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The Peering Predator: Drone Technology Leaves Children Unprotected from Registered Sex Offenders

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The Peering Predator: Drone Technology Leaves Children Unprotected from Registered Sex Offenders

ABSTRACT

The increased accessibility of drone technology for private operators frustrates the purpose of existing sex offender legislation. Sex offenders who are intent on committing further unlawful acts may use the vast capabilities of modern drone technology to target children. This Comment explores current restrictions imposed on registered sex offenders and discusses how those restrictions are insufficient to protect children from sex offender recidivism. In order to bridge the gap between sex offender legislation and the rise of private drone use, North Carolina needs new legislation that appropriately limits registered sex offenders from obtaining or using drones for the purpose of harming children.

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INTRODUCTION

On a chilly October evening in 2015, a North Carolina State Highway Patrol officer, while patrolling the North Carolina State Fair, noticed a drone hovering above the crowd of fairgoers.¹ Authorities followed the drone back to its operator, Matthew Kenning.² As a result, Kenning was charged with one count of misdemeanor regulation of an unmanned aircraft system.³ According to Sheriff Donnie Harrison, the law prohibits flying drones over state property without permission from the state.⁴

A subsequent background check on Kenning revealed something unnerving—his status as a registered sex offender.⁵ In 2003, Kenning received a three-year prison sentence, in addition to mandated offender registration, for committing inappropriate sex acts with a minor in Marion, Indiana.⁶ In the 2015 search warrant, investigators also accused Kenning of visiting a children's playground on September 11, 2015,⁷ which is illegal for registered sex offenders in North Carolina.⁸

In order to protect children from recidivist sex offenders, North Carolina law imposes registration requirements and restrictions on certain sex offenders.⁹ One statutory restriction prohibits convicted sex offenders from being within 300 feet of recreational gatherings of minors or places that are intended for the primary use of minors.¹⁰ Furthermore, the North Carolina General Assembly recently amended the statute to expressly prohibit sex offenders from being on the State Fairgrounds during the fair.¹¹ Kenning was not charged with violating this restriction because he was not physically on the fairgrounds while operating the drone.¹² Nonetheless, in

1. Thomasi McDonald, *Wake Deputies to Review Video from Drone Flown by Sex Offender at NC State Fair*, NEWS & OBSERVER (Oct. 22, 2015, 6:33 PM), <http://www.newsobserver.com/news/local/crime/article41043300.html> [<https://perma.cc/XTN5-ELW7>].

2. *Id.*

3. *Id.*

4. *Id.* Kenning was also charged with possession of drugs and drug paraphernalia. *Id.*

5. *Id.*

6. *Id.* See also N.C. DEP'T PUB. SAFETY, *Offender Information—Kenning, Matthew Allen*, <http://sexoffender.ncsbi.gov/details.aspx?SRN=011853S2> [<https://perma.cc/9WE4-ZZW>] (last visited Dec. 19, 2016).

7. McDonald, *supra* note 1.

8. See N.C. GEN. STAT. § 14-208.18(a)(1) (Supp. 2016).

9. See generally *id.* §§ 14-208.5–208.45 (2015 & Supp. 2016).

10. *Id.* § 14-208.18(a)(2).

11. *Id.* § 14-208.18(a)(4).

12. See Matthew Burns, *Flying Drone at State Fair Lands Raleigh Man in Jail*, WRAL.COM (Oct. 22, 2015), <http://www.wral.com/flying-drone-at-state-fair-lands-raleigh->

using the drone, Kenning committed several acts that North Carolina sex offender legislation aims to prevent. The drone allowed him to observe, photograph, and record children inside a geographic territory that he was legally prohibited from entering.

Kenning's case raises a novel question—whether operating a drone legally extends a sex offender's physical presence to the location of the drone itself. Part I of this Comment provides a general overview of the development of sex offender laws and the current state of such laws in North Carolina. Part II explores the implications of drone technology on North Carolina sex offender legislation, with a specific focus on geographical restrictions. It begins with an investigation into the purpose of current sex offender legislation and explains how drone technology frustrates this purpose, leaving a gap between the law regarding drone use and the legal restrictions placed on sex offenders. Part II ultimately concludes that the public's ease of access to drones threatens the purpose of current sex offender legislation. Part III attempts to remedy North Carolina's legislative gap with proposals for future legislation.

I. THE DEVELOPMENT OF SEX OFFENDER LEGISLATION

A. Federal Sex Offender Legislation

An individual who commits an enumerated sexual offense may be deemed a sex offender and subject to registration requirements.¹³ The definition of “sex offense” varies greatly among the states and in the federal system.¹⁴ Generally, however, “[a] sex offender . . . is a person convicted of a sexually violent offense, deemed a sexually violent predator, or convicted of a criminal offense against a victim who is a minor.”¹⁵ Sex

man-in-jail/14999280/ [https://perma.cc/U9GQ-CECK] (explaining that officers located Kenning with the drone's control unit on Hillsborough Street).

13. See Joseph L. Lester, *Off to Elba! The Legitimacy of Sex Offender Residence and Employment Restrictions*, 40 AKRON L. REV. 339, 342 (2007) (discussing the three generally enumerated categories of sexual offenses).

14. *Id.* at 342–43; see, e.g., N.C. Gen. Stat. § 14-208.6(4) (defining “reportable convictions” as sexually violent or those committed against a minor); Adam Walsh Child Protection and Safety Act, 42 U.S.C. § 16911(5)(A) (2012) (defining a “sex offense” as “involving a sexual act or sexual contact with another” or a criminal offense against a child, as well as enumerated federal and military offenses).

15. Lester, *supra* note 13, at 343.

offender laws are commonly motivated by heinous acts that shock the legislature into action.¹⁶

Federal sex offender legislation began in 1994 with the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act (the Wetterling Act).¹⁷ The Wetterling Act jumpstarted the registration requirements placed on convicted sex offenders.¹⁸ The Act required individuals guilty of sexually violent offenses or crimes against minors to provide law enforcement with residency, telephone, and employment information.¹⁹

Registries such as that created under the Wetterling Act now exist in all fifty states.²⁰ Offender registration helps law enforcement in its investigations of sex crimes.²¹ The registry often expedites investigations by providing a list of likely suspects.²² However, the registries created pursuant to the Wetterling Act could only be used by law enforcement; the public was not granted access.²³

The next significant change in federal sex offender registration law was Megan's Law.²⁴ Megan Kanka, the law's namesake, was abducted, raped, and murdered by a registered sex offender.²⁵ The offender lived across the street from Megan and her family, but they had no way of knowing their neighbor was a twice-convicted sex offender.²⁶ The lack of public access to the sex offender registry sparked outrage within the community and Megan's family.²⁷ Many believed the crime was

16. See Brian P. LiVecchi, Comment, "*The Least of These:*" A Constitutional Challenge to North Carolina's Sexual Offender Laws and N.C. Gen. Stat. § 14-208.18, 33 N.C. CENT. L. REV. 53, 60, 64 (2010).

17. See Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program Act, 42 U.S.C. § 14071 (2006) (repealed by Adam Walsh Child Protection and Safety Act, 42 U.S.C. § 16911 (2006)).

18. See 42 U.S.C. § 14071.

19. *Id.* § 14071(a)(1).

20. Amber Leigh Bagley, Comment, "*An Era of Human Zoning:*" Banishing Sex Offenders from Communities Through Residence and Work Restrictions, 57 EMORY L.J. 1347, 1348, 1352 (2008) (footnote omitted).

21. Bagley, *supra* note 20, at 1351–52.

22. LiVecchi, *supra* note 16, at 61 (citing Bagley, *supra* note 20, at 1351–52).

23. See LiVecchi, *supra* note 16, at 65 ("The most important aspect of notification created by the Adam Walsh Act was the requirement that states make the information contained in their registries available to the public through the internet.").

24. *Id.*

25. *Id.*

26. *Id.* at 64.

27. *Id.*

preventable with knowledge of the neighbor's status as a sex offender.²⁸ The public outrage resulted in Megan's Law, which amended the Jacob Wetterling Act, mandated community access to the Federal Sex Offender Registry, and imposed a condition for state funding on states allowing public access to the state registries.²⁹ Megan's Law expanded the focus of sex offender laws from merely informing law enforcement of sex offender locations to also enlisting the community in sex crime prevention.³⁰

In 2006, the Adam Walsh Child and Protection and Safety Act (the Adam Walsh Act) replaced the Wetterling Act.³¹ The Adam Walsh Act created a tiered system for classifying sex offenders based on the severity of the committed offense.³² Sex offenders in higher tiers are subject to harsher registration and notification requirements than those in Tiers I or II.³³ The Adam Walsh Act requires that states make this classification accessible to the public via the Internet.³⁴

Around the same time that these acts regarding sex offender registries were passed, law enforcement began tracking sex offenders using satellite-based monitoring.³⁵ While many states currently use satellite-based tracking, such tracking is "not effective for the prevention of actual acts of violence."³⁶ Instead, the tracking devices are often used to locate offenders that the state has lost track of.³⁷ If a registered sex offender in one state moves into another state, the tracking device alerts law enforcement officers in the second state that there is an unregistered sex offender in their state. However, these tracking devices are usually not monitored in real time, further limiting their effectiveness.³⁸

Recent developments in sex offender legislation include residence and work restrictions, some of which prohibit certain classes of offenders from living or working in close proximity to schools, playgrounds, and other

28. *Id.*

29. *Id.*

30. *Id.*

31. Steven J. Costigliacci, Note, *Protecting Our Children from Sex Offenders: Have We Gone Too Far?*, 46 FAM. CT. REV. 180, 182 (2008).

32. The Tiers range from Tier I to Tier III, with Tier III being the most severe. See Adam Walsh Child Protection and Safety Act, 42 U.S.C. §§ 16911(2)–(4) (2012).

33. 42 U.S.C. §§ 16911(2)–(4). See also Costigliacci, *supra* note 31, at 183–84.

34. LiVecchi, *supra* note 16, at 65.

35. *Id.* at 66.

36. *Id.*

37. *Id.* (citing Elliott C. McLaughlin & Patrick Oppmann, *Sex Offender Kills Teen While Under GPS Monitoring, Police Say*, CNN (Mar. 12, 2009), <http://www.cnn.com/2009/CRIME/03/12/sex.offender.gps/index.html> [<https://perma.cc/D34Y-HH3E>]).

38. LiVecchi, *supra* note 16, at 66.

places where children are known to gather.³⁹ These restrictions vary from state to state and do not stem from any particular piece of federal legislation.⁴⁰ The broad nature of work and residency restrictions, such as those in place in North Carolina, has generated substantial controversy.⁴¹

B. North Carolina Sex Offender Legislation

North Carolina requires four types of convicted criminals to register in the sex offender database.⁴² The underlying trait of each group is that the individuals have a “reportable conviction.”⁴³ Reportable convictions include violent sex crimes and crimes against minors.⁴⁴ Individuals with a reportable conviction, who are residents of the state or who have been present in the state for fifteen days, must register as a sex offender.⁴⁵ Additionally, individuals with a reportable conviction or who are required to register in another state and are non-residents, but are either students or workers, must “maintain registration with the sheriff of the county where the person works or attends school.”⁴⁶

Sex offenders in North Carolina are ranked into one of two categories based on the severity of their offenses, their targets, and their risk of recidivism.⁴⁷ Different registration requirements are placed on individuals in the different categories.⁴⁸ The first category is primarily comprised of general offenders, such as those with no prior offenses or those who committed non-violent acts, while the second category consists primarily of

39. *Id.* at 68–69.

40. *See id.* (discussing North Carolina’s residency and employment restrictions).

41. *See* LiVecchi, *supra* note 16, at 69.

42. *See* N.C. GEN. STAT. § 14-208.7 (2015). *See also* LiVecchi, *supra* note 16, at 61 (citing N.C. DEP’T OF JUSTICE, SEX OFFENDER & PUBLIC PROTECTION REGISTRATION PROGRAMS, at 3 (Rev. 2014), <http://www.ncdoj.gov/sexoffenderpublication.aspx> [<https://perma.cc/XX4K-C5MF>]).

43. *See* § 14-208.7. *See also* LiVecchi, *supra* note 16, at 61.

44. § 14-208.6(4) (defining “reportable convictions”). North Carolina defines “sexually violent offense” as including various degrees of rape, human trafficking, sexual exploitation, and various acts against minors and the disabled. § 14-208.6(5). “Offense against a minor” includes kidnapping, abduction, and felonious restraint. § 14-208.6(1m).

45. *See* § 14-208.7(a).

46. § 14-208.7(a1).

47. LiVecchi, *supra* note 16, at 62 (describing the “Sex Offender and Public Protection Registration,” §§ 14-208.7–14-208.19a, as Tier I, and the “Sexually Violent Predator Registration Program,” §§ 14-208.20–14-208.25, as Tier II).

48. Category one offenders are required to register as sex offenders for thirty years and must also verify their registration information semiannually. § 14-208.7(a); § 14-208.9A(a). Category two offenders must register for life. § 14-208.40A(c); § 14-208.41. *See also* LiVecchi, *supra* note 16, at 62–64.

aggravated offenders, recidivists, and sexually violent predators.⁴⁹ Because the risk of future offenses is notably higher in the second category, individuals in that tier are subject to harsher registration requirements.⁵⁰

North Carolina's version of Megan's Law, referred to as the Amy Jackson Law, requires that the sex offender registry be made available to the public over the Internet.⁵¹ Category two registrants are required to be part of the satellite-based monitoring program for the rest of their lives, in addition to being listed in the sex offender registry.⁵² Individuals who are not in the second category but have been convicted of raping a child, or have committed an offense against a minor, are also subject to lifetime satellite monitoring.⁵³

In addition to these registration and monitoring requirements, North Carolina has several residency, work, and social restriction laws.⁵⁴ A registered sex offender in North Carolina may not live within 1,000 feet of a school or day care.⁵⁵ The offender's residence cannot be used for the care of a minor, nor can the offender participate in any form of babysitting service.⁵⁶ Offenders may not use or access social networking sites that are accessible to minors.⁵⁷ And, most pertinent to this Comment, an offender's physical location is restricted.⁵⁸

Under North Carolina law, sex offenders are restricted from knowingly being within 300 feet of schools, playgrounds, and other areas where children are likely to be cared for or present.⁵⁹ Recently, the North Carolina General Assembly amended the law to prohibit sex offenders from entering the State Fairgrounds during the fair.⁶⁰ This recent statutory amendment is most likely a response to the events that transpired at the 2015 State Fair during which four sex offenders, including Kenning, were arrested.⁶¹ However, this amendment fails to consider what an offender

49. See LiVecchi, *supra* note 16, at 62; see also N.C. GEN. STAT. § 14-208.20 (identifying individuals subject to the "Sexually Violent Predator Program").

50. LiVecchi, *supra* note 16, at 62–64 (citations omitted).

51. See N.C. GEN. STAT. § 14-208.15.

52. § 14-408.40A(c). See also LiVecchi, *supra* note 16, at 67.

53. § 14-408.40A(c). See also LiVecchi, *supra* note 16, at 67.

54. See N.C. GEN. STAT. §§ 14-208.16–208.18.

55. *Id.* § 14-208.16(a).

56. See *id.* § 14-208.17.

57. See *id.* § 14-202.5. See also §§ 14-202.5(b)(1)–(4) (defining "commercial social networking website").

58. See *id.* § 14-208.18(a) (Supp. 2016).

59. *Id.*

60. See *id.* § 14-208.18(a)(4).

61. See McDonald, *supra* note 1.

with a drone could accomplish from just beyond the edge of the statutory geographical restriction.

II. IMPLICATIONS OF DRONE TECHNOLOGY AND NORTH CAROLINA SEX OFFENDER LEGISLATION

A. Purpose of North Carolina's Sex Offender Laws

The ultimate purpose of sex offender laws is to protect children from being targeted by known sex offenders, yet offenders' access to drones frustrates this purpose. New legislation must be introduced that accounts for the easy access to drone technology. In order to understand the purpose of sex offender laws, it is important to examine the text of the laws and the reasoning lawmakers provided for those laws.

Protecting the public is the underlying foundational purpose of the North Carolina sex offender laws.⁶² The legislature "recognizes that sex offenders often pose a high risk of engaging in sex offenses even after being released from incarceration or commitment and that *protection of the public* from sex offenders is of paramount governmental interest."⁶³ This statement of purpose suggests that the underlying theme of sex offender laws in North Carolina is to *protect* against future sex offenses by registered sex offenders.⁶⁴ The statute goes on to state that "it is the purpose of this Article to assist law enforcement agencies' efforts to *protect communities . . .*"⁶⁵ The General Assembly chose to use the words "protect communities" rather than "prevent recidivism." This is critical because protecting communities focuses on potential victims, while preventing recidivism focuses on the offender and their actions.

Distinguishing between the protection of potential victims and the prevention of recidivism is important in evaluating the degree to which drone technology negatively impacts the purpose of sex offender laws. Children are less protected from sex offenders who use drone technology to gain easier access to potential targets. If the purpose of the law is to protect potential victims, then that purpose can be furthered by legislation restricting a registered sex offender's use of a drone. While restricting drone use alone may not prevent recidivism, it would further the purpose of protecting potential victims.

62. N.C. GEN. STAT. § 14-208.5 (2015).

63. *Id.* (emphasis added).

64. *See id.*

65. *Id.* (emphasis added).

Public safety is likely the primary motivation for each new legislative initiative regarding sex offenders. Understandably, the public has a “desire to keep innocent children safe from potential sexual predators who might be living across the street, unbeknownst to anyone.”⁶⁶ It is this desire that motivated the evolution of sex offense legislation over time, from the Jacob Wetterling Act and Megan’s Law to the Adam Walsh Act.⁶⁷

North Carolina reemphasizes its goal of protecting the community in its stated reason for implementing registration requirements. The stated purpose of registration requirements is “to establish a more stringent set of registration requirements for recidivists, persons who commit aggravated offenses, and for a subclass of highly dangerous sex offenders who are determined by a sentencing court . . . to be sexually violent predators.”⁶⁸

Much like the North Carolina General Assembly, the United States Supreme Court recognizes a need to protect children from recidivists, writing, “[s]ex offenders are a serious threat in this Nation.”⁶⁹ The Supreme Court acknowledged that victims of sexual assault are frequently juveniles.⁷⁰ Moreover, the Court noted that when convicted sex offenders reenter society, they have a greater risk for recidivism than any other criminal offender.⁷¹

Although rehabilitating known sex offenders in an effort to tackle the recidivism problem is an additional goal of sex offender legislation,⁷² protecting children is the top priority of North Carolina’s legislation.

B. The Need for a Drone-Based Sex Offender Law

Drones benefit industries and governments in a variety of applications, but can certainly be misused.⁷³ Most notably, drone technology significantly impacts the level of privacy enjoyed by individuals in

66. Barnaby Grzaslewicz, Comment, *Banished from the Virtual Sandbox: How State Bans on Sex Offender Social Networking Access Implicates the Freedom of Speech*, 32 TEMP. J. SCI. TECH. & ENVTL. L. 85, 85–86 (2013).

67. *See id.* at 91.

68. N.C. GEN. STAT. § 14-208.6A.

69. Conn. Dep’t of Pub. Safety v. Doe, 538 U.S. 1, 4 (2003) (quoting *McKune v. Lile*, 536 U.S. 24, 32 (2002) (plurality opinion)).

70. *Id.*

71. *Id.*

72. *See* N.C. GEN. STAT. § 15A-1343(b2) (2015) (stating that, as a special condition of probation, convicted sex offenders must participate in court ordered rehabilitative treatment).

73. *See* Iva Todorova, *The Sky is the Limit: UAVs by Private Actors and the Implications to Common-Law Privacy*, 10 FLA. INT’L U. L. REV. 803, 805 (2015).

society.⁷⁴ Drones can obtain and store tremendous amounts of high quality “private information about people’s lives, and with information comes power.”⁷⁵ Unfortunately, this power may land in the hands of a known, dangerous sex offender. What dangerous individuals will do with that information is uncertain, but the possibilities should not be disregarded.

Keeping convicted sex offenders away from areas where children gather has traditionally served as a physical barrier between sex offenders and information on potential child victims. However, as seen in the example of Matthew Kenning,⁷⁶ this limitation is quickly disappearing with the introduction of new drone technologies. Drone access erodes this limitation because drones may avoid detection and can carry sophisticated surveillance equipment, allowing them to remotely obtain dangerous information.⁷⁷ While tort law governs harassing people or flying drones on people’s property, and criminal law governs “peeping-tom voyeurism,”⁷⁸ current law appears unfit to address the danger of a high-risk sex offender in control of a drone.

Recreational use of small drones by private individuals is permissible under the FAA Modernization and Reform Act of 2012; as such drones are treated as model aircrafts.⁷⁹ The Act “specifically requires the FAA not to oversee robotic ‘aircraft flown [strictly] for hobby or recreational use.’”⁸⁰ Only when a private drone enters regulated airspace does the FAA have jurisdiction over the operator’s actions.⁸¹ This effectively leaves private drone use regulation to the state legislatures.

Several states across the country have passed or introduced bills aimed at protecting privacy in regard to private drone use.⁸² Many of these bills

74. *Id.*

75. *Id.*

76. McDonald, *supra* note 1.

77. Todorova, *supra* note 73, at 809.

78. Timothy T. Takahashi, *The Rise of the Drones—The Need for Comprehensive Federal Regulation of Robot Aircraft*, 8 ALB. GOV’T L. REV. 63, 118 (2015) (citing Melanie Reid, *Grounding Drones: Big Brother’s Tool Box Needs Regulation Not Elimination*, 20 RICH. J.L. & TECH. 9, 21, 26 (2014); Alissa M. Dolan & Richard Thompson II, *Integration of Drones into Domestic Airspace: Selected Legal Issues*, CONGRESSIONAL RESEARCH SERVICE 21 (2013), <https://fas.org/sgp/crs/natsec/R42940.pdf> [<https://perma.cc/2GEY-P95R>]).

79. *See* Takahashi, *supra* note 78, at 118.

80. *Id.* (quoting FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95, 126 Stat. 77 (codified at 40 U.S.C. § 40101 (2012))).

81. *See* Takahashi, *supra* note 78, at 118.

82. *See id.* at 124–25; *see generally* *Current Unmanned Aircraft State Law Landscape*, NAT’L CONFERENCE OF STATE LEGISLATURES (Oct. 7, 2016), <http://www.ncsl.org/research/>

make it illegal to take photographs or videos using a drone on private property.⁸³ However, the majority of states have not addressed the privacy implications of drone use on *public* property.⁸⁴ North Carolina is no exception. Section 15A-300.1 of the North Carolina General Statutes provides in pertinent part:

(b) [N]o person, entity, or State agency shall use an unmanned aircraft system to do any of the following:

(1) Conduct surveillance of:

a. A person or a dwelling occupied by a person and that dwelling's curtilage without the person's consent.

b. Private real property without the consent of the owner, easement holder, or lessee of the property.⁸⁵

This statute effectively allows a sex offender to fly a drone anywhere, apart from an individual's private property.⁸⁶ Even in the case of a private individual conducting surveillance over another's private property, a victim of unwarranted surveillance only has the opportunity for a civil remedy against the perpetrator.⁸⁷ Thus, one who commits such an act would not face criminal liability.

Although North Carolina law prohibits registered sex offenders from being in certain places where children are likely to be present,⁸⁸ there is no law preventing offenders from using drones to conduct surveillance of children in those areas. Since drones can potentially fly undetected, stay in flight for long periods of time, and hold sophisticated imaging technology⁸⁹—all while operated from a distance—their use by sex offenders creates a threat to the safety of children. Sex offenders now have a tool that allows them to observe children from a distance, track their

transportation/current-unmanned-aircraft-state-law-landscape.aspx [https://perma.cc/M55B-VNNZ].

83. See e.g., Takahashi, *supra* note 78, at 125 (highlighting various state ordinances prohibiting drones within private property as well as state parks).

84. See Todorova, *supra* note 73, at 827.

85. N.C. GEN. STAT. § 15A-300.1(b) (2015).

86. See *id.*

87. *Id.* § 15A-300.1(e).

88. *Id.* § 14-208.18 (Supp. 2016).

89. Todorova, *supra* note 73, at 809, 810–811 (describing how drones can be equipped with infrared cameras, license plate readers, sensors that detect movement, facial recognition technology, and eavesdropping devices). While these various technologies may seem to be too high-tech for an average person, and therefore nothing to be concerned about, most people have these capabilities on their cell phones. It is not unreasonable to believe criminals will also use the technology for crime.

movements, and even stalk potential targets. These abilities frustrate the purpose of protection set out in sex offender legislation.⁹⁰

Today, thanks to the ever-increasing availability of drones, a sex offender can sit in his or her car near a neighborhood full of children and monitor their actions. Through the use of a drone, the sex offender can see when a child gets off the bus alone, walks home alone, or even arrives at home alone. Such use of drones could not only assist the sex offender in tracking possible victims, but it also allows the perpetrator to canvas the area for police or witnesses before moving in, further insulating himself from detection. Of course, without a drone, the sex offender can seek a target in other ways, but using a drone allows the offender to remain undetected and in a location or distance permitted by law.

Scenarios such as these are increasingly possible if drone technology is in the hands of those that wish to harm children. Consider a park setting with children running and playing. Instead of a sex offender sitting at a legally permissible distance with binoculars, an offender could operate a drone from an even further distance and obtain even more dangerous information. Inconspicuously, the sex offender hovers above the park, watching the children, noticing when and where they are alone or out of sight of parents, all the while recording and storing this information. Existing legislation does not protect against this scenario. Thus, the protective purpose of sex offender legislation is frustrated by the potential for such drone usage.

C. *Arguments Against a Drone-Based Sex Offender Law*

In an alternative to the viewpoints discussed above, critics that challenge effectiveness of legislative efforts to restrict sex offenders' rights would likely argue that the purpose of sex offender laws is not frustrated by drone use. There are several arguments suggesting that geographical limitations placed on registered sex offenders are useless and fail to recognize the reality behind sex offenses.⁹¹ First, opponents to the restriction argue that recidivism among convicted sex offenders is low, rendering the restrictions unnecessary.⁹² Second, opponents argue that the

90. See N.C. GEN. STAT. § 14-208.5 (2015).

91. See LiVecchi, *supra* note 16, at 106 (“If offenders are so dangerous that they cannot be 300 feet from a child they should be incarcerated.”); Note, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 HARV. L. REV. 806, 807 n.14 (1985) [hereinafter *Testimony of Child Victims*] (discussing the reality that many offenders have relationships with their victims which counters the effectiveness of geographical limitations).

92. LiVecchi, *supra* note 16, at 92–94.

restrictions are ineffective because the majority of sex crimes involving children are committed by offenders who have a relationship with their victims, rather than complete strangers.⁹³ These two suggestions, if factually accurate, potentially undermine the need for drone use limitations on registered sex offenders.

Critics claim that recidivism among sex offenders is no higher than recidivism among other types of offenders and is possibly even lower.⁹⁴ In fact, critics contend a “vast majority of sex offenders are never arrested for another sex offense.”⁹⁵ Therefore, the argument goes, implementing harsh limitations on registered sex offenders under the guise of preventing recidivism creates poorly supported laws.⁹⁶ However, there is statistical support suggesting that recidivism among sex offenders is indeed higher than that of other crimes.⁹⁷

Even if it is accepted that sex offenders do not pose a high risk for recidivism, certain restrictions are still necessary. Certain types of crimes, such as sex offenses, can be so harmful that society may view any related recidivism as unacceptable. Sexual offenses impact victims for decades to come, contributing to an increased likelihood of substance abuse, mental health issues, and criminal activity.⁹⁸ Given the disparities in harm caused by the crimes, punishment for the crime should be viewed through different lenses.

The claim that the majority of sex offenses are committed by a victim’s family member or a person whom the victim has a relationship also undermines the purpose of the restrictions imposed on sex offenders. In such a scenario where the offender is in a position of trust with the victim such as that of a guardian, coach, or teacher, drones likely would not aid the offender in targeting the victim. The offender has knowledge of and access to the victim without using a drone. Therefore, new limitations

93. *Testimony of Child Victims*, supra note 91, at 807 n.14 (“Of 583 cases of child sex abuse examined in one survey, the offender was a family member in 47% of the cases, otherwise an acquaintance of the child in 42%, and a stranger in only in 8%.”).

94. LiVecchi, supra note 16, at 92 (citing Richard G. Wright, *Sex Offender Post-Incarceration Sanctions: Are There Any Limits?*, 34 NEW. ENG. J. ON CRIM. & CIV. CONFINEMENT 17, 26 (2008)).

95. LiVecchi, supra note 16, at 92 (suggesting there is little need for the current restrictions on registered sex offenders).

96. LiVecchi, supra note 16, at 94.

97. *Id.* at 93. Depending on which factors are considered, the statistics can show different trends. *Id.* (contrasting the likelihood of general recidivism by sex offenders with that of sex offenders with a previous non-sexual offense).

98. *Child Sex Abuse Statistics*, DARKNESS TO LIGHT 6–7, http://www.d2l.org/atf/cf/%7B64AF78C4-5EB8-45AA-BC28-F7EE2B581919%7D/all_statistics_20150619.pdf [<https://perma.cc/L3DE-7X75>].

on drone use by sex offenders would do little to prevent offenses committed against victims who have relationships with their offenders.

While the majority of sex offenses stem from an offender-victim relationship, this is not the only form of sex offense.⁹⁹ The incidents that generated support for the Wetterling Act, Megan's Law, and subsequent state initiatives involved individuals targeting children with whom they had no relationship.¹⁰⁰ Challenges in preventing certain forms of sex offenses should not limit potentially successful initiatives to prevent other forms of sex offenses.

A potential argument against drone-based limitations on registered sex offenders is that the limitations do not prevent unknown or first-time offenders from committing sex offenses. Only registered sex offenders would be required to comply with the drone regulations, allowing unknown or first-time offenders to hover in a blind spot of legislation. However, the ineffectiveness of drone legislation on first-time offenders should not detract from its potential impact on known offenders.

A final viewpoint that questions the practicality of sex offender limitations builds on the premise that sex offenders who are intent on offending are not deterred by punishments for violating limitations.¹⁰¹ For example, a child predator in North Carolina who kidnaps and sexually assaults a child faces over forty years in prison if convicted.¹⁰² It is unlikely that an offender prepared to face forty years in prison is going to be deterred by the punishment for violating North Carolina's location restrictions on sex offenders,¹⁰³ which results in at most twenty-five months in prison.¹⁰⁴

While this theory has merit, deterrence is not the sole objective of sex offense laws.¹⁰⁵ Convicted offenders are required to register, stay away from certain locations, and sometimes wear satellite-based tracking devices.¹⁰⁶ Apart from the intent to deter offenders, these regulations have been enacted to protect individuals from harm.¹⁰⁷ A flying drone spotted in a children's park or following a school bus could alert authorities and

99. *See id.* (distinguishing between sexual abuse by a family member, an acquaintance, and a stranger).

100. *See* LiVecchi, *supra* note 16, at 64.

101. *Id.* at 95–96.

102. *Id.* at 95.

103. N.C. GEN. STAT. § 14-208.19 (2015).

104. *Id.* § 15A-1340.17. *See* LiVecchi, *supra* note 16, at 96.

105. *See supra* Section II.A.

106. *See* N.C. GEN. STAT. §§ 14-208.6A, 208.18 (2015 & Supp. 2016).

107. *See supra* Section II.A.

civilians to a potential threat. Law enforcement needs the ability to track known offenders and the public deserves the ability to do the same.

III. ADDRESSING NORTH CAROLINA'S LEGISLATIVE GAP: SEX OFFENDERS AND DRONE USE

After understanding the purpose of current sex offender legislation and the status of private drone use law, a legislative gap remains regarding drones in the hands of sex offenders. By failing to address this issue in its sex offender laws, North Carolina allows sex offenders to use drones in an effort to target children and at the same time adhere to their geographical restrictions. Only a few states have addressed the privacy implications of private drone use and legislative efforts have come up short.¹⁰⁸ However, the potential for harm when sex offenders use ever-advancing drone technology is great enough to warrant additions to the current restrictions placed on registered sex offenders.

The following three proposals attempt to fill the gap in current North Carolina sex offender legislation. The first two proposals represent extreme options at opposite ends of the spectrum—the first proposing no legislative action and the second proposing aggressive legislative restrictions on sex offender drone use. The third proposal is the most reasonable option and involves balancing competing interests to craft a partial restriction on sex offender drone use.

A. *Ignore the Legislative Gap*

With every policy decision, there is always the option to do nothing. Lawmakers may refuse to recognize the existence of a gap, or they may choose to leave the gap between private drone use and sex offender law where it stands. There are valid arguments that the current registered sex offender geographical restriction laws are ineffective and that any further legislation would be equally as ineffective.¹⁰⁹

Sex offenders who have either not been convicted or are unregistered will not be reached by drone legislation because those individuals are not subject to registration requirements. Similarly, it is possible that offenders who only harm children that they have built some sort of relationship with will not be impacted by legislation restricting drone use, since drone use is

108. Todorova, *supra* note 73, at 836–38 (discussing the difficulties in asserting a privacy claim arising out of drone use); *see also* Takahashi, *supra* note 78, at 125 (discussing legislation in Texas, Kansas, and Louisiana concerning privacy issues and recreational drone use).

109. *See supra* notes 94–96 and accompanying text.

unnecessary for them to find a target. Additionally, there is support for the idea that sex offenders should not continue to be punished after they have served their time in prison and are released into society.¹¹⁰ The argument follows that if society believes sex offenders have not yet “paid their debt to society,” then perhaps harsher prison sentences should be given.¹¹¹ However, this argument applies equally to any post-release restriction.¹¹²

These positions suggest that if all sex offenses cannot be protected against, no efforts should be taken to prevent even some offenses. This is an unwise and unacceptable rationale for law-making decisions. Viewing registration requirements as continued punishment, by focusing solely on the prison sentence already served, assumes the primary purpose of sex offender restrictions is to punish offenders for the crimes they have committed. However, as discussed above, the primary purpose is actually to protect society and provide a safe environment for children who may not be able to protect themselves from becoming a victim of a sex offense.¹¹³ Therefore, solely extending prison sentences, in place of post-release sex offender restrictions, is inappropriate. Instead, a proactive initiative that limits recidivism is a better solution.

B. Aggressively Regulate Drone Use by Sex Offenders

A second, and more appropriate, proposal is to prohibit registered sex offenders from purchasing, owning, or possessing drones as an extension of their current limitations. This strategy would be the most effective in resolving the conflict between the purpose of sex offender registry laws and the ability of sex offenders to use drones, and it would be fairly easy to implement. Although sex offenders may be able to obtain drones in various ways, the primary way is likely by purchase. The more difficult it is for registered sex offenders to acquire drones, the less offenders will be able to use the technology in a manner that harms children. Enforcement of this restriction could be implemented by requiring drone retailers to obtain identification from purchasers and refuse sale to registered sex offenders. An alternative is to allow drone purchase by sex offenders but connect drones with the same GPS tracking device worn by high-risk offenders. Further, this proposal becomes increasingly feasible if licensing private drones becomes a requirement for operation.

110. See Lester, *supra* note 13, at 372. This perspective stems from the retribution theory of criminal law where every crime committed creates a debt that must be paid to society, usually fulfilled through incarceration time.

111. *Id.*

112. *Id.* (proposing alternatives to post-release restrictions).

113. See *supra* notes 62–65 and accompanying text.

It is possible that the government's interest in such a drastic limitation would face a high level of scrutiny and potentially a constitutional challenge.¹¹⁴ Not only would this proposal restrict flying drones in the current enumerated locations, but it would also wholly prohibit flying them in harmless locations. For example, registered sex offenders would be prohibited from flying a drone in a field, away from the public, or even from flying drones on their own private properties. As a result, enforcing this prohibition in circumstances where there is no risk of harm would be over-inclusive and would not serve a public interest.¹¹⁵

C. Partially Restrict Sex Offenders' Access to Drones

A third, and better, option is to craft a partial restriction on sex offenders' access to drone technology. Legislation is needed to bridge the current legislative gap and serve the public interest. The law could prohibit registered sex offenders classified in the second category (aggravated offenders, recidivists, and sexually violent predators)¹¹⁶ from possessing or controlling a drone that contains focused pictures or videos of children. Additionally, registered sex offenders could be prohibited from flying any drone within locations from which their physical presence is banned. Society has a strong interest in preventing children from being monitored by registered sex offenders.¹¹⁷ The purpose of protecting children, which guides current sex offender legislation, also supports a limitation on drone use in restricted areas.¹¹⁸

However, this proposal comes with its own limitations. It may prove difficult to detect when registered sex offenders are flying drones in restricted locations unless those locations are continuously monitored by law enforcement. Drones can go unnoticed when they are not being looked for, so counting on public reporting of drones flying over children's gatherings is likely unreliable. Discovering the individual who is operating a drone and determining if they are a registered sex offender presents

114. See Nikki Gfellers & Kimberly Ann Lewis, Comment, *The Amy Jackson Law—A Look at the Constitutionality of North Carolina's Answer to Megan's Law*, 20 CAMPBELL L. REV. 347, 352–53 (1998) (explaining that a law violates the constitutional ex post facto prohibition if it increases the degree of punishment or creates a new punishment for an offense that was not in effect when the crime was committed).

115. See, e.g., *Dandridge v. Williams*, 397 U.S. 471, 529 (1970) (holding Maryland's welfare maximum grant regulation over-inclusive "because it applies so strongly against a substantial class as to which it can rationally serve no end.").

116. See N.C. GEN. STAT. § 14-208.20 (identifying individuals subject to the "Sexually Violent Predator Program").

117. See *id.* § 14-208.5.

118. See *id.* (discussing the purpose of North Carolina sex offender legislation).

further challenges. Matthew Kenning was only discovered after law enforcement followed the drone as it flew back to him.¹¹⁹ Officers conducted a background check because Kenning flew the drone over state property without permission, which then led to discovering Kenning's sex offender status.¹²⁰ Without the initial violation—flying over state property without permission—officers would have no incentive to follow the drone, much less run a background check on the operator.

The fact that drones can be difficult to detect supports the need for further legislation. The first step in providing a safer environment for children is to enact legislation that places a partial restraint on sex offender drone use. The next step is to develop the means to easily detect nearby drones.

Today, a registered sex offender could not be arrested for observing children with a drone at a private school, private park, public mall, or church playground, even though his physical presence is prohibited at those locations. With this proposal, such conduct would become illegal and receive appropriate punishment. A predator waiting for an opportunity to take advantage of children could be discovered and arrested. Otherwise, law enforcement must wait until the offender steps into the restricted area, or perhaps harms a child, before they can act. At that point it is too late.

CONCLUSION

With the accessibility and advancement of drone technology and the current state of sex offender legislation, registered sex offenders have access to locations where the law prohibits them from physically entering. To further the stated purpose of past legislation, protecting children from offenders requires new laws limiting the opportunities registered sex offenders have to track children. By extending the current geographic restrictions placed on registered sex offenders to include operating a drone within such locations, and prohibiting offenders from possessing photo or video surveillance of children, individuals with harmful intentions can be stopped from hurting children.

It is important to realize that this is just one initiative to further the goal of reducing sex offender recidivism against children. These proposals are not aimed at, nor would they significantly impact, the goal of eradicating sex offenses in our society. Perhaps no collection of legislation could be passed that would achieve that goal. Rather, programs designed

119. McDonald, *supra* note 1.

120. *Id.*

to treat the source of sex offenses being committed in our society are the greatest hope for achieving significant results toward this objective.

Historically, additions to laws regarding sex offenses and registered sex offenders have been made *after* a victim has been severely harmed,¹²¹ but this does not have to be the case. While there may not be a perfect solution to resolve the existing legislative gap between private drone use and registered sex offender legislation, taking action to close the gap does not impose so great a burden as to warrant standing idly by. Unfortunately, it is hard to measure how many sex offenses our laws prevent, but it is far harder to know that horrible acts could have been prevented with proactive legislation. Therefore, action must be taken before it is too late.

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121. See LiVecchi *supra* note 16, at 60–64.

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