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TRY AS THEY MIGHT, JUST CAN'T GET IT RIGHT: SHORTCOMINGS OF THE INTERNATIONAL MEGAN'S LAW OF 2010

INTRODUCTION

Phillip Alpert and his girlfriend were high school sweethearts.¹ Late one night, shortly after Alpert's eighteenth birthday, the young couple got into an argument and broke up.² Tired and angry, Alpert sent a naked photo of his girlfriend, then sixteen, to dozens of her friends and family members.³ She had previously taken the photo herself and sent it to him.⁴ Alpert was later arrested and charged with sending child pornography.⁵ He was convicted, sentenced to a five-year probation, and required to register as a sex offender in the state of Florida.⁶ After his conviction Alpert said,

You will find me on the registered sex offender list next to people who have raped children [and] molested kids . . . because I sent child pornography. You think child pornography, you think 6-year-old, 3-year-old little kids who can't think for themselves, who are taken advantage of. That really wasn't the case [here].⁷

Alpert will remain a registered sex offender until he is forty-three.⁸

Alpert's story serves as a troubling reminder of the ways in which current sex offender laws are flawed, but also provides a real-world example of why proposed legislation such as House Bill 5138—the International Megan's Law of 2010—and its anticipated successors, should not become law. Such legislation has the potential to open the door to new and unintended consequences for people like Phillip Alpert. International Megan's Law of

¹ Deborah Feyerick & Sheila Steffen, '*Sexting*' Lands Teen on Sex Offender List, CNN, <http://www.cnn.com/2009/CRIME/04/07/sexting.busts/index.html>? (last updated Apr. 8, 2009, 10:50 AM).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* In Florida, and many other states, a person who is convicted of a crime against children must automatically register as a sex offender. *Id.*; FLA. STAT. § 943.0435 (2011).

⁷ Feyerick & Steffen, *supra* note 1.

⁸ *Id.*

2010, sponsored by New Jersey Representative Chris Smith,⁹ was drafted to “protect children from sexual exploitation by preventing or monitoring the international travel of sex traffickers and other sex offenders who pose a high risk of committing a sex offense against a minor in a country to which the sex offender intends to travel.”¹⁰ The bill proposed to protect minors by

(1) establishing a system in the United States to notify the appropriate officials of other countries when a sex offender who is identified as a high interest¹¹ registered sex offender intends to travel to their country; (2) strongly encouraging and assisting foreign governments to establish a sex offender travel notification system and to inform United States authorities when a sex offender intends to travel or has departed on travel to the United States; (3) establishing and maintaining non-public sex offender registries in United States diplomatic and consular missions in order to maintain critical data on United States citizen and lawful permanent resident sex offenders who are residing abroad; . . . [and (4)] providing assistance to foreign countries . . . to establish systems to identify sex offenders and provide and receive notification of child sex offender international travel.¹²

Section 3(9) defined a sex offense by listing those crimes encompassed under the bill.¹³ Included in this list was “possession, production, or distribution of child pornography,” making the bill directly applicable to Alpert.¹⁴ Under such a rule, if Alpert decides to spend a college semester studying abroad in London, he would need to report his travel plans to the Florida authorities no later than thirty days before the date of travel.¹⁵ A failure to report could result in Alpert’s imprisonment for up to ten years.¹⁶ If Alpert were identified as a high interest offender, his personal information would be

⁹ *H.R. 5138: International Megan’s Law of 2010*, GOVTRACK.US, <http://www.govtrack.us/congress/bill.xpd?bill=h111-5138> (last visited Oct. 3, 2011).

¹⁰ H.R. REP. NO. 111-568, pt. 1, at 10 (2010).

¹¹ The bill defines a high-interest sex offender as one who “presents a high risk of committing a sex offense against a minor in a country to which [he or she] intends to travel.” *International Megan’s Law of 2010*, H.R. 5138, 111th Cong. § 3(4) (2010). This determination is to be made by the International Sex Offender Travel Center based on the totality of the circumstances. *Id.*

¹² *Id.* § 2(b).

¹³ *Id.* § 3(9)(A).

¹⁴ *See id.* § 3(9)(A)(v).

¹⁵ *Id.* § 4(a)(1).

¹⁶ *Id.* § 4(d).

provided to the appropriate officials in England and would also be added to the sex offender registry kept by the U.S. embassy in London.¹⁷

The bill generally excluded offenders who were adjudicated as juvenile delinquents.¹⁸ However, it included minors convicted as adults for the offense, as long as that offense took place after the offender turned fourteen and the conduct was “comparable to or more severe than aggravated sexual abuse.”¹⁹ While juvenile sex offending is certainly a serious problem, subjecting juveniles to the same registration requirements as adults creates an unnecessary stigma and contradicts research findings that suggest juveniles are particularly susceptible to rehabilitation.²⁰ Studies have shown that juvenile recidivism rates are low.²¹ For example, the results of one study indicated that only four percent of youth arrested for a sex crime ever reoffend.²² Furthermore, research has confirmed that less than ten percent of adult sex offenders committed sex offenses in their youth; thus, a majority of adult offenders were not previously sex offenders as juveniles.²³ A law that incorrectly encompasses juvenile offenders will have no deterrent effect on the ninety percent of adult sex offenders who did not offend as juveniles.

As it was drafted, International Megan’s Law of 2010 posed numerous problems. Without significant changes, any future legislation will be similarly flawed. The 2010 bill met resistance from the American Civil Liberties Union (“ACLU”) on the grounds that “it would be wrong to impose new restrictions on people who [have already] served their sentences.”²⁴ The ACLU’s chief legislative and policy counsel, Michael Macleod-Ball, stressed that for such a law to be successful, there is a need for countries to work together to ensure

¹⁷ See *id.* § 5(a).

¹⁸ *Id.* § 3(3)(A). Juvenile delinquents are “minor[s] who [are] guilty of criminal behavior.” BLACK’S LAW DICTIONARY 946 (9th ed. 2009).

¹⁹ H.R. 5138 § 3(3)(B). Aggravated sexual abuse includes crossing a state line with the intent to engage in sexual activity with a child under the age of twelve, or using force to engage in a sexual act with a minor between the ages of twelve and fifteen, who is at least four years younger than the offender. 18 U.S.C § 2241 (2006).

²⁰ Richard G. Wright, *Introduction to SEX OFFENDER LAWS: FAILED POLICIES, NEW DIRECTIONS 7* (Richard G. Wright ed., 2007).

²¹ HUMAN RIGHTS WATCH, NO EASY ANSWERS: SEX OFFENDER LAWS IN THE US 69 (2007), available at <http://www.hr.org/sites/default/files/reports/US/0907webwcover.pdf>.

²² *Id.*

²³ *Id.* at 69–70.

²⁴ Rob Hotakainen, *Sex Offender Law Could Go Global with California Lawmaker’s Bill*, MCCLATCHY WASH. BUREAU (Feb. 12, 2010, 7:25 PM), <http://www.mcclatchydc.com/2010/02/12/84447/sex-offender-law-could-go-global.html>.

consistency in their registries, particularly because local sex offender laws vary across the international community.²⁵ For example, a 2007 survey conducted by the Committee on Legal Affairs and Human Rights of the Parliamentary Council of the Council of Europe indicated that different international states have different criminal law systems and different definitions of terms like “sexual offense” or “sex offender.”²⁶ The bill’s optimistic suggestion that foreign countries notify the United States when a sex offender intends to enter the country was problematic for any nation that does not currently have a sex offender registry. In Italy, for example, there is no national sex offender registry. Instead, the country attempts to protect children by performing criminal record checks on teachers applying for new jobs.²⁷ While the notification idea is well intentioned, in practice it may be unrealistic to expect a country without an existing list of convicted sex offenders to be able or willing to perform criminal background checks on all citizens who intend to travel to the United States. Macleod-Ball has also cautioned against the dangers of inaccuracy with a large database and the lasting repercussions for someone who may be included on an international registry by mistake.²⁸

Additionally, Section 5(h) of the bill stated that registry information maintained by the embassies should not be made available to the general public.²⁹ However, it already included an exception that would allow entities that provide services to minors, investigative entities looking into a possible sex offense, or law enforcement personnel to request this information.³⁰ If a bill like International Megan’s Law of 2010 is enacted, an amendment that allows for general public notification could plausibly be in its future. Great Britain did this when, after years of parliamentary resistance to the inclusion of a public notification provision, it launched pilot registration and notification schemes to increase the amount of publicly available information on child sex offenders by permitting wary parents to request information from the local

²⁵ *Id.*

²⁶ Eur. Parl. Ass., *Reinforcing Measures Against Sex Offenders*, Doc. No. 12243, at 12 (2010) [hereinafter *Reinforcing Measures Against Sex Offenders*], available at <http://assembly.coe.int/Documents/WorkingDocs/Doc10/EDOC12243.pdf>.

²⁷ Matt Davis, Christian Fraser & Caroline Wyatt, *Global Measures Against Sex Offenders*, BBC NEWS (Jan. 19, 2006), http://news.bbc.co.uk/2/hi/uk_news/politics/4627232.stm.

²⁸ Hotakainen, *supra* note 24.

²⁹ H.R. 5138, 111th Cong. § 5(h)(1) (2010).

³⁰ *Id.* § 5(h)(2).

police.³¹ Furthermore, the United States already allows unrestrained public access to its sex offender registries.³²

A bill that relies on worldwide cooperation and notification to identify traveling sex offenders may be destined to fail when a proposed smaller-scale European sex offender registry has not received widespread support. On May 4, 2010, the Parliamentary Assembly of the Council of Europe (“PACE”)³³ advised against the creation of a Europe-wide sex offender registry.³⁴ Although PACE lacks the authority to issue binding opinions, the texts it adopts serve as guidelines for national governments and influence legislation.³⁵ In its report, PACE cited the practical impediments that come with diverging criminal laws among states as the most obvious obstacle to such a registry.³⁶ Alternatively, it called on European states to take preventive measures against sexual offenses and, instead of the proposed Europe-wide registry, suggested that each state develop and perfect its own national system to manage sex offenders, noting that these systems should include nonpublic sex offender registries.³⁷ The report encouraged information sharing on sex offenders among countries to prevent convicted offenders from working with children across Europe.³⁸ Because the problem of diverse, global sex offender laws would only be amplified with the creation of an international registry system, it is unlikely that PACE would support International Megan’s Law of 2010 or any similar bill.

International Megan’s Law of 2010 passed in the House of Representatives and then moved to the Senate for consideration.³⁹ With the beginning of the 112th Congress in 2011, House Bill 5138 did not become law.⁴⁰ However, Representative Smith has introduced a version of the International Megan’s

³¹ *Reinforcing Measures Against Sex Offenders*, *supra* note 26, at 9.

³² *See* Davis, Fraser & Wyatt, *supra* note 27.

³³ PACE, composed of 318 representatives from the national parliaments of each of its forty-seven member states, meets four times a year to discuss current issues and “ask European governments to take initiatives and report back.” *PACE: Parliamentary Assembly of the Council of Europe*, PACE NEWS, at 2, available at <http://assembly.coe.int/Communication/Brochure/Bro01-e.pdf>.

³⁴ *Reinforcing Measures Against Sex Offenders*, *supra* note 26, at 14.

³⁵ *PACE: Parliamentary Assembly of the Council of Europe*, *supra* note 33.

³⁶ *Reinforcing Measures Against Sex Offenders*, *supra* note 26, at 14.

³⁷ *Id.* at 14–15.

³⁸ *Id.* at 15.

³⁹ *H.R. 5138: International Megan’s Law of 2010*, *supra* note 9.

⁴⁰ *Id.*

Law for three consecutive years.⁴¹ Each time the new bill features minute changes yet gains more ground and popularity than its predecessor. Unlike the past bills, neither of which were ever voted upon, House Bill 5138 passed in the House but was never put to a vote in the Senate.⁴² Regardless, the motivation behind the initial creation of an International Megan's Law, to protect children from unknown sex predators traveling abroad, continues to exist. Furthermore, "[m]embers often reintroduce bills that did not come up for debate under a new number in the next session,"⁴³ and Representative Smith now has the support of one house of Congress. Thus, this Comment assumes that Representative Smith will continue his efforts to enact international sex offender legislation through renewed versions of the International Megan's Law. Because of House Bill 5138's flaws, it is important to stop a similarly drafted bill from passing in both houses and ultimately becoming law.

This Comment argues that future legislation closely resembling House Bill 5138, the International Megan's Law of 2010, should not become law. Further, this Comment encourages future drafts of such a law to account for the inherent weaknesses of House Bill 5138. In Part I, this Comment explores the creation of the sex offender registry through a review of the history of sex offenses in the United States. In its most current form, the disclosure scheme of the International Megan's Law bears resemblance to Great Britain's recently enacted Sarah's Law. Thus, Part I also explores sex offender laws of Great Britain. It discusses why the House of Representatives sought to expand this concept internationally, beginning with previously failed attempts at passing an International Megan's Law and culminating in the House of Representatives' vote in favor of House Bill 5138. In Part II, this Comment presents the substance of the International Megan's Law of 2010. Part III critically analyzes House Bill 5138 and the existing registration and notification laws in both the United States and the United Kingdom. These current laws potentially indicate that House Bill 5138 would not have yielded its anticipated results. This Part also discusses the ways in which a registered sex offender, such as Phillip Alpert, could be affected by this law through an examination of differing sex offender laws in various foreign countries. Finally, Part IV proposes two alternative solutions for Congress to consider in light of the problems discussed: Congress should either change the language in its next attempt or

⁴¹ See H.R. 5138, 111th Cong. (2010); International Megan's Law of 2009, H.R. 1623, 111th Cong. (2009); International Megan's Law of 2008, H.R. 5722, 110th Cong. (2008).

⁴² H.R. 5138: *International Megan's Law of 2010*, *supra* note 9.

⁴³ *Id.*

decline to pass any law until it can analyze the successes and failures of the British Parliament's similarly drafted Sarah's Law.

I. BACKGROUND

A. *Development of Sex Offender Laws in the United States*

At the beginning of the twentieth century, well-known groups, such as the Women's Christian Temperance Union, became concerned with the sexual environment facing young women new to the workforce.⁴⁴ The union began to lobby for an increase in the age of consent, citing the growing number of sexual attacks against women and claiming that older men were seducing young girls in the workplace.⁴⁵ By making it a crime to engage in sexual activity before a certain age, they hoped this increase in the age of consent would help control young women's moral attitudes regarding sex.⁴⁶ By 1920, all states had raised the age of sexual consent from sixteen to eighteen.⁴⁷ Contemporaneously, fear of "sex fiends and perverts preying on children" spread, leading to a rise in research on dangerous sexual behavior.⁴⁸ Both psychological and criminological research provided medical explanations for the deviant behavior and attributed it to imperfect genetics.⁴⁹ As a result, most states had policies in place that permitted the sterilization of criminals "deemed genetically unfit for procreation."⁵⁰ It was not until 1942 that the Supreme Court held this practice to be unconstitutional.⁵¹

Stringent policies regarding sex offenders, largely motivated by emotionally charged cases of sexual abuse against children, emerged in the 1930s.⁵² At this time, sex offenses were considered mental health problems "best dealt with through criminal sexual psychopath laws that were based on the notion that sex offenders are driven by uncontrollable impulses that can be

⁴⁴ Karen J. Terry & Alissa R. Ackerman, *A Brief History of Major Sex Offender Laws*, in *SEX OFFENDER LAWS: FAILED POLICIES, NEW DIRECTIONS*, *supra* note 20, at 67.

⁴⁵ *Id.*

⁴⁶ *See id.*

⁴⁷ *Id.*

⁴⁸ *Id.* (internal quotation marks omitted).

⁴⁹ *Id.* at 67–68.

⁵⁰ *Id.* at 68.

⁵¹ *Id.*; *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

⁵² Terry & Ackerman, *supra* note 44, at 68.

stopped only by permanent incarceration and medical treatment.”⁵³ Because these crimes were viewed as psychological, states soon implemented procedures to indefinitely commit habitual sex offenders into mental health institutions rather than incarcerate them.⁵⁴ This practice flourished and continued with little consistency among states for over a decade.⁵⁵ Opposition to civil commitment grew by the late 1940s as researchers posited that existing statutes were based on both flawed and incomplete views of sex offenders.⁵⁶ In 1950, P.W. Tappan published a report on the problems with sexual psychopath laws, listing ten myths about sex offenders.⁵⁷ These myths included the belief that all sex offenders were “homicidal, stranger sex fiends” and that dangerousness could be predicted.⁵⁸ During the 1970s and 1980s, both research and legislation shifted focus away from medical solutions for sexually deviant behavior toward social explanations.⁵⁹ Emerging sociological and criminological theories considered sexual offenses to be a phenomenon rooted in society.⁶⁰

The late 1990s and early 2000s were accompanied by a renewed interest in austere legislation enacted in response to heinous cases of sexual offenses against children.⁶¹ In 1990, “Washington became the first state to pass comprehensive laws regulating the management, supervision, and commitment of sex offenders.”⁶² The laws were a result of the gruesome acts of Westley Allan Dodd, who sexually molested and murdered three boys, and Earl Shriner, who kidnapped a seven-year-old boy, “sexually assaulted him, and cut off his penis.”⁶³ Neither man expressed remorse for his actions and Dodd publicly stated that he would reoffend if given the chance.⁶⁴ Nevertheless, the state would have lacked the authority to keep the men incarcerated beyond their sentences and would have had no means of monitoring their whereabouts

⁵³ LAURA J. ZILNEY & LISA ANNE ZILNEY, *PERVERTS AND PREDATORS: THE MAKING OF SEXUAL OFFENDING LAWS* 12 (2009).

⁵⁴ Terry & Ackerman, *supra* note 44, at 68.

⁵⁵ *Id.* at 69.

⁵⁶ *Id.* at 70. Multiple psychiatric and mental health organizations joined the campaign against civil commitment laws, and, in 1990, such laws remained in only thirteen states. *Id.* at 72.

⁵⁷ *Id.* at 70–72.

⁵⁸ *See id.* at 71. Additional fallacies included: sex offenders were “over-sexed” individuals, sex offenders have a high recidivism rate, and sex offenders often escalate their behavior. *Id.*

⁵⁹ *Id.* at 72.

⁶⁰ ZILNEY & ZILNEY, *supra* note 53, at 51.

⁶¹ Terry & Ackerman, *supra* note 44, at 74; ZILNEY & ZILNEY, *supra* note 53, at 51.

⁶² Terry & Ackerman, *supra* note 44, at 74.

⁶³ *Id.*

⁶⁴ *Id.*

upon their release.⁶⁵ Aware of the inherent danger of releasing men like Dodd and Shriner, Washington passed the Community Protection Act of 1990, which contained fourteen sections relating to the punishment and supervision of sex offenders.⁶⁶ Many of its provisions, including the registration and community notification requirements, were ultimately enacted in other states and on the federal level.⁶⁷ The Community Protection Act served as the catalyst for the creation of “memorial laws,” typically named after child victims of sexual abuse.⁶⁸

From 1994 to 2006, “Congress passed four separate acts pertaining to the registration and community notification of sexual offenders, each building on the establishments of the prior one.”⁶⁹ In 1996, Congress passed Megan’s Law as a way to encourage states to protect local children by identifying convicted sex offenders and providing the necessary means to monitor their activities.⁷⁰ The law was a federal version of New Jersey’s identically titled Megan’s Law, named after seven-year-old Megan Kanka, who was raped and killed by a pedophile living across the street from her home, unbeknownst to her or her family.⁷¹ The federal Megan’s Law modified and became a subsection of the existing Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Law (“The Wetterling Act”).⁷² The Wetterling Act was the first federal legislation requiring states to create a registry for individuals convicted of sexual offenses against children.⁷³ Together the two acts were known as Registration and Community Notification Laws.⁷⁴ They required that all states implement registration and community notification laws by the end of 1997 or risk losing federal funding for both state and local law enforcement.⁷⁵ With the federal Megan’s Law came the transition from passive registration of sex offenders to active notification of the public that a convicted sex offender

⁶⁵ *Id.*

⁶⁶ *Id.* at 76.

⁶⁷ *Id.* at 74–75.

⁶⁸ *Id.* at 75.

⁶⁹ FRANK C. DICATALDO, *THE PERVERSION OF YOUTH* 207 (2009).

⁷⁰ H.R. 5138, 111th Cong. § 2(a) (2010).

⁷¹ Terry & Ackerman, *supra* note 44, at 79–80.

⁷² The Wetterling Act was passed in 1994 as part of the Federal Violent Crime Control and Law Enforcement Act of 1994. It required each state to create a registry for offenders who committed certain offenses against children. If states failed to comply, they were required to forfeit ten percent of federal funds from the Omnibus Crime Control and Safe Streets Act of 1968. *Id.* at 79.

⁷³ DICATALDO, *supra* note 69, at 205.

⁷⁴ Terry & Ackerman, *supra* note 44, at 80.

⁷⁵ *Id.*

is living within their community.⁷⁶ The Pam Lychner Sexual Offender Tracking and Identification Act, passed in 1996, required the FBI to develop a national database of sex offenders who had been released from prison.⁷⁷ This act expanded the monitoring of sex offenders beyond the state level by linking individual state registries into an unprecedented national registry.⁷⁸

The most recent congressional action on community notification of sex offenders took place in 2006 when President George W. Bush signed the Adam Walsh Child Protection and Safety Act (“Adam Walsh Act”), which “greatly expanded federal sex offender policies by enhancing penalties for those who sexually exploit children, expanding Internet investigations and prosecution for child pornography, and most importantly adding a central compilation of all state sex offender registries into one . . . national sex offender registry [with uniform requirements].”⁷⁹ Title I of the controversial Adam Walsh Act is the Sex Offender Registration and Notification Act, which establishes federal standards for both registration and community notification of sex offenders.⁸⁰ In contrast, the federal Megan’s Law allows for state-by-state discretion as to what information should be collected, how often the registration must be updated, and whether or how to enforce community notification.⁸¹ The Adam Walsh Act mandates that all states “substantially comply” with its provisions within three years of the date of enactment or the states risk losing ten percent of federal JAG funding.⁸² Since its enactment, the Adam Walsh Act has been

⁷⁶ DiCataldo, *supra* note 69, at 206.

⁷⁷ *Id.*; 42 U.S.C. § 16901 (2006).

⁷⁸ DiCataldo, *supra* note 69, at 206.

⁷⁹ Lisa L. Sample & Mary K. Evans, *Sex Offender Registration and Community Notification*, in *SEX OFFENDER LAWS: FAILED POLICIES, NEW DIRECTIONS*, *supra* note 20, at 216.

⁸⁰ *Id.* at 218; Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (2006) (codified in 42 U.S.C. § 16911 & 18 U.S.C. §§ 2241–2248).

⁸¹ See Tatiana Morales, *Why Megan’s Law Is Getting an F*, CBS NEWS (May 11, 2005), http://www.cbsnews.com/stories/2005/05/11/earlyshow/living/main694413_page2.shtml.

⁸² Brittany Enniss, Note, *Quickly Assuaging Public Fear: How the Well-Intended Adam Walsh Act Led to Unintended Consequences*, 2008 UTAH L. REV. 697, 705–06 (citing 18 U.S.C. § 16924(a) (2006)). The Federal JAG program is defined by the Bureau of Justice Assistance:

The JAG Program, administered by the Bureau of Justice Assistance . . . is the leading source of federal justice funding to state and local jurisdictions. The JAG Program provides states . . . and local governments with critical funding necessary to support a range of program areas including law enforcement, prosecution and court, crime prevention and education, corrections and community corrections, drug treatment and enforcement, planning, evaluation, and technology improvement, and crime victim and witness initiatives.

BJA Programs: Justice Assistance Grant (JAG) Program, BUREAU JUST. ASSISTANCE, <http://www.ojp.usdoj.gov/BJA/grant/jag.html> (last visited Feb. 28, 2011).

met with reluctance and currently only fifteen states⁸³ are considered to be in compliance.⁸⁴

B. United Kingdom Sex Offender Laws: History

As this Comment explains, although the criminal classification systems differ between the United States and the United Kingdom, similarities exist between the sex offender legislations of both countries. The proposed disclosure guidelines within House Bill 5138 seem to mirror the controlled public disclosure of a sex offender's criminal background currently in place in the United Kingdom. This likeness makes it important to monitor the successes and possible failures of Sarah's Law in England and Wales to help predict the future of an International Megan's Law.

The criminal law of England and Wales recognizes thousands of criminal offenses in a manner unique among most other legal systems in the world because it lacks any formal distinctions between categories of crimes.⁸⁵ For example, forgetting to sign one's driver's license is a criminal offense in same way that committing armed robbery is a criminal offense.⁸⁶ Both of these crimes may result in a criminal trial and conviction.⁸⁷ Therefore, unlike those of the United States, the laws of England and Wales have no formal distinction between sex offenses and other offenses.⁸⁸ Classifying a crime as a sexual offense becomes a matter of personal preference.⁸⁹ At one extreme, distributing pornography and obtaining an abortion could be considered sex crimes because they are loosely connected to sexual activity.⁹⁰ Alternatively, a sex offense may be viewed as only encompassing crimes in which a sexual

⁸³ The states currently in compliance are Alabama, Delaware, Florida, Kansas, Louisiana, Maryland, Michigan, Mississippi, Missouri, Nevada, Ohio, South Carolina, South Dakota, Tennessee, and Wyoming. *Adam Walsh Child Protection and Safety Act*, NAT'L CONF. ST. LEGISLATURES (Sept. 19, 2011), <http://www.ncsl.org/?tabid=12696>; *Tennessee in Compliance with Adam Walsh Act*, DAILY NEWS, Oct. 3, 2011, <http://www.memphisdailynews.com/news/2011/Oct/3/tennessee-in-compliance-with-adam-walsh-act>.

⁸⁴ John Kelly, *Seven States Comply with Federal Sex Offender Registry at Deadline*, YOUTH TODAY (July 28, 2011), http://youthtoday.org/view_article.cfm?article_id=4936. At the time of publication, the deadline for compliance had passed. Yet, a majority of states still fail to comply. *Id.*

⁸⁵ HOWARD LEAGUE FOR PENAL REFORM, UNLAWFUL SEX: OFFENCES, VICTIMS AND OFFENDERS IN THE CRIMINAL JUSTICE SYSTEM OF ENGLAND AND WALES 7 (1985).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *See id.*

⁹⁰ *Id.*

activity is actually performed.⁹¹ This historical lack of distinction may explain the recent and unorthodox creation of a nonpublic National Violent and Sex Offender Register (“ViSOR”). ViSOR is not a registry limited to convicted sex offenders, but rather a system used across the United Kingdom to “store and share information and intelligence on those individuals who have been identified as posing a risk of serious harm to the public.”⁹²

A fortunate majority of the public is never directly affected by a sex offense, allowing attitudes regarding sex crimes to be strongly influenced by external factors such as press portrayal of sex offenses and offenders.⁹³ In the 1990s, the British “media’s discovery of the paedophile” fed the public’s growing interest through newspaper articles with graphic and biased titles such as *They Set a Sex Monster on My Children*, *6 More Child-Sex Fiends to Go Free*, and *Cage Him Before He Kills Again*.⁹⁴ In 1996, the Home Office⁹⁵ proposed that convicted sex offenders should be required to notify police when moving to a new address.⁹⁶ As a result, the Sex Offenders Register “was first introduced in . . . the Sex Offenders Act 1997 in response to public concern about the whereabouts of sex offenders, particularly paedophiles, and tracking their release from custody.”⁹⁷ The register was not intended to serve a punitive function and was considered an administrative necessity.⁹⁸ No public notification provision was included because parliament did not want to pass a

⁹¹ *Id.*

⁹² *Dangerous Persons Database - ViSOR*, NAT’L POLICING IMPROVEMENT AGENCY, <http://www.npia.police.uk/en/10510.htm> (last visited Oct. 3, 2011). ViSOR is a database consisting of the records of individuals required to register under Sex Offenders Act 2003 (“SOA 2003”), those individuals jailed for more than twelve months for violent crimes, and non-convicted individuals thought to pose a serious risk of harm to the public. *Id.* Any individual who receives a jail term greater than thirty months is subject to an indefinite registration term. *Id.* ViSOR can be accessed by (1) the police, (2) Her Majesty’s Prison Service personnel, (3) the Serious Crime Analysis Section, (4) the Child Exploitation and Online Protection Center, (5) the Joint Border Operations Center, (6) the British Transport Police, (7) HM Forces Service Police Crime Bureau, (8) Probation Service areas in England and Wales, and (9) the Scottish Criminal Justice Social Work Organizations. *Id.*; see *Reinforcing Measures Against Sex Offenders*, *supra* note 26, at 9; Jon Silverman, *How the Sex Offenders Register Works*, BBC NEWS (Jan. 16, 2006, 6:11 PM), http://news.bbc.co.uk/2/hi/uk_news/4618172.stm.

⁹³ See HOWARD LEAGUE FOR PENAL REFORM, *supra* note 86, at 61–62.

⁹⁴ TERRY THOMAS, *SEX CRIME: SEX OFFENDING AND SOCIETY* 21–22 (2d ed. 2005) (internal quotation marks omitted); see Carol Midgley, *They Set a Sex Monster on My Children*, DAILY MIRROR (London), Aug. 15, 1994, at 1, 5; Adam Lee-Potter, *6 More Child-Sex Fiends To Go Free*, SUN (London) Mar. 13, 1998, at 9; Editorial, *Cage Him Before He Kills Again*, DAILY MIRROR (London), Mar. 14, 1998, at 6.

⁹⁵ The Home Office is the United Kingdom’s “lead government department for policies on immigration, passports, counter-terrorism, policing, drugs and crime.” HOME OFF., <http://www.homeoffice.gov.uk/> (last visited Oct. 3, 2011).

⁹⁶ THOMAS, *supra* note 95, at 153.

⁹⁷ KIM STEVENSON ET AL., BLACKSTONE’S GUIDE TO THE SEXUAL OFFENCES ACT 2003, at 159 (2004).

⁹⁸ *Id.*

law making it easy for the public to obtain the personal information of sex offenders.⁹⁹ Parliament feared that “full disclosure” would encourage vigilantism, discourage offenders from registering (thereby driving them into hiding), challenge the offender’s family’s ability to rebuild their lives, adversely affect the victim, and harm innocent family members when the sexual abuse took place within the family.¹⁰⁰

Sex Offenders Act 1997 (“SOA 1997”) required a convicted sex offender¹⁰¹ to privately register his name and other personal information with the police within fourteen days of his release.¹⁰² The duration of the offender’s registration requirement was determined by his sentence, with any sentence over thirty months meriting indefinite registration.¹⁰³ SOA 1997 authorized the police to inform schools and, in rare circumstances, members of the community about convicted sex offenders residing in the area.¹⁰⁴ Although the law itself offered little guidance for carrying out these disclosures, the Home Office issued a circular in conjunction with SOA 1997, providing the police with some instructions for carrying out the disclosures.¹⁰⁵ The circular explained that disclosure determinations should be made on a case-by-case basis, emphasizing that disclosure of sex offenders’ personal information to third parties “should be exceptions to a general policy of confidentiality.”¹⁰⁶ Additionally, each decision regarding disclosure needed to be “justified on the basis of the likelihood of the harm which non-disclosure might otherwise cause.”¹⁰⁷

The members of the British press continued their antics even after the passage of SOA 1997, eventually escalating to name-calling and smear campaigns. Following the kidnapping and murder of eight-year-old Sarah Payne,¹⁰⁸ *News of the World*, a now-defunct tabloid newspaper, began to

⁹⁹ See Meghann J. Dugan, Note, *Megan’s Law or Sarah’s Law? A Comparative Analysis of Public Notification Statutes in the United States and England*, 23 LOY. L.A. INT’L & COMP. L. REV. 617, 618 (2001).

¹⁰⁰ See 297 PARL. DEB., H.C. (6th ser.) (1997) 745, 746.

¹⁰¹ To be subject to the registration requirement, an offender must have either been convicted of a sex crime, been found not guilty of the crime by reason of insanity, or been cautioned by a constable for an offense he admitted to committing. Sex Offenders Act, 1997, c. 51, § 1.

¹⁰² Dugan, *supra* note 100, at 630–31.

¹⁰³ See THOMAS, *supra* note 95, at 155.

¹⁰⁴ Dugan, *supra* note 100, at 631.

¹⁰⁵ See Circular, Sent’g & Offences Unit, Home Off., Sex Offenders Act 1997 (Sept. 1, 1997), available at <http://www.nationalarchives.gov.uk/ERORecords/HO/421/2/circulars/1997/hoc9739.htm>.

¹⁰⁶ *Id.* app. A, para. 9.

¹⁰⁷ *Id.*

¹⁰⁸ Payne was murdered by a convicted sex offender, but this information was not known at the time.

“name and shame” convicted pedophiles by publishing their names, pictures, and whereabouts.¹⁰⁹ *News of the World* identified more than eighty people, causing an outbreak of mob violence across the country and rallying support for a petition demanding full disclosure through a British version of the United States’ Megan’s Law.¹¹⁰

In January of 1999, the British government commissioned a review of the current sex offense law, “the aims of which were to modernize and strengthen the existing legal provisions [and] make them clearer and more coherent . . . thereby [increasing] the protection of children and vulnerable persons.”¹¹¹ When parliament revamped SOA 1997, it took into account criticisms of public notification laws in the United States.¹¹² Sex Offenders Act 2003 (“SOA 2003”) was enacted with additional notification requirements beyond those originally required in SOA 1997.¹¹³ In the process of updating the law, almost all of the Sexual Offences Act of 1956¹¹⁴ and most then-existing provisions relating to sex offenses were repealed.¹¹⁵ SOA 2003 requires that the offender provide personal details, including date of birth, name, home address, and addresses of any “other premises where [the offender] regularly resides or stays . . . such as relatives, estranged wives/partners, children, or close friends.”¹¹⁶ However, despite widespread public support for community notification stemming from Payne’s murder, parliament would not allow for any public access to the registry.¹¹⁷ The act itself “fails to address and provide guidance on the circumstances in which information on sex offenders may be made available and to whom.”¹¹⁸ An amendment was later added allowing the secretary of state access to

¹⁰⁹ ‘Sarah’s Law’ Backing Demanded, BBC NEWS (Aug. 4, 2000, 8:58 PM), http://news.bbc.co.uk/2/hi/uk_news/866397.stm.

¹¹⁰ *Id.*

¹¹¹ STEVENSON ET AL., *supra* note 98, at 1.

¹¹² Dugan, *supra* note 100, at 620.

¹¹³ STEVENSON ET AL., *supra* note 98, at 165; Sexual Offences Act, 2003, c. 42, §§ 80–93.

¹¹⁴ Sexual Offences Act, 1956, 4 & 5 Eliz. 2, c. 69. The Sexual Offences Act of 1956 contained provisions that dated back to the Offences Against the Person Act of 1861 and the Criminal Law Amendment Act of 1885. *See* STEVENSON ET AL., *supra* note 98, at 2. It created more than 200 offenses, many of which were outdated and thus rarely ever used. *Id.* Some offenses, such as incest and “unlawful sexual intercourse, were by way of definition, gender- and age-specific, reflecting historical perspectives and patriarchal attitudes about the nature of sex.” *Id.* Much of the statute was discriminatory and lacked justification, specifically the criminalization of homosexuality. *Id.*

¹¹⁵ *See* STEVENSON ET AL., *supra* note 98, at 1, 4.

¹¹⁶ *Id.* at 165–66.

¹¹⁷ *Id.* at 171.

¹¹⁸ *Id.*

information “notified to the police for the purposes of crime prevention, investigation and detection,” and authorizing the secretary of state to supply this information to a chief constable or the director generals of the National Criminal Intelligence Service and National Crime Squad.¹¹⁹ SOA 2003 also contains a provision that requires relevant offenders,¹²⁰ who intend to travel abroad, to notify the police of their travel itinerary.¹²¹

Until recently, SOA 2003 provided that a sex offender sentenced to thirty months or more was required to register for an indefinite period without the potential for review.¹²² *R v. Secretary of State for the Home Department*, a case decided by the Supreme Court of the United Kingdom in April 2010, held that “the [indefinite] notification requirements constitute a disproportionate interference with [Article 8 of the European Convention on Human Rights]¹²³ because they make no provision for individual review of the requirements.”¹²⁴ Two convicted sex offenders, a fifty-nine-year-old man convicted of indecent assault on his daughter and a teenage boy, known only as “F,” brought the case.¹²⁵ When he was eleven years old, “F” committed numerous sexual offenses, including rape, against a six-year-old boy.¹²⁶ The lower court judges found that the current law improperly denied convicted offenders the chance to prove they no longer posed a risk of reoffending and the high court affirmed.¹²⁷ While the high court’s decision is a victory for human rights, it offers a

¹¹⁹ *Id.*

¹²⁰ Relevant offenders are defined in Section 80(1) as “those who are subject to notification requirements as including all persons convicted of, or cautioned for, a specified offence as listed in [Schedule] 3 of the Act.” *Id.* at 160–61.

¹²¹ *Id.* at 168; Sexual Offences Act, 2003, c. 42, § 86.

¹²² Sexual Offences Act, 2003, c. 42, § 82.

¹²³ Article 8 of the European Convention on Human Rights describes the right to respect for private and family life:

Everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, *opened for signature* Apr. 11, 1950, 213 U.N.T.S. 221.

¹²⁴ *R v. Sec’y of State for the Home Dep’t*, [2010] UKSC 17 [58] (appeal taken from Eng.), *available at* http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2009_0144_Judgment.pdf.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Sex Offenders Win Rights Ruling*, BBC NEWS (Dec. 19, 2008), http://news.bbc.co.uk/2/hi/uk_news/7792497.stm.

disconcerting reminder that children as young as eleven can be placed on the Sex Offenders Register in the United Kingdom and possibly remain there for life.

1. Sarah's Law—Child Sex Offender Disclosure Scheme

In June 2007, the British government published the Review of the Protection of Children from Sex Offenders commissioned by the Home Secretary. The review examined the ways in which the risks posed by child sex offenders were managed, including the amount of information about these offenders that was disclosed to the public.¹²⁸ As a result, a new process was established whereby certain members of the public could contact the police and register their “child protection interest” in a suspicious individual.¹²⁹ If this individual was in fact a known sex offender, the police had a duty to consider disclosing this information.¹³⁰

Thus, by September 2008, the Child Sex Offender Disclosure Scheme, also known as Sarah's Law, was initiated in the counties of Warwickshire, Hampshire, Cambridgeshire, and Cleveland to increase the amount of publicly available information on child-sex offenders.¹³¹ The pilot gave concerned parents and caregivers a formal mechanism to inquire about previous convictions or suspicions of abuse by persons in contact with their children.¹³² During the first six months, more than 150 parents made inquiries and ten were ultimately given relevant information.¹³³ In March 2009, the pool of permissible inquirers was expanded to include anyone who had a concern about an individual.¹³⁴

When the pilots ended in September 2009, the Home Office Minister said the government would consider rolling out a national scheme if evaluations concluded that it had been a success.¹³⁵ Results indicated that, on average, each

¹²⁸ HAZEL KEMSHALL & JASON WOOD, HOME OFF., CHILD SEX OFFENDER REVIEW (CSOR) PUBLIC DISCLOSURE PILOTS: A PROCESS EVALUATION 11 (2d ed. 2010), available at <http://webarchive.nationalarchives.gov.uk/20110218135832/rds.homeoffice.gov.uk/rds/pdfs10/horr32c.pdf>.

¹²⁹ HOME OFFICE, REVIEW OF THE PROTECTION OF CHILDREN FROM SEX OFFENDERS 6 (2007).

¹³⁰ *Id.* at 28.

¹³¹ *Child Sex Offender Disclosure Scheme Guidance*, HOME OFF., 1 (Nov. 21, 2010), <http://tna.europarchive.org/20100413151441/http://www.crimereduction.homeoffice.gov.uk/violentcrime/violentcrime015.htm>.

¹³² *Id.*

¹³³ *Reinforcing Measures Against Sex Offenders*, *supra* note 26, at 9.

¹³⁴ KEMSHALL & WOOD, *supra* note 129, at 1.

¹³⁵ *Reinforcing Measures Against Sex Offenders*, *supra* note 26, at 10.

pilot police force received a manageable twelve inquiries per month, seven of which went on to become full applications resulting in one disclosure per month.¹³⁶ The Home Office deemed the pilots successful, stating that sixty children were protected during the trial period, and Sarah's Law is currently being "rolled out" to eleven additional counties.¹³⁷ It was due to roll out to all police forces across England and Wales by fall 2011.¹³⁸ In August 2011, a known sex offender on the sex offender register attacked an eight-year-old girl on the Isle of Man.¹³⁹ The attack has fueled local politicians to call for the introduction of Sarah's Law on the Isle of Man as well.¹⁴⁰

C. *The International Megan's Laws*

In March 2009, New Jersey Representative Chris Smith introduced House Bill 1623, known as International Megan's Law.¹⁴¹ Representative Smith explained that House Bill 1623 was intended to protect children from sexual exploitation by initiating a notification system between foreign governments and the United States.¹⁴² This bill was referred to both the House Foreign Affairs Committee and the House Judiciary Committee but never made it out of either committee for general debate.¹⁴³ This was not the first time that Representative Smith proposed unsuccessful sex offender legislation; he drafted a similar law—House Bill 5722—in 2008, but that bill died in committee as well.¹⁴⁴

Thus, as expected, in April 2010, Representative Smith tried again and introduced House Bill 5138, International Megan's Law of 2010.¹⁴⁵ During the House debate, Representative Ileana Ros-Lehtinen, a cosponsor of House Bill

¹³⁶ *Child Sex Offender Disclosure Scheme Guidance*, *supra* note 132, at 1.

¹³⁷ Q&A: 'Sarah's Law' Explained, BBC NEWS (Sept. 28, 2010), <http://www.bbc.co.uk/news/uk-england-11427787>.

¹³⁸ *Id.*

¹³⁹ *Further Calls for Sarah's Law To Be Introduced on the Isle of Man*, 3FM (Aug. 5, 2011), <http://www.three.fm/news/isle-of-man-news/further-calls-for-saraahs-law-to-be-introduced-on-the-isle-of-man-3978>.

¹⁴⁰ *Id.*

¹⁴¹ *H.R. 1623: International Megan's Law of 2009*, GOVTRACK.US, <http://www.govtrack.us/congress/bill.xpd?bill=h111-1623> (last visited Oct. 20, 2011).

¹⁴² 155 CONG. REC. H3306 (daily ed. Mar. 11, 2009) (statement of Rep. Chris Smith).

¹⁴³ *H.R. 1623: International Megan's Law of 2009*, *supra* note 142.

¹⁴⁴ *H.R. 5722*, THOMAS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d110:HR05722:@@X> (last visited Oct. 20, 2011). Like International Megan's Law of 2010, International Megan's Law of 2008 was not passed before the new congressional session began and could not be enacted. *See infra* notes 153–54 and accompanying text.

¹⁴⁵ *H.R. 5138: International Megan's Law of 2010*, *supra* note 9.

5138, described the need for such a law, stating that “as things stand today, no country, including the United States, receives adequate warning when dangerous child predators are coming to visit. Thus, many crimes remain undeterred and undetected, and many young lives are permanently scarred as a result.”¹⁴⁶ The text of the bill also provided insight into the motivation behind the legislation. Citing media reports, it stated that “known sex offenders who have committed crimes against children are traveling internationally, and . . . the criminal background of such individuals may not be known to local law enforcement prior to their arrival.”¹⁴⁷ It included the story of an American-registered sex offender who traveled to Mexico and engaged in illicit sexual activity with a fifteen-year-old girl as an example of the type of behavior the bill seeks to prevent.¹⁴⁸ Although the goal of House Bill 5138 was admirable, the legislation has the potential to do more harm than good.

House Bill 5138 featured a number of notable changes from its predecessor, House Bill 1623, including the frequent use of the term “registered sex offenders” (compared to simply “sex offenders”). House Bill 5138 defined a “convicted” sex offender to exclude some juveniles, whereas House Bill 1623 made no distinction, presumably including all minors who have been convicted of a sex offense.¹⁴⁹ Additionally, House Bill 5138 explicitly proposed establishing nonpublic sex offender registries in U.S. embassies abroad and included three categories of eligible entities that may be granted access to the otherwise private registries.¹⁵⁰ In contrast, House Bill 1623 did not include any restrictive language, leaving open the possibility that this information could be made available to the general public. However, even with these changes, House Bill 5138 remained imperfect. Notwithstanding its flaws, International Megan’s Law of 2010 experienced legislative support that its predecessors did not, as House Bill 5138 passed in the House of Representatives in July 2010.¹⁵¹ The bill was referred to the Senate Committee on Foreign Relations but was never brought to vote.¹⁵² Ultimately, House Bill 5138 did not pass before the end of that year. At the end of each two-year

¹⁴⁶ 156 CONG. REC. H6094 (daily ed. July 27, 2010).

¹⁴⁷ H.R. 5138, 111th Cong. § 2(a)(10) (2010).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* § 3(3); H.R. 1623, 111th Cong. (2009).

¹⁵⁰ H.R. 5138 §§ 5(h)(2)(A)–(B).

¹⁵¹ H.R. 5138: *International Megan’s Law of 2010*, *supra* note 9.

¹⁵² *Id.*

congressional session, all proposed bills that have not yet passed are cleared from the books.¹⁵³

II. HOUSE BILL 5138: THE TEXT

House Bill 5138 was part of an ongoing effort to create an international sex offender registration system. Although the bill did not pass in the previous session of Congress, it is nevertheless appropriate for this Comment to review the language of House Bill 5138 to avoid replicating its weaknesses in future versions. International Megan's Law of 2010 was composed of sixteen sections.¹⁵⁴ Section 2 explained the congressional findings regarding the negative impacts of the sexual exploitation of minors.¹⁵⁵ It noted the ongoing efforts of U.S. Immigration and Customs Enforcement ("ICE"), in cooperation with the International Criminal Police Organization ("INTERPOL") and foreign law enforcement, to investigate and identify child-sex crimes committed abroad.¹⁵⁶ Section 2 stated that there have been seventy-three convictions of U.S. citizens charged with committing sex crimes against minors abroad between 2003 and 2009.¹⁵⁷ House Bill 5138 made the claim that this is an expensive but necessary process and advocates for a formalized system.¹⁵⁸ Section 2 also stated that sex offenders are trying to enter the United States and therefore encouraged foreign governments to notify the United States, as well as each other, when a sex offender is crossing international borders.¹⁵⁹ It included the April 2008 story of a registered sex offender from the United Kingdom who traveled to the United States with the intention of living with a woman he had met on the internet and her young daughters.¹⁶⁰ INTERPOL London notified U.S. Customs and Border Protection officers through the U.S. INTERPOL office and the sex offender was denied access to the country.¹⁶¹

Section 2 identified reasons why individuals may travel overseas to commit sex crimes, including: perceived anonymity; the perception that law enforcement in certain countries is scarce, corrupt, or unsophisticated; and the

¹⁵³ *Id.*

¹⁵⁴ *See* H.R. 5138.

¹⁵⁵ *Id.* § 2.

¹⁵⁶ *Id.* § 2(a)(11).

¹⁵⁷ *Id.* § 2(a)(12).

¹⁵⁸ *Id.* § 2(a)(13).

¹⁵⁹ *Id.* § 2(a)(15).

¹⁶⁰ *Id.* § 2(a)(14).

¹⁶¹ *Id.*

ability to “disappear” after a brief stay in the country.¹⁶² It acknowledged that ICE and other law enforcement agencies are already sharing information about sex offenders traveling internationally with other countries “on an ad hoc basis through INTERPOL,” and stated that the technology to detect such offenders and notify foreign governments exists but requires a legal structure to standardize and coordinate efforts.¹⁶³

Section 2 also contained a declaration of purposes, stating that the goal of the bill is to “protect children from sexual exploitation by preventing or monitoring the international travel of sex traffickers and other sex offenders who pose a risk of committing a sex offense against a minor.”¹⁶⁴ It proposed establishing a system in the United States to notify officials of foreign countries when a high-interest registered sex offender intends to travel to their country; strongly encouraging and assisting foreign governments to establish a sex offender travel notification system and to inform U.S. authorities when a sex offender intends to travel or has already traveled to the United States; establishing and maintaining nonpublic sex offender registries in U.S. diplomatic and consular missions for U.S. citizens and permanent resident sex offenders who are residing abroad; providing the Secretary of State with the discretion to revoke the passport of an individual who has been convicted for a sex offense against a minor, or limit the period of validity of a passport issued to a high interest registered sex offender; mandating a report from the Secretary of State about the status of international notifications between governments regarding child-sex offender travel; and providing assistance to foreign countries to establish systems to identify sex offenders as well as provide and receive notification of child sex offender international travel.¹⁶⁵

Section 3 consisted of relevant definitions. It contained an exclusion for certain juvenile adjudications, clarifying that the term “convicted,” when used with regard to a sex offense committed by a minor, does not include “adjudicated delinquent as a juvenile for that offense or convicted as an adult for that offense, unless the offense took place after the offender [turned fourteen] and the conduct upon which the conviction took place was comparable to or more severe than aggravated sexual abuse.”¹⁶⁶ It defined a high-interest registered sex offender as a sex offender that the International Sex

¹⁶² *Id.* § 2(a)(16).

¹⁶³ *Id.* § 2(a)(19).

¹⁶⁴ *Id.* § 2(b).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* §§ 3(3)(A)–(B).

Offender Travel Center¹⁶⁷ reasonably believes presents a high risk of committing a sex offense against a minor.¹⁶⁸ Sex offense is defined as a criminal offense against a minor that involves any of the following:

- (i) Solicitation to engage in sexual conduct[;]
- (ii) Use in a sexual performance[;]
- (iii) Solicitation to practice prostitution . . . [;]
- (iv) Video voyeurism . . . [;]
- (v) Possession, production, or distribution of child pornography[;]
- (vi) Criminal sexual conduct involving a minor, or the use of the Internet to facilitate or attempt such conduct[;]
- (vii) Conduct that would violate section 1591 (relating to sex trafficking of children by force, fraud, or coercion) of title 18, United States Code, if the conduct had involved interstate or foreign commerce and where the person recruited, enticed, harbored, transported, provided, or obtained had not yet attained the age of 18 years at the time of the conduct[;]
- (viii) Any other conduct that by its nature is a sex offense against a minor.¹⁶⁹

An exception was provided for foreign convictions that were obtained without sufficient safeguards for fundamental fairness and due process.¹⁷⁰ The bill also excluded “an offense involving consensual sexual conduct if the victim was at least thirteen years old and the offender was not more than four years older than the victim,” an exception known as a Romeo and Juliet Clause in state legislation.¹⁷¹

Section 4 outlined an American-registered sex offender’s duty to report his or her intention to travel either from the United States to a foreign country or from a foreign country to the United States and listed the information that a sex offender is required to provide to local law enforcement.¹⁷² This duty to report would have applied until the individual was no longer required to register in

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* § 3(4).

¹⁶⁹ *Id.* § 3(9)(A).

¹⁷⁰ *Id.* § 3(9)(B)(i).

¹⁷¹ *Id.* § 3(9)(B)(ii); *Sex Laws: Unjust and Ineffective*, ECONOMIST, Aug. 6, 2009, at 21.

¹⁷² H.R. 5138 § 4(a)(1). This information included:

complete name(s); address of residence and home and cell phone numbers; all email addresses; date of birth; social security number; citizenship; passport number, date and place of issuance, and date of expiration; alien registration number, if applicable; information as to the nature of the sex offense conviction; jurisdiction of conviction; travel itinerary, including the anticipated length of stay at each destination, and purpose of the trip; the date of purchase for plane ticket or other forms of transportation, if already purchased; whether the sex offender is traveling alone or as part of a group; and contact information prior to departure as well as during travel.

Id. § 4(b)(2).

any jurisdiction for a sex offense.¹⁷³ A criminal penalty would be imposed for failure to register.¹⁷⁴ Section 5 created the requirement that all U.S. diplomatic or consular missions in foreign countries establish and maintain countrywide nonpublic sex offender registries for those U.S. citizens who reside abroad or plan to remain in the country more than thirty consecutive days.¹⁷⁵ The sex offender would remain on the registry for as long as he or she remains in the country.¹⁷⁶ The sex offender would be responsible for keeping the embassy apprised of any changes to the information contained in the registry.¹⁷⁷ The text explicitly stated that the information on a registry shall not be made available to the general public, but granted access to U.S. law enforcement and permitted “eligible entities”¹⁷⁸ to request certain information on the registry.¹⁷⁹ Suspicious parents were not considered eligible entities to request this information.¹⁸⁰ Section 5(h)(2)(D) provided limitations on what such eligible entities may do with the information once it has been received.¹⁸¹ Service providers could request information on the registry regarding an individual who is applying for or holds a position that involves contact with children.¹⁸² Section 5(h)(2)(d) also detailed the requirement that a registered sex offender must appear in person at a U.S. diplomatic or consular mission at least every

¹⁷³ *Id.* § 4(a)(3).

¹⁷⁴ *Id.* § 4(d).

¹⁷⁵ *Id.* § 5.

¹⁷⁶ *Id.* § 5(b)(2).

¹⁷⁷ *Id.* § 5(b)(3). The bill required that a traveling sex offender provide the following information to the U.S. diplomatic or consular mission: complete name, date of birth, and a current photograph; passport number, date and place of issuance, date of expiration, and visa type and number, if applicable; alien registration number, where applicable; social security number; address of each residence at which he resides or will reside in that country, the address of any residence maintained in the United States, as well as home and cell phone numbers; purpose for residence in the country; name and address of any place where the sex offender is an employee or will be/has applied to be an employee and will have regular contact with minors; name and address of any place where the sex offender is a student or will be/has applied to be a student and will have regular contact with minors; all email addresses; most recent address in the United States and state of legal residence; the jurisdiction in which the sex offender was convicted and the jurisdiction(s) in which he was more recently legally required to register; the license plate number and a description of any vehicle owned or operated by the sex offender in the country where he is staying; when the sex offender plans to leave the country; any other information required by the Secretary of State. *Id.* §§ 5(d)(1)(A)–(N). The bill allowed for any and all of this information to be included in the registry maintained by the consular or diplomatic mission. *Id.* § 5(d)(3).

¹⁷⁸ An eligible entity is an entity that provides direct services to minors, official law enforcement, or an investigative entity affiliated with law enforcement for the purpose of investigating a possible sex crime. *Id.* § 5(h)(2)(B).

¹⁷⁹ *Id.*

¹⁸⁰ *See id.*

¹⁸¹ *Id.* § 5(h)(2)(D).

¹⁸² *Id.* § 5(h)(2)(D)(i).

six months both to verify personal information and to ensure that the photograph on file accurately depicts his or her current physical appearance.¹⁸³

Sections 6 and 7 described the establishment and guidelines of the International Sex Offender Travel Center.¹⁸⁴ Section 8 detailed the Secretary of State's authority to revoke the passport of an individual convicted of a sex crime abroad and limit the period of validity of a passport issued to a high interest sex offender.¹⁸⁵ Section 10 was entitled "Sense of Congress Provisions" and included the congressional suggestion that the President strongly encourage any foreign country with an age of consent below sixteen to raise that age to at least sixteen.¹⁸⁶ Section 10 stated that the President should "strongly encourage" countries to criminalize the depiction of minors¹⁸⁷ in pornography if they do not already.¹⁸⁸ Finally, Section 10 suggested that the President "formally request foreign governments to notify the United States when a United States citizen has been arrested, convicted, sentenced, or completed a prison sentence for a sex offense against a minor in [that] foreign country."¹⁸⁹

III. ASSESSMENT OF HOUSE BILL 5138

House Bill 5138 contained a number of fatal weaknesses that ultimately would have marred the goal of international sex offender legislation. Thus, it is advantageous that the imperfect bill did not become law. However, because new versions of the International Megan's Law are undoubtedly on the horizon, it is important to analyze the flaws of House Bill 5138 to avoid similar drafting mistakes in the future. Sex offender laws, House Bill 5138 included, are created on the popular, yet false, presumption that "most people convicted of sex offenses will continue to commit such crimes if given the opportunity."¹⁹⁰ This inaccurate notion may be a result of the publicity that some of history's most heinous sex offenders have received. Still, comprehensive studies of sex offenders and recidivism rates find that seventy-five percent of sex offenders never reoffend.¹⁹¹ Furthermore, many registered

¹⁸³ *Id.* § 5(e).

¹⁸⁴ *Id.* §§ 6–7.

¹⁸⁵ *Id.* § 8(a).

¹⁸⁶ *Id.* § 10(b).

¹⁸⁷ Minors are defined as persons under the age of eighteen. *Id.* § 3(6).

¹⁸⁸ *Id.* § 10(b).

¹⁸⁹ *Id.* § 10(c).

¹⁹⁰ HUMAN RIGHTS WATCH, *supra* note 21, at 4.

¹⁹¹ *See id.*

sex offenders, like Phillip Alpert, arguably should never be required to register in the first place. Nevertheless, House Bill 5138 would have subjected all offenders to an additional form of registration, mandating that registered sex offenders notify the U.S. government of their intent to travel internationally and requiring that loosely designated “high risk” offenders be placed on lists in foreign countries as well.¹⁹² International Megan’s Law of 2010 featured several significant improvements over its 2009 predecessor, but it remained vastly flawed.

A. *Overly Inclusive*

House Bill 5138’s vague language made International Megan’s Law of 2010 overly inclusive. The bill proposed that a sex offender notify the state in which he or she is registered of his or her intent to travel abroad.¹⁹³ The state would likewise be required to provide this information to the International Sex Offender Travel Center, created by the President, headed by the Assistant Secretary of Homeland Security, and consisting of a group of government officials from various departments,¹⁹⁴ as mandated by Section 6 of the bill.¹⁹⁵ House Bill 5138 stated that U.S. officials should then notify the appropriate foreign governments of the travel plans of those individuals deemed to be “high interest” by the center.¹⁹⁶ Section 3 defined a high-interest registered sex offender as one whom the center reasonably believes “based on the totality of the circumstances . . . presents a high risk of committing a sex offense against a minor in a country to which the sex offender intends to travel.”¹⁹⁷ This vague definition was the only guidance the bill offered regarding how to determine high-risk offenders.

In theory, sex offender laws are designed to protect the public from violent criminals.¹⁹⁸ However, the current laws in many states require people who urinate in public, teenagers who engage in consensual sex, and young children who expose themselves—individuals who have not committed violent offenses—to register as sex offenders.¹⁹⁹ Subjective “high risk” determinations

¹⁹² *Id.*

¹⁹³ H.R. 5138 § 4(a)(1).

¹⁹⁴ The center would include representatives from the Department of Homeland Security, the Department of State, and the Department of Justice. *Id.* §§ 6(b)(1)–(3).

¹⁹⁵ *Id.* §§ 4(a)(2), 6(b).

¹⁹⁶ *Id.* § 2(b)(1).

¹⁹⁷ *Id.* § 3(4).

¹⁹⁸ See HUMAN RIGHTS WATCH, *supra* note 21, at 5.

¹⁹⁹ *Id.*

coupled with overzealous domestic sex offender laws mean that young adults like Phillip Alpert could find themselves labeled high-risk sex offenders more easily than the drafters of House Bill 5138 may have intended. Upon learning only that Phillip Alpert, a registered sex offender, engaged in the distribution of child pornography, officials at the International Sex Offender Travel Center could conceivably consider him to be a danger to minors all over the world, when that is far from reality. This is not to say that monitoring the international travel of dangerous convicted sex offenders is never acceptable, but rather that without established criteria for determining which offenders are actually high risk, House Bill 5138 missed the mark and allowed for an overbroad screening process.

B. Effect on Juveniles

A second problem with the bill as drafted is its potential effect on underage offenders. House Bill 5138 overlooked the juvenile justice system's historical and continued efforts to differentiate juvenile offenders from their adult counterparts. Despite the drafters' attempt to exclude certain categories of juveniles from House Bill 5138, Section 3 still allowed for the inclusion of juveniles who had been convicted as adults for an offense comparable to or more severe than aggravated sexual abuse.²⁰⁰ The bill stated that the term "convicted," when used with respect to a sex offense committed by a minor, excludes those individuals who were adjudicated delinquent as a juvenile for their offense.²⁰¹ However, the bill did not exclude minors convicted as adults if the minor was over the age of fourteen and "the conduct upon which the conviction took place was comparable to or more severe than aggravated sexual abuse."²⁰² In the U.S. Code, aggravated sexual abuse is defined as causing another to engage in a sexual act by the use of force or threat.²⁰³ The abuse statute includes engaging in sexual activity with an unconscious individual; forcefully or secretly using a substance that "impairs the ability of that other person to appraise or control" a sexual act; and committing any of the previously named acts with a child between the ages of twelve and sixteen, as long as the offender is at least four years older than the victim.²⁰⁴ While this is a seemingly narrow group of juvenile offenders, in reality, the bill would

²⁰⁰ H.R. 5138 § 3(3)(B).

²⁰¹ *Id.* § 3(3)(A).

²⁰² *Id.* § 3(3)(B).

²⁰³ 18 U.S.C. § 2241(a) (2006).

²⁰⁴ *Id.* §§ 2241(b)(2)(A), 2241(c).

affect a significant number of juveniles. Surveys conducted in the early 1980s reported that adolescent males between the ages of thirteen and eighteen were responsible for twenty-one percent of all forcible rapes committed in the United States.²⁰⁵ This number has only increased over the years, as juveniles now constitute twenty percent of all offenders charged with a sex crime in North America.²⁰⁶ These young offenders will be subjected to unnecessarily and detrimentally stringent travel requirements if legislation like House Bill 5138 is passed. Additionally, the bill left much room for subjectivity in the determination of what act might be deemed comparable to or more severe than aggravated sexual assault.

Applying cookie-cutter registration laws to juveniles does not account for the unique characteristics of their offenses.²⁰⁷ It is widely accepted that children differ from adults mentally, physically, and emotionally; and thus, the juvenile justice system was created with a focus on rehabilitation.²⁰⁸ Because of the long-standing view that a child's underdeveloped brain responds positively to treatment,²⁰⁹ rehabilitation ensures that children are not penalized in the same way as adults. Although House Bill 5138 did not include those offenders who were adjudicated delinquent in juvenile court, it still would have subjected many other juveniles to the same strict requirements as their adult counterparts. This practice is contrary to existing research showing that teenagers who commit sex acts with younger children are typically "not reflecting a sexual orientation that strongly prefers prepubescent targets," as is the case with adults who prey on children.²¹⁰ Rather, these young offenders are simply acting out, using similarly aged children with whom they can express themselves sexually, and will not ultimately reoffend.²¹¹

²⁰⁵ Gail Ryan, *Incidence and Prevalence of Sexual Offenses Committed by Juveniles*, in JUVENILE SEXUAL OFFENDING 9, 13 (Sandy L. Lane ed., 1991).

²⁰⁶ *Adolescent Sex Offenders*, CHILD ABUSE EFFECTS, <http://www.child-abuse-effects.com/adolescent-sex-offenders.html> (last visited Oct. 3, 2011).

²⁰⁷ See DiCATALDO, *supra* note 69, at 213.

²⁰⁸ Caitlin Young, *Children Sex Offenders: How the Adam Walsh Child Protection and Safety Act Hurts the Same Children It Is Trying To Protect*, 34 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 459, 460 (2008).

²⁰⁹ See generally Adam Ortiz, *Cruel and Unusual Punishment: The Juvenile Death Penalty: Adolescence, Brain Development and Legal Culpability*, JUV. JUST. CENTER, Jan. 2004, available at http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_juvjus_Adolescence.authcheckdam.pdf (supporting the assertion that adolescents are less morally culpable for their actions than competent adults and are more capable of change and rehabilitation through discoveries in adolescent brain development).

²¹⁰ Young, *supra* note 209, at 477.

²¹¹ *Id.*

Juvenile offenders have “substantially lower recidivism rates” than adults and are less cognitively developed, making them arguably less culpable.²¹² While very few studies exist regarding the effectiveness of registration and community notification laws on adult sexual offenders, there is almost no research on the effectiveness of registration and notification for juveniles that commit sex crimes.²¹³ Furthermore, laws mandating registration, such as House Bill 5138, function primarily to ensure safety by alerting officials (and in the case of community notification laws, the public) to the presence of sex offenders in the community.²¹⁴ However, a large majority of sex offenders know their victims personally, as seen in cases of child molestation, where the perpetrator and victim are often related.²¹⁵ This phenomenon is even more prevalent when the offender is a juvenile.²¹⁶ In ninety percent of sex crimes by juveniles, the victim is known to the offender.²¹⁷ Thus, registration in these instances serves only to embarrass and ostracize the family because it adds little new information that the family does not already know about their relative or friend.²¹⁸ All of these factors make it manifestly unjust to penalize juvenile sex offenders under a one-size-fits-all rubric.

C. Sex Offenders Abroad: Varying Legal Requirements

The wide range of sex offender legislation, or lack thereof, among countries impedes many foreign nations from notifying the United States of a sex offender’s intent to travel, which was a central purpose of House Bill 5138. Criminal law systems across the world vary in such a way that different countries may have different definitions regarding the same offense.²¹⁹ Most countries use common criteria to define a sex offender but many do not have the term “sex offense” anywhere in their criminal codes.²²⁰ Sex offender registries differ from country to country as well.²²¹ Some countries choose not to implement registries; others, such as Norway, use a national criminal

²¹² DICATALDO, *supra* note 69, at 212–13.

²¹³ *Id.* at 211.

²¹⁴ *Id.* at 212.

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ ZILNEY & ZILNEY, *supra* note 53, at 113.

²¹⁸ DICATALDO, *supra* note 69, at 212.

²¹⁹ *Reinforcing Measures Against Sex Offenders*, *supra* note 26, at 12.

²²⁰ *Id.*

²²¹ Eur. Parl. Ass., *For a Europe-Wide Sex Offenders Register: Introductory Memorandum*, Doc. No. 51 (Nov. 4, 2008), at 3–4 [hereinafter *For a Europe-Wide Sex Offenders Register*], available at http://assembly.coe.int/CommitteeDocs/2010/20081104_ajdoc51.pdf.

registry that is not specific to sex offenses.²²² In Thailand, sex is decriminalized, and although rape is considered a criminal offense, the law is rarely enforced.²²³ As recently as 2008, other countries, including Austria, Croatia, and Slovenia, have begun to debate introducing a sex offender registry.²²⁴ Complicating matters further, the age of consent ranges among nations from thirteen to eighteen, making it a crime to have sex with a sixteen-year-old in Ireland, where the age of sexual consent is seventeen, but not in the United Kingdom.²²⁵ The extensive variety that exists in foreign laws hinders the desired effect of a law like House Bill 5138.

A tenet of international law states that an individual residing abroad is bound by the laws of the host state.²²⁶ If legislation like International Megan's Law of 2010 is enacted, a foreign country will be alerted that a U.S. citizen who is a registered sex offender, like Phillip Alpert, will be within its jurisdiction.²²⁷ This gives that country the power and requisite knowledge to impose its own sex offender laws and requirements upon a noncitizen. Yet International Megan's Law of 2010 left many questions unanswered, such as whether Alpert would also be placed on the sex offender registry of the given foreign country, whether he would actually fare better because the country he has chosen to visit does not have a registry, or whether domestic residence restrictions would be imposed abroad. The bill explicitly required that an offender provide the name and address of any place where he will be a student and will have regular contact with minors.²²⁸ If London authorities decided to prohibit Alpert from living within a specified number of feet from a school, it would greatly affect his ability to study abroad as a college student. Currently, Great Britain has not implemented residency restrictions that bar offenders from living near a school, but individuals can be placed on the country's registry even if there is only a slight suspicion of child abuse.²²⁹ Alerting British officials of Alpert's intent to travel may place him at risk of becoming a registered sex offender in Great Britain as well as the United States, thereby imposing an additional stigma on him before he even arrives in the country.

²²² *Id.* at 3.

²²³ ZILNEY & ZILNEY, *supra* note 53, at 178–79.

²²⁴ *For a Europe-Wide Sex Offenders Register*, *supra* note 222, at 4.

²²⁵ *Reinforcing Measures Against Sex Offenders*, *supra* note 26, at 12. In the United Kingdom, the age of consent is sixteen. Laura Smith-Spark, *What Is a "Right" Age of Consent?*, BBC NEWS, http://news.bbc.co.uk/2/hi/uk_news/3699814.stm (last updated Oct. 1, 2004, 9:50 AM).

²²⁶ DAVID J. BEDERMAN, *INTERNATIONAL LAW FRAMEWORKS* 84 (3d ed. 2010).

²²⁷ H.R. 5138, 111th Cong. §§ 2(b)(7), 6(e), 13(a) (2010).

²²⁸ *Id.* § 5(d)(1)(H).

²²⁹ *The End of Innocence*, *ECONOMIST*, Jan. 19, 2006, at 53.

In Italy, there is no national sex offender registry and therefore nothing requiring an individual who has committed a sex crime to notify the police upon his or her release from prison.²³⁰ Instead, Article 609 of the Italian Criminal Code contains rules against sexual violence and includes sex crimes such as sexual acts with minors and group sexual violence punishable by varying prison terms.²³¹ As an alternate means of ensuring the safety of children, criminal record checks are performed on teachers who apply for new jobs, and each applicant must provide a sworn affidavit stating that their record is clean.²³² The Ministry of Public Instruction claims that this system works, explaining that every application since 2001 has been checked against police records.²³³ However, in 2005, a kindergarten teacher was among those arrested as a result of a police investigation into child pornography on the internet, calling the effectiveness of this practice into question.²³⁴ Prospective teachers may pass the initial screen only to commit undetected sex crimes in the future.

It is difficult to speculate what the government of a country that has not chosen to create a sex offender registry would do with the warning that a U.S. citizen, who is also a registered sex offender, plans to enter that country. While an individual like Phillip Alpert does not pose any danger to Italian citizens, child predators like Jack Sporich may be able to live free of suspicion, especially if they do not remain in the country long enough to merit registering with the U.S. embassy. Sporich spent nine years in a California prison after he molested hundreds of boys on camping trips.²³⁵ He then relocated to Cambodia where he lured three young boys into his home using toys, candy, and money.²³⁶ Although Sporich is exactly the type of person House Bill 5138 was designed to target, Italy does not subject its own citizens to any period of registration and likely would not do so for visiting sex offenders. Thus, even if U.S. authorities notified the Italian government that an offender like Jack Sporich had plans to visit their country, he could not be placed on a non-existent Italian registry, effectively making House Bill 5138 moot in Italy. In early 2011, Silvio Berlusconi, the Italian prime minister, faced the possibility of being tried as a sex offender for engaging in sexual relations with an

²³⁰ Davis, Fraser & Wyatt, *supra* note 27.

²³¹ *See generally* art. 609 Codice penale [C.p].

²³² Davis, Fraser & Wyatt, *supra* note 27.

²³³ *Id.*

²³⁴ *Id.*

²³⁵ Deena Guzder, *A Move To Register Sex Offenders Globally*, TIME (Sept. 7, 2009), <http://www.time.com/time/world/article/0,8599,1920911,00.html>.

²³⁶ *Id.*

underage prostitute.²³⁷ While the media focused on the potential fifteen-year sentence that accompanies a conviction, Berlusconi does not have to fear registering as a sex offender if he is found guilty—a lifelong stigma that would attach to his sentence in the United States or Great Britain.

In some extreme cases, a U.S. national may be exposed to barbaric punishments because the host country has been notified of this individual's standing as a registered sex offender. The offender may be monitored more closely during his or her stay in the country and face primitive and sometimes brutal consequences if he does reoffend. This is particularly worrisome for people like Phillip Alpert who arguably should not be a registered sex offender at all. In the Czech Republic, male sex offenders are punished with surgical castration, despite staunch resistance from the Council of Europe.²³⁸ Currently, the Czech Republic is the only country in Europe that still uses this procedure as a means of punishment.²³⁹ In Uganda, a proposed bill creates a crime called "aggravated homosexuality" that calls for the death penalty for homosexuals who have sex with anyone under the age of eighteen.²⁴⁰ The Ugandan Anti Homosexuality Bill, first introduced in 2009, also provides for seven years in prison for someone who attempts to commit homosexuality, five years for landlords who knowingly house gays, "three years for anyone, including parents, who fail to hand gay children over to the police within [twenty-four] hours," and the extradition of gay Ugandans living abroad.²⁴¹ Although this bill would not apply to Alpert, it could lead to a disastrous outcome for a U.S. citizen in Uganda previously convicted of a same-sex offense against a minor. If the Ugandan bill were to pass and U.S. officials then notified the Ugandan government that a homosexual convicted sex offender intended to visit their country, the offender would not be repunished for his prior sex crime in Uganda. Instead, he would be subject to harsh punishment for his sexual preferences, as his presence alone would violate Uganda's ban on homosexuality.

²³⁷ John Hooper, *Berlusconi Could Face Trial as Alleged Sex Offender*, GUARDIAN, Jan. 14, 2011, at 23.

²³⁸ Lee Cendrowicz, *The Unkindest Cut: A Czech Solution for Sex Offenders*, TIME (Feb. 11, 2009), <http://www.time.com/time/world/article/0,8599,1878462,00.html>.

²³⁹ *Id.*

²⁴⁰ A Bill For an Act Entitled the Anti Homosexuality Act, 2009, Bill Supp. No. 13, CII Uganda Gazette No. 47 (Sept. 25, 2009) § 3; Dan Harris et al., *Anti-homosexual Bill in Uganda Causes Global Uproar*, ABC NEWS (Mar. 10, 2010), <http://abcnews.go.com/Nightline/anti-homosexuality-bill-uganda-global-uproar/story?id=10045436>.

²⁴¹ Harris, *supra* note 241; *see also* A Bill For an Act Entitled the Anti Homosexuality Act, 2009, §§ 4, 11, 14, 17.

D. Lessons Legislators Should Learn from the Past

The successes and failures of the United States' Megan's Law and the United Kingdom's Sarah's Law should be used to analyze and predict the potential detrimental outcomes of laws such as International Megan's Law of 2010.

1. United States' Megan's Law

Mandatory registration and community notification of a specific class of convicted offenders is unprecedented in the history of U.S. law.²⁴² "No class of offender has been subjected to the [demanding] postrelease requirements of the current sexual offender."²⁴³ Yet U.S. policy responses aimed at sexual offenses, especially those enacted over the last twenty years, have fundamentally failed.²⁴⁴ Despite all efforts, "[t]hey have not done any of the following: reduc[e] sex offenders' recidivism rates; provid[e] safety, healing, or support for victims; [or] reflec[t] the scientific research on sexual victimization, offending, and risk."²⁴⁵

The federal version of Megan's Law was enacted as part of the Wetterling Act in 1996.²⁴⁶ The federal legislation requires states to make relevant information on convicted sex offenders available to the general public.²⁴⁷ The law mandates that registered offenders regularly update their personal information to ensure accuracy.²⁴⁸ However, the law does not include instructions on how the states should notify the public.²⁴⁹ Ultimately, every state has a different version of Megan's Law.²⁵⁰ For example, a sex offender registered in Florida, like Phillip Alpert, will have his address and picture made publicly available on the internet, but if he moves to New York, where risk assessments are conducted, no one will be notified if he is deemed to be low risk.²⁵¹ He would not be allowed to live in the vicinity of a school in Alabama, but in California, he could live right next door to a school, as

²⁴² DiCATALDO, *supra* note 69, at 207.

²⁴³ *Id.*

²⁴⁴ Wright, *supra* note 20, at 3.

²⁴⁵ *Id.* at 3–4.

²⁴⁶ Sample & Evans, *supra* note 79, at 214.

²⁴⁷ *Id.*

²⁴⁸ *Id.* at 215.

²⁴⁹ *Id.* at 214.

²⁵⁰ Morales, *supra* note 81.

²⁵¹ *Id.*

California does not have any residence restrictions.²⁵² Although the Sex Offender Registration and Notification provision in the Adam Walsh Act attempted to correct this problem by “standardiz[ing] the ways in which states have previously responded to . . . Megan’s Law,” only fifteen states are in compliance with the Adam Walsh Act.²⁵³ Thus, even with the power to revoke federal funding for noncompliance, Congress has experienced difficulty achieving uniformity among the states. The diversity that currently exists among foreign sex offender laws, as previously discussed, makes consistency in travel notifications to the U.S. government even more difficult to accomplish.

Several scholars have examined the ability of notification laws to reduce offending and have not found any significant effects on sex offenders’ behavior.²⁵⁴ While these laws do succeed in informing the public, they also appear to increase public anxiety over sex crimes rather than ease the fear of victimization.²⁵⁵ Additionally, notification requirements have a severely negative impact on sex offenders, exposing them to threats and harassment, social isolation, vulnerability, and stigmatization within their communities—potential risk factors for the commission of sex crimes.²⁵⁶ Thus, the unintended consequences of notification laws may actually trigger relapses and lead to reoffenses.

A New Jersey study released in 2009 found that registration helps locate sex offenders but does not actually affect recidivism rates.²⁵⁷ Results showed that the act of registering convicted sex offenders facilitated finding them in the event that they were suspected of a sex crime, but by comparing arrest rates in New Jersey before and after Megan’s Law was passed, the study did not find a significant difference in the data.²⁵⁸ The study notes that any local or nationwide decline in the rate of sex offenses is likely not the result of Megan’s Law, but rather the result of greater societal changes, such as New Jersey’s policy of civilly committing high risk offenders.²⁵⁹ Overall, “there is

²⁵² *Id.*

²⁵³ Sample & Evans, *supra* note 79, at 218; Kelly, *supra* note 85.

²⁵⁴ Sample & Evans, *supra* note 79, at 235.

²⁵⁵ *Id.*

²⁵⁶ *Id.* at 234.

²⁵⁷ David Morgan, *Megan’s Law No Deterrent to Sex Offender*, CBS NEWS (Feb. 11, 2009, 1:36 PM), <http://www.cbsnews.com/stories/2009/02/06/national/main4780981.shtml>.

²⁵⁸ *Id.*

²⁵⁹ KRISTEN ZGOBA ET AL., MEGAN’S LAW: ASSESSING THE PRACTICAL AND MONETARY EFFICACY 38 (2008), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/225370.pdf>.

little evidence to date, including this study, to support a claim that Megan's Law is effective in reducing either new first-time sex offenses or sexual re-offenses."²⁶⁰

Data on the ineffectiveness of Megan's Law is particularly troubling when the law is applied to juveniles. In most states, minors convicted of a sex offense can be subjected to the same registration, community notification, and residency restrictions as their adult counterparts.²⁶¹ Although some juvenile offenders exhibit dangerous behavior, more typically their conduct "reflects the impulsiveness and perhaps difficulty with boundaries that many teenagers experience and that most will outgrow with maturity."²⁶² Unfortunately, these noncoercive and nonviolent juvenile offenders may still find themselves labeled as sex offenders.²⁶³ For example, as of 2009, at least thirteen states require an individual to register as a sex offender for public urination, at least twenty-nine still require registration for consensual sex between teenagers, and thirty-two register flashers and streakers.²⁶⁴

The juvenile justice system recognizes that children who break the law should not be treated the same as adults. Stated simply, forcing young offenders to carry the burden of a criminal record for their mistakes is beneficial neither to them nor to the community.²⁶⁵ While juvenile records are often expunged or sealed once the offender reaches the age of majority, sex offender registration continues for years after the child has turned eighteen and sometimes for the duration of his life.²⁶⁶ Thus, these juvenile offenders must continuously suffer from the shame and stigma that comes with the public label of "sex offender." Furthermore, there is little evidence to indicate that youths who commit sex crimes "engage in acts of sexual penetration for the same reasons as their adult counterparts."²⁶⁷ Policies intended to protect the community will be more successful when they are used in a targeted manner against those individuals who pose the greatest risks to the community rather than applied broadly.²⁶⁸ Studies suggest that public safety could be better served if registration and notification laws were applied to individual offenders

²⁶⁰ *Id.* at 41.

²⁶¹ HUMAN RIGHTS WATCH, *supra* note 21, at 65.

²⁶² *Id.* at 8.

²⁶³ *Id.* at 65.

²⁶⁴ *Sex Laws: Unjust and Ineffective*, *supra* note 172.

²⁶⁵ HUMAN RIGHTS WATCH, *supra* note 21, at 66.

²⁶⁶ *Id.*

²⁶⁷ *Id.* at 68–69.

²⁶⁸ Sample & Evans, *supra* note 79, at 237.

based on their specific likelihood of reoffending, while allowing juvenile offenders to rehabilitate.²⁶⁹ According to the Association for the Treatment of Sexual Abusers, “[t]he problems child sex offenders have that may have been a factor in their sex offending are frequently ones that are quite amenable to treatment, for example, conduct disorders, depression, and learning disabilities.”²⁷⁰ Therefore, mental health professionals and other scholars believe in the possibility of the successful treatment of child sex offenders.²⁷¹

In the same way that varying state registration requirements limit the success of the federal version of Megan’s Law in the United States, diverse international criminal laws will impede the goals of legislation like House Bill 5138. Furthermore, scientific data indicates that registration and community notification laws not only have less of a deterrent effect on juveniles (due to their general inability to assess consequences), but the laws also conflict with a basic principle of the juvenile justice system: rehabilitation rather than retribution.²⁷² Yet both House Bill 5138 and the federal Megan’s Law apply to some juvenile offenders.²⁷³ It is, however, commendable that International Megan’s Law of 2010 would have potentially succeeded in an area where the federal Megan’s Law has failed. The bill required that a sex offender be deemed high interest before its provisions would apply, implying that a more individualized assessment would be conducted.²⁷⁴ Although much of House Bill 5138 must be changed in preparing future drafts, this prerequisite should remain in any future attempts at drafting international sex offender legislation.

2. *United Kingdom’s Sarah’s Law*

Sarah’s Law is a recent development in British sex offender legislation. The similarities between its limited public disclosure and the monitored disclosure to eligible entities proposed in House Bill 5138 make it an important precursor to a successful International Megan’s Law. For years after eight-year-old Sarah Payne was murdered by a convicted pedophile, British citizens campaigned for a law based on the United States’ Megan’s Law.²⁷⁵ The British

²⁶⁹ *Id.* at 225.

²⁷⁰ HUMAN RIGHTS WATCH, *supra* note 21, at 69.

²⁷¹ *Id.*

²⁷² DiCATALDO, *supra* note 69, at 212–14.

²⁷³ H.R. REP. NO. 111-568, pt. 1, at 11 (2010).

²⁷⁴ *Id.*

²⁷⁵ Stephen Wright, *Sarah’s Law To Go Nationwide*, DAILY MAIL (Jan. 25, 2010, 8:13 AM), <http://www.dailymail.co.uk/news/article-1245680/Saraha-Law-allowing-parents-carry-sex-offender-checks-rolled-out.html>.

government finally made an effort to appease its citizens in 2008, when pilot schemes were established in four counties where parents were “given the right to ask police if anyone with regular unsupervised access to their children [had] a conviction for child sex [offenses].”²⁷⁶ When creating these pilots, the Home Office followed the United States’ example, sending a delegation to the United States to study how Megan’s Law worked before the trials were set up.²⁷⁷ Following a request, the pilots required police to carry out two checks: a priority check within twenty-four hours of an inquiry and a second, “more thorough risk assessment” that could take up to several weeks.²⁷⁸ The disclosure scheme was designed to cover five main categories of individuals: a mother’s new boyfriend, a daughter’s new boyfriend, an overly friendly neighbor, an unfriendly neighbor, or a coach.²⁷⁹

Ultimately, the pilots were deemed a success.²⁸⁰ The Home Secretary said the results “had been ‘extremely encouraging’ and the project had protected children.”²⁸¹ Sarah’s Law is in the process of being extended to all counties within the United Kingdom.²⁸² One potential explanation for the pilots’ success is the controlled manner in which information was released to the public. Unlike sex offender laws in the United States, which mandate unrestricted community notification, parents were only informed that a registered sex offender was residing nearby if someone in the vicinity directly asked the police.²⁸³

Sarah’s Law places the responsibility on parents to ask police about the criminal background of a suspected sex offender.²⁸⁴ Officers then look into the individual’s background and reveal details, if disclosure is deemed to be in the child’s interests.²⁸⁵ For example, in each of the twenty-one instances of disclosure throughout the course of the pilot schemes, the police knew the subject to have been previously convicted of sex offenses against children and

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ See *supra* text accompanying notes 136–39.

²⁸¹ Wright, *supra* note 276.

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ Q&A: ‘Sarah’s Law’ Explained, *supra* note 138.

²⁸⁵ *Id.*

found parents' concerns relevant to the situation.²⁸⁶ A parent given this information is required to maintain confidentiality and is not allowed to pass the information to others.²⁸⁷ The Chief Constable of the Association of Chief Police Officers has stated that it is realistic to think people will actually keep this information private.²⁸⁸ He explained that there is no need for people to share the information because if information exists that "someone with previous [offenses] for child sex offending is living in a particular house next door . . . [and] there were other children to whom they have access . . . [the police] would disclose that . . . to anyone who has children who are at risk."²⁸⁹ The chief constable expressed that the goal is to avoid the vigilantism caused by widespread public disclosure while still maintaining safety.²⁹⁰ Before Sarah's Law, parents could alert police to their concerns about someone, but it was unclear whether they would be informed if the officers discovered a legitimate cause for concern.²⁹¹

Police fear that the scheme could "drive sex offenders underground, or cause vigilante-style attacks," as has been the case in the United States as a result of the federal Megan's Law.²⁹² Critics of Sarah's Law also caution that it could create a false sense of security for the public.²⁹³ Currently, not enough time has passed since the enactment of Sarah's Law to adequately determine its possible shortcomings and the controlled disclosure must be monitored. Notably, only five years before the disclosure scheme began, parliament

²⁸⁶ KEMSHALL & WOOD, *supra* note 129, at 10. According to the disclosure scheme guidance, these concerns could include:

- (i) Information known about the subject in relation to other offences/intelligence relevant to safeguarding children.
- (ii) Concerning behavior relevant to safeguarding children being displayed by the subject that has been disclosed as part of the disclosure application. . . .
- (iii) Circumstances known about the subject's previous child sexual offending and the circumstances/gravity of that offending now raises concerns about a risk of harm posed to the child/children named in the disclosure request.

Id. at 5.

²⁸⁷ Q&A: 'Sarah's Law' Explained, *supra* note 138.

²⁸⁸ *Police Doubt 'Sarah's Law' Will Cause Vigilante Attacks*, BBC NEWS (Aug. 1, 2010, 8:59 AM), <http://www.bbc.co.uk/news/uk-10827669?>

²⁸⁹ *Id.*

²⁹⁰ *Id.*

²⁹¹ Q&A: 'Sarah's Law' Explained, *supra* note 138.

²⁹² *Id.*

²⁹³ *Id.*

deliberately declined to include a public notification provision.²⁹⁴ Now it seems the British government has shifted its views by allowing individuals to request information about registered sex offenders that was previously unavailable to them.²⁹⁵ Soon, parliament may address the public's wishes and enact a law like Megan's Law or the Adam Walsh Act, mandating full disclosure to U.K. citizens.

IV. POSSIBLE SOLUTIONS

Over the past several years, the recurring proposal of an International Megan's Law indicates that representatives supporting this type of legislation will continue drafting new versions of the bill until one becomes law. Therefore, this Comment recognizes two possible solutions to the inadequacies of the House Bill 5138. The first suggests declining to pass any International Megan's Law until the long-term ramifications of the United Kingdom's Sarah's Law can be determined. However, this alternative may not be the most beneficial to the accomplishment of a legitimate goal: the protection of minors. The second, and more desirable, option focuses on correcting the substantive flaws of House Bill 5138 and applying the necessary changes to any future drafts.

A. *Solution 1: Do Not Pass Future Drafts of International Megan's Law*

The "Findings" section of House Bill 5138 had what appears to be a success story stemming from the ongoing efforts to combat the sexual exploitation of minors.²⁹⁶ In 2008, a lifetime registered sex offender from the United Kingdom was denied entry into the United States after INTERPOL London notified U.S. Customs about the offender's status.²⁹⁷ The British sex offender had made plans to live with a woman and her young daughters.²⁹⁸ The bill explained that ICE had been working in conjunction with INTERPOL and law enforcement in other countries, training foreign officials to prevent and detect sex crimes.²⁹⁹ As a result, over the past eight years, ICE has helped secure the convictions of seventy-three U.S. citizens charged with committing

²⁹⁴ See Autumn Long, Note, *Sex Offender Laws of the United Kingdom and the United States: Flawed Systems and Needed Reforms*, 18 *TRANSNAT'L L. & CONTEMP. PROBS.* 145, 158 (2009).

²⁹⁵ Q&A: 'Sarah's Law' Explained, *supra* note 138.

²⁹⁶ See H.R. 5138, 111th Cong. § 2(a)(14) (2010).

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ *Id.* § 2(a)(11).

sex crimes against minors overseas.³⁰⁰ This information seems to indicate that the existing system for detecting international sex crimes is working. Thus, it is not absurd to conclude that there is no real substantial need for a law like House Bill 5138, and consequently legislators should not feel pressure to pass any future drafts.

Currently, all sex offender legislation in the United States features some form of community notification and public access to the registries, yet House Bill 5138 proposed the creation of nonpublic sex offender registries in U.S. diplomatic and consular missions.³⁰¹ The bill explicitly stated that the information on these registries would not be available to the general public and only eligible entities would have the authority to request information.³⁰² As a result of this significant difference in disclosure requirements, Congress could elect to wait until well after the United Kingdom's Sarah's Law has been implemented across the country before considering any additional drafts of an International Megan's Law. This is a viable option because Sarah's Law also features controlled disclosure.³⁰³ Individuals are only granted access to information after it has been specifically requested and the consequences of disclosure have been evaluated by the local police.³⁰⁴ Although the four pilot schemes were successful, Sarah's Law may yield different results over time and across a larger population.

While this first solution would certainly eliminate the need for any concern about the weaknesses in House Bill 5138, the House of Representatives' 2010 vote in support of the bill suggests that Congress will not likely decline to pass this type of legislation for the indefinite future. Furthermore, the existence of child predators overseas, like Jack Sporich,³⁰⁵ warrants action, making the complete absence of legislation an undesirable solution as well.

B. Solution 2: Pass Legislation Resembling House Bill 5138 with Altered Language

When Representative Smith proposed House Bill 5138, he stated that it was imperative for the U.S. government to take the lessons learned from both the

³⁰⁰ See *id.* § 2(a)(12).

³⁰¹ *Id.* § 2(b)(3).

³⁰² *Id.* § 5(h).

³⁰³ *Police Doubt 'Sarah's Law' Will Cause Vigilante Attacks*, *supra* note 289.

³⁰⁴ See *supra* Part I.B.1.

³⁰⁵ See *supra* text accompanying notes 236–37.

state and national versions of Megan's Law and expand the protection of children globally.³⁰⁶ Although Representative Smith has arguably not considered the problems with Megan's Law in his own drafting attempts, and has thus far been unsuccessful in creating a viable version of International Megan's Law, his motives are sound. Because children should be protected from known sex offenders nationally and overseas, there is a need for some form of international sex offender legislation. Thus, the second option—passing legislation that both accounts for and corrects the weaknesses of House Bill 5138—is the more desirable choice.

1. Focus on International Uniformity

During the debate on House Bill 5138, Nevada Representative Shelley Berkley emphasized the need for such a law.³⁰⁷ Representative Berkley explained that this legislation would strengthen existing enforcement capability and discourage offenders from committing crimes abroad by requiring them to report their intent to travel.³⁰⁸ She said,

to know that an individual poses a danger to children and to do nothing simply because that person leaves [the United States] is unconscionable. [This law provides] the capability to help other governments protect their citizens, and we need to do all we can to prevent . . . predators from circumventing our laws to prey on children of [other] countries.³⁰⁹

As Representative Berkley explained, the United States *should* assist foreign countries by notifying them that an American-registered sex offender has expressed the intention to visit. Because each state mandates the registration of convicted offenders, the United States is capable of accomplishing this goal. However, this legislation ought to focus on protecting youth in the United States as well as other countries. Thus, to achieve reciprocity in the notification process, future legislation should emphasize one of House Bill 5138's stated goals: providing assistance to foreign countries to establish their own systems to identify sex offenders.³¹⁰

³⁰⁶ 156 CONG. REC. H6095 (daily ed. July 27, 2010) (statement of Rep. Smith).

³⁰⁷ 156 CONG. REC. H6094 (daily ed. July 27, 2010) (statement of Rep. Berkley).

³⁰⁸ *Id.*

³⁰⁹ *Id.*

³¹⁰ *See* H.R. 5138, 111th Cong. § 2(b)(7) (2010).

The varying requirements and classifications of sex offenders across the international arena are, and will continue to be, the largest impediment to the success of any bill. In 2010, a PACE report acknowledged the lasting damage experienced by young victims of sex crimes, but still advised against the creation of a Europe-wide registry.³¹¹ The report pointed to the legal inconsistencies across Europe and recommended that each European state develop an efficient and comprehensive system³¹² to manage sex offenders before a Europe-wide registry could succeed.³¹³ Because an International Megan's Law would target an even larger audience, the problems caused by diverse criminal law systems would only be amplified. Any future drafts should not only offer ways to combat the potential lack of reporting in foreign countries without registration requirements, but also provide more clarification regarding the ways in which the plethora of existing foreign laws will affect U.S. convicted sex offenders abroad. As drafted, House Bill 5138 only provided a detailed description of the nonpublic U.S. embassy registries, but does not offer any insight into exactly what foreign governments can and should do upon receiving notification that a high-interest American sex offender plans to relocate to their country.

2. *Exclude All Juvenile Offenders*

Most scholars acknowledge that registration and notification laws were enacted without any research-based evidence of their effectiveness.³¹⁴ In particular, data, coupled with the widespread belief that registration laws have no significant effect on reducing recidivism,³¹⁵ is particularly worrisome when these laws are applied to juvenile offenders. Placing juveniles on sex offender registries is often detrimental to their development, hindering their progress in school and participation in community activities.³¹⁶ Underage offenders can already be indefinitely subjected to stigmatizing laws that are arguably useless in the long run; House Bill 5138 would have perpetuated this problem on an international level. Furthermore, the types of individuals labeled juvenile sex offenders by these laws are entirely heterogeneous.³¹⁷ Some state registries

³¹¹ *Reinforcing Measures Against Sex Offenders*, *supra* note 26.

³¹² The report stated that the systems should include a sex offender registry. *Id.*

³¹³ *Id.*

³¹⁴ Sample & Evans, *supra* note 79, at 231.

³¹⁵ *Id.* at 233.

³¹⁶ Nastassia Walsh & Tracy Velazquez, *Registering Harm: The Adam Walsh Act and Juvenile Sex Offender Registration*, *CHAMPION MAG.*, Dec. 2009, at 20.

³¹⁷ *See* DICATALDO, *supra* note 69, at 26.

include the adolescent boy who uses a borrowed video camera to tape sex with a same-aged female classmate and then shows the video to his friends on the same list as the adolescent who violently rapes a peer or the repeated molester of young children.³¹⁸ Although some young offenders commit crimes that arguably warrant registration in the United States, many do not, and all must suffer. The inconsistency among state registration requirements in conjunction with House Bill 5138's discretionary language that allowed for the inclusion of juveniles who have committed crimes "comparable to or more severe than" sexual abuse³¹⁹ can expose non-deserving youth to even greater shame by requiring them to register in foreign countries as well as the United States.

Sex offenders are often subject to intense scrutiny motivated by the fear that they will inevitably reoffend.³²⁰ However, the recidivism rates of all sex offenders are generally low.³²¹ In particular, "the existing data on . . . juvenile sex offenders provide solid evidence that young offenders are much less likely than adult offenders to commit further sex offenses and that the known rates of sex re-offending for juveniles are also very low in absolute terms."³²² Consequently, the societal benefits of mandating that low risk offenders also register on foreign soil are minimal, especially when considering a minor's cognitive immaturity and amenability to treatment.³²³ There is an inherent contradiction between the focus on juvenile rehabilitation—there are more than 800 treatment programs geared toward juvenile offenders across the United States³²⁴—and registration and community notification laws subjecting juvenile sex offenders to the same postconviction requirements as adult offenders in more than half of the states and in House Bill 5138. Mandating that juveniles register as sex offenders is contrary to the purpose of the juvenile justice system, founded on the belief that children are different from adults and should face age-appropriate punishments for their actions.³²⁵ Therefore, all juvenile offenders should be excluded from the provisions of a future International Megan's Law.

³¹⁸ *Id.* at 25.

³¹⁹ H.R. 5138, 111th Cong. § 3(3)(B) (2010).

³²⁰ Sample & Evans, *supra* note 79, at 228.

³²¹ *Id.*

³²² DiCATALDO, *supra* note 69, at 79 (quoting FRANKLIN E. ZIMRING, AN AMERICAN TRAGEDY: LEGAL RESPONSES TO ADOLESCENT SEXUAL OFFENDING 62 (2009)).

³²³ Walsh & Velazquez, *supra* note 317.

³²⁴ ZILNEY & ZILNEY, *supra* note 53, at 113.

³²⁵ Walsh & Velazquez, *supra* note 317.

3. Create Guidelines for Determining High-Interest Sex Offenders

House Bill 5138 mandated that any sex offender that is a U.S. citizen must report his or her intent to travel internationally to the jurisdiction in which he or she is registered as a sex offender.³²⁶ The relevant jurisdiction must then notify the to-be-established International Sex Offender Travel Center of these travel plans.³²⁷ According to the bill's stated purposes, foreign officials would be alerted when those sex offenders who are ultimately identified as high-interest offenders have made plans to visit their country.³²⁸ A high-interest registered sex offender is defined as a sex offender "who the Center . . . based on the totality of the circumstances, has a reasonable belief presents a high risk of committing a sex offense against a minor in a country to which the sex offender intends to travel."³²⁹ This is the only guidance that House Bill 5138 offered regarding the necessary high-interest determination.

Any bill should include a prerequisite that convicted offenders be deemed high risk or dangerous before their personal information is sent to foreign countries because targeted applications of community protection policies are far more successful than broadly applied policies.³³⁰ The high interest provision in House Bill 5138 left too many holes. The bill seemed to give the center immense leeway in making this determination, and the overall lack of uniformity among state sex offender registries allows for potentially unjust and inconsistent results. Although the Adam Walsh Act attempts to alleviate this problem, more than fifty percent of the states are not in complete compliance with the law.³³¹ Thus, until there is nationwide compliance, states will continue to differ in their registration requirements, with twenty-one states choosing not to include all convicted sex offenders on their registries and only thirty-eight mandating that juvenile offenders register.³³² Virginia, for example, conducts sex offender risk assessments to be used by judges in determining an offender's sentence.³³³ Florida law, on the other hand, requires that anyone (Phillip Alpert included) convicted of a crime against children automatically

³²⁶ H.R. 5138, 111th Cong. § 4(a)(1) (2010).

³²⁷ *Id.* § 4(a)(2).

³²⁸ *Id.* § 2(b)(1).

³²⁹ *Id.* § 3(4).

³³⁰ See Sample & Evans, *supra* note 79, at 237.

³³¹ See *supra* text accompanying notes 79–85.

³³² See *supra* text accompanying notes 80–85; Morales, *supra* note 81; Feyerick & Steffen, *supra* note 1.

³³³ See generally VA. CRIMINAL SENTENCING COMM'N, ASSESSING RISK AMONG SEX OFFENDERS IN VIRGINIA (2001), available at http://www.vcsc.virginia.gov/sex_off_report.pdf.

register.³³⁴ This means that the state where a sex offender is convicted may determine their likelihood of being deemed high interest and this haphazard designation is arguably not what the drafters of House Bill 5138 intended. Therefore, to ensure consistency and fairness, future drafts must include specific guidelines for the high-interest determination.

CONCLUSION

Legislation closely resembling House Bill 5138, International Megan's Law of 2010, should not be enacted into law. The drafters need to consider the overall lack of scientific evidence supporting the effectiveness of its namesake federal law in the United States, Megan's Law. House Bill 5138 would have suffered similar shortcomings to the existing U.S. law and future drafts should therefore avoid attempting to implement comparable provisions, particularly with respect to juvenile sex offenders. Furthermore, because House Bill 5138, like Great Britain's Sarah's Law, allowed only for limited public disclosure to specified eligible entities, it may be advisable for Congress to wait until after the effects of the country-wide implementation of Sarah's Law can be accurately determined. However, the unquestionable need to protect children nationally and abroad through some form of international sex offender legislation makes this option the less favorable one.

House Bill 5138 also left many questions unanswered as to how to compensate for the vast differences between sex offender laws in the United States and those of other countries. The bill failed to clarify how a country without a sex offender registry could reasonably be expected to notify U.S. officials that a registered sex offender has made plans to travel to the United States. This becomes particularly problematic in light of the fact that only eight countries, including the United States, have implemented sex offender registries.³³⁵ When asked to advise on the creation of a Europe-wide sex offender registry, the Parliamentary Assembly of the Council of Europe stressed the need for individual countries to create and perfect their own sex offender laws before such a massive registry could be successfully created. It

³³⁴ See Feyerick & Steffen, *supra* note 1.

³³⁵ HUMAN RIGHTS WATCH, *supra* note 21, at 118.

follows that the success of an International Megan's Law requires the same global dedication to improving sex offender legislation.³³⁶

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³³⁶ On October 24, 2011, Representative Smith did, indeed, introduce an International Megan's Law of 2011, also called House Bill 3253. *H.R. 3253: International Megan's Law of 2011*, GOVTRACK.US, <http://www.govtrack.us/congress/bill.xpd?bill=h112-3253> (last visited Jan. 5, 2012). As of publication time, the bill has been referred to the House Subcommittee on Immigration Policy and Enforcement and not yet voted upon. *Id.* However, the International Megan's Law of 2011 reads as an almost exact replica of its predecessor, and thus, is inadequate. Any linguistic changes to the latest bill are trivial and do not correct the flaws identified by this Comment. For example, the aforementioned problem of varying international criminal laws and legal terms has not been addressed and some juveniles may still fall victim to the law's repercussions. Therefore, this Comment urges against the passing of House Bill 3253.

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