Friend Request Pending: Does a Rare Victory Before the Seventh Circuit Mean Sex Offenders Will Finally Receive Fair Treatment from Courts?

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Recommended Citation
Matt Dillinger, Friend Request Pending: Does a Rare Victory Before the Seventh Circuit Mean Sex Offenders Will Finally Receive Fair Treatment from Courts?, 8 Seventh Circuit Rev. 374 (2013).
Available at: http://scholarship.kentlaw.iit.edu/seventhcircuitreview/vol8/iss2/6
FRIEND REQUEST PENDING: DOES A RARE VICTORY BEFORE THE SEVENTH CIRCUIT MEAN SEX OFFENDERS WILL FINALLY RECEIVE FAIR TREATMENT FROM COURTS?

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Cite as: Matt Dillinger, Friend Request Pending: Does a Rare Victory Before the Seventh Circuit Mean Sex Offenders Will Finally Receive Fair Treatment from Courts?, 8 SEVENTH CIRCUIT REV. 374 (2013), at http://www.kentlaw.iit.edu/Documents/Academic Programs/7CR/v8-2/dillinger.pdf.

INTRODUCTION

That sex offenders as a group have few friends is an understatement. Of all members of society, they are perhaps the most despised and the least pitied.¹ As such, sex offenders are prime targets for “tough-on-crime” legislators, and new laws imposing ever greater restrictions and burdens on this subset of criminal have proliferated rapidly in the last two decades.² These laws often stretch constitutional

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¹ J.D. candidate, May 2013, Chicago-Kent College of Law, Illinois Institute of Technology.

² See also Jamey Dunn, Sex offender legislation is often more about politics than justice, ILLINOIS ISSUES (September 2011), http://illinoisissues.uis.edu/archives/2011/09/state.html.
boundaries and occasionally verge on the absurd. What is especially troubling is that these restrictive laws may be all for naught. Recent studies suggest that many of these laws are based more on urban legend and reactionism than actual research, and do little to keep the public safe. There is no reason to think the new laws, based on the same principles, will be any more effective.

Further complicating things, lawmakers frequently refer to offenders as “monsters,” muddling whether the motivation behind new legislation is actually to protect the public or if lawmakers are merely acting out of individual fear, anger or revulsion.

3 For instance, Illinois recently passed a law prohibiting certain classes of sex offenders from participating “in a holiday event involving children under 18 years of age, including but not limited to distributing candy or other items to children on Halloween, wearing a Santa Claus costume on or preceding Christmas, being employed as a department store Santa Claus, or wearing an Easter Bunny costume on or preceding Easter.” 720 ILCS 5/11-9.3, as amended, June 22, 2012, effective January 1, 2013; see also Jamie Lee Curtis Taete, Sex Offenders in Florida Now Have Warning Signs Outside Their Homes, VICE (last visited June 17, 2013), http://www.vice.com/read/sex-offenders-in-florida-now-have-warning-signs-outside-their-homes (discussing Florida Sheriff’s new policy of posting warning signs in front of the homes of sexual predators).


5 “I questioned whether or not I was the ideal person to bring this [bill], because of the just revulsion I feel for people who have these convictions. Revulsion is not too strong a word. I mean these are not criminals that we’re angry at. These are people that are just frightening to me and all of us, and I think rightfully so, and I don’t have a lot of faith in our ability to rehabilitate people who would engage in this type of conduct.” Doe v. Nebraska, 898 F. Supp. 2d 1086 (D. Neb. 2012)(quoting Neb. Sen. Lautenbaugh from floor debate on recent sex offender legislation); see also Convicted Sex Offender Tells His Story as the Governor Tries to Get New Laws
Like elsewhere in society, sex offenders have generally found no great friend in the courts. Statutes prohibiting sex offenders from parks and other public places, creating permanent public registries, and requiring the release of offenders’ online identifiers have all been upheld as constitutional. These laws are often based on misconception and myth, such as the idea that sex offenders frequently target strangers in public places, or that the rate of sex offender recidivism is practically 100 percent. Furthermore, courts have relied on the same unsupported hearsay in upholding these laws that legislatures relied on in drafting them. However, the Seventh Circuit recently made clear that there are in fact limits on how far states can go in regulating even this particularly detested subset of society.

On January 23, 2013, the Seventh Circuit in Doe v. Prosecutor, Marion County, Indiana held that an Indiana statute prohibiting sex offenders from using social networking websites violated the First Amendment. With this decision, registered sex offenders may at last have found a court sympathetic to their unique position in the legislative crosshairs. Additionally, the Seventh Circuit’s decision

Passed, WAFB (Apr. 07, 2008 7:07 PM CDT),
http://www.wafb.com/Global/story.asp?S=8132017; see also Dan Gunderson, When Getting Tough Backfires, MPR NEWS (June 18, 2007),
http://minnesota.publicradio.org/standard/display/project_display.php?proj_identifier=2007/06/12/sexoffenders (“Sometimes what happens is lawmakers don't want to know the facts, or the facts don't make any difference,” says [Minnesota Senator Tim Mathern]. “There really are two things that affect public policy. One is the facts. The other is the feelings and political pressure. There are legislators who will say, 'Don't confuse me with the facts. I've made up my mind.'”).

6 See Smith v. Doe, 538 U.S. 84, 105 (2003) (holding that Alaska’s Sex Offender Registration Act was constitutional); Kansas v. Hendricks, 521 U.S. 346, 350, 117 (1997) (holding that Kansas Sexual Predator Act, which allowed for indefinite civil confinement of certain sex offenders, was constitutional); Doe v. Shurtleff, 628 F.3d 1217, 1220 (10th Cir. 2010) (holding that Utah law requiring registration of all online identifiers and websites owned by sex offenders was constitutional); Doe v. Moore, 410 F.3d 1337, 1339 (11th Cir. 2005) (holding that Florida’s sex offender notification/registration scheme and sex offender DNA registration statute were constitutional).

7 See Doe v. Prosecutor, Marion Cnty., Ind., 705 F.3d 694, 695 (7th Cir. 2013).

8 See id.

9 See id.
may just be the tip of the iceberg—part of an increasing trend towards requiring rationality in sex offender legislation, an area where states and localities have historically been able to do just about anything they wanted. *Doe* and its ilk may be a judicial death knell for irrational sex offender legislation, including statutes that have previously been ruled constitutional. With the increasing availability of information on sex offenders, outdated models of regulation may no longer meet even lower standards of review. At the very least, *Doe* is a sorely needed lesson for legislatures—hopefully one that will prompt more responsible lawmaking in the future.

Part I of this comment provides some background on sex offender legislation and its treatment in court, and also introduces the Indiana law. Part II discusses the *Doe* case including both the district court decision and the Seventh Circuit decision. Part III examines the Seventh Circuit’s reasoning in further detail and argues that *Doe* is part of a larger movement among courts to be more critical of sex offender legislation. It also discusses why sex offender legislation is misguided, what impact this may have on future court decisions, and suggests guidelines for drafting constitutional legislation.

I. BACKGROUND

A. Brief History of Sex Offender Legislation

Sex offender regulation is a relatively new phenomenon.\(^\text{10}\) Despite its occasionally draconian undertones, what can be termed modern sex offender legislation did not appear until the early 1990s.\(^\text{11}\) However, that is not to say that there were no previous attempts to curb sex offenses with special laws.\(^\text{12}\) Surprisingly, however, the earlier legislation tended to focus much more on mental health treatment for

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\(^{10}\) See U.S. Dept. of Justice, Off. of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking, Sex Offender Registration and Notification in the U.S. (2012).


\(^{12}\) See id.
offenders and ensuring public safety than today’s laws, which focus primarily on shame and punishment.  

Sex offender legislation can be divided into three historical periods. The first period, from the 1930s to the 1950s, mostly involved civil commitment statutes, which allowed for indefinite confinement of certain offenders. The second period, beginning in the 1970s and running into the late 1980s, can be characterized by increased penalties, greater awareness, and a continued focus on treatment. The final period, and the one most relevant to this comment, began in the early 1990s, and it is notable for post-incarceration regulation of offenders, including registry schemes, public notification and residency restrictions.

Legislative efforts in the first period sought to respond to the problem of “sexual psychopaths.” In what has by now become standard operating procedure for enactment of sex offender legislation, these laws were passed in the wake of a few highly publicized sex crimes. The first of these laws was enacted in Michigan in 1935, and allowed a judge or jury to commit individuals charged with sex offenses to state hospitals or mental institutions if they were deemed to be “sexual psychopaths” posing a danger to society. This type of law authorizing civil commitment combined with psychiatric treatment typified early sex offender laws. Although sexual psychopath laws

13 See id.
14 See id.
15 See id.
16 See id. at 54.
17 See id.
18 See id. at 55.
20 Id.
21 See People v. Smith, 275 N.W.2d 466, 469-70 (1979) (“The criminal sexual psychopath statutes enacted in various jurisdictions were substantially the same, particularly with respect to their definition of a criminal sexual psychopathic person. Essentially, a sexual psychopath was defined as a person who, while not insane or feeble-minded, had a mental disorder coupled with propensities toward the commission of criminal sex offenses. Although the various sexual psychopath statutes were substantially consistent in defining a sexually psychopathic person,
created the possibility of indefinite civil commitment, the focus of the laws was prevention, treatment, and public safety, more than simply punishment.\textsuperscript{22} The next wave of laws appeared in the 1970s as women’s groups led campaigns to increase awareness of date rape and other common types of sexual offenses that had previously received little attention.\textsuperscript{23} Laws passed in this period often increased penalties for sex crimes, yet they also included treatment-based sentencing, demonstrating that rehabilitation was still an important goal.\textsuperscript{24} While many laws are reactions to some perceived problem, modern sex offender legislation is exceptionally reactionary—almost always following soon after an especially notorious and shocking sex crime.\textsuperscript{25} Modern laws are wide-ranging, and include post-conviction civil confinement, registration and public notification laws, residency restrictions and other limitations on freedom.\textsuperscript{26} These laws apply to people convicted of a broad range of offenses from indecent exposure and statutory rape to sexual assault of a child.\textsuperscript{27} The first modern sex offender law was enacted in Washington State in 1990 after a particularly brutal and highly publicized attack on a young boy.\textsuperscript{28} The

\textsuperscript{22} The two rationales of treatment-based sentencing were encouraging reporting and preventing recidivism. Lieb, \textit{supra} note 11, at 54.

\textsuperscript{23} \textit{Id.} at 53.

\textsuperscript{24} See id.

\textsuperscript{25} See \textit{id.} (noting that in most instances, new sex offender legislation is preceded by the sexual murder of a woman or child by a person with a history of sexual violence).

\textsuperscript{26} \textit{Id.} at 70-75.

\textsuperscript{27} \textit{See generally} BREND A V. SMITH, FIFTY STATE SURVEY OF ADULT SEX OFFENDER REGISTRATION REQUIREMENTS (2009), available at ssrn.com.

\textsuperscript{28} See \textit{id.} at 66.
public was outraged after a man raped and almost murdered a 7-year-old boy just two years after his release from prison and after prison officials had specifically warned that they knew he would reoffend. Shortly thereafter, Washington State’s Community Protection Act, unanimously approved, increased sentences for all sex offenses, implemented registration and notification programs, and created the nation’s first modern civil commitment laws for sex offenders. The Washington law quickly became a model for other states, and in 1994 Congress passed the first major national sex offender regulation—the Jacob Wetterling Crimes Against Children and Sexually Violent Offenders Registration Act. This landmark act, named after a 9-year-old Minnesota boy who was abducted at gun-point and never found, required states to register and track sex offenders. Soon after, in response to the sexual assault and murder of seven-year-old Megan Kanka by a man previously convicted of sexual offenses against children, New Jersey enacted a particularly tough piece of legislation—dubbed “Megan’s Law”—requiring registration and community notification of offenders’ names, addresses and physical descriptions. By 1996, every state, the District of Columbia, and the Federal Government had enacted some variation of Megan’s Law.

For every federal sex offender law that was enacted, state legislatures enacted many more. Between 2008 and 2012, over 550

29 Id.
32 Id.
33 See Richard G. Wright, supra note 1, at 30.
35 After the Jacob Wetterling Act, the federal legislation continued with the Pam Lyncher Sex Offender Tracking and Identification Act of 1996, the Jacob Wetterling Improvements Act in 1997, the Protection of Children from Sexual Predators Act in 1998, the Campus Sex Crimes Prevention Act in 2000, the Adam Walsh Child Protection and Safety Act in 1996, and the Sex Offender Registration and Notification Act also in 2006. U.S. DEPT. OF JUSTICE, OFF. OF SEX OFFENDER
new laws governing sex offenders were enacted by states, territories, and D.C.\textsuperscript{37} These new statutes restricted where sex offenders could live, work, and travel; increased penalties; mandated stricter and more extensive registration with state and local authorities; prohibited sex offenders from designated places, jobs and activities; and expanded upon community notification requirements.\textsuperscript{38} The new laws spread so quickly that some commentators characterize the rush to regulate sex offenders as a legislative epidemic.\textsuperscript{39} Unfortunately, with this mad rush to show the public that something was being done, little time was spent figuring out whether the laws being created would actually make the public safer.

\textbf{B. Challenges to Modern Offender Statutes}

These tough new laws quickly faced legal challenges.\textsuperscript{40} Despite scant justification for the modern laws’ heavy burdens on offenders’ constitutional rights, these challenges met with little long-term success in court. One of the first such challenges, \textit{Smith v. Doe}, objected to the retroactive application of sex offender registration laws.\textsuperscript{41} The plaintiffs in \textit{Smith v. Doe} argued that Alaska’s version of Megan’s Law violated the Ex Post Facto Clause of the Constitution, which prohibits retroactive punishment.\textsuperscript{42} The law in question, which required both registration and notification of sex offenders, applied retroactively to all Alaskans convicted of sex offenses or child kidnapping.\textsuperscript{43} The Ex...
Post Facto Clause concerns only penal statutes. Accordingly, the court reviewed the legislation to determine if it was akin to a penal statute, weighing “whether, in its necessary operation, the regulatory scheme: has been regarded in our history and traditions as a punishment; imposes an affirmative disability or restraint; promotes the traditional aims of punishment; has a rational connection to a nonpunitive purpose; or is excessive with respect to this purpose.” The Court then found that “the stigma of Alaska's Megan's Law results not from public display for ridicule and shaming but from the dissemination of accurate information about a criminal record, most of which is already public.” The Court also found that the remaining factors suggested the statute was not punitive in nature, and therefore reversed the Ninth Circuit’s decision. However, Justices Stevens, Ginsberg, and Breyer all dissented from the majority’s opinion because “Alaska’s Act imposes onerous and intrusive obligations on convicted sex offenders; and it exposes registrants, through aggressive public notification of their crimes, to profound humiliation and community-wide ostracism.” The dissent also argued that the Act was excessive in its non-punitive purpose, imposing significant restrictions and burdens upon offenders without regard for their risk of recidivism.

Similarly, in Cutshall v. Sundquist, the Sixth Circuit held that Tennessee’s registration and notification statute did not violate the Fifth Amendment’s Double Jeopardy Clause or any other part of the Constitution. The plaintiff argued that the statute was punitive and thus punished him twice for the same offense. In support of this proposition he cited evidence that Tennessee legislators, in discussing the Act, had specifically said its purpose was to punish offenders and

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45 Id. at 97.
46 Id. at 98.
47 See id. at 106.
48 See id. at 115 (Ginsburg, J., dissenting).
49 See id. at 116 (Ginsburg, J., dissenting).
50 See Cutshall v. Sundquist, 193 F.3d 466, 472 (6th Cir. 1999).
drive them from the state.\textsuperscript{51} He also argued that the ten-year registration was arbitrary and capricious and that the statute’s published location in the criminal code was itself evidence of the statute’s punitive nature.\textsuperscript{52} Furthermore, he argued, the public disclosure of registry information did not serve the state’s stated purpose of helping law enforcement, but instead merely subjects offenders to “stigmatization, ridicule, and harassment.”\textsuperscript{53}

The court analyzed the statute using seven factors articulated by the U.S. Supreme Court in \textit{Kennedy v. Mendoza-Martinez}.
\textsuperscript{54} The court then concluded without serious consideration that pretty much every factor showed that the statute was non-punitive. For example, despite historical use of pillories to shame criminals, the court concluded that the notification statute serves as a safety tool rather than a scarlet letter.\textsuperscript{55} Furthermore, the court ignored entirely the evidence of the legislature’s intent that the plaintiff produced and took for granted the state’s claim that the notification statute makes the public safer.\textsuperscript{56}

Civil commitment statutes that allowed for potentially indefinite confinement were also held not to violate the Eighth Amendment’s prohibition of cruel and unusual punishment because they were not punitive in nature but rather forms of non-punitive detention.\textsuperscript{57} More recently, the North Carolina Supreme court upheld a statute that required global positioning tracking of sex offenders because the statute was enacted “with the intent to create a civil, regulatory scheme to protect citizens of our state from the threat posed by the recidivist

\footnotesize{\textsuperscript{51} See id.  \\
\textsuperscript{52} Id.  \\
\textsuperscript{53} Id.  \\
\textsuperscript{54} Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 (1963); \textit{Cutshall}, 193 F.3d at 473.  \\
\textsuperscript{55} See \textit{Cutshall}, 193 F.3d at 475.  \\
\textsuperscript{56} See id. at 474-77.  \\
\textsuperscript{57} See Kansas v. Hendricks, 521 U.S. 346, 371 (1997) (holding that Kansas’s civil commitment statute violated neither the Ex Post Factor Clause nor the Double Jeopardy Clause); \textit{see also} United States v. Comstock, 130 S. Ct. 1949, 1965, 176 L.Ed. 2d 878 (2010) (holding that the Necessary and Proper Clause granted Congress the authority to pass a federal civil commitment statute).}
tendencies of convicted sex offenders.”\textsuperscript{58} Again, the court found that the statute was not punitive in nature and therefore did not violate the Ex Post Facto Clause.\textsuperscript{59}

Thus, the precedential landscape leading up to \textit{Doe} made the plaintiff’s chances look rather bleak. Although the Indiana law ventured into somewhat uncharted legal territory given the effect on expression, the state had every reason to feel good about its chances.

\textbf{C. The Indiana Law}

On July 1, 2008, Indiana Code Section 35-42-4-12 took effect.\textsuperscript{60} The law prohibited certain registered sex offenders from using social networking sites, instant messaging programs, and chat rooms that allow access to persons under the age of 18.\textsuperscript{61} Indiana’s law should not

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{58} See \textit{State v. Bowditch}, 700 S.E.2d 1, 13 (2010).
\item \textsuperscript{59} See \textit{id}.
\item \textsuperscript{60} Ind. Code Ann. § 35-42-4-12 (2008).
\item \textsuperscript{61} See Ind. Code Ann. § 35-42-4-12 (2008):
\end{itemize}
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\item Sec. 12. (a) This section does not apply to a person to whom all of the following apply:
\item (1) The person is not more than:
\item (A) four (4) years older than the victim if the offense was committed after June 30, 2007; or
\item (B) five (5) years older than the victim if the offense was committed before July 1, 2007.
\item (2) The relationship between the person and the victim was a dating relationship or an ongoing personal relationship. The term “ongoing personal relationship” does not include a family relationship.
\item (3) The crime:
\item (A) was not committed by a person who is at least twenty-one (21) years of age;
\item (B) was not committed by using or threatening the use of deadly force;
\item (C) was not committed while armed with a deadly weapon;
\item (D) did not result in serious bodily injury;
\item (E) was not facilitated by furnishing the victim, without the victim's knowledge, with a drug (as defined in IC 16-42-19-2(1)) or a controlled substance (as defined in IC 35-48-1-9) or knowing that the victim was furnished with the drug or controlled substance without the victim's knowledge; and
\end{itemize}
\end{footnotesize}
(F) was not committed by a person having a position of authority or substantial influence over the victim.

(b) This section applies only to a person required to register as a sex or violent offender under IC 11-8-8 who has been:

(1) found to be a sexually violent predator under IC 35-38-1-7.5; or
(2) convicted of one (1) or more of the following offenses:
   (A) Child molesting (IC 35-42-4-3).
   (B) Child exploitation (IC 35-42-4-4(b)).
   (C) Possession of child pornography (IC 35-42-4-4(c)).
   (D) Vicarious sexual gratification (IC 35-42-4-5(a) or IC 35-42-4-5(b)).
   (E) Sexual conduct in the presence of a minor (IC 35-42-4-5(c)).
   (F) Child solicitation (IC 35-42-4-6).
   (G) Child seduction (IC 35-42-4-7).
   (H) Kidnapping (IC 35-42-3-2), if the victim is less than eighteen (18) years of age and the person is not the child’s parent or guardian.
   (I) Attempt to commit or conspiracy to commit an offense listed in clauses (A) through (H).
   (J) An offense in another jurisdiction that is substantially similar to an offense described in clauses (A) through (H).

(c) As used in this section, “instant messaging or chat room program” means a software program that requires a person to register or create an account, a username, or a password to become a member or registered user of the program and allows two (2) or more members or authorized users to communicate over the Internet in real time using typed text. The term does not include an electronic mail program or message board program.

(d) As used in this section, “social networking web site” means an Internet web site that:

(1) facilitates the social introduction between two (2) or more persons;
(2) requires a person to register or create an account, a username, or a password to become a member of the web site and to communicate with other members;
(3) allows a member to create a web page or a personal profile; and
(4) provides a member with the opportunity to communicate with another person.

The term does not include an electronic mail program or message board program.

(e) A person described in subsection (b) who knowingly or intentionally uses:

(1) a social networking web site; or
(2) an instant messaging or chat room program;

that the offender knows allows a person who is less than eighteen (18) years of age to access or use the web site or program commits a sex offender Internet offense, a Class A misdemeanor. However, the offense is a Class D felony if the person has a prior unrelated conviction under this section.
have come as a surprise to anyone. With the increasing promulgation of post-incarceration sex offender regulation and the rise of the Internet and social media, it was only a matter of time before states began targeting sex offenders’ online activities. Fears of sex offenders grooming children via social networking sites such as Facebook and MySpace or otherwise engaging in cyber stalking are understandable, yet the actual incidence of sex offenders meeting children over the internet is extremely low. Indiana’s law and laws like it are a win-win for politicians like the Indiana law’s sponsors Jim Merrit and John Wasserman because there is no sex offender lobby to worry about upsetting and, because the laws are generally low-cost, most voters see no downside. New legislators are especially prone to

(f) It is a defense to a prosecution under this section that the person:
    (1) did not know that the web site or program allowed a person who is less than eighteen (18) years of age to access or use the web site or program; and
    (2) upon discovering that the web site or program allows a person who is less than eighteen (18) years of age to access or use the web site or program, immediately ceased further use or access of the web site or program.


63 See Erin Mulvaney, State lawmakers move to restrict sex offenders, HOUSTON CHRON., (April 4, 2013), http://www.houstonchronicle.com/news/houston-texas/houston/article/State-lawmakers-move-to-restrict-sex-offenders-4407867.php (quoting Texas Rep. Trey Martinez Fisher as saying, “[w]ith the evolving technology and increasing number of cyber crimes and crimes committed against the vulnerable, the goal is to extend the same policy we have for sex offenders now to the Internet.”).

64 See Janis Wolak et al., Online “Predators” and their Victims: Myths Realities and Implications for Prevention and Treatment, AMERICAN PSYCHOLOGIST 63, 111-128 (2008), http://www.unh.edu/ccrc/pdf/Am%20Psy%202008.pdf (arguing that “publicity about online “predators” who prey on naive children using trickery and violence is largely inaccurate”).

this kind of “get tough on crime” legislation because “nobody wants to be seen as being soft on sexual perversion.”

The Indiana law was presumably to be applied in conjunction with related legislation which required registered sex offenders not only to provide all online identifiers, such as email addresses and user names, but also to consent to a search of personal computers and any device with online access at any time, and to the installation of monitoring software or hardware. The latter two sections of this law were struck down in 2008 as a violation of the Fourth Amendment. However, the social networking law survived another five years.

II. DOE V. PROSECUTOR, MARION COUNTY, INDIANA

A. The District Court Decision

On March 14, 2012, John Doe filed a motion for a preliminary injunction preventing enforcement of the Indiana law on the basis that the law impermissibly infringed upon his First Amendment Rights; however, both parties agreed to treat the motion as for a permanent injunction and postponed the decision until after a full bench trial could be held.

Doe, who was allowed to file suit under a pseudonym so as not to face unnecessary public exposure and harassment during the pendency of the lawsuit, was a sex offender required to register on Indiana’s sex and violent offender registry. He was arrested in Marion County, Indiana in 2000 and later convicted of two counts of child

68 Doe v. Prosecutor, Marion Cnty., Ind., 566 F. Supp. 2d at 867.
69 See Doe v. Prosecutor, Marion Cnty., Ind., 705 F.3d 694, 695 (7th Cir. 2013).
70 Id.
71 Doe v. Prosecutor, Marion Cnty., Ind., No. 1:12-cv-00062-TWP-MJD (S.D. Ind. Feb. 27, 2012) (order on plaintiff’s motion to proceed by anonymous name and motion to seal affidavit containing actual name).
72 Id.
exploitation. Released from prison in 2003, Doe completed probation in 2004. Doe is the father of a teenage son of whom he has custody and whose activities on Facebook and other websites he wishes to be able to monitor like any other parent. Doe brought this lawsuit alleging the unconstitutionality of the Indiana Law because he wishes to use social media to monitor his son’s internet use, as well as to stay in touch with friends and comment on the news.

District Court Judge Tanya Walton Pratt held that Indiana’s law was constitutional and denied both Doe’s Motion for Preliminary Injunction and his request for permanent relief in the form of a declaratory judgment and a permanent injunction. Although the court conceded that the law implicated speech protected by the First Amendment, it nevertheless found the statute constitutional.

To do so, the court applied the Supreme Court’s test from Ward v. Rock against Racism, which determines the constitutionality of regulations that restrict the “time, place, and manner” of expression, as opposed to statutes that prohibit specific forms of expression. In Ward, the Court held that New York City’s restrictions on volume at an outdoor concert venue did not target a specific type of expression—i.e. were content neutral—and therefore needed to satisfy only intermediate scrutiny. The Court’s test asks whether a regulation is “narrowly-tailored to serve significant government interests” and if the regulation “leaves open ample alternative channels of communication.”

Applying the Ward standard, the court found the Indiana law constitutional because Doe failed to offer any alternative means through which Indiana could have achieved the same goal of

74 Id.
75 Id.
76 Id.
77 Id. at 11.
78 Id. at 5.
80 See Doe v. Prosecutor, Marion Cnty., Ind., 2012 WL 2376141, at *7.
81 See 491 U.S. at 781.
82 See id. at 803.
deterrence and prevention of online sexual exploitation of minors without violating his First Amendment rights. However, by placing this burden on Doe, the court confused who possessed the burden in the first place. \(^{83}\) While acknowledging the importance of social networking in society, Judge Pratt expressed concern over the use of new technologies as a “virtual playground” for criminals, in this case sexual predators. \(^{84}\) Even with the law, she stated, “the vast majority of the internet is still at Mr. Doe’s fingertips.” \(^{85}\)

The court next addressed Doe’s contention that the law was unnecessary and therefore not narrowly tailored because a separate law already existed in Indiana that prohibits online solicitation of children. \(^{86}\) While conceding that this argument had some appeal, the court stated that the two statutes serve different purposes; the challenged statute aimed to prevent and deter the sexual exploitation of minors because it punished conduct before minors were victimized, while the other aimed to punish those who have already committed the crime of solicitation. \(^{87}\) “The government need not wait until a crime was again committed in order to act to prevent criminal sexual acts,” said the court. \(^{88}\) Like so many before it, the court relied upon the Supreme Court’s characterization of recidivism by sex offenders as “frightening and high” rather than requiring the state to produce actual studies that show such a recidivism rate. \(^{89}\) The court also found that Doe had sufficient alternative channels of communication to satisfy the second half of the constitutional test, noting with some pop culture

\(^{83}\) See Doe v. Prosecutor, Marion Cnty., Indiana, 705 F.3d 694, 701 (7th Cir. 2013) (explaining the state bears the burden of showing that the statute leaves open ample alternative channels of communication); Doe v. Prosecutor, Marion Cnty., Ind., 2012 WL 2376141 at *7.
\(^{84}\) Doe v. Prosecutor, Marion Cnty., Ind., 2012 WL 2376141, at *2.
\(^{85}\) Id. at 7.
\(^{86}\) Id.
\(^{87}\) Id. at 8.
\(^{88}\) Id. at 9.
\(^{89}\) Id. at 8 (quoting Smith v. Doe 538 U.S. 84, 103, 123 (2003) (in which the court was quoting itself from McKune v. Lile, 536 U.S. 24, 34 (2002))).
savvy that “communication does not begin with a ‘Facebook wall post’ and end with a ‘140-character Tweet,’”\textsuperscript{90}

Lastly, the court distinguished this case from \textit{Doe v. Jindal},\textsuperscript{91} in which the federal district court in Louisiana held a similar Louisiana statute unconstitutional.\textsuperscript{92} The court in \textit{Jindal} held that the statute in question was overbroad in that it would prohibit offenders from accessing a substantial amount of websites that did not actually present a risk, such as the site of the court.\textsuperscript{93} Unlike the Indiana statute, the statute at issue in \textit{Jindal} imposed a sweeping ban on common websites, not just social networking sites, and the \textit{Jindal} court failed to use the proper content-neutral framework.\textsuperscript{94} Doe, dissatisfied with the district court’s decision, appealed to the Seventh Circuit.\textsuperscript{95}

\textbf{B. The Seventh Circuit Decision}

On appeal, Doe got the ruling he was looking for.\textsuperscript{96} The Seventh Circuit, reviewing \textit{de novo}, reversed the district court’s decision, finding the Indiana law unconstitutional on its face.\textsuperscript{97} The court found that Mr. Doe’s First Amendment rights, as incorporated against the states through the Fourteenth Amendment, were clearly infringed by Indiana’s law.\textsuperscript{98} Specifically, the law precluded Doe from “expression through the medium of social media” and limited “his right to receive information and ideas.”\textsuperscript{99} However, the court found the law to be content neutral, as had the district court.\textsuperscript{100} Therefore, Indiana was

\textsuperscript{90} See Doe v. Prosecutor, Marion Cnty., Ind., 2012 WL 2376141, at *10.
\textsuperscript{92} See Doe v. Prosecutor, Marion Cnty., Ind., 2012 WL 2376141, at *11.
\textsuperscript{93} See Doe v. Jindal, 853 F. Supp. 2d at 604.
\textsuperscript{94} Id.
\textsuperscript{95} See Doe v. Prosecutor, Marion Cnty., Ind., 705 F.3d 604, 604 (7th Cir. 2013).
\textsuperscript{96} See id.
\textsuperscript{97} Id. (Judge Flaum and Tinder were joined in the decision by Judge Tharp who sat by designation).
\textsuperscript{98} See id. at 695.
\textsuperscript{99} Id. at 697-98.
\textsuperscript{100} Id. at 698.
entitled to place reasonable “time, place, or manner restrictions” on offenders’ expression so long as the statute met the Ward standard.\(^\text{101}\) Under Ward,\(^\text{102}\) as the District Court had noted,\(^\text{103}\) such content neutral restrictions must be “narrowly tailored to serve a significant governmental interest” and “leave open ample alternative channels for communication of the information.”\(^\text{104}\) Unlike the district court, however, the Seventh Circuit never reached the second half of the test because they determined that the statute was not narrowly tailored.\(^\text{105}\)

In its analysis, the court relied on a series of Supreme Court cases that clarify when a law that infringes the freedom of speech may still be considered constitutional, starting with Frisby v. Schultz.\(^\text{106}\) In Frisby, abortion protestors challenged a municipal law that forbade picketers from engaging in picketing directed at a single residence.\(^\text{107}\) The protesters had been intent on letting a local doctor know how they felt about abortion, and the legislature responded to protect the doctor and other private residents from harassment.\(^\text{108}\) Applying the content neutral test, the Court held that the law was narrowly tailored because it targeted only speech that was within the scope of the city’s significant interest in protecting residents from “targeted picketing” which, it said, “inherently and offensively intrudes on residential privacy.”\(^\text{109}\)

The Seventh Circuit then discussed City of L.A. v. Taxpayers for Vincent,\(^\text{110}\) in which the Supreme Court upheld a city ordinance that prohibited posting signs on public property.\(^\text{111}\) The Court in Vincent held the statute did not violate the First Amendment rights of the

\(^{101}\) Id.


\(^{104}\) Doe v. Prosecutor, Marion Cnty., Ind., 705 F.3d at 798.

\(^{105}\) Id.


\(^{107}\) Id. at 476.

\(^{108}\) Id.

\(^{109}\) Id. at 486.


\(^{111}\) Id. at 817.
plaintiffs who had wished to post cardboard candidate signs on public property. The court determined that because the substantive evil which the city sought to address—visual blight—was not merely a possible by-product of the activity prohibited but was created by the medium of expression itself, the statute was narrowly tailored.

Next, the court examined two cases where statutes had been struck down because the states involved had alternative means of combating the evil that their laws were designed to prevent. First, the court looked at *Schneider v. Town of Irvington*. In this 1939 Supreme Court decision, the Court struck down a series of laws that banned outright, or banned without permission, the distribution of any handbills or fliers, or door-to-door canvassing. According to the Seventh Circuit, the Court in *Schneider* reached its decision because the evil the state sought to address—littering—was only indirectly being addressed by the law, and the state had numerous alternative ways to address the problem, i.e., going after the litterers themselves.

Similarly, in *Martin v. City of Struthers*, the Court invalidated a law prohibiting all door-to-door solicitations or distributions because the evil targeted by the law could be easily prevented by traditional methods, such as no trespassing signs.

The court then compared the foregoing case law to the Indiana statute. Neither party disputed that “there is nothing dangerous about Doe’s use of social media as long as he does not improperly communicate with minors.” And because illicit communication is a small part of overall social network activity, the Indiana law covered “substantially more activity than the evil it seeks to redress.”

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112 Id.
113 Id. at 810.
114 See Doe v. Prosecutor, Marion Cnty., Ind., 705 F.3d 604, 698-99 (7th Cir. 2013).
115 Schneider v. Town of Irvington, 308 U.S. 147, 165 (1939).
116 Id.
117 Id.
118 Martin v. City of Struthers, 319 U.S. 141, 147 (1943).
119 See Doe v. Prosecutor, Marion Cnty., Ind., 705 F.3d at 699.
120 Id.
121 Id.
According to the court, like the legislatures in *Martin* and *Schneider*, Indiana had “other methods to combat unwanted and inappropriate communication between minors and sex offenders.” Specifically, the state already had in place laws making it a felony for persons over 21 to “solicit” children, prohibiting “inappropriate communication with a child,” and communication “with the intent to gratify the sexual desires of the person or the individual,” all of which included enhanced punishments for acts performed over a computer network. The court praised these “alternative options” as better methods for advancing Indiana’s goals and “refusing to burden benign Internet activity.” The court also disagreed with the district court judge’s characterization of the challenged law and the preexisting laws as possessing different purposes—one being to “prevent and deter” and one to “punish.” All laws are for the purpose of punishing activities after they’ve occurred, said the court. All Indiana’s law would do is increase sentences for online solicitation by providing another statute under which to convict offenders. If they want to increase sentences, said the court, the legislature should just do so without disguising it in this manner. The court’s reasoning seems to ignore the point that the statute would, if effectively administered, prevent sex offenders who might be at risk of recidivism from placing themselves in positions where they might be enticed to do so—thus preventing injury before it occurs. However, the state also bore the burden of explaining how its legislation directly alleviates specific harms it seeks to cure and it failed to do so.

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122 *Id.*
123 *Id.* (citing Ind. Code § 35-42-4-6 (2008)).
126 *See* Doe v. Prosecutor, Marion Cnty., Ind., 705 F.3d at 699.
127 *See id.* (citing Doe v. Prosecutor, Marion Cnty., Ind., No. 1:12-CV-00062-TWP, 2012 WL 2376141, at *8 (S.D. Ind. June 22, 2012)).
128 *Id.*
129 *See id.*
130 *See id.*
131 *See id.*
After hammering the Indiana law’s over breadth, the court reeled in its criticism somewhat, noting that they “. . . must be careful not to impose too high a standard on Indiana.” Ward introduced an “administratability exception” which provides that “the requirement of narrow tailoring is satisfied ‘so long as the [state interest] would be achieved less effectively absent the regulation.’” The court said that some level of over-inclusiveness might be justified where legislatures face a “great difficulty” in targeting only the “exact source” of evil. In determining how to apply this exception, the court looked to a test from Colorado v. Hill, wherein the Supreme Court upheld a statute that prohibited anyone from approaching people within a 100-foot radius of a healthcare facility “for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education or counseling with [an]other person on public property.” According to the Court’s test, a statute may be constitutional if “(1) the prohibited expression that did not further the state interest was minimal, and (2) its inclusion stemmed from the difficulty in carving a rule that covered precisely the evil contemplated by the legislature.” However, the court found the Colorado exception to be inapplicable here, theorizing that Indiana could have, “with little difficulty,” better targeted the problem with the pre-existing statutes or a law solely banning communication between minors and sex offenders through social media. Leaving some room for future legislative action, the court suggested that a constitutional law that accomplishes Indiana’s goals is feasible, but declined to say exactly what it would look like.

Near the end of the opinion, the court cautiously suggested that if Indiana chooses to try again, it might be beneficial if they can develop an argument that the statute allows law enforcement to “swoop in”

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132 Id.
134 See Doe v. Prosecutor, Marion Cty. Ind., 705 F.3d 604, 700 (7th Cir. 2013) (citing Hill v. Colo., 530 U.S. 703, 729 (2000)).
136 Doe v. Prosecutor, Marion Cnty., Ind., 705 F.3d at 698-99 (citing Hill v. Colo., 530 U.S. at 729).
137 See id. at 700.
138 See id.
before any solicitation occurs.\textsuperscript{139} Perhaps, added the court, a potential new law could be tailored so as to apply only to certain especially risky persons.\textsuperscript{140} The court concluded that “subsequent Indiana statutes may well meet [the narrow tailoring requirement], but the blanket ban on social media in this case regrettably does not.”\textsuperscript{141} The Seventh Circuit then remanded the case to the district court with instructions to enter judgment in favor of Doe.\textsuperscript{142}

III. \textit{Doe’s Impact Today and Tomorrow}

\textbf{A. What makes Doe Different?}

\textit{Doe} made clear that sex offenders have a right to surf the web and that states may not infringe upon this right without strong justification; yet, offenders have for years been barred from surfing the waves at California’s famous Huntington Beach—apparently constitutionally.\textsuperscript{143} They have also been banned from public libraries in multiple cities and states, preventing access to books and the Internet.\textsuperscript{144} A majority of states now have statutes that forbid registered sex offenders from living within 500 to as much as 2,500 feet from schools or other areas children are likely to congregate.\textsuperscript{145} Florida’s residency restrictions are so strict that some sex offenders in Miami-Dade County have been forced to live in a makeshift colony under the Julia Tuttle Causeway.

\begin{footnotesize}
\begin{enumerate}
\item See id. at 701.
\item See id. at 702.
\item Id. at 703.
\item Id.
\item See Iowa Code Ann. § 692A.113 (West) (banning certain sex offenders from being “present upon the real property of a public library without the written permission of the library administrator”).
\item Sinha, supra note 4, at 346.
\end{enumerate}
\end{footnotesize}
which connects Miami to Miami Beach. Unlike Indiana’s law that prohibits only online activity, none of these laws that restrict actual physical activity have been held to be unconstitutional. The question thus arises: why are states able to drastically limit where registered sex offenders can live, work and travel, yet at the same time, according to the Seventh Circuit, states are constitutionally forbidden from passing laws which impede only digital expression? Indeed, common sense makes this dichotomy hard to fathom.

The clearest answer, of course, is speech. What immediately differentiates the Doe statute from other regulations that have been upheld as constitutional is that it implicated the First Amendment, specifically, the rights of speech, association, and, by implication, expression. Without a doubt, the Indiana law’s direct and substantial impact upon online speech gave the court what it needed to overturn the law. Laws which infringe upon rights guaranteed by the First Amendment must satisfy the strictest standard of review, known as “strict scrutiny,” which requires that the law be narrowly tailored to further a compelling governmental interest. However, content neutral First Amendment restrictions must only satisfy the intermediate standard of review set out in Ward.

As discussed previously, the court in Doe applied the intermediate standard of review to the Indiana social networking law because the court found it was a content neutral limitation upon expression. However, if another fundamental right were to be infringed by a statute, the reviewing court would generally apply strict scrutiny.

146 Damien Cave, Roadside Camp for Miami Sex Offenders Leads to Lawsuit, N.Y. TIMES (July 9, 2009), http://www.nytimes.com/2009/07/10/us/10offender.html?_r=0.
147 See Doe v. Prosecutor, Marion Cnty., Ind., 705 F.3d 694, 698 (7th Cir. 2013).
148 See id.
150 Doe v. Prosecutor, Marion Cnty., Ind., 705 F.3d at 698.
151 See id.
However, where there is no fundamental or constitutional right implicated, a law must only satisfy rational basis review.\textsuperscript{153} Rational basis review is the most deferential standard used by reviewing courts and requires only that the governmental action be "rationally related" to a "legitimate" government interest.\textsuperscript{154} In most challenges to sex offender laws courts have applied this lesser standard of review.\textsuperscript{155} For instance, in \textit{Doe v. City of Lafayette}, a city park district banned a registered sex offender from all of the city's parks, long after he had completed probation and without a hearing, after learning that he had been seen sitting in his car at parks, seemingly observing the children playing there.\textsuperscript{156} The Seventh Circuit upheld the city's actions.\textsuperscript{157} Despite Mr. Doe's contentions otherwise, the court held that the First Amendment was not implicated because Mr. Doe was going to the parks merely to watch children and not to engage in expressive protected activity.\textsuperscript{158} The court then held that the ban implicated no fundamental right because a fundamental right to enter public areas to loiter or for other innocent purposes does not exist.\textsuperscript{159} Thus, because no fundamental interest was implicated, the court applied rational

\textsuperscript{153} See generally 16B C.J.S. CONST. LAW § 1120.
\textsuperscript{154} See \textit{Doe v. City of Lafayette, Ind.}, 377 F.3d 757, 773 (7th Cir. 2004).
\textsuperscript{155} See, e.g., Smith v. Doe, 538 U.S. 84, 123 S.Ct. 1140, 155 L.Ed.2d 164 (2003) (holding that the Alaska Sex Offender Registration Act did not violate the Ex Post Facto Clause); Conn. Dep't of Pub. Safety v. Doe, 538 U.S. 1, 123 S.Ct. 1160, 155 L.Ed.2d 98 (2003) (holding that the public disclosure provision of Connecticut's sex offender registration law did not violate the Due Process Clause); \textit{Doe v. City of Lafayette, Ind.}, 377 F.3d at 758-59; \textit{Doe v. Miller}, 405 F.3d 700 (8th Cir.2005) (holding residency restriction within two thousand feet of school or child care facility constitutional under rational basis review).
\textsuperscript{156} See \textit{Doe v. City of Lafayette, Ind.}, 377 F.3d at 758-59.
\textsuperscript{157} Id.
\textsuperscript{158} See id. at 763 ("He did not go to the park to advocate the legalization of sexual relations between adults and minors. He did not go into the park to display a sculpture, read a poem or perform a play celebrating sexual relations between adults and minors. He did not go into the park for some higher purpose of self-realization through expression. In fact, he did not go into the park to engage in expression at all.").
\textsuperscript{159} Id. at 769 ("The historical and precedential support for a fundamental right to enter parks for enjoyment is, to put it mildly, oblique.").
basis review, asking whether the ban was “rationally related” to “a legitimate government interest.”

Noting that the city banned a single sex offender who had a history of sexually predatory actions towards children, and who had shown a potential to relapse, the court held that the city’s actions would have satisfied even strict scrutiny.

Similarly, in *Doe v. Miller*, the Eighth Circuit upheld a 2002 Iowa law that prohibited certain sex offenders from residing within 2,000 feet of schools or childcare facilities. Several sex offenders affected by the law brought suit in federal district court, asserting that the law was unconstitutional on its face. The district court in *Doe v. Miller* agreed with the plaintiffs, and noted that the law often made entire towns off limits to offenders. The district court, applying strict scrutiny, held that the residency restriction violated both procedural due process and substantive due process because it infringed on the plaintiffs’ fundamental right to travel and to “privately choose how they want to conduct their family affairs.” However, the Eighth Circuit concluded that even if they were to recognize the right to intrastate travel as a fundamental right, this right would not be infringed by a law which restricted only where sex offenders could live, not where they could travel. Therefore, the court determined that the law was rationally related to the goal of preventing sex offender recidivism, and thus constitutional. Despite the fact that the state’s own witness testified that “life-long restrictions like [the Iowa law] do not aid in the treatment process, and could even foster negative attitudes toward authority and depression in offenders,” and the Does’ contention that no scientific study backs the effectiveness of residency restrictions in preventing sex offense recidivism, the court held that the law was rationally related to that goal. According to the

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160 *Id.* at 773.
161 *Id.*
163 *Doe v. Miller*, 405 F.3d 700, 705 (8th Cir. 2005).
164 See *id*.
165 *Id.* at 706.
166 *Id.*
167 *Id.* at 723.
court, the Does’ argument understated “the authority of a state legislature to make judgments about the best means to protect the health and welfare of its citizens in an area where precise statistical data is unavailable and human behavior is necessarily unpredictable.”168 However, that authority can go only so far. The next section discusses some of the many common misconceptions about sex offenders.

B. Separating Fact from Fiction

In the early 1990s, when modern sex offender regulation began to appear, there was little reliable research on sex offenders, and none on the efficacy of modern legislation. In fact, even today the public perception of sex offenders is so skewed that numerous state and federal enforcement agencies have deemed it necessary to create “myths about sex offenders” websites in order to correct these misconceptions.169 Although concerns about sex offenders are valid, there are numerous myths that turn legitimate concerns into a blinding hysteria that leads to overzealous lawmaking and ineffective laws.170 Much has been previously written debunking the “facts” about sex offenders; however, it is worth reviewing this topic briefly given its relevance to all sex-offender-related legislation and to show the vast difference between the actual truth and the perceived truth.

One of the most common misconceptions, and one that has special relevance to statutes like Indiana’s, is that strangers perpetrate sex offenses. In fact, the vast majority of sex offenses are committed by a

168 Id. at 714.
170 See 43 No. 6 CRIM. LAW BULL. Art. 1.
person known to the victim, often a relative, friend, or authority figure. The numbers are even higher when it comes to sexual assaults on children, where over 90 percent of offenses are committed by someone known to the victim. Despite this, most legislation targets only the minority of offenses that are committed by strangers; yet, residency restrictions, registration and notification, and social networking bans do little to prevent those 80 to 90 percent of offenses that are committed by people the victim already knows. Misguided efforts like this suggest that legislators that push through sex offender regulation are more preoccupied with politics and getting elected than with actually keeping the public safe.

Another common myth is that sex offenders are virtually guaranteed to reoffend. Again, the facts do not support this condemnation. In comparison with recidivism rates of other types of criminals, sex offenders are actually significantly less likely to reoffend. A very small subset of offenders—adult males who abuse male children—are the most likely to reoffend. Although there is a surprising lack of comprehensive studies, and the studies that do exist

171 See Wright, supra note 1, at 21; see also Lieb, supra note 11, at 50.
173 See also Jamey Dunn, Sex Offender Legislation is often more about politics than justice, ILL. ISSUES, http://illinoisissues.uis.edu/archives/2011/09/state.html (September 2011) (“Illinois for a long time has every new set of legislators come in, and they pass bills on crime because it looks good when you go back home and you say, ‘I’m tough on crime.’ So what happens is, we’re now layered with bill after bill after bill,” Rep. Rosemary Mulligan, a Park Ridge Republican, said in the last days of the spring legislative session while debating a bill that pertained to sex offenders. “Most of us will vote for it because it looks bad if you don’t, which is a mistake that happens when we continue to pass these kinds of laws.” Mulligan and 90 of her House colleagues voted in favor of the bill.”).
174 See id.
175 Id.
176 Wright, supra note1, at 27 (“A study of Massachusetts prisoners released in 1999 found that 28% of sex offenders were re-incarcerated within three years of their release. This was the lowest rate of recidivism (as measured by re-incarceration) when compared with other groups of non-sexual criminal offenders.”).
177 See id.
often offer conflicting results, it does not seem to be the case that sex offenders in general are nearly as likely to commit another sex offense in the future as politicians would make them out to be. Indeed, it bears noting that recidivism rates vary drastically based upon what category of offender is being measured and how the recidivism rate is being measured.

A third and extremely pertinent myth is that residency restrictions and other common legislative action directed at sex offenders are effective in protecting the public. There is in fact little if any evidence that this is the case. Rather than preventative, these measures appear to be punitive in nature, satisfying the public’s desire for revenge on an especially reviled subset of criminals. Some commentators have even argued that, rather than deterring future sex offenses, residency restrictions and other legislation that prevent sex offenders from reintegrating with society actually increase the risk of recidivism.

Furthermore, not all sex offenders pose the same danger to the public. One of the many criticisms of modern sex offender laws is that they indiscriminately target all offenders regardless of their individual risk. Indeed, this was part of the Seventh Circuit’s reasoning in Doe. For instance, individuals convicted of Romeo and Juliet relationships, public indecency, or consensual sex by a teacher with a teenage

178 See id.
179 See id.
181 See Margaret Troia, Ohio’s Sex Offender Residency Restriction Law: Does It Protect the Health and Safety of the State’s Children or Falsely Make People Believe So?, 19 J.L. & HEALTH 331, 344 (2005).
182 See Peter Whoriskey, Some Curbs on Sex Offenders Called Ineffective, Inhumane, WASH. POST (Wednesday November 22, 2006), http://www.washingtonpost.com/wp-dyn/content/article/2006/11/21/AR2006112101468.html (quoting Georgia House Majority Leader as describing his goal in sex offender residency legislation as “ . . . to make it so onerous on those that are convicted of these offenses . . . they will want to move to another state.”).
183 See Troia, supra note 182, at 344.
student can hardly be equated with violent rapists and offenders whose victims were children.\textsuperscript{184}

As some modern legislation nears a quarter century of existence, studies are beginning to appear examining the efficacy of these laws. These studies overwhelmingly show modern sex offender legislation to be ineffective. For instance, a study by the Minnesota Department of Corrections that examined 224 recidivist sex offenders determined that residency restrictions would have likely had no preventative effect in any of the cases studied.\textsuperscript{185} Studies in Iowa, California and Colorado all concluded the same thing.\textsuperscript{186} A 2011 study focusing on the effects of notification laws nationally concluded that they actually increased recidivism because they made illegal activity more attractive by increasing social and financial costs to offenders attempting to rejoin society.\textsuperscript{187} Another recent study of registration laws on a national level led the authors to conclude that sex offender registry statutes not only failed to reduce recidivism but actually increased rates of re-offense.\textsuperscript{188} Studies like these should influence court rulings in the future.

\textsuperscript{184} See Doe v. Sex Offender Registry Bd., 697 N.E.2d 512, 522 (1998) (quoting New York Times Co. v. United States, 403 U.S. 713, 729 (1971) (Stewart, J., concurring) (“Requiring the government to assemble and present clear evidence of a sex offender’s dangerousness would ensure that limited adjudicatory and police enforcement resources would be concentrated on those individuals who realistically may pose threats to young children and other vulnerable populations. As observed in an altogether different context but oddly apropos of this classification system as well, “when everything is classified, then nothing is classified, and the system becomes one to be disregarded by the cynical or the careless.”)).

\textsuperscript{185} Sinha, supra note 4, at 347 (“Only 79 (35 percent) of the cases involved offenders who established direct contact with their victims. Of these, 28 initiated victim contact within one mile of their own residence, 21 within 0.5 miles (2,500 feet), and 16 within 0.2 miles (1,000 feet). A juvenile was the victim in 16 of the 28 cases. But none of the 16 cases involved offenders who established victim contact near a school, park, or other prohibited area. Instead, the 16 offenders typically used a ruse to gain access to their victims, who were most often their neighbors.”).

\textsuperscript{186} Id. at 348.


\textsuperscript{188} Id.
Acknowledging these facts and fictions is extremely important in the constitutional review of statutes governing sex offenders. However, for the most part, courts have not done so. In 2002, the Supreme Court in McKune v. Lile189 remarked that sex offenders had a “frightening and high risk of recidivism,” and despite a lack of actual research justifying this statement, courts have cited this decision as evidence of sex offenders’ high rates of recidivism ever since.190 Recently, the Ninth Circuit, in just one sentence, determined that California had a rational basis for its sex offender notification laws, saying: “[s]ex offenders pose a threat to the public, and when they reenter society, they are much more likely to be re-arrested than other offenders.”191

In Doe, the Seventh Circuit took an important step towards treating sex offender legislation like any other type of legislation, and away from the self-perpetuating reliance on myth that has dominated sex offender jurisprudence for many years/decades. Just how much effect this move will have in litigating the constitutionality of sex offender laws is directly related to the type of statute at issue and what type of review the courts apply. The next section discusses the importance of these distinctions.

C. A Changing Tide in the Courts?

While challenges to sex offender legislation have almost universally failed in the past,192 recently courts have been more

190 See Smith v. Doe, 538 U.S. 84, 103 (2003) (citing McKune to justify a finding that Alaska’s Sex Offender Registration Act was non-punitive and thus not a violation of the Ex Post Facto Clause).
191 Johnson v. Terhune, 184 F. App’x 622, 624 (9th Cir. 2006).
192 See Smith v. Doe, 538 U.S. 84, 105 (2003) (holding that Alaska’s Sex Offender Registration Act was constitutional); Kansas v. Hendricks, 521 U.S. 346, 350, 117 (1997) (holding that Kansas Sexual Predator Act, which allowed for indefinite civil confinement of certain sex offenders, was constitutional); Doe v. Shurtleff, 628 F.3d 1217, 1220 (10th Cir. 2010) (holding that Utah law requiring registration of all online identifiers and websites owned by sex offenders was constitutional); Doe v. Moore, 410 F.3d 1337, 1339 (11th Cir. 2005) (holding that
inclined to review such legislation closely and to strike down laws that do not meet constitutional standards.\textsuperscript{193} This increased skepticism comes as studies increasingly suggest that existing laws are ineffective despite their ubiquity. Several recent cases illustrate this change in the judicial review of sex offender legislation.

In January 2012, in \textit{Doe v. City of Albuquerque}, the Tenth Circuit struck down an Albuquerque law that banned sex offenders from public libraries.\textsuperscript{194} The court first chastised the city for failing to offer a justification for the law; however, it then provided one itself, stating that, “it is evident that the ban seeks to provide a safe environment for library patrons, including children.”\textsuperscript{195} Nevertheless, the court held that the law was unconstitutional because the city had failed to show that the law was narrowly tailored or that it left open ample alternative channels of communication.\textsuperscript{196} In fact, the City erroneously concluded that it had no burden to prove the existence of these alternatives and thus presented no evidence.\textsuperscript{197} Accordingly, while the outcome of the case is encouraging, it does not stand for the premise that library bans are unconstitutional, but merely that the government must present at least some justification for such a law if it is to be upheld.\textsuperscript{198}

In \textit{Doe v. Jindal}, nine prostitutes convicted under Louisiana’s Crimes Against Nature by Solicitation statute, which makes a separate offense for those who solicit oral or anal sex, challenged the statute’s requirement that they register as sex offenders as a violation of the 14th


\textsuperscript{194} Doe v. City of Albuquerque, 667 F.3d at 1133.

\textsuperscript{195} Id.

\textsuperscript{196} Id. at 1133-1136.

\textsuperscript{197} Id. at 1115 (“Complicating our inquiry is the fact that the City, relying on a mistaken interpretation of case law regarding facial challenges, erroneously contended that it had no burden to do anything in response to Doe’s summary judgment motion.”).

\textsuperscript{198} See id. at 1135.
Amendment’s Equal Protection Clause because it treated them differently from those convicted under the regular prostitution statute.\(^{199}\) In 2012, the U.S. District Court held that there was no rational basis for treating those convicted under the former statute differently from those convicted under the latter and granted summary judgment to the plaintiffs.\(^{200}\)

Again in Louisiana, on June 14, 2011, Governor Bobby Jindal signed into law a statute very similar to Indiana’s.\(^{201}\) The law, like

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200 Id. at 1008.

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

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

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

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

C. For purposes of this Section: (1) “Chat room” means any Internet website through which users have the ability to communicate via text and which allows messages to be visible to all other users or to a designated segment of all other users. (2) “Minor” means a person under the age of eighteen years. (3) “Peer-to-peer network” means a connection of computer systems whereby files are shared directly between the systems on a network without the need of a central server. (4) “Social networking website” means an Internet website that has any of the following capabilities: (a) Allows users to create web pages or profiles about themselves that are available to the general public or to any other users. (b) Offers a mechanism for
Indiana’s, prohibited certain sex offenders, specifically those whose crimes involved children, from accessing “social networking websites, chat rooms, and peer-to-peer networks.”202 John and James Doe challenged the statute (pseudonymously, as is standard in such cases) as facially overbroad and unconstitutionally affecting their First Amendment rights.203 The plaintiffs contended that the law would prohibit them not only from accessing many websites, including Facebook, but also, “NOLA.com, CNN.com, FoxNews.com, ESPN, BBC or Reuters, NYTimes.com, Politico.com, Newsweek, The Economist, National Geographic, YouTube, Getagameplan.org (Louisiana's official hurricane preparedness website), Gmail, Yahoo, Hotmail, AOL, LinkedIn, Monster, USAJOBS.gov (the federal government’s employment database), eBay, Zagat, and Amazon” because the sites “have a mechanism for communication among users.”204 The court acknowledged that the states have a legitimate interest in protecting children from sex offenders; however, relying on Hill v. City of Houston,205 the court held that the Louisiana Act was not crafted narrowly or precisely enough to pass constitutional muster.206

The strongest condemnation came in a recent decision by the United States District Court for Nebraska that held unconstitutional a communication among users, such as a forum, chat room, electronic mail, or instant messaging.

D. (1) Whoever commits the crime of unlawful use or access of social media shall, upon a first conviction, be fined not more than ten thousand dollars and shall be imprisoned with hard labor for not more than ten years without benefit of parole, probation, or suspension of sentence. (2) Whoever commits the crime of unlawful use or access of social media, upon a second or subsequent conviction, shall be fined not more than twenty thousand dollars and shall be imprisoned with hard labor for not less than five years nor more than twenty years without benefit of parole, probation, or suspension of sentence.

204 Id.
205 Hill v. City of Houston, 789 F.2d 1103, 1113 (5th Cir.1986) (holding that a statute that made it unlawful to “in any manner oppose, molest, abuse or interrupt” a police officer in the execution of his duty was unconstitutionally overbroad).
206 Doe v. Jindal, 853 F. Supp. 2d at 605 (the court also found the Act to be unconstitutionally vague).
Nebraska law which, for all its similarities with the Indiana law, could have been the product of bi-state cooperation. Judge Kopf remarked in the opening of the opinion that if the people of Nebraska want to go to hell it is his job to get them there; however, he chided, they must get there constitutionally and Nebraska’s sex offender legislation “violently swerved from that path.”

The Nebraska statutes at issue in Doe v. Nebraska criminalized certain use of social networking sites by sex offenders, required them to provide all identifiable internet information, such as email addresses, passwords, blogs, screen-names, etc., and required them to consent to searches of their computers and electronic devices by law enforcement. The court held that the statute that banned access to social networking sites was not narrowly tailored and did not leave open ample alternative channels. Instead, the court said that the legislation went too far and covered too much, admonishing lawmakers to “use a scalpel rather than a blunderbuss” in crafting laws. The really shocking ruling, however, was yet to come.

The court found that the intent of the legislature in passing these statutes was to punish sex offenders rather than to protect the public, and that the bill’s sponsor had acted out of “rage” and “revulsion.” Accordingly, the court held that the statutes were unconstitutional because they violated the state and federal prohibitions of ex post facto laws. The court, noticeably troubled, stated:

208 Id. (“The age of the triggering conviction does not matter. The fact that the offender has a clear record since the conviction does not matter. The fact that the offender is not under court supervision does not matter. The fact that the offender legitimately needs access to the banned sites to make his or her living does not matter. The fact that the offender legitimately needs access to the banned sites to obtain news that probably cannot be obtained in another way does not matter. The fact that the offender legitimately needs access to the banned sites to check on the health and well being of his children while they are in a distant hospital does not matter. The fact that the offender did not use any of the banned sites to commit his or her crime does not matter.”).
209 Id. at 20.
210 See id. at 4.
These statutes retroactively render sex offenders, who were sentenced prior to the effective date of these statutes, second-class citizens. They are silenced. They are rendered insecure in their homes. They are denied the rudiments of fair notice. In Nebraska’s “rage” and “revulsion,” they are stripped of fundamental constitutional rights. In short, sex offenders who were sentenced prior to the enactment of these laws are punished.\textsuperscript{211}

This language goes beyond where the Seventh Circuit or any other court has gone, actively accusing the state of acting improperly in enacting such laws. Unlike previous courts, the court refused to uphold sex offender legislation on possibility and tradition alone.

State courts have also begun to reject sex offender legislation as unconstitutional on both state and federal grounds.\textsuperscript{212} For instance, four state supreme courts recently held that sex offender legislation violated the respective state constitutional prohibitions against ex post facto laws.\textsuperscript{213} However, \textit{Doe}, as the first big federal appellate decision,\textsuperscript{214} stands at the forefront of the recent decisions that have confirmed that sex offenders are still deserving of constitutional rights despite their previous actions, and that legislatures cannot create statutes without some justification for doing so. The next section examines what the Doe ruling means for the future of sex offender legislation and litigation.

\begin{footnotesize}
\textsuperscript{211} \textit{Id. at 34.}
\textsuperscript{212} \textit{See Doe v. State, 189 P.3d 999 (Alaska 2008); Wallace v. State, 905 N.E.2d 371 (Ind. 2009); Maine v. Letalien, 985 A.2d 4 (Me. 2009); State v. Williams, 952 N.E.2d 1108 (Ohio 2011).}
\textsuperscript{213} Doe v. State, 189 P.3d at 999; Wallace v. State, 905 N.E.2d at 371; Maine v. Letalien, 985 A.2d at 4; State v. Williams, 952 N.E.2d at 1108.
\textsuperscript{214} Just three days before the Seventh Circuit’s decision, the Tenth Circuit struck down an Albuquerque law prohibiting registered sex offenders from accessing public libraries. However, rather than a meaningful ruling, the decision was likely due to an error on the part of the City’s attorneys who thought they had no burden in the case. \textit{See Doe v. City of Albuquerque, 667 F.3d 1111, 1115 (10th Cir. 2012).}
\end{footnotesize}
D. Moving Forward

After Doe, it is clear that where First Amendment rights are implicated, state sex offender laws do not pass constitutional muster just because the state claims an interest in protecting children.\textsuperscript{215} Furthermore, Doe suggests certain existing laws may be vulnerable to challenge. For instance, the Illinois “Santa Clause statute” states as follows:

\begin{quote}
(c-2) It is unlawful for a child sex offender to participate in a holiday event involving children under 18 years of age, including but not limited to distributing candy or other items to children on Halloween, wearing a Santa Claus costume on or preceding Christmas, being employed as a department store Santa Claus, or wearing an Easter Bunny costume on or preceding Easter. For the purposes of this subsection, child sex offender has the meaning as defined in this Section, but does not include as a sex offense under paragraph (2) of subsection (d) of this Section, the offense under subsection (c) of Section 11-1.50 of this Code. This subsection does not apply to a child sex offender who is a parent or guardian of children under 18 years of age that are present in the home and other non-familial minors are not present.\textsuperscript{216}
\end{quote}

The Santa Claus statute restricts expressive conduct protected by the First Amendment because non-verbal communication is protected by the First Amendment, especially where “[a]n intent to convey a particularized message [is] present” and “the likelihood [is] great that the message would be understood by those who viewed it.”\textsuperscript{217} The statute prevents offenders from being employed as mall Santas, which it is hard to find fault with. However, it would also prevent an offender from performing in a play or comedic holiday performance

\textsuperscript{215} See Doe v. Prosecutor, Marion Cnty., Ind., 705 F.3d 694, 695 (7th Cir. 2013).
\textsuperscript{216} 720 ILCS § 5/11-9.3 (2013).
that involved dressing like one of these characters. Furthermore, and more worrisome, the law also prevents a child sex offender from participating in a holiday event involving children under the age of 18.” This provision could potentially prohibit substantial expression. For instance, it would arguably prevent offenders from participating in church activities, such as Christmas or Hanukkah services, attending an Earth Day or Labor Day rally, taking part in a New Year’s Eve celebration, or a Thanksgiving dinner. Even putting aside any void for vagueness arguments, this statute is on shaky ground. Although the Santa Claus statute, unlike the Indiana law, limits its application only to sex offenders who committed offenses involving minors, given the massive potential limitation on expression and the lack of evidence that it would be successful, a strong argument could be made that it is not narrowly tailored to serve a compelling governmental interest. Like many sex offender laws, the Santa Clause statute is based upon myth and fear rather than empirical evidence or rational debate.

Thus, just as the state in Doe failed to show any evidence that individuals covered by the law posed the specific risk sought to be alleviated, Illinois would likely be unable to show a legitimate risk of offenses on the dates, times, or places covered by the law.

Relatedly, laws forbidding sex offenders from public libraries are becoming increasingly popular. Although a library ban was very

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218 A “holiday event” is not clearly defined in the statute and could be unconstitutional on that ground alone. See United States v. Harriss, 347 U.S. 612, 617 (1954) (“The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute.”).

219 See M. Benjamin Snodgrass, The Specter of Sex Offenders on Halloween: Unmasking Cultural, Constitutional, and Criminological Concerns, 71 OHIO ST. L.J. 417, 419 (2010) (despite a desire to restrict what sex offenders can do, research has uncovered only one incident of a person who victimized a child during the course of trick-or-treating.).

220 See Jennifer Ekbaw, Not in My Library: An Examination of State and Local Bans of Sex Offenders from Public Libraries, 44 IND. L. REV. 919 (2011) (“... political leaders in Albuquerque, New Mexico, New Bedford, Massachusetts, Quincy, Massachusetts, Methuen, Massachusetts, Stephenville, Texas, Rowan County, North Carolina, and the State of Iowa have attempted to protect children by prohibiting sex offenders from entering public libraries.”).
recently struck down as unconstitutional by the Tenth Circuit, the court strongly hinted that its decision was based on the state’s error to appreciate its burden, and that a future statute could easily pass muster.\footnote{See Doe v. City of Albuquerque, 667 F.3d 1111, 1115 (10th Cir. 2012) (“Complicating our inquiry is the fact that the City, relying on a mistaken interpretation of case law regarding facial challenges, erroneously contended that it had no burden to do anything in response to Doe’s summary judgment motion. Consequently, the City failed to present any evidence as to the reasons or justification for its ban, whether the ban was narrowly tailored to address the interest sought to be served, or whether the ban left open alternative channels for receiving information. Had the City done so, it is not difficult to imagine that the ban might have survived Doe’s challenge, for we recognize the City’s significant interest in providing a safe environment for its library patrons, especially children.”).} Thus, it is not yet clear how courts will react to challenges to such statutes when actually defended by the state.\footnote{See id.} However, based on Doe, there is a strong argument that this type of statute is unconstitutional. The First Amendment includes not just a right to speak but also to receive information.\footnote{See Stanley v. Georgia, 394 U.S. 557, 564 (1969).} Therefore, the library bans should receive the same intermediate review as the Indiana statute in Doe. Under this intermediate review, most such statutes would clearly fail unless they targeted only those offenders who the state had reason to believe were at a high risk of recidivism. Furthermore, a state would have to show a real risk rather than “simply posit the existence of the disease sought to be cured,” which may be hard considering the relative rarity of attacks on children by strangers and the fact that the number of such attacks that have taken place likely number in the single digits in the entire United States. Doe would be a persuasive case to sight in a challenge to any such statute.

The Seventh Circuit indicated in Doe that a constitutional reworking of Indiana’s law was possible. However, for a new law to be constitutional, Indiana “must do more than simply posit the existence of the disease sought to be cured,” and “the regulation

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\footnote{See Doe v. City of Albuquerque, 667 F.3d 1111, 1115 (10th Cir. 2012) (“Complicating our inquiry is the fact that the City, relying on a mistaken interpretation of case law regarding facial challenges, erroneously contended that it had no burden to do anything in response to Doe’s summary judgment motion. Consequently, the City failed to present any evidence as to the reasons or justification for its ban, whether the ban was narrowly tailored to address the interest sought to be served, or whether the ban left open alternative channels for receiving information. Had the City done so, it is not difficult to imagine that the ban might have survived Doe’s challenge, for we recognize the City’s significant interest in providing a safe environment for its library patrons, especially children.”).}

\footnote{See id.}

\footnote{See Stanley v. Georgia, 394 U.S. 557, 564 (1969).}
[must] in fact alleviate those harms in a direct and immediate way."\textsuperscript{224} The next section discusses what future laws might look like.

\textbf{E. Indiana Legislators Respond to the Seventh Circuit’s Ruling}

The \textit{Doe} decision had scarcely been published when Hoosier legislators began scrambling to enact a constitutional version of the recently rejected law.\textsuperscript{225} The bill, which is currently pending, limits applicability of the act to those sex offenders convicted of either class A felony child molestation or child solicitation.\textsuperscript{226} In addition, the Act makes direct solicitation of a minor via social networking sites a crime.\textsuperscript{227} Although the second provision is likely constitutional,\textsuperscript{228} the legislators’ effort to render constitutional the first provision is insufficient. Indiana must “present some evidence, beyond conclusory assertions,” in order to justify legislation limiting access to social networking sites.\textsuperscript{229} The revised Indiana bill, although certainly narrower than its predecessor, will fail for some of the same reasons that the initial attempt did, particularly that there is little to no evidence to show that this regulation would actually make Hoosier children safer.\textsuperscript{230} State senators Jim Merrit and John Wasserman merely amended the previous statute to apply to a slightly narrower group of offenders.\textsuperscript{231} However, studies have shown that not only are sex offenses much more likely to be committed by a person already

\textsuperscript{224} See \textit{Doe v. Prosecutor, Marion Cnty., Ind.}, 705 F.3d 694, 701 (7th Cir. 2013).
\textsuperscript{226} See \textit{id.}
\textsuperscript{227} \textit{Id.}
\textsuperscript{228} It does; however, appear to be a mere backdoor way of increasing potential prison terms as the court mentioned in its decision. See \textit{Doe v. Prosecutor, Marion Cnty., Ind.}, 705 F.3d 694, 701 (7th Cir. 2013).
\textsuperscript{229} See \textit{Doe v. Prosecutor, Marion Cnty., Ind.}, 705 F.3d at 702.
\textsuperscript{231} See \textit{id.}
known to the victim, but that when sex offenders do meet their “victims” over the internet they are almost always between the ages of 13 and 17 and the sex is consensual.\textsuperscript{232} Thus, if sex offenders grooming child victims over the internet is not the problem legislators and the media make it out to be, then Indiana’s law will have to be even narrower to justify such a substantial abridgement of First Amendment rights. The Seventh Circuit suggested that a similar law that applies only to those “individuals whose presence on social media impels them to solicit children” would be constitutional.\textsuperscript{233} For instance, if the law prohibited only those registered sex offenders whose triggering offense involved minors and the Internet, it would likely be constitutional.\textsuperscript{234} That is not what the senators have proposed.\textsuperscript{235} Another solution for Indiana would be to hold individualized hearings on individuals deemed likely to pose a high risk of online recidivism.\textsuperscript{236} Unfortunately, Indiana’s revised statute would likely fail a constitutional challenge because its proponents are relying on the same reactionary political motivations that have created most of our modern sex offender laws, rather than attempting a serious examination of the issues.

In the coming years, there is no doubt that legislatures, like Indiana’s, will target sex offenders’ online activities. Furthermore, some of these laws will pass constitutional muster. In crafting new laws, legislatures should take the following approach: (1) determine

\textsuperscript{232} See Janis Wolak et al., Online “Predators” and their Victims: Myths Realities and Implications for Prevention and Treatment, \# American Psychologist 63, 111-128 (2008), available at http://www.unh.edu/ccrc/pdf/Am%20Psy%202-08.pdf ("Many of the media stories and much of the Internet crime prevention information available suggest that it is naïve and inexperienced young children who are vulnerable to online child molesters (e.g., Blustein, 2007; Boss, 2007; Crimaldi, 2007; Manolatos, 2007). However, 99\% of victims of Internet-initiated sex crimes in the N-JOV Study were ages 13 to 17 (M = 14.46, SD = .14), and none were younger than 12 (Wolak, et al., 2004)").

\textsuperscript{233} Doe v. Prosecutor, Marion Cnty., Ind., 705 F.3d 694, 702 (7th Cir. 2013).

\textsuperscript{234} See id.

\textsuperscript{235} Press Release, supra note 231.

\textsuperscript{236} See id. (discussing a Kansas civil commitment law that provided individualized assessments for offenders).
the exact evil that needs preventing; (2) hold hearings on how to best target that evil emphasizing empirical data and serious discussion and discouraging invective; and (3) craft a law based on the hearings that targets the exact evil. If these steps are followed, not only will the outcome likely be constitutional, but it also will be much more likely to actually protect children and, in general, to keep society safer.

CONCLUSION

*Doe*, along with its brethren, may not signal a sea change in the courts’ approach to constitutional challenges to sex offender legislation, but there is an undeniable shift in the courts towards more sensible review of sex offender legislation, an area where irrational legislation has historically been upheld almost without question. While the First Amendment is not as clearly implicated in the majority of sex offender regulation as it was in *Doe*, First Amendment analysis can reasonably be argued to apply to some existing regulations, such as those prohibiting sex offenders from public libraries. Additionally, because much of modern sex offender legislation is crafted based on gut reaction rather than serious study, some statutes may well fail even rational basis review in the future. As studies increasingly show the inefficiency of current laws and break down the misconceptions surrounding sex offenders, there may be cause to revisit challenges to existing legislation.

Additionally, legislatures should take heed of both the courts’ recent skepticism and the emergence of new data exposing the misconceptions surrounding sex offenders, and they should use these tools as motivation to craft better laws. If a safe society is the goal, states should focus on enacting laws that actually prevent recidivism and educate society on real risks, rather than creating laws based on emotion, tradition and politics. *Doe* is a victory not only for the plaintiff in the case, but also for society, as it means that constitutional rights still exist even for the least popular members of society. While

Doe probably does not mean that sex offenders have found a friend in the courts, they may have one fewer enemy.