[152] and as another representative put it, would prevent "these guys . . . from forum shopp[ing]."[153]

The 2008 bill made several substantive changes to the registry. First, it added misdemeanor and felony voyeurism and aggravated kidnapping as registrable sex offenses.[154] The bill required offenders to list any water or aircraft that they use in addition to vehicles, which also included vehicles borrowed by offenders on a regular basis.[155] Offenders had to provide the Department of Corrections with DNA samples, fingerprints, all telephone numbers, including cell phones, their secondary and temporary addresses, a copy of the offender's passport, all immigration documents, any professional licenses the offender holds, the name, address of their employer, any place where the offender works as a volunteer, and the offender's Social Security number.[156] Under the bill, a sex offender could not change his name.[157] The website also needed to display offenders' professional licenses, any educational institution they attend, any place they are employed, and any place where they volunteer.[158] The bill also reduced the time in which offenders had to notify the state of a change of address from five days to three business days.[159]

No concerns were raised, nor debated on this bill.[160] It passed by a unanimous vote in both houses.[161]

The legislature also enacted a 2008 statute giving some money to the Department of Corrections to study sex offender treatment for three years.[162] Under the pilot program, offenders needed to be evaluated every sixteen weeks for three years under the following criteria: (i) alcohol and other drug use; (ii) mental health status; (iii) physical

[152]Utah H.R. Deb., supra note 151 (comments by Representative Litvak). supra note 130 (comments by Representative Ray).

[153]Utah H.R. Deb., supra note 151 (comments by Representative Fallon).

[154]Utah H.R. Deb., supra note 151 (amending Utah Code Ann. § 77-27-21.5 (1)(m)(i)(B) and (10)(c)(ii)(D) (except if the offender is the natural parent of the victim)).

[155]Utah H.R. Bill 492, supra note 151.

[156]Utah H.R. Bill 492, supra note 151.

[157]Utah H.R. Bill 492, supra note 151.

[158]Utah H.R. Bill 492, supra note 151.

[159]Utah H.R. Bill 492, supra note 151.

[160]Utah H.R. Deb., supra note 151; Utah Sen. Deb., Sex Offender Notification and Registration, Mar. 5, 2008 (Senator Peterson said he was "thrilled" to present this "wonderful" legislation to the Senate).

[161]Utah H.R. Deb., supra note 151; Utah Sen. Deb., supra note 160.

[162]Utah Code Ann. § 77-27-21.9 (2008).

health; (iv) criminal behavior; (v) education; (vi) emotional health and barriers; (vii) employment; (viii) family dynamics; (ix) housing; (x) physical health and nutrition; (xi) spirituality; (xii) social support systems; (xiii) special population needs, including: (A) co-existing disorders; (B) domestic violence; (C) drug of choice; (D) gender, ethnic, and cultural considerations; (E) other health issues; (F) sexual abuse; and (G) sexual orientation; (xiv) transportation; and (xv) treatment involvement.[163]

The bill's sponsor indicated that a high priority needed to be put on preventing reoccurring sex offenses, what he deemed "some of our most heinous" crimes.[164] He stated that according to the Department of Corrections, about half of sex offenders reoffend (as compared with 70% of traditional offenders).[165] Yet he felt that we, as a society, had an obligation "to make sure they're not returning to jail."[166]

One other Representative also indicated concerns about recidivism and likelihood of intervention:

> [T]he average sex offender had up to a hundred and ten victims, [and] had violated those victims three hundred and sixteen times for a period of sixteen years prior to being caught the first time. This tells us a couple of things. In order to control sex offenders, we have to, one, have long prison terms where they're going to get the treatment, two, they need to have treatment, and, three, one of the missing links, which this bill, I think, will help fulfill, is the proper tracking of sex offenders and trying to prevent them from reoffending again. . . . [W]e know that the first time a sex offender is caught they've been committing these offenses for up to sixteen years prior to the first offense. The recidivism rates are really artificially low. How many years will it take for them to be caught a second time? What this bill does is it steps in and helps to prevent that

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[163]Utah Code Ann., supra note 162, § (1)(b). The introduced version of this bill also required the assessment to consider the following additional factors that weren't part of the passed legislation: (iv) financial; (vi) utilities; (vii) clothing; (viii) diet and nutrition; (ix) eating disorders; (x) addictions; (xi) substance abuse; (xii) smoking cessation; (xiii) stress management; (xiv) medical conditions; (xv) reproductive health; (xvi) medications; (xvii) physical disability and accessibility; (xviii) physical fitness and recreation; (xix) dental health; (xx) mental health; (xxi) acculturation; (xxii) social skills; (xxiii) connection to the community; (xxiv) family and interpersonal relationships; (xxv) parenting and childcare; (xxvi) family and elder care obligations; (xxvii) sexual and elder abuse; (xxix) religion; (xxx) civil legal issues; and (xxxi) criminality. Sex Offender Law amendment, Utah H.R. Bill 109, Introduced.

[164]Utah H.R. Deb., Sex Offender Law amendment, Feb. 22, 2008 (comments by Representative Hughes).

[165]Utah H.R. Deb., supra note 164 (comments by Representative Hughes).

[166]Utah H.R. Deb., supra note 164 (comments by Representative Hughes).

> from occurring again and to track their possibility and potential for reoffending.[167]

This 2008 bill unanimously passed the Senate and passed the House with only one vote against it.[168]

One bill that was introduced, but did not pass in 2008, would have required lifetime registration of any offender who "attempts" or "conspires to commit" one of the lifetime registering offenses.[169]

In 2009, the Utah Legislature passed four pieces of legislation affecting sex offender registration. The first bill required offenders, who were not under the supervision of the Department of Corrections, to register with their local municipal or county law enforcement agency.[170] According to the bill's sponsor, this bill resulted from a specific case:

> Within my district, we had an individual move in from out of state, put up a Mickey Mouse in front of his house, drove his scooter around the neighborhood, started talking to the kids. Red flags went up all over the place with the parents. After some research, parents found that he was a registered sex offender listed in another state and had just moved into our state. Out of this came the idea of how could we bring a little bit quicker contact with local agencies as they move into an area.[171]

The police chief from this district also testified that he was the "last to find out" about this Mickey Mouse offender and that it would be a good thing if that person were to have to register with his department.[172] No one alleged this offender actually committed a sex offense.[173]

The 2009 bill's sponsor felt that having contact with local law enforcement would be beneficial.

> [It] gives a face-to-face opportunity for the local police officers to meet with the individual and say, "Hey, we know that you're here and you know that we know. Live your life and stay out of trouble. This legislation

[167]Utah H.R. Deb., supra note 164 (comments by Representative Wimmer).

[168]Utah Sen. Deb., Sex Offender amendment, Mar. 5, 2008.

[169]Sex Offender Registration amendment, Utah H.R. Bill 176, 2008.

[170]Utah H.R. Bill 41, Sex Offender Registration, 2009 General Leg. Sess. (amending Utah Code Ann. §77-27-21.5 (2008)).

[171]Utah H.R. Law Enforcement and Criminal Justice Comm. Hearing, Jan. 28, 2009 (comments by Representative Sumsion).

[172]Utah H.R. Law Enforcement and Criminal Justice Comm., supra note 171 (comments by Chief Gary Higgen, Saratoga Springs).

[173]Utah H.R. Law Enforcement and Criminal Justice Comm., supra note 171.

> is not looking for the local police agencies to check up on them. They know where they live already; it just gives them a bit of face time.[174]
>
> This bill unanimously passed both houses without debate.[175]

Another bill created a new criminal offense for child sex offenders.[176] According to the bill, a convicted sex offender[177] may not request, invite or solicit a child under the age of fourteen to accompany the sex offender without permission from the child's parent.[178] Under the 2009 bill, an offender may be with a child under the age of fourteen so long as the offender has either written permission or verbal permission if he is in the child's home.[179] It is a Class A misdemeanor for the child sex offender to be with a child for any reason without this written permission.[180] It is not a defense that the offender reasonably mistook the child's age.[181] The bill allowed for two other exceptions: if the child is the offender's biological child, or if the offender acts to save the child from a life or death emergency.[182] A violation of this subsection extends registration an additional five years.[183]

According to legislators and to supporters of this bill, it arose out of a law enforcement concern that a sex offender could "lure"[184] a child to come with him, or be alone with a child, and if law enforcement were to catch him or if the child were to run away, they would be "powerless" to do anything absent actually taking the child.[185]

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[174]Utah H.R. Law Enforcement and Criminal Justice Comm., supra note 171 (comments by Representative Sumsion).

[175]Utah H.R. Deb., Sex Offender Registration, Utah H.R. Bill 41; Utah Sen. Deb., Sex Offender Registration, and 32, Utah H.R.

[176]Utah H.R. Bill 29, Sex Offenders' Contact with Children, 2009 General Leg. Sess., enacting Utah Code Ann. § 77-27-21.8 (2009).

[177]Whose original offense was against a child under the age of fourteen. See supra note 176, § (2).

[178]Utah Code Ann., supra note 176, § (2)(a).

[179]Utah Code Ann., supra note 176, § (2).

[180]Utah Code Ann., supra note 176, § (2).

[181]Utah Code Ann., supra note 176, § (4).

[182]Utah Code Ann., supra note 176, § (2)(c), (5).

[183]Utah H.R. Bill 29, supra note 176.

[184]Utah Sen. Deb., Sex Offenders' Contact with Children, Utah H.R. Bill 29 (comments by Senator Okurland).

[185]Utah H.Rep. Law Enforcement and Criminal Justice Comm., Jan. 28, 2009 (comments by Representative Okerlund, Kevin Holman, Sanpete County Sheriff, and Alden Orem, Juab County Sheriff). The comment was often raised that were the offender to physically take the child, then it would be kidnapping. See, e.g., Utah H.R.

One county sheriff mentioned a few specific incidents.[186] He indicated there were a group of individuals who were waiting at bus stops to pick up their own kids.[187]

> [B]ut they've tried to get other kids to come with them. Because of our rural community, it's quite a ways from home—the kids are interested in getting a ride. We want to stop that—the parents in that area have expressed these problems to me several times. Another individual in our area was not in a public area like a swimming pool, but down the road and kids were walking down the road back and forth from the pool. They were solicited by an individual. We couldn't do anything. We're lucky these children chose to run away. The law of averages, they'll pick someone up. Our citizens are concerned. They want us to do more with this.[188]

None of these individuals were alleged to have offended against one of these children.[189] Nonetheless, the law enforcement officers opined that the law made it difficult for them to explain their lack of enforcement ability to parents.[190] "We need to take action," one sheriff asserted.[191]

These offenders, according to the 2009 bill's sponsor, have already identified themselves as predators, and this legislation enables law enforcement to better protect children.[192] Some legislators raised concerns, such as if the child sex offender were a sibling of younger children or if a parent giving verbal consent could simply revoke that consent or claim they never gave it.[193] The sponsor's response was that "[t]here is an area for abuse . . . but I don't think it would happen too often."[194] The bill's sponsor turned some time over to a county attorney who asserted that siblings would be held to the same "permis-

Deb., Sex Offenders' Contact with Children, Utah H.R. Bill 29 (comments by Representative Greenwood).

[186]Utah H.Rep. Law Enforcement and Criminal Justice Comm., supra note 185 (comments by Kevin Holman, Sanpete County Sheriff).

[187]Utah H.Rep. Law Enforcement and Criminal Justice Comm, supra note 185 (comments by Kevin Holman, Sanpete County Sheriff).

[188]Utah H.Rep. Law Enforcement and Criminal Justice Comm., supra note 185 (comments by Kevin Holman, Sanpete County Sheriff).

[189]Utah H.Rep. Law Enforcement and Criminal Justice Comm., supra note 185.

[190]Utah H.Rep. Law Enforcement and Criminal Justice Comm., supra note 185 (comments by Alden Orem, Juab County Sheriff).

[191]Utah H.Rep. Law Enforcement and Criminal Justice Comm., supra note 185.

[192]Utah H.R. Deb., supra note 185 (comments by Representative Greenwood).

[193]Utah H.R. Deb., supra note 185 (comments by Representative Johnson); Utah H.R. Law Enforcement and Criminal Justice Comm., supra note 185 (comments by Representative Ota).

[194]Utah H.R. Deb., supra note 185 (comments by Representative Greenwood).

sion" standard because "often, siblings are the ones abusing children."[195]

Despite some concerns about enforceability,[196] the 2009 bill passed both houses unanimously.[197]

One 2009 bill added those who commit multiple lewdness, sexual battery, or public urination offenses to the sex offender registry.[198] The sponsor said this legislation was motivated out of a "rash of instances where people have been charged with lewdness, right into the high school locker rooms, exposing themselves to the children."[199]

Several concerns were raised about whether those who commit these type of offenses are actually dangerous sex offenders.[200] One senator posited a situation in which a guy has sex with his girlfriend on a boat, then urinates in public and finally moons someone at a college football game.[201] "Now they're on the registry for ten years, is that what I'm hearing?"[202] The sponsor's response was that by continuing to offend, even on low-level, less-serious offenses, these people have demonstrated a certain degree of dangerousness:

> These are less serious and not predatory in nature. But if you're doing it repeatedly, then you are very aware of what you are doing. [Discussion of recent case of a man hiding in girl's locker room.] He had a long history of convictions for lewdness. But, he's clearly a predatory-type person.[203]

When asked specifically about whether these offenders posed a danger to the community, the sponsor responded without actual

[195]Utah H.R. Deb., supra note 185 (comments by Reed Richards, Weber County Attorney).

[196]Utah H.R. Deb., supra note 185 (comments by Representative Johnson).

[197]Utah Sen. Deb., supra note 184; Utah H.R. Deb., supra note 185.

[198]Utah H.R. Bill 136, Sex Offender Definition Amendments, 2009 General Leg. Sess. (amending Utah Code Ann. §§ 76-9-702, 76-9-702.5, and 77-27-21.5).

[199]Utah H.R. Deb., Sex Offender Definition Amendments, Utah H.R. Bill 136, 2009 General Leg. Sess. (comments by Representative Ray).

[200]Utah Sen. Judiciary Comm. Hearing, February 25, 2009, Utah H.R. Bill 136 (comments by unnamed Senator).

[201]Utah Sen. Judiciary Comm. Hearing, supra note 200 (comments by Senator Greiner).

[202]Utah Sen. Judiciary Comm. Hearing, supra note 200 (comments by Representative Ray).

[203]Utah Sen. Judiciary Comm. Hearing, supra note 200 (comments by Representative Ray).

sociological data.[204] He called these "serial" type of offenses with people who "have an actual issue" from whom the community "needed to be afraid."[205] He agreed that there may not be a link between mooning and sex offenses, but that those with multiple lewdness convictions "do escalate" their behavior and that "we need to be concerned with these people."[206] While admitting that "prank-type lewdness" occurs, he argued it would not be the type of offense that typically becomes a serial offense.[207] He argued instead that innocent pranksters or non-sex offenders would never make the registry since offenders get "two free moons before [they] are on the registry. . . . We'll give you one or two of those as a free pass. You do it the third time, then you've obviously got issues."[208]

One representative was concerned the 2009 bill diluted the registry by adding non-dangerous offenders.

> The more requirements that we add to the sex offender registry, the less effective of a tool it becomes in providing some of the critical protection and safety that it is designed to do. . . . The more we add, we take away some of the power behind the registry by diluting it too much.[209]

The sponsor's response was that by the third offense, people have demonstrated a serious problem. "These are actual people . . . that have a serious issue. We think they ought to be watched. This won't be the last adjustment to the registry. . . . For the time being, this needs to be on there, so we can track who these people are. . . . We need to know who they are."[210]

Another senator questioned whether putting mooners on the registry would result in them being labeled as sex offenders "for the rest of

[204]Utah Sen. Judiciary Comm. Hearing, supra note 200 (comments by Representative Ray).

[205]Utah Sen. Judiciary Comm. Hearing, supra note 200 (comments by Representative Ray).

[206]Utah Sen. Judiciary Comm. Hearing, supra note 200 (comments by Representative Ray).

[207]Utah Sen. Judiciary Comm. Hearing, supra note 200 (comments by Representative Ray).

[208]Utah Sen. Judiciary Comm. Hearing, supra note 200 (comments by Representative Ray).

[209]Utah Sen. Judiciary Comm. Hearing, supra note 200 (comments by unnamed Senator). The representative also pointed out that lewdness involving a child was already on the registry). This bill added general lewdness not involving children as a registrable offense. Id.

[210]Utah Sen. Judiciary Comm. Hearing, supra note 200 (comments by Representative Ray).

their life."[211] The sponsor reiterated the "free moon" policy—that the first or second offense would not subject the person to the sex offender registry.[212]

One senator expressed a real hard time supporting the bill because "the registry seems like a really, really extreme step for this type of stuff."[213] He, and others, ultimately felt comfortable with an amendment, which moved the registry requirement to the fourth, rather than the third, of these minor convictions.[214] The amendment also made the fourth lewdness a felony conviction, at which point the person would be put on the registry as a convicted felon.[215] One senator mischaracterized the legislation as involving cases where defendants exposed themselves to children.

> Personally, I would like to have it on the third offense. If you stop and think about it. Here's someone who is lewdness or you know, showing himself to kids as they walk by on the street or on the corner. You get caught doing that three times, those type of things, you're gonna be on the sex offender list. And this goes to the fourth time. This is a lot better than nothing and I recommend you support this bill.[216]

The bill ultimately passed both houses with unanimous support.[217]

One other bill passed in 2009 was in response to court decisions in *State of Utah v. Briggs* and *Doe v. Shurtleff*.[218] According to that bill, the Department of Corrections had to remove offenders' Internet passwords from information collected.[219] The Department also had the

[211]Utah Sen. Judiciary Comm. Hearing, supra note 200 (comments by unnamed Senator).

[212]Utah Sen. Judiciary Comm. Hearing, supra note 200 (comments by Representative Ray).

[213]Utah Sen. Judiciary Comm. Hearing, supra note 200 (comments by unnamed Senator).

[214]Utah Sen. Judiciary Comm. Hearing, supra note 200; Utah Sen. Deb., Sex Offender Definition amendment, Utah H.R. Bill 136.

[215]Utah Sen. Deb., supra note 214 (amending Utah Code Ann. §§ 76-9-702 (2)).

[216]Utah Sen. Judiciary Comm. Hearing, supra note 200 (comments by Senator Buttars).

[217]Utah H.R. Debates., supra note 185; Utah Sen. Judiciary Comm. Hearing, supra note 200. The first House debate, prior to an amendment by the Senate, had two no votes. See Utah H.Rep. Law Enforcement and Criminal Justice Comm., supra note 185.

[218]Utah H.R. Bill 247, Amendment to Email Information Required of Registered Sex Offenders, 2009 General Leg. Sess. (amending Utah Code Ann. §§ 63G-2-302, 77-27-21.5 (2009)).

[219]Utah H.R. Bill 247, supra note 218.

obligation to remove online identifiers and language regarding primary and secondary targets from the publicly accessed website.[220]

In 2010, the Utah Legislature made several changes to the sex offender registry. House Bill 125 removed simple kidnapping from the registry.[221] The bill's sponsor said the bill was motivated by a specific case in which an individual who was drunk entered a house with a gun and forced the occupants out of the home—this individual was placed on the sex offender registry because he had committed a simple kidnap.[222] The bill's sponsor initially thought of creating an Internet portal for sex offenses and one for kidnapping, but decided rather to simply drop kidnapping from the statute.[223] We can still "get them" for aggravated kidnapping, the bill's sponsor said.[224] Several concerns to this statute were raised in the Senate debates, where the bill initially failed to pass.[225] Although the bill's sponsor indicated that the bill would only remove twenty individuals from the registry, senators seemed to be concerned with the possibility that some elements of the kidnapping statute could include sex-related crimes.[226] A compromise bill passed which removed kidnapping from the registry except for kidnapping when the victim is held in involuntary servitude or if the person restrains a minor without the parents' consent.[227]

Additionally, in 2010, the Utah legislature authorized agencies other than the Department of Corrections to collect an annual fee from an

[220]Utah H.R. Bill 247, supra note 218.

[221]Kidnapping and Sex Offender Registry amendment, Utah H.R. Bill 125 (amending Utah Code Ann. § 77-27-21.5). See also Utah Code Ann. § 76-5-301(1)(a) and (1)(b) (2010), defining simple kidnapping.

[222]Utah. Sen. Judiciary, Law Enforcement and Criminal Justice Comm., Feb. 24, 2010 (comments of Representative Bigelow).

[223]Utah Sen. Judiciary, supra note 222 (comments of Representative Bigelow). See also Abigail Shaha, Utah Legislature: Sex Offender Registry Bill Advances, Desert News, Feb. 24, 2010.

[224]Utah Sen. Judiciary, supra note 222 (comments of Representative Bigelow).

[225]Utah Sen. Deb., Utah H.R. Bill 125, Mar. 4, 2010.

[226]One senator specifically mentioned the case of accused Elizabeth Smart kidnapper Brian David Mitchell and argued that he should be included on the sex offender registry for his kidnapping. Utah Sen. Judiciary, Law Enforcement and Criminal Justice Comm., Feb. 24, 2010; Floor Debate, Mar. 3, 2010 (comments by Senator Jon Greiner).

[227]Kidnapping and Sex Offender Registry amendment, Utah H.R. Bill 125 (amending Utah Code Ann. § 77-27-21.5). The legislature did not examine whether these two types of kidnapping were intrinsically tied with sex-related offenses—only the possibility that they "seemed" tied together. Utah Sen. floor Debates, Mar. 8-9, 2010 (comments by Senator Jon Greiner). See also Utah Code Ann. § 76-5-301(1)(c) and (1)(d) (2010), defining the kidnapping situations that are still subject to registration requirements.

offender if he registers with them.[228] The legislature also expanded the registry to include offenders who had been convicted of crimes in military tribunals.[229] The director of the Utah Sentencing Commission indicated to the Senate Committee that there was some possibility of including sex offenders from other nations on the registry as well, so long as those nations had adequate safeguards for due process.[230]

Finally, the legislature clarified the definition of a secondary residence for purposes of registration.[231] Under the statute, an offender must register a secondary residence with the Department of Corrections if he owns or has financial interest in the property or if he stays overnight more than ten days at the property in any calendar year.[232]

In sum, although Utah's sex offender registry was created in 1983, it saw relatively little action until the U.S. Congress stepped into the picture with its enactments of the Wetterling Act, Megan's Law, the Campus Sex Crimes Act, and the Adam Walsh Act, to name a few. From 1996 to 2010, the Utah Legislature made twenty-five changes to its sex offender registry; thirteen were made after 2005.[233] Yet, it appears that at no point in its history did the Utah Legislature attempt to address the registry's efficacy. Never, in over twenty-five years of existence, did Utah legislators look to whether the registry actually prevented sex-related offenses from occurring. Instead, the Utah legislature looked to ever-expand the number and type of offenses that were included on the registry. Although legislators had initial concerns about the rights of sex offenders, these concerns have mostly vanished as Utah legislators have become increasingly caught up in the ever-increasing punishment of sex offenders.

[228]The fee can be no more than $25 annually. See Utah H.R. Bill 209, Sex Offender Regulation amendment, 2010 General Leg. Sess. (amending Utah Code Ann. § 77-27-21.5).

[229]Utah H.R. Bill 276, Sex Offender Registry amendment, 2010 General Leg. Sess. (amending Utah Code Ann. § 77-27-21.5). The bill's sponsor indicated that they had somehow missed including military convictions. House Law Enforcement and Criminal Justice Comm., Feb. 12, 2010 (comments by Representative Ray).

[230]Utah Sen. Judiciary, Law Enforcement and Criminal Justice Comm., Feb. 24, 2010 (comments by Jacey Skinner).

[231]Utah H.R. Bill 365, Department of Corrections Registry amendment, 2010 General Leg. Sess (amending Utah Code Ann. § 77-27-21.5).

[232]Utah H.R. Bill 365, supra note 231. This applies even if the offender does not own the property at which he is staying. This bill passed without debate in either chamber. House Floor Deb, Mar. 4, 2010. Utah Sen. Floor Debate, Mar. 10, 2010.

[233]Supra note 92.

II. THE PROBLEMS AND PROPOSED SOLUTIONS REGARDING UTAH'S SEX OFFENDER REGISTRATION LAWS

Current predator policies—to identify, stigmatize, and exclude—distorts the true nature and extent of sexual violence, focuses on a small fraction of the problem, ignores the great majority of victims and their trauma, and does little or nothing to deal with the root causes of sexual violence.[234]

Problem: Legislators are applying a conviction-based approach rather than a risk-assessment approach.

At its initial enactment, there were eighteen sex offenses requiring registration under Utah's sex offender registry.[235] Since then, Utah's sex offender registry has been amended a number of times resulting in additional sex offenses needing registration.[236] In 2010, there are now twenty-three sex offenses mandating registration, including the recent provision that the person convicted of multiple mooning incidents be registered.[237] In continually expanding the scope of sex offenses requiring registration, Utah legislators lack an understanding of the different types of sex offenders, their different rates of recidivism, and their various levels of dangerousness. Instead of focusing on statistics regarding the complexities of sex offenders, legislators make continual amendments to Utah's sex offender registry based primarily upon high profile cases and social panic. Thus, instead of empirical-based legislation, we have hysteria-based laws. Utah Legislators also proceed as though all sex offenders are similar and will recidivate if given the chance. The empirical truth, however, is that not all sex offenders present the same risk of reoffending.[238]

In addition to expanding the scope of sex offenses requiring registration, Utah legislators have increased the number of require-

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[234]Eric S. Janus, Failure to Protect: America's Sexual Predator Laws and the Rise of the Preventive State 146 (2006).

[235]Utah Code Ann. § 77-27-21.5 (1983).

[236]Utah Code Ann. § 77-27-21.5 (1)(i) (2009). See also www.corrections.utah.gov.

[237]It is important to note that on a nationwide level, states have increased the number of sex offenses requiring registration. A Human Right Watch study found that "at least five states required men to register if they were caught visiting prostitutes. At least 13 required it for urinating in public (in two of which, only if a child was present). No fewer than 29 states required registration for teenagers who had consensual sex with another teenager. And 32 states registered flashers and streakers." Georgia Harlem, Unjust and Ineffective, Economist, Aug. 8, 2009, at 22.

[238]Lisa L. Sample & Mary K. Evans, Sex Offender Registration and Community Notification, in Sex Offender Laws: Failed Policies, New Directions 221, 226 (Richard D. Wright ed., 2009).

ments imposed on those who must register.[239] Many sex offenses now carry lifetime registration requirements or increased time periods for registration compared to those set at the inception of Utah's sex offender registry.[240] In addition, a sex offender is now required to report a change of address within three days of moving[241] as opposed to the previous ten-day requirement.[242] Additional requirements imposed on sex offenders seen in recent amendments include the mandate that a sex offender cannot be in a "protected area"[243] and if seen with a child fourteen or younger, a sex offender must have proof of permission to be with the child.[244]

The fundamental problem with the momentum of sex offender laws in Utah and across the nation is the methodology employed by legislators when enacting sex offender legislation. Legislators are employing a "conviction-based approach" rather than a "risk-assessment approach."[245] The conviction-based approach says that if a sex offender has been convicted of a registrable offense, then he must register.[246] There is no inquiry into whether the offender is likely to reoffend, only whether his conviction is found on the list of registrable offenses.[247] Furthermore, recidivism rates or various levels of dangerousness do not guide legislators when deciding which offenses should be added to the list of registrable offenses. When deciding whether to add a sex offense to the registration requirements, legislators are employing a broad, not narrow, sweep to assuage social panic. The general view seems to be that if the offense has something to do with sex, legislators must make it a registrable offense.

In addition, legislators use the conviction-based approach to impose additional requirements each year on all registered sex offenders. Instead of applying amendments to only a subset of registered sex offenders, additional requirements are imposed on every sex offender who must register. In essence, the conviction-based approach treats

[239]Utah Code Ann. § 77-27-21.5 (2010).

[240]Utah Code Ann. § 77-27-21.5 (2010).

[241]Utah Code Ann. § 77-27-21.5 (9)(a) (2010).

[242]Utah Code Ann. § 77-27-21.5 (12)(a) (2010).

[243]Utah Code Ann. § 77-27-21.7 (2010). Also, in Georgia, there was proposed bill to ban sex offenders living within 1,000 feet of a bus stop. This bill ultimately did not pass as it was determined that all 490 sex offenders in one Atlanta county lived within 1,000 feet of a bus stop, and thus would be evicted if the bill passed. See Harlem, supra note 237, at 22.

[244]Utah Code Ann., supra note 243.

[245]Sample & Evans, supra note 238, at 221.

[246]Sample & Evans, supra note 238, at 231 & 236.

[247]Sample & Evans, supra note 238, at 231 & 236.

all sex offenders as alike and fails to make any distinctions amongst them.[248]

The ramification of the conviction-based approach is that once a sex offender must register, society will view the sex offender as being as dangerous as anyone else on the registry. To the public, all of the registrable sex offenses appear to have the same degree of severity. The reality is that the general public is not in the habit of looking into the mitigating issues that pertain to many of the sex offenders listed on the registry. The general public has little time or no care to request court transcripts or code books in order to better understand the specifics of a registered sex offender who lives in their community. While there may be mitigating details brought to light in court regarding any specific sex offense conviction, as well as differences between the degrees of dangerousness for sex offenses in general, the public only cares about whether their neighbor is on, or off, the sex offender registry.

In applying the conviction-based approach, legislators are enacting laws based upon four of the most common and inaccurate assumptions about sex offenders: 1) that they inevitably reoffend, 2) that they have a propensity to kill their victims, 3) that they most frequently choose children as victims, and 4) that they are often strangers to their victims.[249] In response to the legislators' assumption that sex offenders inevitably reoffend, the empirical data shows that

> recidivism rates tend to be much lower for sex offenders than those found for other offender groups, and sex offense recidivism rates tend to be much lower than sex offender laws imply.[250]

Thus, not all sex offenders inevitably reoffend, and recidivism rates for sex offenses are lower than recidivism rates for other violent and non-violent crimes.[251] In addition, the recidivism rates are not the same for each type of sex offense. Sex offenders who target adults recidivate at a higher rate than those who molest children.[252]

Empirical data also shows that the legislators' real concern needs to be focused on the sex offender known as the Sexually Violent Preda-

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[248]Apart from the requirement that some offenders must register for life, while other offenders are to register for a ten-year period, the additions in each amendment apply to all sex offenders. Utah Code Ann. § 77-27-21.5 (2010).

[249]Sample & Evans, supra note 238, at 226.

[250]Sample & Evans, supra note 238, at 228.

[251]Francis Williams, The Problem of Sexual Assault, in Sex Offender Laws: Failed Policies, New Directions 17, 44 (Richard G. Wright ed., 2009).

[252]Sample & Evans, supra note 238, at 226, 229 (Marques et al. also examined sex offenders with child and adult victims and found that a greater proportion of rapists were rearrested for another sex crime (9.1%) than child molesters (4%).").

tor ("SVP") and not on those who have committed nonviolent sex crimes. SVPs are

> persons who have been convicted or charged, and who, as a result of the mental abnormality or personality disorder, are likely to continue to engage in predatory acts of sexual violence.[253]

SVPs engage in brutal behavior towards children including child-rape, ritualistic sexual practices, and murder.[254] Thus, SVPs are the image that fuels public angst about sex offenders.[255] In reality, SVPs are an extremely small subset of those who are subject to sex offender registration requirements. Statistics show that SVPs make up the smallest percentage of child offenders, estimated at five percent of the population or less.[256] SVPs are generally not corrected with treatment and the best means of dealing with the SVP is incarceration or long term, if not permanent, monitoring.[257]

Not everybody convicted of a sex offense is a SVP, and, in fact, the vast majority of people required to register on Utah's sex offender registry are not SVPs. There is an obvious difference in dangerousness levels between the SVP and the person who is required to register because of too many convictions for mooning or instances of public urination on his or her criminal background. The differences in the psychology and motivations of the SVP compared with the college-fraternity-male-repeat-mooner cannot be overstated.

In addition, statistics show that there are various types of child sex offenders who have substantially lower recidivism rates than the SVP. This is the case with people convicted of viewing child pornography.[258] Child pornography offenders have different psychological profiles.[259] For instance, there is one type of man who uses child pornography to feed his attraction to children but who has enough awareness of the legal and social consequences of acting on this arousal that he would never offend.[260] This man differs from the man with similar arousal patterns who actively seeks to initiate child contact.[261] In addition, men differ in their motivations for viewing child pornography. Some men

[253]Williams, supra note 251, at 33.

[254]Ian Friedman et al., Sexual Offenders: How to Create a More Deliberate Sentencing Process, NACDL The Champion 14 (2009).

[255]Friedman et al., supra note 254, at 14.

[256]Friedman et al., supra note 254, at 15.

[257]Friedman et al., supra note 254, at 15.

[258]Friedman et al., supra note 254, at 14.

[259]Friedman et al., supra note 254, at 14.

[260]Friedman et al., supra note 254, at 14.

[261]Friedman et al., supra note 254, at 14.

who view child pornography have a strong or primary sexual attraction to pre- and post-pubescent children.[262] Other men viewing child pornography, however, are primarily aroused by sex with adults, but their involvement with child pornography stems from a longstanding problem with sexual addiction in general.[263] Most importantly, arousal from child pornography should not be used as the sole predictor of recidivism as the sex offender's criminal background and tendency towards antisocial behavior are very important factors in predicting the possibility of recidivism.[264] Statistics show that "if one takes into account both prior and current offenses, child pornography offenders with no other form of criminal involvement were the least likely to commit future offenses."[265]

In addition, contrary to the SVP who is impervious to treatment, the majority of child sex offenders are greatly helped with treatment,[266] proving that the psychological make-up and internal reasoning of all sex offenders is not the same.[267] Many child sex offenders enjoy a successful career and family life and their offenses are instances of a maladaptive attempt to cope with life's stressors.[268] Their primary sexual interest is ordinarily focused towards their own age group, and their sexual interest in children is temporary and/or opportunistic, and when acted upon, a manifestation of their emotional stressors.[269] Alcohol and drug use often act as precipitating factors for offenses for this type of child sex offender.[270] For this type of child sex offender,

[262]Friedman et al., supra note 254, at 14.

[263]Friedman et al., supra note 254, at 14.

[264]Friedman et al., supra note 254, at 14.

[265]Friedman et al., supra note 254, at 15. This Article stated that recidivism rates in the child pornography offender population were relatively predictable with the most reliable indicator being the sex offender's prior criminal history.

[266]Pursuant to the directive of 18 U.S.C.A. § 3621(f)(2), the Bureau of Prisons must make available sexual offender programs to prison inmates. At the Utah State Prison, sex offender treatment is available to prison inmates who qualify.

[267]Friedman et al., supra note 254, at 15. This category of child sex offenders is referred to as "regressed or situational child sexual offenders" and this population makes up approximately 80% of all child sex offenders. Other types of child sex offenders discussed in this Article are the "dedicated or fixated type offender," the "developmentally delayed or mentally disturbed child offender, and "the sexually addicted offender." These types of child sex offenders are distinguished by their different motivations and internal reasoning that cause their offenses, and the recidivism rates vary for each of these types of child sex offenders. Id.

[268]Friedman et al., supra note 254, at 15.

[269]Friedman et al., supra note 254, at 15.

[270]Friedman et al., supra note 254, at 15.

treatment benefits greatly and the offender is less likely to recidivate if given treatment opportunities and long-term monitoring.[271]

In 2006, the Utah's sex offender registry was amended to require that certain juvenile sex offenders be registered.[272] This amendment is yet another instance of policy makers failing to make distinctions based on recidivism levels and degrees of dangerousness.[273] Under the Utah registry, a juvenile can be required to register if the offense committed is rape of a child, object rape of a child, forcible sodomy, sodomy on a child, or aggravated sexual assault and the juvenile is committed to secure detention until age twenty-one.[274] If these factors exist, the juvenile must register for a period of ten years.[275]

Requiring youth to register can be detrimental to their school attendance and ability to participate in normal everyday adolescent

[271]Friedman et al., supra note 254, at 15.

[272]Utah Code Ann., supra note 93.

[273]The first instance of federal law allowing juveniles to be placed on registries came in 2006, through Title I of the Adam Walsh Child Protection and Safety Act- the Sex Offender Registration and Notification Act (SORNA). According to SORNA, "youth ages 14 and up must be put on the registry if prosecuted and convicted as an adult or (a) if he or she is 14 or older at the time of the offense and (b) he or she is adjudicated delinquent for an offense comparable or more serious than "aggravated sexual abuse" or adjudicated delinquent for a sex act with any victim under the age of 12. The only exception is a 'Romeo and Juliet' clause, which excludes from registration youth who engage in consensual intercourse when they are no more than four years older than the other party and the other party is at least 13 years old." Nastassia Walsh & Tracy Velazquez, Registering Harm: The Adam Walsh Act and Juvenile Sex Offender Registration, Champion: National Association of Criminal Defense Lawyers (Dec. 2009), at 20. See 42 U.S.C § 16911(5)(C). See also Maggie Jones, The Case of The Juvenile Sex Offender: How Can You Distinguish A Budding Pedophile from a Kid With Real Boundary Problems? N.Y. Times Mag., July 2007, sec. 6, at 38, stating: "Under the Adam Walsh Act, a 35-year-old who has a history of repeatedly raping young girls will be eligible for public registry, and so will a 14-year-old boy adjudicated as a sex offender for touching an 11-year-old girl's vagina. According to the law, the teenager will remain on the national registry for life. He will have to register with authorities every three months, and if he fails to do so . . . he may be imprisoned for more than one year."

[274]Utah Code Ann. § 77-27-21.5 (2010).

[275]Utah Code Ann., supra note 274. Also, in comparing Utah's juvenile sex offender registration laws with some other states in the nation: "Among states that do include juveniles in community-notification laws, there is little consistency in terms of who is eligible and for how long. Some jurisdictions allow for judicial discretion on whether to include juveniles or permit youths to petition to be removed after a number of years. In some states, a juvenile has to be 14 to be listed on public sex-offender registries. In others, they may be eligible at 10 or 12 . . . [I]n South Carolina, anyone—whether adult or child—who is placed on its Internet registry is there for life." Jones, supra note 273, at 36.

activities.[276] The ostracism felt by the juvenile offender can also easily translate into continual deviant behavior.[277] Studies show that the motivations of juvenile sex offenders are different from those of adult sex offenders.[278] For youth offenders, sex offenses are based on experimentation, not aggression.

> According to the National Center on Sexual Behavior of Youth, the vast majority of youth sex offenses are manifestations of nonsexual feelings. Youth engage in fewer abusive behaviors over shorter periods of time and engage in less aggressive sexual behavior. Youth rarely eroticize aggression and are rarely aroused by child sex stimuli. Most youth behavior that is categorized as a sex offense is activity that mental health professionals do not label as predatory. Therefore, using an adult registration system for youth does not fit, likely has no public safety benefit, and therefore should not be applied to youth.[279]

Juvenile sex offenders have very low recidivism rates. In 2002, a review of 25 studies of juvenile sex offense recidivism rates showed that "youth who commit sex offenses have a 1.8–12.8 percent of arrest and a 1.7–18 percent chance of reconviction for another sex offense."[280] This rate is low compared to the recidivism rate for non-sex offenses committed by juveniles.[281]

The American juvenile justice system is founded on the idea that juveniles ought to be treated differently than adults when it comes to legal issues.[282] Juvenile records are generally kept sealed from the public, and punishments imposed for deviant behavior by juvenile courts are generally lighter than sentences imposed in adult courts for similar crimes.[283] The theory is that juveniles are less responsible for their actions. Juvenile court sanctions emphasize rehabilitation

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[276]Utah Code Ann., supra note 274.

[277]Utah Code Ann., supra note 274.

[278]Utah Code Ann., supra note 274.

[279]Walsh & Velasquez, supra note 273, at 22. See also Brittany Enniss, Quickly Assuaging Public Fear: How the Well-Intended Adam Walsh act Led to Unintended Consequences Utah L. Rev. 697, 707-08 (2008).

[280]Walsh & Velasquez, supra note 273, at 22. See also Michael F. Caldwell, What We Do Not Know About Juvenile Sexual Re-Offense Risk, 7 Child. Maltreatment 291 (2002).

[281]Walsh & Velasquez, supra note 273, at 23.

[282]Walsh & Velasquez, supra note 273, at 23.

[283]Walsh & Velasquez, supra note 273, at 23. See also Jones, supra note 273, at 35.

because the young brain is continually developing in its ability to make proper judgments and risk-assessments.[284]

In requiring juveniles to register as sex offenders, Utah legislators have failed to factor in these basic distinctions that separate juvenile offenders from adult offenders. In addition, legislators are sending the message to the public that juvenile sex offenders are more like adult sex offenders than they are like kids. Legislators incorrectly give the public a message that juvenile sex offenders are as dangerous as adult sex offenders.

In responding to the faulty assumption made by legislators that sex offenders have a propensity to murder their victims, "scholars suggest that sex offenders rarely kill."[285] Empirical data has also contradicted the remaining faulty assumptions used by legislators when enacting sex offender registration laws.

> [The] notions that children are often the targets of sex offenders' attention and that sex offenders are often strangers to their victims are also challenged by empirical evidence. . . . A review of the NCVS ([U.S. National Crime Victimization Survey] from 1996 to 2005 suggested that the majority of victims of sex crimes knew their attackers.[286]

Thus, legislators enact laws on the faulty assumption that we are most in fear of stranger danger attacks. The empirical data shows, however, that the real danger of sex offenders exists within the walls of one's own house.

In sum, legislative assumptions about sex offenders do not comport with empirical evidence. This means that the likelihood of Utah's sex offender registration laws achieving their goal of protecting children seems bleak. The legislators' practice, both in Utah and nationwide, of expanding the scope of sex offenses requiring registration is not supported by empirical data. In doing this, legislators are not only causing undue stress on a number of sex offenders by making it difficult for them to reintegrate into society, legislators are also failing to adequately meet the overwhelming societal goal of keeping our children safe.

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[284]Walsh & Velasquez, supra note 273, at 23. See also Enniss, supra note 279, at 707.

[285]Sample & Evans, supra note 238, at 229 (In one study, "Frances and Soothill (2000) followed 7,436 convicted sex offenders in England and Whales in 1973 over a 21 year period and found that only 2.55% (or 19 of 7,436) were convicted for killing another person.").

[286]Sample & Evans, supra note 238, at 229–230. Another study done in 2000 by the Bureau of Justice Statistics, Sexual Assault of Young Children as reported to Law Enforcement-Victim, Incident, and Offender Characteristics showed that "in 93 percent of sexual assaults on children, a family member or acquaintance victimizes the child." Walsh & Velazquez, supra note 273, at 21.

Problem: Utah's Sex Offender Registry is ineffective.

National and Utah statewide statistics do not show a decline in sex offense arrests resulting from the implementation of sex offender registry and notification laws.[287] If the registries were truly effective, we would see a substantial decline in sex offenses within the last ten years based upon the increase in registry requirements. Instead, arrests for sex offenses have basically maintained their numbers.[288]

Problem: The costs associated with Utah's sex offender registry have increased.

The costs associated with Utah's sex offender registry have increased as a result of the momentum to make harsher penalties for those in noncompliance. In 2006, the Utah legislature increased the penalty associated for failure to register from a class A misdemeanor to a third degree felony.[289] The result of this increase means that a person convicted of failing to register can now serve a possible maximum sentence of up to five years at the Utah State Prison.[290] Prior to this amendment, the penalty for failing to register was a class A misdemeanor, with a maximum penalty of one year in jail.[291] In addition, the new amendment imposes a minimum mandatory penalty, whereby it gives a mandate to judges that that if prison is not imposed for an offender's failure to register, a judge must impose a minimum mandatory jail sentence of 90 days.[292] Thus, legislators have not given judges any discretion to suspend incarceration for those convicted of failing to register. The effect of this amendment is a huge increase in costs associated with the incarceration of offenders convicted of failing to register. The problem with mandatory incarceration for these of-

[287] Sample & Evans, supra note 238, at 233. See also Enniss, supra note 279, at 712; Harlem, supra note 237, at 23 ("A study by Kristen Zgoba of the New Jersey Department of Corrections found that the state's system for registering sex offenders and warning their neighbors cost millions of dollars and had no discernible effect on the number of sex crimes.").

[288] See Uniform Crime Reports, Federal Bureau of Investigation, Nationwide and Utah for Sexual Offenses, 2000–2010.

[289] The Utah Legislature increased the penalty for failure to register to a third degree felony for those sex offenders whose underlying registrable charge was a third degree felony or those offenders subject to lifetime registration. Otherwise, it is still a class A misdemeanor penalty for misdemeanant registrants. See Utah Code Ann. § 77-27-21.5 (16). See also Utah H.R. Bill 158S01, supra note 99.

[290] Utah Code Ann., supra note 289.

[291] Utah Code Ann., supra note 289.

[292] Utah Code Ann., supra note 289.

fenses is that Utah's prison and jails are at maximum capacity.[293] With limited bed space, there is a need to prioritize the list of who should be given incarceration. Simply put, people convicted of failing to register should not trump murderers and rapists for bed space at the Utah State Prison.

Other costs besides those associated with incarceration have resulted from Utah's sex offender registry. Because the number of sex offenders needing to register continually increases, the tax money required to pay law enforcement and probation and parole agencies to effectively monitor these offenders substantially increases. More and more tax money is needed from Utah citizens in order to sustain the costs associated with the momentum of Utah's sex offender registry laws. The recent dire economic reality, however, shows that there is less, not more, tax money that can be spent by agencies responsible for monitoring convicted sex offenders.[294] With probation agents already having close to unmanageable caseloads, the practical reality is that increasing the number of sex offenders for them to monitor results in jeopardizing the effectiveness of the monitoring process. Those offenders who are most dangerous and most in need of monitoring will be only summarily looked at in order that time is allotted for monitoring all registrants.

Of course, costs will always coincide with implementing a sex offender registry and resulting costs alone do not effectively argue against implementing sex offender registries. However, unnecessary costs resulting from ineffective requirements of sex offender registries do need to be addressed and curtailed so that tax money can be better spent on achieving the goals of sex offender registries. Tax money needs to be spent on monitoring those offenders most likely to reoffend. In addition, tax monies currently spent on evicting sex offenders would be better spent on treating them. Legislative amendments aimed at increasing the number of offenders needing to register leads to unjustified costs associated with monitoring more people. Legislators, both in Utah and nationwide, must responsibly discuss the costs associated with monitoring large numbers of offenders as opposed to the costs associated with monitoring those sex offenders who are most likely to reoffend. Legislators need to make sure that adequate money is spent monitoring the most dangerous sex offend-

[293]Robert Gehrke, Utah Prisons: Nearing Inmate Capacity with No Relief in Sight, Salt Lake Trib., Oct. 21, 2009, available at http://www.sltrib.com/news/ci_13603757. According to this article, Utah's "recession has crunched state Corrections with less money to build new prisons. The Department's director warned law makers . . . that the system will hit capacity soon, with no relief valve from a planned parole-violator facility." Id.

[294]Harlem, supra note 237, at 22.

ers and insist that money is spent wisely in protecting society's children.

Problem: The registry has lost sight of the goal of protecting children.

Since 2006, Utah's registry has been modified thirteen times and in each instance, more and more is required of those needing to register. In essence, it is becoming easier to convict sex offenders for their failure to comply with various technical registration requirements. And, harsher penalties await those who do not keep up with the continuing mandates given by legislators. Due to recent amendments, sex offenders must always make sure that they are not in "protected areas" including licensed day care or preschool facilities, public swimming pools, community parks, public or private elementary or secondary schools, and playgrounds or places intended to allow physical activity for children.[295] Thus, it is always necessary for offenders to be very aware of their surroundings as they travel about in the community. Certainly, normal citizens do not have this type of heightened awareness of their surroundings as they carry about their everyday activities.

In addition, registered sex offenders must make sure that they have adequate proof of written or verbal permission when seen near a child under the age of fourteen.[296] In essence, these amendments are so unnecessarily burdensome that they set up sex offenders for failure. Sex offenders continually experience ostracism[297] and it is increasingly difficult for sex offenders to find residences and employment.[298] The sex offender is deprived of the "clean slate" opportunity afforded to every other person convicted of a crime who has "paid his dues." In not allowing sex offenders to properly integrate into society we risk losing track of them altogether.

Because of the public shaming against sex offenders, they ultimately experience harassment and isolation. This type of overwhelming instability can easily lead to the commission of further crimes, whether

[295]Utah Code Ann. § 77-27-21.7 (2010).

[296]Utah Code Ann., supra note 295.

[297]Even worse than ostracism has been vigilante attacks on sex offenders needing to register. In April 2006, "a vigilante shot and killed two sex offenders in Maine after finding their addresses on the registry. One of the victims had been convicted of having consensual sex with his 15-year-old girlfriend when he was 19. In Washington state in 2005 a man posed as an FBI agent to enter the home of two sex offenders, warning them that they were on a 'hit list' on the internet. Then he killed them." Harlem, supra note 237, at 22.

[298]Harlem, supra note 237, at 22.

they be theft related crimes or additional sex offenses.[299] Thus, the actual result of increasing restraints and duties on sex offenders can be counterproductive to achieving society's goal of protecting children. Worse yet, increased restrictions can actually assist in the commission of further sex abuse crimes and non-sex crimes in the community. Instead of creating laws that will set up a sex offender for failure, we should allow a sex offender a real chance to be rehabilitated.

Solutions: Risk-assessments should be employed at various stages.

A risk-assessment analysis should be employed in determining who must register. The ideal means for determining whether one should have to register on the sex offender registry would be to a have a court determine this. The U.S. Supreme Court, however, has already determined that it is not a violation of the U.S. Constitution to require sex offenders to register without a court hearing to address risk-related issues.[300]

The fact that a hearing is not required prior to registration does not stop the need for the implementation of risk-assessments, and the starting point of this risk-assessment analysis needs to occur at the debates held at legislative sessions. When legislators are debating which crimes should constitute registrable crimes, they need to be discussing statistics and empirical data about who is, and who is not, dangerous. Legislators guided only by the panic surrounding high profile cases are perpetuating hysteria-based laws, and these laws must be replaced by empirically-rooted legislation indicative of where the real dangers exist.

In addition, a risk-assessment analysis should be employed in determining whether a sex offender may be removed from the registry once he is required to register. Currently, if a sex offender must register in Utah, the required time period of registration is fixed at a term of either ten years or for life. The type of conviction determines the requisite time period of registration. There is currently no ability to appeal to any authority for an earlier termination.

A better solution would be to employ a risk-assessment analysis in determining whether a sex offender can be removed from the registry. Judges could hold hearings and be given discretion to determine whether a sex offender merits removal from the registry based upon

[299] "Several studies suggest that making it harder for sex offenders to find a home or a job makes them more likely to reoffend. Gwenda Willis and Randolph Grace of the University of Canterbury in New Zealand . . . found that the lack of a place to live was 'significantly related to sexual recidivism.' " See Harlem, supra note 237, at 23.

[300] *Connecticut Dept. of Public Safety v. Doe,* 538 U.S. 1, 123 S. Ct. 1160, 155 L. Ed. 2d 98 (2003).

the achievements and progress made by the sex offender. In making these determinations, judges could make educated decisions based, in part, upon examining the sex offender's psychosexual evaluation,[301] employment and probation history, education status, age, physical limits impacting an offender's ability to reoffend, the offender's success in integrating back into the community, and whether the sex offender completed a sex offender management program. Probation agents should also give input on whether a sex offender deserves to be taken off the registry as they are the ones who have closely monitored the progress made, or lack thereof, by the sex offender. An additional benefit of implementing these types of registry hearings is that they would provide a sex offender an incentive to earn the ability to be removed from the registry. This possible result ultimately encourages good, not bad, behavior from sex offenders. We can best meet our goal of protecting our children if sex offenders are self-motivated to avoid acts warranting continued registration.

Lastly, electronic monitoring devices should be considered as an alternative to continued registration requirements for deserving sexual offenders. Global positioning satellite ("GPS") tracking systems are common among probation and pre-trial agencies across the nation.[302] At minimal expense to the offender, GPS technology enables continual tracking of offenders and provides immediate notification of violations.[303] These devices have alleviated prison and jail overcrowding across the nation.[304] GPS devices have also allowed offenders the opportunity to maintain employment and schooling. Thus, GPS technology provides for the reintegration of an offender into society.[305] Applying GPS technology as an alternative to continued sex-registration requirement presents a win, win scenario. Sex offenders would be

[301]Psychosexual evaluations are often used at sentencing to aid a judge in determining the proper sentence for a sex offender. The purpose of a psychosexual evaluation is to provide a complete picture of the potential for a sex offender to reoffend. Guidelines for incarceration and/or treatment are outlined in these reports, as well as issues relating to the offender's ability to return to work, home, and the community. The details contained in the psychosexual evaluation regarding an offender include a sexual and relationship history, family and social history, drug and alcohol issues, mental health issues, and, if present, a discussion of an offender's psychological, physical, and sexual trauma history. In addition, the evaluation will address a sex offenders sexual arousal patterns, determined by a penile plethysmograph test. See Friedman et al., supra note 254, at 14. See also Paul Stuff, Utah's Children: Better Protected Than Most By New Civil Sex Offender incapacitation Laws?, 24 J. Contemp. L. 295, 316 (1998) (discussing the penile plethysmograph test).

[302]Friedman et al., supra note 254, at 17.

[303]Friedman et al., supra note 254, at 17.

[304]Friedman et al., supra note 254, at 17.

[305]Friedman et al., supra note 254, at 17.

removed from the registry and could reintegrate into society without the fear of ostracism. In addition, the public's fear of the sex offender would be alleviated as implementing the GPS device would give society assurances that the sex offender's actions are being monitored.

In sum, the problems of Utah's sex offender registration laws reveal that legislators are employing a conviction-based approach as opposed to a risk-assessment analysis. Implementing risk-assessments is the solution to adequately address the problems of Utah's sex offender registry. Risk-assessments must be made initially by legislators when determining who must register, and again later by judges, influenced by probation agents, about whether an offender may be removed from the registry.

III. CONSTITUTIONAL CHALLENGES AGAINST UTAH'S SEX OFFENDER REGISTRATION LAWS

There is no inherent contradiction between protecting the rights of children and protecting the rights of former offenders.[306]

Nationwide, typical constitutional challenges to sex offender registry laws have been centered on the following arguments: 1) cruel and unusual punishment, 2) ex post facto, 3) due process, 4) equal protection, 5) search and seizure, and 6) failure of the state to notify the offender of his duty to register.[307] These constitutional challenges have not had much success as courts nationwide have routinely held that registration laws are not punishment, but appropriate state regulation.[308]

Regarding Utah's sex offender registry, since its enactment, constitutional challenges to it have been made in only a handful of cases. The cases discussed in this Article are: 1) *Femedeer v. Haun,*[309] 2) *State v. Briggs,*[310] and 3) *Doe v. Shurtleff.*[311]

FEMEDEER V. HAUN

In *Femedeer v. Haun* the Tenth Circuit Court of Appeals upheld constitutional challenges against the Utah sex offender's notification

[306]See Zilney & Zilney, supra note 1, ch. 5 (citing Human Rights Watch, No Easy Answers: Sex Offender Laws in the US 130 (2007)).

[307]Karen J. Terry & Alissa R. Ackerman, A Brief History of Major Sex Offender Laws" in Sex Offender Laws: Failed Policies, New Directions 65, 81 (Richard G. Wright ed., 2009).

[308]Terry & Ackerman, supra note 307, at 81.

[309]*Femedeer v. Haun*, 227 F.3d 1244, 47 Fed. R. Serv. 3d 574 (10th Cir. 2000).

[310]*State v. Briggs*, 2008 UT 83, 199 P.3d 935 (Utah 2008).

[311]*Doe v. Shurtleff*, 2008 WL 4427594 (D. Utah 2008).

scheme related to ex post facto and double jeopardy claims.[312] These challenges focused on convicted sex offenders who committed their crimes prior to the effective date of the enabling registration.[313] According to the ex post facto claim, *Femedeer* argued that the Utah registry requirements as applied to him, violated Article I, Section 9 of the U.S. Constitution, known as the Ex Post Facto Clause, stating, "No . . . ex post facto law shall be passed."[314] These laws make "more burdensome the punishment for a crime after its commission."[315] The Double Jeopardy Clause of the Fifth Amendment of the U.S. Constitution states: "nor shall any person be subject for the same offense to be put twice in jeopardy of life or limb."[316] This clause gives protection to an offender for multiple punishments for the same criminal offense.[317] In *Femedeer*, the Tenth Circuit Court of Appeals ultimately found no constitutional violations on grounds of ex post facto or double jeopardy because Utah's sex offender registration and reporting requirements are not punitive in purpose, but only impose civil burdens with a primarily remedial objective.[318]

STATE OF UTAH V. BRIGGS

In 1986, Steven A. Briggs was convicted of Sexual Abuse of a Child, a second degree felony, in violation of Utah Code Annotated § 76-4-401.1.[319] For this conviction, Briggs was sentenced to serve a prison term of one to fifteen years in prison.[320] Throughout his trial and incarceration, Briggs maintained his innocence and because of this stance, he served every single day of his fifteen-year sentence.[321]

A few days prior to his release from prison in 2002, a Department of Corrections official, Agent Pepper, presented Briggs a form for signature purporting to outline his responsibility to register annually as

[312] *Femedeer*, 227 F.2d at 1248.

[313] *Femedeer*, 227 F.2d at 1248.

[314] *Femedeer*, 227 F.2d at 1248; U.S. Const. art. I, sec. 9.

[315] *Femedeer*, 227 F.2d at 1248; *Collins v. Youngblood*, 497 U.S. 37, 110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990).

[316] *Femedeer*, 227 F.2d at 1248; U.S. Const. amend. V.

[317] *Femedeer*, 227 F.2d at 1254.

[318] *Femedeer*, 227 F.2d at 1253-54. See also David Mull, Interpreting Utah's Sex Offender Registration Requirements After *Femedeer v. Haun*, 2001 Utah L. Rev. 843 (providing a critical analysis of the *Femedeer* decision).

[319] *State v. Briggs*, 2008 UT 83, 199 P.3d 935 (Utah 2008).

[320] *Briggs*, 199 P.3d at 938.

[321] *Briggs*, 199 P.3d at 938.

a sex offender.[322] The form included information regarding Briggs' physical appearance as well as conviction information.[323] The form stated:

> I have been notified of my responsibility to register as a sex offender as required by Utah Code Ann. 77-27-21.5. I have also been notified of my continuing responsibility to annually register with the Utah State Department of Corrections and again within 10 days of every change of my place of habitation.[324]

Briggs refused to sign this form. Agent Pepper explained to Briggs that his failure to sign the form was a violation of the law. Briggs replied, 'You'll have to file charges against me if you can find me.' Agent Pepper then noted on the form: "Refused to sign @ 0820 hrs."[325]

On the day of his scheduled release from the Utah State Prison, on May 14th, 2002, Briggs was given another opportunity by Agent Pepper to sign the sex offender registration form.[326] Briggs again refused to sign the form. Agent Pepper then notified Briggs that he was filing a case against Briggs for failure to register as a sex offender.[327] Briggs was subsequently transferred from the Utah State Prison to the Salt Lake County Jail.[328]

Eventually, the failure to register charge was dismissed against Briggs because the district attorney reasoned that the mere failure to sign the sex offender form did not constitute a violation of the statute.[329] Signing the sex offender registration form is not a requirement of Utah's sex offender statute; therefore, the refusal to sign the form is not an element of failure to register as a sex offender.[330] Briggs was released from jail.[331]

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[322] *Briggs*, 199 P.3d at 938.

[323] *Briggs*, 199 P.3d at 938.

[324] *Briggs*, 199 P.3d at 938.

[325] *Briggs*, 199 P.3d at 938.

[326] *Briggs*, 199 P.3d at 938.

[327] *Briggs*, 199 P.3d at 938.

[328] *Briggs*, 199 P.3d at 938.

[329] *Briggs*, 199 P.3d at 938.

[330] *Briggs*, 199 P.3d at 938.

[331] *Briggs*, 199 P.3d at 938.

When Briggs was released from jail, he initially moved to a Salt Lake City hostel.[332] One month later, he moved to a second Salt Lake City address where he has resided ever since.[333]

Since his release from jail, there was nothing to suggest that Briggs was trying to hide his whereabouts from Department of Corrections officials.[334] In fact, Briggs sent a letter to the Adult Probation and Parole[335] ("APP") asking for a return of his property when he was first incarcerated.[336] The letter sent by Briggs included his initial address.[337] In addition, on various occasions, police officers and APP agents visited Briggs' residence for purposes of investigating neighborhood crime, and when asked, Briggs always provided his identifying information.[338] During this period of time, Briggs was "off paper"—meaning he not on parole, and thus did not have a parole agent.[339] Other people living with Briggs, however, were on APP supervision.[340] Thus, it was commonplace for APP visits to occur at Briggs' residence.[341] There was no time during the years 2003–2005 that Briggs ever received a visit from anyone in the Department of Corrections requesting his signature for a sex offender registration form.[342] In addition, Department of Corrections officials never informed Briggs during this three-year time period that he was not properly registered.[343]

After his release from jail, Briggs was under the impression that he was registered because his picture was on the Internet on Utah's sex offender registry site.[344] The defense attorney who handled the failure to register matter that was eventually dismissed showed this Internet registry listing to Briggs at an office visit.[345] Unknown to Briggs, the

[332] *Briggs*, 199 P.3d at 938.

[333] *Briggs*, 199 P.3d at 938.

[334] *Briggs*, 199 P.3d at 938.

[335] *Briggs*, 199 P.3d at 938.

[336] *Briggs*, 199 P.3d at 938.

[337] *Briggs*, 199 P.3d at 938.

[338] *Briggs*, 199 P.3d at 938–39.

[339] Trial transcript, *Briggs*, 199 P.3d. 935.

[340] Trial transcript, *Briggs*, 199 P.3d. 935.

[341] Trial transcript, *Briggs*, 199 P.3d. 935.

[342] Trial transcript, *Briggs*, 199 P.3d. 935.

[343] Trial transcript, *Briggs*, 199 P.3d. 935.

[344] *Briggs*, 199 P.3d at 939.

[345] *Briggs*, 199 P.3d at 939.

registry lacked his current address information, a necessary statutory requirement.

In March 2003, after Briggs' case was dismissed against him, the Department of Corrections instigated/passed Utah Administrative Code Rule 251-110-3(2): "registrants shall sign the Utah Sex Offender Registration Form and the Sex Offender Address Form upon each request."[346]

In May 2005, an FBI agent was doing some investigation and in the process noticed that Briggs was not registered as required by statute.[347] Using a subscription database, the FBI agent located Briggs and arrested him for failure to register.[348] Briggs was charged with three counts of failure to register as a sex offender, all class A misdemeanors, for the years 2003, 2004, and 2005.[349] Thus, each count charged pertained to one year of Briggs' failure to register as required under Utah's sex offender registry.

The Trial Court Proceedings

At the trial court level, a motion hearing was held where Briggs argued that Utah's registration statute was unconstitutional for a number of reasons. First, Briggs argued that because he was sentenced and convicted before the enactment of several amendments to the registration statute, the statute violates the Ex Post Facto Clause of the Utah State Constitution as applied to him.[350] Although the U.S. Supreme Court had already decided that registration requirements did not violate ex post facto guarantees, Briggs argued that the Utah Constitution afforded him greater constitutional protections than did federal laws. Briggs pointed out that at the time of his second degree felony conviction, the information on the registry would only have been available to law enforcement to aid in the capture and monitoring of sex offenders.[351] However, after his conviction, the sex offender statute had been amended several times retroactively to increase the requirements of sex offenders and to allow for the dissemination of the registry information to the public at large.[352] Accordingly, Briggs argued that to apply those amendments

[346]Utah Admin. Code R. 251-110-3(2) (2010).

[347]*Briggs*, 199 P.3d at 939.

[348]*Briggs*, 199 P.3d at 939.

[349]*Briggs*, 199 P.3d at 939.

[350]*Briggs*, 199 P.3d at 939. See also motion submitted to trial court.

[351]*Briggs*, 199 P.3d at 939. See also motion submitted to trial court.

[352]*Briggs*, 199 P.3d at 939. See also motion submitted to trial court.

to him violated the Ex Post Facto Clause of the Utah State Constitution.[353]

The trial court held that Briggs did not present any reason why the Utah Constitution would afford greater ex post facto protections than did the U.S. Constitution.[354] Furthermore, the trial court held similar to the court in *Femedeer* that the intent of the statute was not punitive in purpose, but instead, was a non-punitive and civil regulatory scheme.[355]

Another argument made by Briggs at the trial court level was that Utah's sex offender registry violated his right to due process because it designated him as a currently dangerous sex offender without notice and an opportunity to be heard on the validity of that designation.[356] Both the U.S. and Utah State Constitutions hold that no person shall be deprived of life, liberty, or property without due process of law.[357] Thus, Briggs argued that the sex offender registry statute deprived him of his liberty interest in his reputation.[358] As with the ex post facto argument, the due process argument was focused on the view that Utah's sex offender statute violated rights afforded to Briggs by Utah's State Constitution. Briggs did not base his due process argument on federal law because the U.S. Supreme Court had already issued its holding in *Connecticut Department of Public Safety v. Doe*[359] that sex offender registration statutes similar to Utah's do not violate federal due process requirements.[360] Thus, the basis of Briggs' argument was that the Utah Constitution afforded him greater protection than did the U.S. Constitution.[361]

In response, the trial court held that Briggs again failed to show that Utah's Constitution affords him greater protections than did the U.S. Constitution.[362] Thus, the trial court was not persuaded that Briggs' procedural due process rights in his present circumstances were greater under the Utah Constitution than they were under the U.S. Constitution.

The last argument made by Briggs at the motion hearing at the trial

[353] *Briggs*, 199 P.3d at 939.

[354] *Briggs*, 199 P.3d at 939.

[355] *Briggs*, 199 P.3d at 939.

[356] *Briggs*, 199 P.3d at 939.

[357] *Briggs*, 199 P.3d at 939.

[358] *Briggs*, 199 P.3d at 939.

[359] *Briggs*, 199 P.3d at 939.

[360] *Briggs*, 199 P.3d at 939.

[361] *Briggs*, 199 P.3d at 939.

[362] *Briggs*, 199 P.3d at 939.

level was that Utah's sex offender registration statute violates the non-delegation doctrine of the Utah Constitution because it impermissibly delegates legislative power to the Department of Corrections, an executive agency.[363] In essence, this argument highlights the separation of powers issue in arguing that an executive agency should not be carrying out duties reserved for the legislature.[364] Briggs pointed to the Department of Corrections' rule requiring him to sign a registration form as an instance of the Department of Corrections acting in a legislative capacity.

The trial court held that the registration statute does not violate the non-delegation doctrine of the U.S. Constitution because the Department of Corrections

> has not been given the authority to determine if failure to register will constitute criminal behavior, or even what must be disclosed to the Department of Corrections, and the Department of Corrections does not have the authority to determine the penalty for violation. . . . The Department of Corrections is charged simply with the procedures for registration to ensure that the process of registration is orderly.[365]

Thus, the trial court emphasized that the Department of Corrections is simply making procedures to carry out law rather than making law.[366] With this view, the trial court saw no separation of powers problem.

After Briggs' motion was denied, he elected to have a bench trial.[367] At the close of the State's evidence, defense counsel moved for a directed verdict stating that the State had presented insufficient evidence to support a finding that Briggs had knowingly failed to register.[368] The trial court denied the motion.[369] Briggs took the stand and testified that for a number of reasons, he believed he was registered for the years 2003–2005.[370] At the end of all of the evidence, the trial court found Steven Briggs guilty of three counts of failing to register as a sex offender in violation of 77-27-21.5.[371]

The Utah Supreme Court

After the trial court made its ruling in *State v. Briggs*, the Utah

[363] *Briggs*, 199 P.3d at 939.

[364] *Briggs*, 199 P.3d at 939.

[365] See trial court's ruling.

[366] See trial court's ruling.

[367] *Briggs*, 199 P.3d at 939.

[368] *Briggs*, 199 P.3d at 939.

[369] *Briggs*, 199 P.3d at 939.

[370] *Briggs*, 199 P.3d at 939.

[371] *Briggs*, 199 P.3d at 939.

Supreme Court heard arguments regarding issues raised in the trial court.[372] The Utah Supreme Court addressed Briggs' non-delegation argument, his insufficient evidence argument, and his due process argument.[373]

The Non-delegation Argument:

On appeal, Briggs again asserted that the sex offender registration statute violates the non-delegation doctrine because it allows the Department of Corrections discretion in defining what constitutes failure to register.[374] Specifically, because the Department of Corrections prescribes the rules governing registration, it is in effect defining the elements of the crime of failure to register, a function reserved for the legislature.[375] An instance of this is seen in Utah Administrative Code Rule 251-110-3(2), wherein the Department of Corrections requires that "[r]egistrants shall sign the Utah Sex Offender Registration Form and the Sex Offender Address Form upon each request."[376] This requirement is not found in the statute.

The Utah Supreme Court found no non-delegation issue and stated:

> Every element of failing to register is defined by the legislature in the statute. The legislature defined 'failure to register' as failing to 'comply with the rules of the department made *under this section*,' meaning section 77-27-21.5. In that section, the legislature very precisely defines who must register, when they must register, for how long they must register, and the information they must provide to be registered. . . . The statute does not give the DOC discretion to add or remove any of these requirements; it merely confers discretion to prescribe procedures for sex offenders to fulfill the statutory requirements.[377]

Thus, the Utah Supreme Court found that the Department of Corrections is not acting as a legislative body because it is merely making procedural rules to assist in the implementation of laws already enacted by the legislature. The statute is clear in listing requirements about who must register, when registration must occur, the time period requirements of registration, and the details to be supplied for registration. Because the Department of Corrections is merely making

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[372] *Briggs*, 199 P.3d 935 (decision by passed the Utah Court of Appeals).

[373] The ex post facto argument raised in the trial court was not raised on appeal.

[374] *Briggs*, 199 P.3d at 940.

[375] *Briggs*, 199 P.3d at 940.

[376] Utah Admin. Code R. 251-110-3(2) (2010).

[377] *Briggs*, 199 P.3d at 940.

rules to carry out these requirements specified in the statute, there is no non-delegation problem.[378]

In response, although the Utah Supreme Court found no non-delegation problem, this issue merits further analysis. When examining the Utah registry statute, it does not address the mechanics of how a sex offender must register, where they must register, to whom they must register, and what constitutes sufficient and insufficient registration on these issues. For instance, the statute is silent on whether an offender must report to a specific office for registration or whether an offender is sufficiently registered by merely writing APP with the information asked for in the registry. Any answer given to these questions by the Department of Corrections' policies arguably brings up a non-delegation claim. There appears to be a continued non-delegation problem as long as the mechanics of proper or sufficient registration are left to the Department of Corrections. In other words, if an offender is subject to failure to register charges for not complying with the Department of Corrections' policies for sufficient registration, the Department of Corrections is ultimately acting in a legislative capacity and not an executive capacity.

In reality, the Department of Corrections has vague policies regarding the specifics of what constitutes sufficient and insufficient registration. The policies are vague because they do not adequately address where a sex offender must register, to whom, and in what manner they must register.[379] This vagueness inherent to the Department of Corrections policies ultimately punishes the sex offender because it is the sex offender who bears ultimate responsibility for registering. As applied to Briggs, why wasn't his unanswered letter to APP for his property sufficient registration? After all, it contained his current address within his letter.

In sex offender cases, registration typically happens when an offender is placed on APP probation because the probation officer will assist the sex offender with the registration process. And, if a sex offender is "off paper" like Briggs, there will be no APP agent knocking on their door to help them with this process. Those sex offenders in

[378] *Briggs*, 199 P.3d at 940.

[379] Regarding the Internet site for Utah's sex offender registry, there is no way for an offender required to register to register on the Internet. Furthermore, once a sex offender is listed on the registry's Internet site, it does not allow the sex offender the ability to update his information. The web site does not tell a person the mechanics of what constitutes sufficient registration. Just recently, the web site now provides a list of locations to go to in order to register. It is important to note that during the years that Briggs was accused of not registering (2003–2005), Utah's sex offender registry web site failed to provide the list of places where sex offenders could go in order to register.

situations similar to Briggs are set up for future convictions for failure to register if they do not keep updated on the Department of Corrections' policies, albeit vague policies, regarding proper registration. Ultimately, where vagueness exists in the Department of Corrections policies, it is the offender, and not the Department of Corrections, who will face negative consequences if the offender is not sufficiently registered. That is, it is the sex offender who risks felony convictions for not understanding the proper procedures for sufficient registration.

The Utah Supreme Court also addressed Briggs' claim that the Department of Corrections' form requirement found in Utah Administrative Code Rule 251-110-3(2) violates the Non-Delegation Clause. The Utah Supreme Court held:

> Briggs points out that he was, in fact arrested for failing to sign the form, and he notes that the statute does not contain any requirement that he sign the form. . . . Briggs asserts that he cannot be convicted for failure to comply with this rule because it is not found in the statute. But Briggs was not convicted for failure to sign the form. In fact, the first case against Briggs was dismissed after the district attorney noted that signing a form was not a requirement of the statute. Briggs became "unregistered" only after he moved to SLC and failed to provide his address to DOC within 10 days. After moving a second time, he again failed to provide the DOC with his updated address. If Briggs had met all of the statutory registration requirements but merely failed to sign the form, he would not be unregistered, and the State has not claimed otherwise. Although the form prescribed in the DOC in [the] Utah Administrative Code . . . provides a *convenient* way for sex offenders to comply with the registration law, failure to use or sign the form is not a crime. Thus, the statute does not give the DOC authority to define any element of the crime, and the DOC, by using the form, has not exceeded its authority in that respect.[380]

In deciding that the requirements of Utah Administrative Code Rule 251-110-3(2) do not violate the Non-Delegation Clause, the Utah Supreme Court emphasized that the form is merely a *convenient* means of being registered and not an instance of a legislative type action.[381] In response, the Department of Corrections is not at all providing a convenient means of registration. After all, if an offender merely signs the form, he is not considered to have an ongoing registration status.

The Utah Supreme Court ultimately upheld Briggs' convictions because he didn't properly give his change of address within ten days of moving, a procedure never explained to Briggs because he was "off paper". Arguably, Briggs was really convicted of not understanding the Department of Corrections' vague procedures for what constitutes

[380] *Briggs*, 199 P.3d at 941 (emphasis added).

[381] *Briggs*, 199 P.3d at 941.

proper registration. Briggs thought he was registered during the time period of 2003–2005. The Utah courts, however, held that it was not enough for Briggs to see his picture on the Internet on Utah's sex offender registry site, send a letter to probation officials which contained his address, and talk to probation agents who came to his door. Briggs never refused to sign the registration form during the years 2003–2005. In fact, he never was asked to sign the form during this time period. Ultimately, Briggs agreed to be registered, but he did not agree to sign any forms.

The Insufficient Evidence Argument:

On appeal, Briggs challenged the insufficiency of the evidence supporting the convictions in the trial court.[382] Specifically, Briggs argued that the evidence presented at trial was insufficient to support a conviction that he "knowingly" failed to register.[383] Despite the fact that Briggs proffered testimony that he believed he was registered because: 1) he sent a letter to the Department of Corrections that included his first address, that 2) he had continual correspondences with the Department of Corrections between 2003–2005, and that 3) he saw his picture on the sex offender's Internet site during an office visit with his attorney, the Utah Supreme Court held that

> the record clearly shows that Briggs was informed of his duty to provide the DOC with up-to-date address information and that he failed to do so. The form that Agent Pepper read aloud to Briggs before his release clearly notified him of his responsibility to send his updated address and other information to the DOC annually and every time he changed addresses. Agent Pepper explained that Briggs needed to sign the form and that it was against the law to refuse to do so. Briggs replied, 'You'll have to file charges against me if you can find me.' Even if Briggs's refusal is viewed in the best possible light-meaning that he only refused to sign but not to complete the statutory requirements of registration- he was clearly informed that failure to update the DOC with his address every time he moved would be a chargeable offense. He expressed his indifference that his failure to comply could result in charges being filed against him. And although he lived in two different residences following his release from prison, Briggs never provided an updated address to the registry. In light of the undisputed record, it is clear that Briggs knowingly refused to comply with his responsibility to register. Briggs's assertion that he did not want or need to sign the form or that he believed he was registered after leaving the prison, does not outweigh the testimony of Agent Pepper, who explained the requirements to him.[384]

In response, the Utah Supreme Court fails to place enough focus on

[382] *Briggs*, 199 P.3d at 941.

[383] *Briggs*, 199 P.3d at 941.

[384] *Briggs*, 199 P.3d at 941.

the fact that Briggs was told that his case for not signing the form was dismissed-allowing what should be an understandable inference from Briggs that the contents of the form were made inapplicable. In addition, the trial evidence showed that when Briggs was released from jail, there was no probation agent that told him of his continuing requirements to register because he was in effect "off paper". At trial, there was no proof given by the state prosecutor that Briggs had been asked by anyone from the Department of Corrections to sign a registration form between the years 2003-2005. Rather, the testimony offered by Briggs was that during this time, he continually identified himself to probation agents who were visiting his residence because of other people living with him. Why weren't these meetings between Briggs and probation officials during 2002-2005 sufficient for Briggs in meeting the statutory requirement that he provide an updated address to the registry? Why didn't the fact that Briggs' second residence was found on a subscription database that was accessed by an FBI agent not constitute an updated residence for purposes of the registration requirement?

The Due Process Argument:

On appeal, Briggs raised the argument that the registration statute violates his procedural due process rights because it labels him as currently dangerous without providing him a hearing to initially determine whether he is, in fact, currently dangerous.[385] The Utah Supreme Court concluded:

> [We] hold that the provisions of the registration statute [requiring the DOC] to publish information related to his prior conviction, current address, appearance, and other similar information do not violate his right to procedural due process . . . However, we hold that [the provision in the] registration statute [that requires] the DOC to publish Briggs's primary and secondary targets and thereby implying that he is currently dangerous violates his right to procedural due process unless he is given a hearing as to whether he is currently dangerous.[386]

In reaching its conclusions, the Utah Supreme Court emphasized federal due process guarantees rather than the protections given under the Utah Constitution.[387]

The Utah Supreme Court emphasized that Utah's registration statute

[385] *Briggs*, 199 P.3d at 942.

[386] *Briggs*, 199 P.3d at 949.

[387] "Because we hold that under federal procedural due process Briggs is entitled to a hearing prior to the DOC's publishing any information related to his current dangerousness, it is unnecessary to reach the question of whether the Utah Constitution also requires the DOC to provide a hearing before publishing information related to his current level of dangerousness." *Briggs*, 199 P.3d at 943.

required the Department of Corrections to publish two types of information about an offender.[388] The first type of information that was published did not imply that an offender was currently dangerous as it related to the offender's prior convictions, current address, appearance, and other similar information.[389] This information also did not impermissibly opine on the offender's present likelihood of committing a crime.[390]

The court, however, held that the second type of information required by Utah's sex offender registration did impermissibly imply that the listed offender is currently dangerous.[391] Section 77-27-21.5(13)(a)(ii) required the Department of Corrections to publish information related to the offender's "primary and secondary targets."[392] According to the registration statute, neither "primary" nor "secondary" targets were defined.[393] The Utah Supreme Court noted that "Webster's New College Dictionary defines 'target' as 'an objective; goal" or "someone or something that is the focus of attention, interest, etc.' "[394] In focusing on the problems of listing primary and secondary targets without an initial hearing, the Utah Supreme Court stated:

> If the registry entry for a registered offender lists 'minor females' under the heading 'primary target,' it implies that the offender's current goal, focus of attention, or interest is minor females. Even if the DOC derives the listed offender's primary target by reference to the offender's past victims, the label is troubling in that it implies that the offender is *presently* focused on repeating past crimes with similar victims. Anyone reading the registry would likely conclude that the offender's primary target is the DOC's prediction regarding the offender's next victim.
>
> In addition to primary target information, the Utah registration statute requires the DOC to publish information on the offender's secondary targets. While primary targets is troubling because it implies future dangerousness, the undefined nature of the term 'secondary targets' raises even more concerns. We presume that the offender's primary targets are derived from a description of the victim of the offender's past offense, but we are unable to discern how the DOC identifies the offender's secondary targets. This lack of structure for identifying secondary targets raises additional due process concerns because the offender

[388] *Briggs*, 199 P.3d at 944.

[389] *Briggs*, 199 P.3d at 944.

[390] *Briggs*, 199 P.3d at 944.

[391] *Briggs*, 199 P.3d at 944.

[392] *Briggs*, 199 P.3d at 944.

[393] *Briggs*, 199 P.3d at 944.

[394] *Briggs*, 199 P.3d at 944.

does not even know what facts are relevant for determining secondary targets.[395]

The Utah Supreme Court held that Utah's sex offender statute, sec. 77-27-21.5(13)(a)(ii) requiring the Department of Corrections to publish primary and secondary targets implies that sex offenders are currently dangerous.[396] Furthermore, this statute violates a sex offender's due process rights if they have not been afforded notice and an opportunity to be heard on the accuracy of the designation of the "primary" and "secondary" targets.[397] Most importantly, the trial court where an offender was convicted of their underlying offense does not provide a procedurally safeguarded opportunity to contest the fact of their current dangerousness before placement on Utah's sex offender registry.[398]

In response, in requiring a hearing to first determine current dangerousness before listing an offender's primary or secondary targets, the Utah Supreme Court effectively took one step in the direction of using a risk-assessment approach as opposed to a conviction-based focus. This is certainly a step in the right direction for reasons previously addressed in this Article. The Utah Supreme Court, however, did not go far enough in directing the Utah legislature and Utah courts to implement risk-assessments when approaching registration requirements. In continually requiring sex offenders to register without an initial hearing to determine whether they ought to be listed at all on the registry, the Utah Supreme Court is still upholding the conviction-based approach. This approach states that if an offender has a conviction for a specified registrable offense, they must register and due process protections do not require a hearing for the offender prior to registration to determine current dangerousness. Isn't mere placement on the registry suggesting to the public that the offender is currently dangerous? Will requiring hearings prior to any listing of primary and secondary targets for offenders on the registry really minimize the societal judgment directed towards them? In all reality, doesn't the public view all listed sex offenders as currently dangerous? People in society are not driven to make distinctions between levels of dangerousness for those on the registry. Rather, the social panic that its created from these sex offender registries is the view that anyone who must be on this list is, in fact, currently dangerous.

Lessons to Learn from *Briggs*:

The Utah Supreme Court ultimately concluded that Briggs' non-

[395] *Briggs*, 199 P.3d at 944–45.

[396] *Briggs*, 199 P.3d at 948.

[397] *Briggs*, 199 P.3d at 948.

[398] *Briggs*, 199 P.3d at 948.

delegation argument and insufficiency of the evidence argument were without merit. Regarding the due process argument, the Utah Supreme Court held that sex offenders were allowed a hearing to determine current dangerousness before the Department of Corrections could post any information related to primary or secondary targets of sex offenders on the registry. Ultimately, the Utah Supreme Court upheld Briggs' convictions for three counts of failing to register, each class A misdemeanors, for the years 2003, 2004, and 2005.

If Briggs' case were filed today, he would be looking at three third degree felony charges with a possible fifteen-year prison term. In looking at the facts of his case, it wasn't enough that his picture was on the Internet on the sex offender registry site during the years that he was charged with not registering, or that he continually identified himself to probation agents during the three year term, or that he wrote a letter to probation officials that contained his address. And, even though an FBI agent was instantly able to track down Briggs in order to pursue more charges against him, probation officials made no attempts to locate Briggs to inform him that his sex offender registration was incomplete. Briggs' convictions were ultimately based upon technicalities of proper registration that he didn't understand. More importantly, the rules regarding how a sex offender is to be properly registered remain vague and undefined. For Briggs, the result of not knowing how to be properly registered was three class A misdemeanor convictions. Now, because of amendments that have increased the penalties for failing to register, those sex offenders not knowing how to be properly registered are looking at potential felony convictions with possible prison time.

If our goal is to protect children, why are we burden shifting? Why are we focused on requiring sex offenders to keep up with vague procedural requirements instead of placing our focus on effectively monitoring those most dangerous and likely to re-offend? Why are we having more and more laws enacted and policies created which only serve to increase the costs of prosecution and incarceration? Wouldn't we rather have taxpayer money spent on ensuring that probation agents are actively monitoring the whereabouts of the most likely individuals to re-offend? The Utah Supreme Court's ruling in Briggs slowed down the momentum of sex offender legislation (and for the right reasons) but it did not go far enough to address the impermissible burden shifting that continues regarding this issue. Too much responsibility is placed on the sex offender and they are ultimately set up for failure because the mechanics of proper registration are still vague and unknown to a large group of sex offenders. Ultimately, Utah's current sex offender registration laws do a lot in putting blame on sex offenders for what they don't do. These laws, unfortunately, do very little in making sure that we are monitoring the most dangerous

child predators. If we are to truly protect Utah's children, we must change the focus of our sex offender registration laws.

DOE V. SHURTLEFF

The next challenge to Utah's sex offender registry statute came in federal court in 2008. In *Doe v. Shurtleff*, the District Court for the District of Utah ruled that the state legislature had impermissibly interfered with an offender's first amendment rights by requiring the use of online identifiers.[399]

In that case, Doe was a convicted sex offender who was incarcerated and who had completed his sentence without probation or parole.[400] As a sex offender, and under Utah's statute, Doe had an obligation to provide the Department of Corrections with "any electronic mail, chat, instant messenger, social networking, or similar name used for Internet communication. It does not include date of birth, Social Security number, or PIN number."[401] He also had the obligation to provide the department with passwords used on these sites, which could not be released to the public.[402]

Addressing the issue of ripeness,[403] the court opined that Doe had been put in an awkward situation. He may

> turn[] over his Internet information to the UDOC [Utah Department of Corrections] and fac[e] a well-grounded possibility that his protected online speech will not remain anonymous or . . . refus[e] to provide his internet information to the UDOC and fac[e] a felony prosecution. Notably, Mr. Doe has made a credible and undisputed proffer that UDOC staff threatened him with arrest and prosecution when he tried to register without providing his Internet information.[404]

Second, the court held that under the Utah statute there was a real possibility that this information could become public knowledge.[405] Finally, the court felt that a real danger existed because law enforcement had no limitation on how it might use the information.[406] "Given that there are no restrictions in the Registry Statute on how the UDOC [Utah Department of Corrections] may use or distribute Mr. Doe's

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[399] *Doe v. Shurtleff*, 2008 WL 4427594 (D. Utah 2008).

[400] *Doe*, 2008 WL 4427594 (D. Utah 2008), at *2–3.

[401] *Doe*, 2008 WL 4427594 (D. Utah 2008), at *4 (citing Utah Code Ann. § 77-27-21.5(1)(j)).

[402] *Doe*, 2008 WL 4427594 (D. Utah 2008), at *4 (citing Utah Code Ann. § 77-27-21.5(2)(c)).

[403] Since Doe had not been prosecuted.

[404] *Doe*, 2008 WL 4427594 (D. Utah 2008), at *10.

[405] *Doe*, 2008 WL 4427594 (D. Utah 2008), at *10–11.

[406] *Doe*, 2008 WL 4427594 (D. Utah 2008), at *10–11.

Internet information, his protected speech is undoubtedly chilled."[407] The court found the issue ripe for review.[408]

Finding itself in "wholly untested legal waters,"[409] the court held that the Utah statute violated Doe's First Amendment rights.[410]

The court also discussed the relative recentness of legislation like Utah's, which it believed had been prompted in large fashion by the Adam Walsh Act.[411] These statutes are well meaning, the court said, but they must not run afoul of constitutional prohibitions.[412]

First, the court held that "anonymous speech is a well-established constitutional right"[413] which also extends to the world of the Internet.[414]

> This dynamic, multifaceted category of communication includes not only traditional print and news services, but also audio, video, and still images, as well as interactive, real-time dialogue. Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer. As the district court found, "the content on the Internet is as diverse as human thought.[415]

The court cited other courts, which have struck down sex offender regulations because of violations of Internet anonymity.[416] Quoting the

[407] *Doe*, 2008 WL 4427594 (D. Utah 2008), at *11.

[408] *Doe*, 2008 WL 4427594 (D. Utah 2008), at *12.

[409] *Doe*, 2008 WL 4427594 (D. Utah 2008), at *14.

[410] *Doe*, 2008 WL 4427594 (D. Utah 2008), at *26.

[411] *Doe*, 2008 WL 4427594 (D. Utah 2008), at *13.

[412] *Doe*, 2008 WL 4427594 (D. Utah 2008), at *23-24 (citing *Sable Communications of California, Inc. v. F.C.C.*, 492 U.S. 115, 126, 109 S. Ct. 2829, 106 L. Ed. 2d 93, 16 Media L. Rep. (BNA) 1961 (1989)) ("There is a compelling interest in protecting the physical and psychological well-being of minors.").

[413] *Doe*, 2008 WL 4427594 (D. Utah 2008), at *14 (citing *McIntyre v. Ohio Elections Com'n*, 514 U.S. 334, 357, 115 S. Ct. 1511, 131 L. Ed. 2d 426, 23 Media L. Rep. (BNA) 1577 (1995)).

[414] *Doe*, 2008 WL 4427594 (D. Utah 2008), at *15-16.

[415] *Doe*, 2008 WL 4427594 (D. Utah 2008), at *15-16 (quoting *Reno v. American Civil Liberties Union*, 521 U.S. 844, 870, 117 S. Ct. 2329, 138 L. Ed. 2d 874, 25 Media L. Rep. (BNA) 1833 (1997) (citation omitted)).

[416] *Doe*, 2008 WL 4427594 (D. Utah 2008), at *17-21; *American Civil Liberties Union v. Johnson*, 4 F. Supp. 2d 1029, 1031 (D.N.M. 1998), aff'd, 194 F.3d 1149, 28 Media L. Rep. (BNA) 1257 (10th Cir. 1999) (requiring age verification before accessing Internet speech would "bar many people from accessing important information—such as gynecological information—anonymously."); *American Civil Liberties Union of Georgia v. Miller*, 977 F. Supp. 1228, 1230, 25 Media L. Rep. (BNA) 1978, 43 U.S.P.Q.2d 1356 (N.D. Ga. 1997) (finding a statute which prohibited the use of false names

Western District of Washington, the *Shurtleff* court reasserted persons' rights in online communication.

> Internet anonymity facilitates the rich, diverse, and far ranging exchange of ideas. The "ability to speak one's mind" on the Internet "without the burden of the other party knowing all the facts about one's identity can foster open communication and robust debate." People who have committed no wrongdoing should be free to participate in online forums without fear that their identity will be exposed under the authority of the court. . . . The Internet is a truly democratic forum for communication. It allows for the free exchange of ideas at an unprecedented speed and scale. For this reason, the constitutional rights of Internet users, including the First Amendment right to speak anonymously, must be carefully safeguarded.[417]

The *Shurtleff* court had to address whether, as a convicted sex offender, Doe had given up his right to free speech.[418] The court did not think that he had.[419] Citing two decisions in particular, the court held that "care must be used in restricting the rights of even potentially dangerous criminals on supervised release."[420] The first was a U.S. Supreme Court opinion holding that even those in custody have First Amendment rights.[421] Additionally, the Tenth Circuit held that a complete ban on Internet access to a repeat convicted sex offender was overly broad.[422] The court cited innocent reasons for Internet usage, including research, checking the weather or reading the newspaper.[423]

Yet the *Shurtleff* decision was qualified. Even though the court found that the Utah sex offender registry burdened Doe's right to anonymous online speech, it held that a less-restrictive statute might pass constitutional muster.[424] Specifically, the court mentioned the need to limit the information to use as part of a criminal investigation

in online communication to be an unconstitutional violation by imposing "content-based restrictions on [persons'] right to communicate anonymously and pseudonymously over the Internet.").

[417] *Doe*, 2008 WL 4427594 (D. Utah 2008), at *18–19 (quoting *Doe v. 2TheMart.com Inc.*, 140 F. Supp. 2d 1088, 1092, 29 Media L. Rep. (BNA) 1970, 49 Fed. R. Serv. 3d 404, 120 A.L.R.5th 725 (W.D. Wash. 2001)). The *2TheMaart.com* case had to do with the ability to subpoena the identification of online users.

[418] *Doe*, 2008 WL 4427594 (D. Utah 2008), at *19.

[419] *Doe*, 2008 WL 4427594 (D. Utah 2008), at *19–21.

[420] *Doe*, 2008 WL 4427594 (D. Utah 2008), at *20.

[421] *Doe*, 2008 WL 4427594 (D. Utah 2008), at *19–20.

[422] *Doe*, 2008 WL 4427594 (D. Utah 2008), at *19–20 (citing *U.S. v. White*, 244 F.3d 1199, 1206 (10th Cir. 2001)).

[423] *Doe*, 2008 WL 4427594 (D. Utah 2008), at *20.

[424] *Doe*, 2008 WL 4427594 (D. Utah 2008), at *21–22, *24.

and to restrict dissemination to the public.[425] "An alternative statute that contained such restrictions would be similarly effective and less threatening to protected anonymous speech."[426] The court held that the statute, as currently written, did not pursue the least-restrictive means available to meet the legitimate goal of protecting children.[427]

Doe's victory was short-lived, however, when the Utah Legislature amended the statute to conform to the *Shurtleff* court's analysis.[428] The district court revisited the statute and its earlier ruling and found the new statute to not violate the First Amendment.[429]

> Following the 2009 amendments, the anonymity of those registered under the Registry Statute can only be lifted to investigate an Internet sex crime. Because of the restrictions on the use of the information, the chilling effect on speech is necessarily diminished. It is no longer the case that the anonymity that Mr. Doe relies on as a catalyst for his protected online speech is significantly threatened by the Registry Statute. Accordingly, the Registry Statute now complies with the requirements of the First Amendment.[430]

In sum, in a situation similar to the *Briggs* case, *Shurtleff* stands for the proposition that courts are willing to say that sex offender registration laws can unconstitutionally infringe on sex offenders' rights. And, the *Shurtleff* court was successful, to some degree, in slowing down panic-driven legislators. Because of the *Shurtleff* decision, the Utah Legislature amended the registration statute to prohibit public dissemination of certain information. *Shurtleff* was a small victory, but

[425] *Doe*, 2008 WL 4427594 (D. Utah 2008), at *24.

[426] *Doe*, 2008 WL 4427594 (D. Utah 2008), at *24 ("If Utah wants the additional benefit of having Mr. Doe's Internet information available on its Registry strictly for law enforcement purposes, it will not be difficult to amend the Registry Statute to that effect.")

[427] *Doe*, 2008 WL 4427594 (D. Utah 2008), at *23. The court also emphasized that law enforcement still has several tools at its disposal, including investigative subpoenas. *Doe*, 2008 WL 4427594 (D. Utah 2008), at *26.

[428] Amendments to Email Information Required of Registered Sex Offenders, supra note 218.

[429] Doe appealed the District Court's denial to the Tenth Circuit Court of Appeals, who affirmed the conviction. *Doe v. Shurtleff*, 628 F.3d 1217 (10th Cir. 2010), cert. denied, 131 S. Ct. 1617, 179 L. Ed. 2d 502 (2011). The Court reasoned that the requirement that Doe turn over his Internet identifiers did not unconstitutionally violate his right to free speech, since the State had a compelling interest in regulating sex offenses and the statute ultimately safeguarded the identifiers from public disclosure. Doe, 628 F.3d at. 1222–26. Additionally, the Court found no ex post facto violation, given that Doe had already turned his identifiers over to third parties. Doe, 628 F.3d at 1226–27.

[430] *Doe*, 2008 WL 4427594 (D. Utah 2008), at *12. The court also addressed and rejected Fourth Amendment and ex post facto issues raised by Doe.

significant nonetheless, because it is an example of a court saying "slow down" and a legislature complying with that order.

CONCLUSION

While recent court cases addressing Utah's sex offender registration requirements have arguably slowed down the hysteria-based momentum of these laws in the last couple of decades, more needs to be done to fix the problems underlying these laws. Utah's sex offender registration laws should be aimed at monitoring those individuals most dangerous and likely to re-offend. Society's goal of protecting children can best be met by enacting legislation that considers the motivations and circumstances that drive sex offenders to re-offend. The conviction-based method employed by the Utah Legislature and legislatures across the nation disregards important empirical data regarding sex offender recidivism rates. Simply increasing the numbers of people who must register and increasing the punishments for non-compliance is not addressing the core problems leading to sex offenses. Risk-assessments must be made by Utah's legislators and judges when determining who must register if the sex offender registry is to have any practical benefit of protecting Utah's children. Now is the time to slow down the momentum of hysteria-based sex offender registration laws in order to begin a new era of evidence-based laws that can effectively respect the constitutional rights of sex offenders, assuage social panic, and protect the safety of children nationwide.