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Against Juvenile Sex Offender Registration

Catherine L. Carpenter

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AGAINST JUVENILE SEX OFFENDER REGISTRATION

*Catherine L. Carpenter**

Imagine if you were held accountable the rest of your life for something you did as a child?

This is the Child Scarlet Letter in force: kids who commit criminal sexual acts when they are children, but who, as adults, pay the price with burdens of sex offender registration and public notification. And in a game of "how low can you go?," states have forced children as young as nine and ten years old onto state sex offender registries, some with registration requirements that extend the rest of their lives.

No matter the constitutionality of adult sex offender registration—and on that point, there is debate—this Article argues that juvenile sex offender registration violates the Eighth Amendment's prohibition against cruel and unusual punishment. "Once a sex offender, always a sex offender" is not an appropriate slogan when dealing with children who commit sexual offenses. Low recidivism rates and varied reasons for the misconduct demonstrate that a child's criminal act does not necessarily portend future predatory behavior. And with a net cast so wide it ensnares equally the child who rapes and the child who engages in sex with an underage partner, juvenile sex offender registration schemes are not moored to their civil regulatory intent.

*Compounding the problem is automatic lifetime registration for child offenders. This Article analogizes this practice to juvenile sentences of life imprisonment without the possibility of parole, which the Supreme Court declared unconstitutional in *Miller v. Alabama* and *Graham v. Florida*. It argues that mandatory lifetime registration applied to children in the same manner as adults is cruel and unusual punishment because it violates fundamental principles that require sentencing practices to distinguish between adult and child offenders.*

Scrutiny of child sex offender registration laws places front and center the issue of what it means to judge our children. And on that issue, we

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are failing. The public's desire to punish children appears fixed despite our understanding that child sexual offenders pose little danger of recidivism, possess diminished culpability, and have the capacity for rehabilitation. In a debate clouded by emotion, it is increasingly clear that juvenile sex offender registration is cruel and unusual punishment.

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I. INTRODUCTION

Imagine if you were held accountable the rest of your life for something you did as a child?

That is what happened to Leah,¹ who at ten years old, “flashed” her eight and five-year-old stepbrothers and simulated the sex act with them while they were fully clothed.² Growing up in another generation,

1. This Article does not use the last names of child registrants. But Leah, herself, made the decision to go public in the blog she started while in college. See Leah DuBuc, *So, Who is Leah DuBuc Anyway?*, KALAMAZOO VALLEY COMMUNITY COLLEGE, http://classes.kvcc.edu/eng155/21410/dubuc/all_about_me.htm (last visited Jan. 28, 2014) (describing her life as a child registrant).

2. See Martha T. Moore, *Sex Crimes Break the Lock on Juvenile Records*, USA TODAY (July 10, 2006, 10:57 PM), http://usatoday30.usatoday.com/news/nation/2006-07-10-juvenile-offenders_x.htm?csp=34 (describing the impact of registration laws on child offenders); see also Katie Walmsley, *NJ Case Raises Questions about Meghan's Laws: Case of Horseplay or Serious Sexual Misconduct?*, ABC NEWS (July 27, 2011), <http://abcnews.go.com/US/nj-case-raises-questions-meghans->

Leah's actions may have been considered "playing doctor,"³ but not by today's standards. Leah was convicted of criminal sexual conduct⁴ and placed on the state's public sex offender registry when she was twelve years old.⁵ The Child Scarlet Letter, if you will.⁶

In her college blog, Leah detailed the impact that sex offender registration has had upon her life. Not surprising, it has included loss of college internships, difficulty in finding a place to live, bullying from dorm mates, and loss of employment.⁷ No matter her acts of volunteerism or her level of education, Leah will be required to remain on the state registry until she is thirty-seven years old.⁸ Even after she is no longer required to register, Leah will still have to contend with the lasting vestiges of Internet public notification. This is because information disseminated via the Internet is really not possible to delete. It is forever "etched in cyberspace."⁹ And Leah must endure these hardships all because of an act she committed when she was ten years old.

For other child offenders, the consequences can be more devastating.

laws/story?id=14171897&page=2 (recounting the harm done to juvenile registrants). In her college blog, Leah refutes the charges that were leveled against her. See DuBuc, *supra* note 1.

3. "Playing Doctor" is a term coined to describe children's exploration of each other's genitals and is considered by child psychologists as a normal occurrence among young children. See, e.g., *Is Your Preschooler Playing Doctor?*, FAMILY EDUCATION, <http://life.familyeducation.com/sexuality/toddler/53839.html> (last visited Jan. 28, 2014) (acknowledging normal sexual curiosity among children); see also *Genital Play: What's Normal, What's Not*, ASK DR. SEARS: THE TRUSTED RESOURCE FOR PARENTS, <http://www.askdrsears.com/topics/child-rearing-and-development/sexuality/genital-play-whats-normal-whats-not> (last visited Jan. 28, 2014) (offering criteria for which sexual play is normal and which sexual play is not); Jose I. Concepcion, *Understanding Preadolescent Sexual Offenders*, 78 FLA. B.J. 30, 33 (July/Aug. 2004) ("Sexual play by developing children—'playing doctor'—is normal and not a cause for concern.").

4. For ease of readability, this Article uses the term 'convicted' and 'adjudicated' interchangeably in discussing a child offender's adjudication of delinquency.

5. See Moore, *supra* note 2 (reporting that Leah's request to be placed on a nonpublic registry was denied by the court because her offense was aggravated by the fact that one of her stepbrothers was more than five years younger than she was at the time of the alleged incident); see also Human Rights Watch, *Sex Offender Laws and Child Offenders*, in NO EASY ANSWERS: SEX OFFENDER LAWS IN THE US 71 (2007) [hereinafter NO EASY ANSWERS], available at <http://www.hrw.org/sites/default/files/reports/us0907webwcover.pdf> (detailing the lingering impact of registration laws on a ten year old boy who sexually abused his six year old sister).

6. The 'scarlet letter' refers to Nathaniel Hawthorne's novel by the same name, published in 1850, involving an adulterous relationship between a married woman and a young minister, for which the heroine is forced to wear a scarlet letter around her neck upon discovery of the affair. See NATHANIEL HAWTHORNE, *THE SCARLET LETTER* (New York, Fleet Press Corp. 1969) (inviting the reader to criticize the Puritanical practice of shaming the adulteress).

7. DuBuc, *supra* note 1 (describing the effect of public notification on her life).

8. See Moore, *supra* note 2 (quoting Leah as saying, "Look at everything I've done. Let me go on with my life.").

9. *Doe v. Dist. Att'y*, 932 A.2d 552, 568 n.21 (Me. 2007) (Alexander and Silver, JJ., concurring), *overruled by* *State v. Letalien*, 985 A.2d 4 (Me. 2009).

Registration and notification burdens continue for life¹⁰ and often without any legal avenue to remove the child from the registry.¹¹ As one Minnesota trial court commented in ordering lifetime registration for an eleven-year-old child, “Registration [for life] as a predatory offender may seem to be a harsh collateral consequence for an eleven year old boy.”¹²

Leah represents one type of child registrant: the child charged with the sexual abuse of other children.¹³ But the registry is not limited to those offenders. Registration is also required for children who engage in voluntary sexual intercourse with other children.¹⁴ Such is the situation involving J.L., who, at fourteen, had voluntary sexual intercourse with his twelve-year-old girlfriend.¹⁵ Ironically, under controlling South Dakota law, had the girl been thirteen years of age, J.L.’s act would

10. See, e.g., *In re J.R.Z.*, 648 N.W.2d 241, 245 (Minn. Ct. App. 2002) (upholding registration of eleven year old); *In re J.W.*, 204 Ill.2d 50 (Ill. 2003) (affirming lifetime registration for a twelve-year-old adjudicated delinquent). For a full exploration of the damaging effects of child registration see HUMAN RIGHTS WATCH, *RAISED ON THE REGISTRY: THE IRREPARABLE HARM OF PLACING CHILDREN ON SEX OFFENDER REGISTRIES IN THE U.S.* (2013) [hereinafter *RAISED ON THE REGISTRY*], available at http://www.hrw.org/sites/default/files/reports/us0513_ForUpload_1.pdf (profiling Jacob C. who, at eleven years old, touched his sister’s genitals, and who was made to register as a sex offender for life); *id.* at 35 (recounting the story of T.T. who was found guilty of aggravated sexual assault for inserting a feminine hygiene product in his six-year-old half-brother’s anus and forced to register for life).

11. See *RAISED ON THE REGISTRY*, *supra* note 10, at 49 (interviewing Gabriel P. who, at ten years old, was subject to lifetime registration for an incident that involved touching a seven year old). For constitutional scrutiny of such practice, see *People ex rel. Z.B.*, 757 N.W.2d 595, 597 (S.D. 2008) (declaring that South Dakota law was unconstitutional for requiring a fifteen year old to remain on the sex offender registry for life when adults who committed the same offense were able to have their names removed if they obtained a suspended imposition of sentence). See generally Krista L. Schram, *The Need for Heightened Procedural Due Process Protection in Juvenile Sex Offender Adjudications in South Dakota: An Analysis of the People in the Interest of Z.B.*, 55 S.D. L. REV. 99 (2010) (arguing that the lack of individualized assessment results in denial of procedural due process rights for child adjudicated offenders).

12. *In re J.R.Z.*, 648 N.W.2d at 245.

13. See *RAISED ON THE REGISTRY*, *supra* note 10, at 28 (“Child sex offenses range from ‘sharing pornography with younger children, fondling a child over the clothes, [and] grabbing peers in a sexual way at school, [to] date rape, gang rape, or performing oral, vaginal, or anal sex on a much younger child.’”) (quoting David Finkelhor, Richard Ormrod & Mark Chaffin, *Juveniles Who Commit Sex Offenses Against Minors*, U.S. DEPARTMENT OF JUSTICE JUVENILE JUSTICE BULLETIN 3 (Dec. 2009), available at <http://www.unh.edu/ccrc/pdf/CV171.pdf>).

14. See, e.g., *Humphrey v. Wilson*, 652 S.E.2d 501, 520 (Ga. 2007) (concerning seventeen-year-old Genarlow Wilson who engaged in consensual oral sex with a fifteen-year-old girl); see also *In re H.V.*, No. A06-1214, 2007 WL 1599207 (Minn. Ct. App. June 5, 2007) (involving a fifteen year old who engaged in sexual intercourse with a thirteen year old). Although tried as an adult, teenager Ricky Blackman was considered a sexually violent offender under Oklahoma law for having sexual relations with his underage girlfriend. See also Emanuella Grinberg, *No Longer a Registered Sex Offender, but the Stigma Remains*, CNN.COM (Feb. 11, 2010, 6:41 AM), <http://www.cnn.com/2010/CRIME/02/11/oklahoma.teen.sex.offender> (chronicling Ricky Blackman’s conviction as an adult offender for having sex with an underage girl when he was sixteen years old).

15. *People ex rel. J.L.*, 800 N.W.2d 720 (S.D. 2011).

have been considered a misdemeanor¹⁶ because of lenient “Romeo and Juliet”¹⁷ statutory rape laws.¹⁸ However, because the girl was twelve years old, J.L.’s act was deemed an aggravated sexual offense, automatically subjecting him to lifetime registration as a sex offender.¹⁹

J.L.’s treatment is not unique. Registry rolls are filled with children who commit voluntary, but presumed criminal, sexual acts with other minors and who, because of those acts, are required to register as sex offenders.²⁰

Characterizing J.L.’s act as an aggravated sexual offense is best understood against the backdrop of the federal Sex Offender Registration and Notification Act (SORNA), which Congress enacted in 2006 as part of a comprehensive system of sex offender registration and notification.²¹ SORNA reclassified registration, dividing offenders into three categories or “tiers” based solely on the crimes they committed.²² Rather than assessing an offender’s future dangerousness on an

16. S.D. CODIFIED LAWS § 22-22-7 (2013) (providing that “[i]f the victim is at least thirteen years of age and the actor is less than five years older than the victim, the actor is guilty of a Class 1 misdemeanor”); see also ARIZ. REV. STAT. ANN. § 13-1407(F) (2013) (allowing a defense to sexual conduct with a minor if “the defendant is under nineteen years of age or attending high school and is no more than twenty-four months older than the victim and the conduct is consensual”).

17. For a comparison of Romeo and Juliet to teenagers having consensual sex today, see Steve James, *Romeo and Juliet Were Sex Offenders: An Analysis of the Age of Consent and a Call For Reform*, 78 UMKC L. REV. 241, 241 (2009) (“While the idea of Romeo and Juliet being prosecuted as sex offenders may seem absurd, the reality is that it has happened and could happen to many modern teens.”).

18. See generally Catherine L. Carpenter, *On Statutory Rape, Strict Liability, and the Public Welfare Offense Model*, 53 AM. U. L. REV. 313, 341 (2003) (tracking states with less stringent punishment where the age differential between perpetrator and victim is less than three or four years). For an example of a state statutory rape statute with age differentials, see ALASKA STAT. § 11.41.436(a)(1) (2013) (charging as a Class B felony sexual abuse of a victim who is between thirteen and fifteen by one who is at least seventeen years of age); ALASKA STAT. § 11.41.440(a)(1) (2013) (charging as Class A misdemeanor sexual abuse of a victim who is under the age of thirteen by one who is less than sixteen years old).

19. *People ex rel. J.L.*, 800 N.W.2d 720.

20. See, e.g., *In re T.W.*, 291 Ill. App.3d 955, 959 (Ill. App. Ct. 1997) (concerning consensual sexual relationship between minors where court rejected the accused male’s argument that registration statute was vague as to which of the two participants should be required to register); *In re H.V.*, No. A06-1214, 2007 WL 1599207 (Minn. Ct. App. June 5, 2007) (involving a fifteen year old who engaged in sexual intercourse with a thirteen year old); RAISED ON THE REGISTRY, *supra* note 10, at 38. But see *In re D.B.*, 950 N.E.2d 528, 533 (Ohio 2011) (finding OHIO REV. CODE ANN. § 2907.02(A)(1)(b) (West 2008) unconstitutionally vague as applied to a thirteen-year-old who was required to register as a sex offender for engaging in sexual conduct with an eleven-year-old).

21. See 42 U.S.C. §§ 16911–16929 (2012). SORNA was enacted as part of the Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No 109-248, 120 Stat. 587 (2006). The Act also established a national sex offender registry, which is accessible by the public via a website. *Id.* §§ 16919–16920.

22. 42 U.S.C. § 16911 (2012). See Chrysanthi Leon, David L. Burton & Diana Alvarez, *Net-Widening in Delaware: The Overuse of Registration and Residential Treatment for Youth Who Commit Sex Offenses*, 17 WIDENER L. REV. 127, 133 (2011) (criticizing the current system for its use of psychological evaluation only for treatment and not for tier placement).

individualized basis, SORNA requires that the conviction alone determines the registrant's classification, and from that classification flow the burdens associated with registration and notification.²³

Not only did SORNA change the classification of offenders, the federal scheme also subjected child sex offenders in the juvenile justice system to the same registration and notification burdens as their adult counterparts.²⁴ Interestingly, although SORNA only mandated registration for those fourteen years or older, states have passed sex offender registration laws requiring children far younger to register.²⁵ As an incentive for states to implement the program, SORNA dictated a loss of federal funding in the event a state failed to comply with the requirements.²⁶

Adult and child registrants also face ever-changing and increasingly harsh registration rules,²⁷ and should they relocate to another state, they must navigate conflicting registration schemes at the risk of penalties for the failure to register.²⁸ Consider Jacob C., who at eleven years old committed a sexual act against his younger sister. He touched her genitals.²⁹ Because of that act, Jacob lost his freedom; he was placed in

23. See, e.g., *State v. Bodyke*, 933 N.E.2d 753, 759 (Ohio 2010) (explaining that “offenders [under SORNA] are classified as Tier I, Tier II, or Tier III sex offenders . . . based solely on the offender’s offense”).

24. See 42 U.S.C. § 16911(8) (defining the term “convicted” to include “adjudicated delinquent as a juvenile for that offense, but only if the offender is 14 years of age or older at the time of the offense”). For an interesting story on one person who pushed for national juvenile registration, see Moore, *supra* note 2 (highlighting the story of Amie Zyla, age 18, who advocated for the release of information pertaining to child offenders).

25. See, e.g., N.C. GEN. STAT. ANN. § 14-208.26(a) (West 2012) (declaring that when a juvenile is adjudicated delinquent for a violation of one of the enumerated offenses, “and the juvenile was at least eleven years of age at the time of the commission of the offense, the court shall consider whether the juvenile is a danger to the community,” and if so, the court may require the juvenile to register); MONT. CODE ANN. § 46-23-502(10) (2013) (stating that a “sexual or violent offender” includes *any person* who, in youth court, has been found to have committed or been adjudicated for a sexual or violent offense, which demonstrates no differentiation in the treatment of juveniles and adults); WIS. STAT. ANN. § 938.34(15m)(1) (West 2013) (indicating that a juvenile adjudicated delinquent for any violation, solicitation, conspiracy, or attempt to commit any enumerated violation may be required to comply with the same reporting requirements as adults if the court determines that there was an underlying sexual motivation).

26. See 42 U.S.C. § 16925(a) (2012) (legislating that states would lose ten percent of certain federal funding if SORNA were not adopted).

27. See, e.g., *Starkey v. Okla. Dep’t of Corrs.*, 305 P.3d 1004 (Okla. 2013) (reviewing the increasing registration requirements undertaken by the State of Oklahoma over a ten year period); *Wallace v. State*, 905 N.E.2d 371, 374–77 (Ind. 2009) (examining the myriad of continuously-changing Indiana statutes in the previous decade); *accord State v. Letalien*, 985 A.2d 4, 8–11 (Me. 2009).

28. See, e.g., *In re Shaquille O’Neal B.*, 684 S.E.2d 549 (S.C. 2009) (highlighting the disparate treatment in registration of adjudicated child sex offender who moved from North Carolina to South Carolina and the resulting confusion he faced in discerning the registration requirements because of the move); see also Grinberg, *supra* note 14 (tracing the harsh requirements Ricky Blackman faced when he moved to Oklahoma despite the expungement of his conviction in Iowa).

29. See RAISED ON THE REGISTRY, *supra* note 10 (arguing that public registration laws

a juvenile home and not allowed to live with his sister who was also his victim. His actions continued to have life-altering consequences when he moved from Michigan to Florida at eighteen to start fresh.³⁰ Jacob had great difficulty understanding Florida's registration burdens and even greater difficulty meeting the state's changing residency restrictions.³¹ Ultimately, he was arrested and convicted of the felony of failure to register.³² All because of a criminal act that Jacob committed when he was eleven years old.

This is the Child Scarlet Letter in force. Kids like Leah, J.L., and Jacob C. who engage in criminal sexual acts when they are children, but who, as adults, pay the price with burdens of registration and notification originally intended for adult offenders.³³ And in a game of "how low can you go?",³⁴ states have forced children as young as nine and ten years old onto state sex offender registries,³⁵ some for the rest of their lives.³⁶

irrevocably impact the lives of children who are required to register as sex offenders).

30. *Id.* at 1–2 (chronicling the legal troubles Jacob C. had in discerning the registration requirements when he moved from Michigan to Florida).

31. *Id.*

32. *Id.*

33. See *U.S. v. Juvenile Male*, 590 F.3d 924, 927 (9th Cir. 2010), *vacated*, 131 S. Ct. 2860 (2011) (recognizing "the brunt of SORNA's retroactive application to juvenile offenders is felt mainly by adults who committed offenses long ago as teenagers—many of whom have built families, homes, and careers notwithstanding their history of juvenile delinquency, which before SORNA's enactment was not a matter of public record"); see also *In re J.R.Z.*, 648 N.W.2d 241, 249 (Minn. Ct. App. 2002) (inviting the legislature "to review the prudence of requiring all juveniles adjudicated for criminal sexual conduct to register as predatory sex offenders"). Registration affects not only currently adjudicated children; it also affects adults previously adjudicated as delinquents. See, e.g., *U.S. v. W.B.H.*, 664 F.3d 848 (11th Cir. 2011) (requiring registration post-SORNA and twenty years after child's delinquency adjudication).

34. See *Chubby Checker—Limbo Rock Lyrics*, METROLYRICS, <http://www.metrolyrics.com/limbo-rock-lyrics-chubby-checker.html> (last visited Jan. 28 2014) (referencing an oldie-but-goodie phrase from the lyrics of *Limbo Rock* popularized by singer Chubby Checker). On Michigan's practice to register children as young as nine years old, see *Juveniles Crowd Michigan Sex Offender Registry*, SEX OFFENDER REPORTS, CHARTS AND OTHER PAPERS (May 3, 2012), <http://sexoffender-reports.blogspot.com/2012/05/juveniles-crowd-michigan-sex-offender.html> (noting that Michigan's youngest registered sex offenders are nine years old); see also *SC Supreme Court OKs Juvenile Sex Offender Registration*, WIS TV (Aug. 12, 2013), <http://www.wistv.com/Global/story.asp?s=1398401&clienttype> (reporting on the unanimous ruling by the court that requiring a nine year old to register does not violate the child's due process rights).

35. See, e.g., MINN. STAT. ANN. § 243.166(6)(d) (West 2013) (precluding any exception from lifetime predatory sex offender registration for juveniles under the age of 14); *In re Ronnie A.*, 585 S.E.2d 311 (S.C. 2003) (holding that registration of nine year old did not violate due process). See also RAISED ON THE REGISTRY, *supra* note 10, at 33 (explaining that eight of those interviewed were 10 or younger "with the youngest being 9 years old"). One interviewee, Max B., started registration at ten years old for having inappropriately touched his eight year old sister. *Id.* at 33.

36. See, e.g., *In re J.R.Z.*, 648 N.W.2d 241 (classifying an eleven year old as a sexual predator for the rest of his life); *In re J.W.*, 204 Ill.2d 50, 65 (Ill. 2003) (upholding lifetime registration for a twelve-year-old boy who had sexual contact with another boy); see also Caitlin Dickson, *Barely a Teenager and Marked for Life*, IN THESE TIMES (Sept. 3, 2013),

It is an obvious truth that children are different from adults. Indeed, the juvenile justice system is based on that premise, and recent Supreme Court decisions have highlighted those differences in holding that juveniles are not deserving of the death penalty³⁷ or life imprisonment without the possibility of parole.³⁸ Yet, under the federal mandate of SORNA, these differences are ignored. Children are treated like their adult counterparts, forced to endure harsh registration³⁹ and notification burdens⁴⁰ not contemplated by the juvenile justice system.⁴¹

This Article asserts that child registration and public notification run counter to the prevailing and fundamental policies of rehabilitation and

http://inthesetimes.com/article/6334/barely_a_teenager_and_marked_for_life (describing the struggle faced by a registrant who was required to register for life on Iowa's public sex offender registry because at thirteen years old, he told his four-year-old cousin to expose herself).

37. See *Roper v. Simmons*, 543 U.S. 551 (2005) (holding the death penalty unconstitutional when applied to a minor convicted of murder).

38. See *Miller v. Alabama*, 132 S. Ct. 2455 (2012) (determining that it was unconstitutional to sentence juveniles to life imprisonment without the possibility of parole in homicide cases); see also *Graham v. Florida*, 130 S. Ct. 2011 (2010) (finding that life imprisonment without the possibility of parole was unconstitutional when applied to a juvenile convicted of a nonhomicide offense).

39. See, e.g., 42 U.S.C. § 16915-115(a)(3) (2012) (stating that a Tier III sex offender shall keep his or her registration current for life); 42 U.S.C. § 16916-116(3) (2012) (requiring that a Tier III sex offender must appear in person to have his or her current photograph taken, and verify the registration information not less frequently than every three months). For examples of state codifications of SORNA, see ALA. CODE 1975 § 15-20A-28(a) (2013) (mandating that a juvenile adjudicated delinquent who was fourteen or older at the time of an offense enumerated in subsection (a) shall be subject to registration and notification, if applicable, for life); FLA. STAT. ANN. § 943.0435(11) (West 2013) (obliging a juvenile adjudicated delinquent to maintain registration for the duration of his or her life); KAN. STAT. ANN. § 22-4906(b)(1)(H) (2013) (declaring that a juvenile sex offender fourteen years of age or older must register for life); MD. CODE ANN., CRIM. PROC. § 11-704.1(e) (2013) (explaining that a juvenile registrant must "appear in person at a location designated by the Department of Juvenile Services every 3 months" to update registration and have a photograph taken); MINN. STAT. § 243.166 subd. 6(d) (2013) (asserting that a person must register for life if he has been adjudicated delinquent for any enumerated offense for which registration is required and he has a prior adjudication for an offense for which registration was required).

40. See IDAHO CODE ANN. § 18-8404 (2013) (declaring that the Idaho state police shall establish and maintain a separate registry of juvenile sex offenders including registrants' fingerprints, photographs, and other information, which "is subject to release to criminal justice agencies pursuant to section 18-8305, Idaho Code, and to the public pursuant to section 18-8323, Idaho Code"); NEV. REV. STAT. § 62F.260 (2012) ("The records relating to a child must not be sealed pursuant to the provisions of NRS 62H.100 to 62H.170, inclusive, while the child is subject to registration and community notification as a juvenile sex offender pursuant to NRS 179D.010 to 179D.550, inclusive."); MONT. CODE ANN. § 46-23-508(3) (2013) (stating that "[d]issemination to the public of information allowed or required by this section may be done by newspaper, paper flyers, the internet, or any other media determined by the disseminating entity," and that the disseminating entity should consider the offender's level of risk to the public); WIS. STAT. ANN. § 301.45(2) (2013) (noting that "[t]he department shall maintain a registry of all persons subject to sub. (1g)" including the person's name and all aliases, date of birth, gender, race, height, weight, hair and eye color, the address of the person's residence, email addresses, name and address of the person's employment, and the name and location of the person's school, among other information).

41. See *infra* Part II.B (describing the clash of policies between SORNA and those in the juvenile justice system).

confidentiality of the juvenile justice system.⁴² Even if one were to argue that child offender registration satisfies important policy considerations of public safety and protection of child victims, the automatic nature of child registration does not. The current model of “conviction based assessment” required under SORNA⁴³—where the nature of the conviction determines future dangerousness of the actor—is unsound when applied to child offenders because their commission of sex crimes does not necessarily portend predatory behavior.⁴⁴

It is not just the nature of automatic registration that causes concern. Depending on the triggering offense, a child offender might also be subjected to mandatory registration *for life*.⁴⁵ This Article draws a parallel between mandatory registration for life and life imprisonment without the possibility of parole, which the Court in *Graham v. Florida*⁴⁶ and *Miller v. Alabama*⁴⁷ found to be cruel and unusual punishment because such a sentence treated juvenile conduct as unredeemable and without the possibility of rehabilitation.⁴⁸ So too is mandatory lifetime registration. A lifetime registration requirement is

42. See *infra* Part II.A (reviewing the fundamental tenets of the juvenile justice system).

43. See 42 U.S.C. § 16911(1)–(4) (2012) (classifying sex offenders in one of three tiers by the crime committed); see also *U.S. v. Parks*, 698 F.3d 1, 3 (1st Cir. 2012) (“By its own terms, SORNA’s registration requirements applied automatically to individuals who commit a triggering sexual offense . . .”). Courts have commented on the impact of conviction-based assessment. See, e.g., *State v. Williams*, 952 N.E.2d 1108, 1113 (Ohio 2011) (observing that, under Ohio’s amended sex offender statute, offenders were no longer entitled to a hearing to determine whether they would be classified as a sexually oriented offender, habitual sex offender, or sexual predator); *Commonwealth v. Baker*, 295 S.W.3d 437, 446 (Ky. 2009) (noting that Kentucky’s residency restrictions apply to certain offenders without an individualized assessment of whether they would be a danger to children).

44. See *infra* Part V.

45. See 42 U.S.C. § 16915(a)(3) (2012) (declaring that a Tier III sex offender shall keep registration current for “the life of the offender”). For examples of state codifications of SORNA, see CAL. PENAL CODE § 290.008(a) (2007) (noting that “any person who, on or after 01/01/1986 is discharged or paroled from the Department of Corrections and Rehabilitation after having been adjudicated a ward of the juvenile court because of the commission or attempted commission of any offense described . . . shall register as a sex offender”); KAN. STAT. ANN. § 22-4906(h) (2013) (requiring that an offender over the age of fourteen years shall register for life who is adjudicated as a juvenile offender for an act, which if committed by an adult would constitute a sexually violent crime set forth in KAN. STAT. ANN. § 22-4902(c) (2013) and such crime is an “off-grid felony or felony ranked in severity level 1 of the nondrug grid”).

46. 130 S. Ct. 2011 (2010) (offering reasons why juveniles deserve less serious punishment than their adult counterparts in nonhomicide cases).

47. 132 S. Ct. 2455 (2012) (presenting the rationales for why life imprisonment without the possibility of parole is not appropriate for juvenile offenders in homicide cases).

48. See *Miller*, 132 S. Ct. at 2460 (holding that mandatory life without parole for offenders under the age of eighteen at the time of their crimes violates the Eighth Amendment’s prohibition on cruel and unusual punishment.); see also *Graham*, 130 S. Ct. at 2030 (describing life without parole as an “irrevocable judgment”); cf. *Moore v. Biter*, 725 F.3d 1184, 1189 (9th Cir. 2013) (explaining that a juvenile sex offender’s sentencing of 254 years in prison is irreconcilable with *Graham*’s mandate); accord *People v. Caballero*, 282 P.3d 291 (Cal. 2012) (concluding that a juvenile’s sentence of 110 years violated *Graham*).

an official pronouncement that the child remains a continual danger for life without any possibility of rehabilitation.⁴⁹

No doubt, there are hurdles to overcome in arguing that child sex offender registration is cruel and unusual punishment. Generally, sex offender registration laws have been treated as civil regulations, and as such, they are not governed by the Eighth Amendment's prohibition on cruel and unusual punishment.⁵⁰ Nor has the stigma associated with registration been deemed sufficient to constitute punishment⁵¹ or a denial of the registrant's due process rights.⁵²

Labeling the registration scheme as a civil regulation—a bar to a viable challenge under the Eighth Amendment—is one hurdle to overcome. However, more challenging than this legal obstacle is the inability to counter the emotion that grips the debate.⁵³ The impetus to register children, even in the face of compelling arguments and statistics to the contrary, convincingly demonstrates that emotions control the legislative agenda.⁵⁴ Faulty assumptions regarding high recidivism rates

49. Two recent state supreme courts have come to the conclusion that automatic lifetime registration is unconstitutional for child offenders. See *In re C.P.*, 967 N.E.2d 729 (Ohio 2012) (concluding that the mandatory aspect of the statute was unconstitutional); see also *N.L. v. State*, 989 N.E.2d 773 (Ind. 2013) (rejecting automatic registration for life, requiring instead clear and convincing evidence before a child will be required to register for life). Also, in a groundbreaking ruling in Pennsylvania, Court of Common Pleas Judge Uhler found that the state's requirement of lifetime registration for juveniles convicted of certain sexual offenses violates juveniles' rights under various provisions of the Pennsylvania and U.S. Constitutions, as well as Pennsylvania's Juvenile Act. See *In re J.B.*, No. CP-67-JV-0000726-2010 (Penn. Ct. Com. Pl. Nov. 4, 2013).

50. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."). See *In re C.P.*, 967 N.E.2d 729, 753 (Ohio 2012) (O'Donnell, J., dissenting) (chastising the majority for its lack of analysis on whether Ohio's registration scheme was a civil or criminal penalty before it found an Eighth Amendment violation).

51. See *infra* Part III (discussing the stigmatizing impact of registration and notification).

52. See, e.g., *State v. Eighth Jud. Dist. Ct.*, 306 P.3d 369 (Nev. 2013) (concluding that invoking retroactive application of sex offender registration on child registrant does not violate the Due Process clause); see also *U.S. v. Ambert*, 561 F.3d 1202, 1209 (11th Cir. 2009) (rejecting substantive due process challenge because sex offenders do not have a fundamental right to avoid publicity); *U.S. v. Juvenile Male*, 670 F.3d 999, 1012 (9th Cir. 2012) (finding that individuals convicted of serious sex offenses do not have a fundamental right to be free from sex offender registration requirements because those requirements serve a "legitimate nonpunitive purpose of public safety, which is advanced by alerting the public to the risk of sex offenders in the community").

53. See Catherine L. Carpenter, *Legislative Epidemics: A Cautionary Tale of Criminal Laws that Have Swept the Country*, 58 BUFF. L. REV. 1, 18–32 (2010) (tracing the emotionally-charged rhetoric that surrounded the origins of adult sex offender registration laws).

54. See *infra* Part II.C. (describing the societal panic that has developed in the discussion of sex offenders). One indication that emotion, rather than sound reasoning, controls the legislation is that registration schemes are ineffective deterrent measures. See, e.g., Molly J. Walker Wilson, *The Expansion of Criminal Registries and the Illusion of Control*, 73 LA. L. REV. 509 (2013) (claiming that registries are misguided attempts to control and quell anxiety); Michele L. Earl-Hubbard, *The Child Sex Offender Registration Laws: The Punishment, Liberty Deprivation, and Unintended Results Associated with the Scarlet Letter Laws of the 1990s*, 90 NW. U. L. REV. 788, 853–54 (1996) (asserting that notification laws create a false sense of security in the community because of the inherent voluntariness

and future dangerousness only fan the flames.⁵⁵

Part II of this Article frames the clash of policies between the juvenile justice system and SORNA. On one side are the juvenile justice system's long-standing policies to promote rehabilitation and protect the child's privacy interests.⁵⁶ In direct conflict are SORNA's requirements of mandatory registration of children and public notification of their confidential adjudications. This Part will explore both the legal and emotional reasons why the tension between competing statutory aims has been settled in favor of SORNA.

Part III outlines the devastating and stigmatizing impact of registration and notification on the child offender. It traces the practical implications of life as a child registrant, including the inability of the child to live with family, the bar to future educational goals, the impediment of a career, and most devastating, the ostracism and isolation from peers.

The balance of the Article analyzes child sex offender registration laws within a constitutional framework. Although they are potentially unconstitutional under principles of ex post facto and substantive and procedural due process,⁵⁷ this Article explores only their constitutionality under the Eighth Amendment's prohibition against cruel and unusual punishment.⁵⁸

Part IV argues that child sex offender registration is a criminal penalty cast as a civil regulation and is therefore subject to Eighth

of the system). Interestingly, the U.S. Government Accountability Office reports that there have been no studies on the effects on public safety following enactment of the laws. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-211, SEX OFFENDER REGISTRATION AND NOTIFICATION ACT: JURISDICTIONS FACE CHALLENGES TO IMPLEMENTING THE ACT, AND STAKEHOLDERS REPORT POSITIVE AND NEGATIVE EFFECTS (2013), available at <http://www.gao.gov/assets/660/652033.pdf>.

55. See *infra* Part II.C.

56. See *infra* Part II.A (tracing the development of the juvenile justice system).

57. *Doe v. State*, 189 P.3d 999 (Alaska 2008) (finding that ASORA's registration requirements violates the ex post facto clause of state constitution); *accord Doe v. Dep't of Pub. Safety & Corr. Servs.*, 40 A.3d 39 (Md. 2013); *Commonwealth v. Baker*, 295 S.W.3d 437 (Ky. 2009); *F.R. v. St. Charles Cnty. Sheriff's Dept.*, 301 S.W.3d 56 (Mo. 2010). See also *State v. Briggs*, 199 P.3d 935 (Utah 2008) (holding that statute allowing the Department to publish offender's primary and secondary targets violated due process if defendant was not provided with a hearing on whether he was currently dangerous). For an argument on the constitutionality of sex offender registration laws under ex post facto and substantive due process principles, see generally Catherine L. Carpenter & Amy E. Beverlin, *The Evolution of Unconstitutionality in Sex Offender Registration Laws*, 63 HASTINGS L. J. 1071 (2012).

58. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."). Indeed, a compelling argument can be made that child registration violates substantive due process under *Rochin v. California*, 342 U.S. 165 (1952), which requires that the government activity "shock the conscience." *Id.* at 172. No greater evidence of this test exists than the look on the faces of those with whom I share the current state of law regarding the registration and notification burdens that children endure. Whether it is my law students or audiences I address, the reaction is the same: all are surprised and saddened to learn that children are required to register as sex offenders.

Amendment analysis. Employing the multi-factored test from *Kennedy v. Mendoza-Martinez*,⁵⁹ this Part asserts that child sex offender registration is not a civil regulation because registration is no longer rationally connected to its civil intent. Specifically, with respect to child offenders, child sex offender registration is excessive legislation because it is predicated on the misguided premise that a child's sexual crime signifies future dangerousness as an adult.⁶⁰

Assuming registration is punishment, Part V makes the case that, under the Eighth Amendment, child registration violates the prohibition against cruel and unusual punishment. First, this Part tracks the national consensus against child registration, and then under independent analysis, it demonstrates that automatic registration is excessive legislative drafting. One size does not fit all when it comes to the registration of children who commit sexual offenses.

Compounding the problem is automatic lifetime registration for child offenders. Part V analogizes this practice to juvenile sentences of life imprisonment without the possibility of parole, which the Supreme Court declared unconstitutional in *Miller v. Alabama* and *Graham v. Florida*. Mandatory lifetime registration applied to children in the same manner as adult offenders is cruel and unusual punishment because it violates fundamental principles that require sentencing practices to distinguish between adult and child offenders.⁶¹

For kids like Leah, J.L., and Jacob C., the 'Scarlet Letter' is not fiction. Nor is it an exaggeration of the stigma and isolation they face on a daily basis. No matter the constitutionality of adult sex offender registration—and on that point, there is debate—this Article concludes that the current system of child sex offender registration is cruel and unusual punishment.

II. COMPETING GOALS OF THE JUVENILE JUSTICE SYSTEM AND REGISTRATION OF CHILD SEX OFFENDERS

A delinquency adjudication coupled with the requirement that the child must register as a sex offender is in striking juxtaposition. The adjudication is a confidential resolution combined with an adult and public consequence. The joining of the private and the public is more

59. 372 U.S. 144, 168–69 (1963) (articulating seven factors to be used to determine whether a regulation is punitive).

60. See *infra* Part V (offering statistics to refute the perception that child offenders recidivate).

61. See *Miller v. Alabama*, 132 S. Ct. 2455, 2458 (2012) (declaring that a mandatory penalty scheme that invokes such a harsh punishment "contravenes *Graham* (and also *Roper*'s) foundational principle: that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children"). See also *infra* Part V.B.2 for a detailed discussion of the arguments.

startling when we consider the long-standing history of treating child offenders differently from their adult counterparts.⁶²

A. Fundamental Tenets of the Juvenile Justice System

From its founding, juvenile court was intended to be different from adult court.⁶³ Unlike adult court proceedings, which are adversarial in nature and designed to punish,⁶⁴ juvenile court was structured to encourage treatment and rehabilitation.⁶⁵ In noting the differences between the two systems of justice, Judge Reinhardt wrote in *United States v. Juvenile Male* that one is “public and punitive . . . the other largely confidential and rehabilitative.”⁶⁶

It is not always easy to determine whether a child offender should remain under the jurisdiction of the juvenile court or be transferred to

62. See *U.S. v. Juvenile Male*, 590 F.3d 924, 931 (9th Cir. 2010) (recalling the historical distinctions between the two systems); accord *In re W.Z.*, 957 N.E.2d 367, 371–72 (Ohio Ct. App. 2011).

63. See *In re Gault*, 387 U.S. 1, 14 (1967) (emphasizing that “wide differences have been tolerated—indeed insisted upon—between the procedural rights accorded to adults and those of juveniles”); *In re W.Z.*, 957 N.E.2d at 370 (explaining the differences between the adult criminal court system versus the juvenile court system); *People ex rel. Z.B.*, 757 N.W.2d 595, 606 (S.D. 2008) (Sabers, J., dissenting) (“The juvenile justice system is premised on a rehabilitative theory of justice, much unlike the harsher, more punitive adult system.”). Scholars have also explored the distinction between the two systems of justice. See, e.g., Linda M. B. Uttal & David H. Uttal, *Children Are Not Little Adults: Developmental Differences and the Juvenile Justice System*, 15 PUB. INT. L. REP. 234, 235 (2010) (urging that a “systematic reform is needed that recognizes the cognitive and emotional differences between children and adults”); Megan F. Chaney, *Keeping the Promise of Gault: Requiring Post-Adjudicatory Juvenile Defenders*, 19 GEO. J. ON POVERTY L. & POL’Y 351, 354 (2012) (writing that “[t]he first juvenile justice reformers envisioned a safe haven away from the confines and harshness of adult court where less culpable youngsters could be rehabilitated to reenter society as productive, lawabiding adults”).

64. See *Roper v. Simmons*, 543 U.S. 551, 570 (2005) (stressing the importance of rehabilitating juveniles because “the character of a juvenile is not as well formed as that of an adult”); see generally Jeffrey Fagan & Elizabeth Piper Deschenes, *Criminology: Determinants of Judicial Waiver Decisions for Violent Juvenile Offenders*, 81 J. CRIM. L. & CRIMINOLOGY 314, 318–25 (1990) (addressing the goal of adult court, which is to punish the offender); Jarod K. Hofacket, Comment, *Justice or Vengeance: How Young is Too Young for a Child to be Tried and Punished as an Adult?*, 34 TEX. TECH. L. REV. 159, 162 (2002) (noting that the juvenile system revolves around rehabilitation while the adult systems focuses on punishment).

65. See, e.g., IND. CODE § 31-10-2-1(5) (2013) (codifying the goals of the juvenile justice system, which are to “ensure that children within the juvenile justice system are treated as persons in need of care, protection, treatment, and rehabilitation”). See also Tonya K. Cole, Note, *Counting Juvenile Adjudications as Strikes Under California’s ‘Three Strikes’ Law: An Undermining of the Separateness of the Adult and Juvenile Systems*, 19 J. JUV. L. 335, 336 (1998) (explaining that when states followed Illinois’s lead in 1899 in enacting juvenile codes, “the focus was not on guilt or innocence as in the adult criminal system, but on reform and treatment”).

66. *U.S. v. Juvenile Male*, 590 F.3d 924, 932 (9th Cir. 2009). See also *Schall v. Martin*, 467 U.S. 253, 263 (1984) (“The State has ‘a parens patriae’ interest in preserving and promoting the welfare of the child’ which makes a juvenile proceeding fundamentally different from an adult criminal trial.”) (internal citation omitted).

adult court. In general, the juvenile court considers the following factors: the juvenile's age and social background; the nature of the alleged offense; the extent and nature of the juvenile's prior delinquency record; the juvenile's intellectual development and psychological maturity; the nature and success of past treatment efforts; and the availability of programs to treat the juvenile's behavioral problems.⁶⁷

The belief that the juvenile justice system is best able to rehabilitate child offenders is illustrated in the Ohio case of *In re C.P.*,⁶⁸ in which the state requested that C.P. be transferred to adult court to face allegations of two counts of rape and one count of kidnapping with sexual motivation.⁶⁹ Despite both the seriousness of the charges and a previous adjudication of C.P., when he was eleven years old, for sexually abusing his half-sister,⁷⁰ the juvenile court rejected the state's request, stating, "I think we have time within the juvenile system and we have resources within the juvenile system to work with this boy."⁷¹

Rehabilitation is the cornerstone of the juvenile justice system. In describing its development, the Supreme Court wrote in its landmark decision of *In re Gault*,⁷² "The apparent rigidities, technicalities, and harshness, which [the reformers] observed in both substantive and procedural criminal law were therefore to be discarded."⁷³ *Gault* represents one of four cases from the 1960s in which the Supreme Court evaluated the balance of affording the juvenile offender due process rights with the goal of maintaining a nonadversarial system.⁷⁴

Although *Gault* provided juveniles with certain constitutional safeguards reserved for adults,⁷⁵ it also upheld the guarantees of

67. See, e.g., *U.S. v. Juvenile Male No. 1*, 47 F.3d 68, 70 (2d Cir. 1995) (quoting with approval the district court's statement that "Congress has provided juvenile adjudication as an alternative to adult prosecution. That reflects a hope that the disastrous effects of the environment in which I.R. has grown can be reversed.").

68. *In re C.P.*, 967 N.E.2d 729 (Ohio 2012).

69. *Id.* at 732.

70. *Id.* at 733.

71. *Id.* See also D.C. CODE § 16-2301(6) (2012) ("The term 'delinquent child' means a child who has committed a delinquent act and is in need of care or rehabilitation.").

72. *In re Gault*, 387 U.S. 1, 15-16 (1967) (balancing the policies of the juvenile justice system with constitutional safeguards for juveniles).

73. *Id.* at 15. For an historical review of the juvenile justice system, see Barry C. Feld, *Unmitigated Punishment: Adolescent Criminal Responsibility and LWOP Sentences*, 10 J. L. & FAM. STUD. 11, 13-16 (2007).

74. See *Kent v. U.S.*, 383 U.S. 541 (1966) (holding that a waiver of jurisdiction must be attended by due process); *Gault*, 387 U.S. at 20 (concluding that juveniles were entitled to certain due process rights afforded to adult criminals); *In re Winship*, 397 U.S. 358, 368 (1970) (requiring that a state must show proof beyond a reasonable doubt for acts that would be considered a crime by an adult); *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971) (finding that juveniles do not have a right to a jury trial in juvenile adjudications).

75. *Gault*, 387 U.S. at 31-58 (determining that juveniles are entitled to notice of the charges,

confidentiality and privacy associated with the juvenile justice system.⁷⁶ These safeguards purposefully shield the child offender from the stigma associated with the delinquency adjudication through confidential and private proceedings⁷⁷ and through the expungement of evidence pertaining to the arrest and delinquency.⁷⁸

Unlike adult court proceedings, which demand public scrutiny and a public trial because of retributive and penal results,⁷⁹ juvenile court proceedings are private and confidential to stimulate rehabilitation and avoid the stigma attached to public condemnation. The child offender's privacy is so zealously protected that the Federal Juvenile Delinquency Act (FJDA), for example, expressly prohibits the use of the juvenile's record for "employment, license, bonding, or any civil right or privilege"⁸⁰ and similarly provides that "neither the name nor picture of any juvenile shall be made public in connection with a juvenile delinquency proceeding."⁸¹ The belief is that maintaining the privacy of the juvenile offender in proceedings that are confidential enables the juvenile offender to avoid the stigma associated with the delinquency.⁸²

right to counsel, and the privilege against self-incrimination); *accord In re W.Z.*, 957 N.E.2d 367, 371 (Ohio Ct. App. 2011) ("Although certain constitutional protections afforded adults, including notice, confrontation, the right to counsel, the privilege against self-incrimination, and freedom from double jeopardy, are applicable to juvenile proceedings, other protections, including trial by jury, are not.").

76. *Gault*, 387 U.S. 1.

77. *See, e.g., In re C.P.*, 967 N.E.2d 729, 745 (Ohio 2012) (emphasizing that "[c]onfidentiality has always been at the heart of the juvenile justice system").

78. *See, e.g., State v. Fletcher*, 974 A.2d 188, 196 (Del. 2009) (describing the role of the expungement statute in Delaware); *State v. Giovanelli*, 274 P.3d 18, 20–21 (Idaho Ct. App. 2012) (examining the impact of purging the record on the state's attempt to transfer the juvenile to the adult sex offender registry). For an interesting look at a child offender's desire to expunge his record only for the purpose of obtaining removal from the registry, see *State v. K.H.*, 860 N.E.2d 1284, 1286 (Ind. Ct. App. 2007) ("It's not that I want to expunge the record, the fact is that I know what I did is wrong. . . . [B]ut my main concern is getting it off the registry.").

79. *See, e.g., In re J.S.*, 438 A.2d 1125, 1129 (Vt. 1981) (stating that the publication of a juvenile's name could negatively impact the rehabilitative goals of the juvenile justice system and that confidential proceedings protect juveniles from the stigma faced by similarly adjudicated adults); *see also Barry C. Feld, Violent Youth and Public Policy: A Case Study of Juvenile Justice Law Reform*, 79 MINN. L. REV. 965, 1012 (1995) ("The juvenile component of offenders' criminal history often is not available because of the confidentiality of juvenile court records . . .").

80. 18 U.S.C. § 5038(a) (2012) (prohibiting release of record except in limited circumstances); *accord Mo. REV. ANN. STAT. § 211.425(3)* (2013) (declaring that juveniles' information contained on the registration forms shall be kept confidential and may only be released to those authorized to receive such information).

81. 18 U.S.C. § 5038(e) (2012) (specifying that the child's identity and image shall not be publicly released except in limited circumstances); *see also U.S. v. Three Juveniles*, 61 F.3d 86, 88 (1st Cir. 1995) ("The confidentiality provisions of the [Federal Juvenile Delinquency] Act are therefore quite essential to the Act's statutory scheme and overarching rehabilitative purpose."); *U.S. v. Under Seal*, 709 F.3d 257, 261–62 (4th Cir. 2013) (reviewing SORNA provisions that run counter to the Federal Juvenile Delinquency Act).

82. *See, e.g., U.S. v. Brian N.*, 900 F.2d 218, 220 (10th Cir. 1990) (reiterating that the purpose of the juvenile court proceeding is to "remove juveniles from the ordinary criminal process in order to

There is an irony to the juxtaposition of a juvenile court proceeding that is cloaked in the protection of confidentiality and contemporaneous public notification of that child's crime. That irony was not lost on one court:

We also find it ironic that . . . Ohio appellate courts protect the child's privacy and use only the child's initials in the caption or the text. At the same time, however . . . Ohio's AWA automatically requires Tier III juvenile sexual offenders to register and to report to local authorities, which removes all anonymity prior to the outcome of any rehabilitation efforts.⁸³

B. A Clash of Policies

SORNA's requirement that children in the juvenile justice system must nonetheless register as sex offenders is in obvious opposition to the systems twin precepts: confidentiality and the potential for rehabilitation. It, therefore, sets up a classic legal dilemma with which even law students are familiar—how to reconcile competing statutory aims. On one side is a firmly established codification of judicial philosophy that treats juvenile offenders differently. On the other side is Congress's intent to carve out an exception within the juvenile justice system for children who commit sexual offenses.⁸⁴

How might the important policies contained in the FJDA and Congress's desire to require child offenders to register be reconciled? Simply put, they cannot be. Policies of rehabilitation and protection of the child's privacy cannot coexist with the requirements of registration and notification to the community of their delinquency.⁸⁵ They cannot coexist because the burdens associated with registration and community notification detrimentally impact a child's chance for rehabilitation.⁸⁶ The mandatory registration of J.L., who had consensual sexual intercourse with his underage girlfriend, troubled one justice who wrote, "The mandatory disposition of this case appears to have the opposite

avoid the stigma of a prior criminal conviction and to encourage treatment and rehabilitation"). *But see* CAL. WELF. & INST. CODE § 676(a) (West 2013) (permitting the public to attend juvenile court proceedings where certain crimes are alleged to have been committed).

83. *In re W.Z.*, 957 N.E.2d 367, 381 (Ohio Ct. App. 2011).

84. *See supra* notes 14–23 and accompanying text (delineating when children must register because of the commission of certain offenses).

85. *See, e.g., U.S. v. Juvenile Male*, 590 F.3d 924 (9th Cir. 2009), *vacated*, 131 S. Ct. 2860 (2011) (finding that protection of privacy and confidentiality are suborned by SORNA requirements that juvenile offenders must register); *see also In re C.P.*, 967 N.E.2d 729, 746 (Ohio 2012) (stating that "[r]egistration and notification requirements frustrate two of the fundamental elements of juvenile rehabilitation: confidentiality and the avoidance of stigma").

86. *See, e.g., In re W.Z.*, 957 N.E.2d at 377 ("[A] child who commits a one-time mistake is automatically, irrefutably, and permanently presumed to be beyond redemption or rehabilitation.").

effect [of encouraging rehabilitation]. Rather than promoting J.L.'s rehabilitation, the State has ensured that J.L. will be labeled as a sex offender for the rest of his life."⁸⁷

To require a child to register sits in direct opposition to efforts to rehabilitate the child. Consider the words of a child offender who was placed on the registry at fourteen years old: "[O]ur mistake is forever available to the world to see. There is no redemption, no forgiveness. You are never done serving your time. There is never a chance for a fresh start. You are finished. I wish I was executed because my life is basically over."⁸⁸

Generally, when statutes are in conflict, canons of statutory construction dictate that the specific will trump the general.⁸⁹ Faced with whether to preserve the core of the juvenile justice system or to accede to Congressional intent to make children register, courts have taken the position that confidentiality and rehabilitation must give way to Congress's view that child offenders pose such a danger to the community.⁹⁰ On this point, the Family Court of Delaware wrote:

[I]n applying Megan's Laws to juveniles, many States, Delaware being no exception, suddenly appeared to disregard a concept which the American Criminal Justice System, indeed the criminal justice systems adopted in almost every country around the world, had recognized for over 100 years, that juveniles are different from adults and should be treated differently.⁹¹

No matter that Congress's position is contradicted by significant statistical evidence and psychological analysis;⁹² courts, nonetheless, have deferred to Congressional intent without much resistance.⁹³ *United States v. Under Seal* offers an excellent example of this deference.⁹⁴ In

87. *People ex rel. J.L.*, 800 N.W.2d 720,725 (S.D. 2011) (Meierhenry, Ret. J., concurring specially).

88. See RAISED ON THE REGISTRY, *supra* note 10, at 52 (quoting then 16 year old Austin S. from Louisiana); see also HUMAN RIGHTS WATCH, US: MORE HARM THAN GOOD 52 (May 1, 2013), available at <http://www.hrw.org/news/2013/05/01/us-more-harm-good> (statements of Dominic G., who was required to register for an offense he committed when he was thirteen) ("I'm a ghost. I can't put my name on a lease, I never receive mail. No one cares if I am alive. In fact, I think they would prefer me dead.").

89. See, e.g., *In re J.R.Z.*, 648 N.W.2d 241, 247 (Minn. Ct. App. 2002) ("Generally, specific statutory provisions control general provisions when the two are in conflict.").

90. See, e.g., *U.S. v. Under Seal*, 709 F.3d 257, 262 (4th Cir. 2013).

91. *Fletcher v. State*, No. 0404010688, 2008 WL 2912048, at *5 (Fam. Ct. Del. June 16, 2008).

92. See *infra* notes 246–251 (citing various recidivism studies).

93. See, e.g., *In re J.R.*, 341 Ill.App.3d 784, 804 (Ill. Ct. App. 2003) (rejecting claim that registration and notification violated procedural or substantive due process); *State v. Eighth Jud. Dist. Ct.*, 306 P.3d 369, 372 (Nev. 2013) (concluding that retroactive application of statute was constitutional as applied to child offender); *In re J.L.E.*, 223 P.3d 323 (Kan. Ct. App. 2010) (summarily finding obligation of child offender to register).

94. See, e.g., *Under Seal*, 709 F.3d at 262.

declaring the primacy of SORNA over conflicting provisions of the FJDA, the court stated:

Our review is limited to interpreting the statutes, and both the statutory text, legislative history and timing of SORNA indicate that its reporting and registration requirements were plainly intended by Congress to reach a limited class of juveniles adjudicated delinquent in cases of aggravated sexual abuse, including Appellant, despite any contrary provisions of the FJDA.⁹⁵

Acquiescence to legislative intent is not uncommon. In fact, great deference is afforded to legislative intent to craft parameters of offenses.⁹⁶ However, as Justice Bell of the Maryland Court of Appeals observed when considering the validity of Maryland's strict liability statutory rape statute, legislative authority does not come with impunity.⁹⁷ There must be occasions where the court observes principles that extend beyond interpreting legislative intent.

C. Emotion that Clouds the Debate

Reliance on formalism to choose among competing statutory aims disregards an underlying but unspoken motivation for the choice. In truth, deference to SORNA's mandatory registration of children is not solely an exercise in statutory construction. It is a choice fueled by emotion.

To be sure, we are afraid of the sexual predator. Images from high profile cases continue to haunt us even as statistics show child sexual abuse declining.⁹⁸ Jerry Sandusky is that image. A trusted and respected assistant coach of a major college football team and founder of a youth charity, he preyed on young boys from disadvantaged homes, showering them with attention and gifts.⁹⁹ Grooming, it is called.¹⁰⁰

95. *Id.*

96. See generally *Lambert v. California*, 355 U.S. 225, 228 (1957) (emphasizing the considerable weight that courts give to legislative authority); *Liparota v. U.S.*, 471 U.S. 419, 424 (1985) ("The definition of the elements of a criminal offense is entrusted to the legislature . . .").

97. *Garnett v. State*, 632 A.2d 797, 817 (Md. 1993) (Bell, J., dissenting) ("To recognize that a State legislature may, in defining criminal offenses, exclude *mens rea*, is not to suggest that it may do so with absolute impunity, without any limitation whatsoever.").

98. See Erica Goode, *Researchers See Decline in Child Sexual Abuse Rate*, NEW YORK TIMES, June 28, 2012, at A13 (reporting a 60% decline in child sexual abuse cases from 1992 to 2010).

99. See Maureen Dowd, *American Horror Story*, NEW YORK TIMES, June 12, 2012, at A27 (reporting on Sandusky's pattern of abuse directed at fatherless children).

100. See Malcolm Gladwell, *In Plain View: How Child Molesters Get Away with It*, THE NEW YORKER, Sept. 24, 2012, http://www.newyorker.com/arts/critics/atlarge/2012/09/24/120924crat_atlarge_gladwell (describing grooming as "the process by which child molesters ingratiate themselves into the communities they wish to exploit").

After a lengthy investigation, Sandusky was convicted of forty-five counts of sexual molestation of ten young boys.¹⁰¹

Jerry Sandusky is not the only image we have of the serial sexual predator. Philip Garrido, a registered sex offender, is another terrifying image. He abducted Jaycee Lee Dugard in broad daylight on her way to school when she was eleven years old, and he kept her captive for eighteen years, raping her repeatedly.¹⁰² In similarly violent fashion, Ariel Castro kidnapped three young women over a three year period, brutalizing them for the next eleven years in his home in a Cleveland suburb before their escape.¹⁰³

This horror is real. These images frighten us and stay with us. So powerful are the “pictures in our heads,” political journalist Walter Lippmann wrote that we rely on them to shape our view of the world.¹⁰⁴ In the case of Ariel Castro, the boarded up and dilapidated home where he repeatedly raped and assaulted the women was such a devastating symbol of the horror these women faced that the house was demolished shortly after Castro was sentenced to prison.¹⁰⁵

Not only does the image of the serial predator haunt us, it spurs us to act.¹⁰⁶ The separate and tragic deaths of three young children—Adam Walsh in 1981,¹⁰⁷ Jacob Wetterling in 1992,¹⁰⁸ and Megan Kanka in

101. See Joe Drape, *Sandusky Guilty of Sexual Abuse of 10 Young Boys*, NEW YORK TIMES, June 22, 2012, at A1 (reporting on the conviction of former Penn State Assistant Football Coach Jerry Sandusky).

102. See Casey Glynn, *Nancy and Philip Garrido Sentenced for Jaycee Lee Dugard Kidnapping*, CBS NEWS (June 2, 2011, 1:56 PM), <http://www.cbsnews.com/news/nancy-and-philip-garrido-sentenced-for-jaycee-lee-dugard-kidnapping> (following the conviction of Phillip and Nancy Garrido for the kidnapping and rape of Jaycee Lee Dugard).

103. See Michael Muskal, *Ariel Castro Sentenced; Victim Says His ‘Hell Is Just Beginning’*, LA TIMES (Aug. 1, 2013), <http://articles.latimes.com/2013/aug/01/nation/la-na-ariel-castro-20130802> (reporting on the sentencing of Ariel Castro).

104. See LORI DORFMAN & VINCENT SCHIRALDI, OFF BALANCE: YOUTH, RACE & CRIME IN THE NEWS 4 (2001), available at http://www.justicepolicy.org/uploads/justicepolicy/documents/off_balance.pdf (quoting WALTER LIPPMANN, PUBLIC OPINION (1922)).

105. Jennifer Lindgren, Doug Stanglin & Yamiche Alcindor, *Ariel Castro’s House of Horror Leveled in Cleveland*, USA TODAY (Aug. 7, 2013, 3:56 PM), <http://www.usatoday.com/story/news/nation/2013/08/07/ariel-castro-cleveland-house-abduction/2626855> (reporting on the community’s desire to demolish Castro’s home).

106. See generally Carpenter, *supra* note 53.

107. See *Our History*, NAT’L CTR. FOR MISSING & EXPLOITED CHILDREN, <http://www.missingkids.com/History> (last visited May 7, 2014) (describing the heartbreaking story of Adam Walsh’s abduction and murder in 1981). In response to this tragedy, Adam’s father, John Walsh, established the National Center for Missing and Exploited Children. See *About John Walsh, Host of “America’s Most Wanted”*, NAT’L CTR. FOR MISSING & EXPLOITED CHILDREN, http://www.missingkids.com/en_US/documents/PressKit_JohnWalsh.pdf#page=1 (last visited May 7, 2014).

108. See *How We Began and the Need for Transition*, JACOB WETTERLING RESOURCE CTR., <http://www.gundersenhealth.org/nccpt/jacob-wetterling-resource-center/who-we-are/history> (last visited

1994¹⁰⁹—served as the catalyst for national legislation on sex offender registration laws¹¹⁰ and public notification statutes.¹¹¹ In the state of New Jersey, where Megan Kanka was murdered, the response from the legislature was swift. It passed the first community notification law—what we have come to call “Megan’s Law”—three months after a public petition supported it.¹¹²

In fact, it is the singular death of seven year old Megan who was brutally raped and murdered by her neighbor Jesse Timmendequas¹¹³ that frightens us the most. The push for community notification laws was an attempt to gain control over the frightening realization that someone previously convicted of the sexual assault of other children could live in a neighborhood without the knowledge of parents in the community.¹¹⁴

Professor Walker Wilson observes that “our desire to exercise control over potential threats is a driving force behind much of human behavior.”¹¹⁵ This need to exercise control over terrifying images of violent sexual predators has led us to ramp up sex offender registration and notification schemes over the past decade with a “dizzying array of increased registration and community notification requirements, the emergence of harshening residency restrictions, and the elimination of individuated risk assessment.”¹¹⁶ As Professor Wayne Logan wrote, “To students of the field, the laws—often enacted unanimously and without meaningful debate—serve as object lessons in legislative panic.”¹¹⁷

May 7, 2014) (explaining how the movement began to create national sex offender registration):

109. See *State v. Timmendequas*, 737 A.2d 55, 66–73 (N.J. 1999) (detailing the brutal assault and murder of seven-year-old Megan Kanka in 1994 by Jesse Timmendequas, a neighbor who, unbeknownst to Megan’s family, had prior convictions for sexual assault against children).

110. The Jacob Wetterling Crimes Against Children and Sexually Violent Offenders Registration Program, Pub. L. 103-322, 108 Stat. 2038 (1994).

111. Pub. L. No. 104-145, § 2, 110 Stat. 1345 (1996) (amending the Jacob Wetterling Act to include the requirement that state law enforcement agencies “shall release relevant information that is necessary to protect the public concerning a specific person required to register under this section”).

112. See *E.B. v. Verniero*, 119 F.3d 1077, 1081–82 (3d Cir. 1997).

113. See *Timmendequas*, 737 A.2d at 67–68.

114. See Lisa Anderson, *Demand Grows to ID Molesters, States Weigh Children’s Safety Versus Offenders’ Rights*, CHI. TRIB., Aug. 15, 1994, available at http://articles.chicagotribune.com/1994-08-15/news/9408150089_1_kanka-family-megan-kanka-offenders (identifying community anger as “the catalyst” for passage of community notification laws); Stephen W. Dill, *A Plea for the Sake of Megan*, PHILA. DAILY NEWS, Aug. 3, 1994, at 4 (reporting on community rallies that urged passage of new laws to protect the public).

115. Walker Wilson, *supra* note 54, at 511.

116. See Carpenter & Beverlin, *supra* note 57, at 108. See also *Wallace v. State*, 905 N.E.2d 371, 374–77 (Ind. 2009) (critiquing the many changes of Indiana’s sex offender registration laws).

117. Wayne A. Logan, *Megan’s Law as a Case Study in Political Stasis*, 61 SYRACUSE L. REV. 371, 371 (2011).

James Starkey can attest to the increasingly harsh penalties he faced in the ten years since he was required to register as a sex offender.¹¹⁸ Goal posts kept moving on James, a signal of the escalating social panic surrounding sex offender registration laws. Initially in 1998, Starkey received a deferred adjudication in Texas to the charge of sexual assault of a fifteen year old.¹¹⁹ He was required to register for ten years, a term that was subsequently upheld when he moved to Oklahoma a short time later.¹²⁰ That requirement was set to expire in 2008, but because of a serially-amended sex offender registration law, Starkey's crime was recast by the Oklahoma legislature to require lifetime registration just as his obligation was set to end.¹²¹

The fear—sometimes real, but sometimes imagined¹²²—has spilled over into our handling of children convicted of sex crimes.¹²³ Our desire to protect our children from Jerry Sandusky, Philip Garrido, and Jesse Timmendequas has moved us to broaden the reach of sex offender laws to include children in the juvenile justice system. But it has come at the expense of forsaking foundational policies of rehabilitation and confidentiality. Historian Philip Jenkins described the phenomenon as a “social panic” in which the “fear is wildly exaggerated and wrongly directed.”¹²⁴ Jenkins wrote:

When the official reaction to a person, groups of persons or series of events is *out of all proportion* to the actual threat offered, when experts, in the form of police chiefs, the judiciary, politicians and editors *perceive*

118. See *Starkey v. Okla. Dep't of Corrs.*, 305 P.3d 1004 (Okla. 2013) (reviewing the harshening of Starkey's registration requirements).

119. It is unclear from the record whether the adjudication was for sexual actions that were consented to or compelled. *Id.* at 1008.

120. *Id.* at 1009. But see *id.* (examining whether Starkey was required to register at all in Oklahoma).

121. *Id.*

122. See Richard G. Wright, *Sex Offender Post-Incarceration Sanctions: Are There Any Limits?*, 34 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 17, 21–25 (2008) (providing statistics that sexual assault by a stranger is an “infrequently occurring event”). See also DORFMAN & VINCENT, *supra* note 104, at 3 (“Although violent crime by youth in 1998 was at its lowest point in the 25-year history of the National Crime Victimization Survey, 62% of poll respondents felt that juvenile crime was on the increase.”).

123. See, e.g., Elizabeth Garfinkle, *Coming of Age in America: The Misapplication of Sex-Offender Registration and Community-Notification Laws to Juveniles*, 91 CAL. L. REV. 163 (2003) (arguing that community notification statutes are ineffective when applied to child offenders); Brittany Enniss, Note, *Quickly Assuaging Public Fear: How the Well-Intended Adam Walsh Act Led to Unintended Consequences*, 2008 UTAH L. REV. 697, 706–08 (2008) (noting that the AWA, enacted to protect minors, has harmed juvenile offenders who have been subject to its provisions).

124. See PHILIP JENKINS, *MORAL PANIC: CHANGING CONCEPTS OF THE CHILD MOLESTER IN MODERN AMERICA* 6–7 (1998) (criticizing the public's fear of sexual offenses as highly disproportionate to the threat of the offenses themselves); see also John Douard, *Sex Offender as Scapegoat: The Monstrous Other Within*, 53 N.Y.L. SCH. L. REV. 31, 41 (2009) (“[S]ex offenders are the targets of ‘moral panic.’”).

the threat in all but identical terms, and appear to talk with one voice of rates, diagnoses, prognoses and solutions, when the media representations universally stress sudden and dramatic increases . . . then we believe it is appropriate to speak of a *moral panic*.¹²⁵

Sweeping generalizations and hastily passed legislation are hallmarks of the social panic that surrounds sex offender registration laws. The emotion that grips us leads to registration laws drafted so broadly that they ensnare equally the rapist and the child who engages in consensual sexual intercourse.¹²⁶ Panic causes us to pass registration laws quickly and without much scrutiny.¹²⁷ While it is certainly true that a few child offenders demonstrate predatory behavior,¹²⁸ panic also leads us to ignore evidence that child sex offenders are not likely to reoffend¹²⁹ or that they commit sexual crimes for a myriad of reasons other than predatory inclinations.¹³⁰

Reliance on legislative deference may be the explicitly stated reason for support of Congressional intent to carve out an exception for child sex offenders in the juvenile justice system. But, by no means is it the only reason.

III. ACKNOWLEDGING THE STIGMA OF CHILD REGISTRATION

All sex offender registration is stigmatizing. Of that there is

125. Philip Jenkins, *Failure to Launch: Why Do Some Social Issues Fail to Detonate Moral Panics?*, 49 BRIT. J. CRIMINOLOGY 35, 35 (2009) (quoting STUART HALL ET AL., *POLICING THE CRISIS: MUGGING, THE STATE, AND LAW AND ORDER* 16 (1978)).

126. See *infra* Part IV (discussing the excessive nature of sex offender registration laws). See also Eric J. Bruske, Note, *Sex Offenders are Different: Extending Graham to Categorically Protect the Less Culpable*, 89 WASH. U. L. REV. 417, 418 (2011) (contrasting the cases of an eighteen year old who posted a nude picture of his ex-girlfriend with a serial predatory pedophile, both of whom were required to register as sex offenders).

127. See, e.g., Logan, *supra* note 117, at 374 (describing how “the Speaker of the Assembly Garabed ‘Chuck’ Haytaian, running for the U.S. Senate, declared a legislative emergency, bypassing customary committee debate and forcing sex offender registration and community notification proposals to move directly to the floor for consideration”).

128. See, e.g., *B.W. v. State*, 909 N.E.2d 471, 474 (Ind. Ct. App. 2009) (describing child offender as “very high risk” to reoffend based on a history of predatory sexual contact with at least 47 people, ranging in age from two to “seniors”).

129. See, e.g., NICOLE PITTMAN & QUYEN NGUYEN, A SNAPSHOT OF JUVENILE SEX OFFENDER REGISTRATION AND NOTIFICATION LAWS: A SURVEY OF THE UNITED STATES 6 (2012), available at <http://www.ovsom.texas.gov/docs/Juvenile-Sex-Offender-Registration-and-Notification-Laws-Snapshot-2012.pdf> (citing studies compiled by Professor Franklin E. Zimring revealing that over 92% of all individuals who committed a sex offense as a juvenile did not commit another sex offense); see also *id.* (noting that Dr. Elizabeth Letourneau conducted a study finding a sexual offense reconviction rate of less than 1%); Leon, *supra* note 22, at 145 (analyzing data collected by the author to conclude that sex offenders had a 5.3% rate of recidivism over a three year follow-up period); Janis F. Bremer, *Juveniles Who Engage in Sexually Harming Behavior—A Restorative Justice System*, 32 WM. MITCHELL L. REV. 1085, 1087 (2006) (reporting a recidivism rate of 4% among a sample conducted in 1996 of 1600 child sex offenders).

130. See *infra* Part V.

agreement, even among courts that have held that registration schemes are only civil regulations.¹³¹ Indeed, courts recognize that being publicly labeled a “sex offender” is sufficiently derogatory to severely injure a person’s reputation.¹³² The Ninth Circuit Court of Appeals summed it up well when it wrote that it could “hardly conceive of a state’s action bearing more ‘stigmatizing consequences’ than the labeling of [an individual] as a sex offender.”¹³³ Even the term ‘stigma,’ which has been generally defined as a “mark or token of infamy, disgrace, or reproach,”¹³⁴ underscores this observation.

Therefore, the question is not whether registration is stigmatizing. The question is whether the stigma associated with registration rises to the level of punishment. Certainly, the seminal 2003 Supreme Court opinion in *Smith v. Doe* provides the framework for this inquiry.¹³⁵ The Court found that Alaska’s sex offender registration scheme was not sufficiently stigmatizing to be punitive for purposes of an ex post facto analysis under the Eighth Amendment.¹³⁶

From the registrants’ perspective in *Smith*, stigma flowed directly from the shame and humiliation accompanying registration and notification. As such, their argument continued, registration and notification were tantamount to the shaming punishments employed in Colonial times.¹³⁷

However, the Court rejected that contention, writing, “[T]he stigma of Alaska’s Megan’s Law results not from public display for ridicule and shaming but from the dissemination of accurate information about a

131. See, e.g., *Smith v. Doe*, 538 U.S. 84, 99 (2003) (“It must be acknowledged that notice of a criminal conviction subjects the offender to public shame, the humiliation increasing in proportion to the extent of the publicity. And the geographic reach of the Internet is greater than anything which could have been designed in colonial times.”); see also *Young v. State*, 806 A.2d 233, 249 (Md. 2002) (“Being labeled as a sexual offender within the community can be highly stigmatizing and can carry the potential for social ostracism.”); *Ray v. State*, 982 P.2d 931, 936 (Idaho 1999) (“[R]egistration brings notoriety to a person convicted of a sexual offense [and] does prolong the stigma attached to such convictions.”).

132. See *State v. Norman*, 808 N.W.2d 48, 61 (Neb. 2012) (acknowledging the stigma of registration); *Doe v. Pryor*, 61 F. Supp. 2d 1224, 1231 (M.D. Ala. 1999) (“While it might seem that a convicted felon could have little left of his good name, community notification . . . will inflict a greater stigma than would result from conviction alone.”); *State v. Robinson*, 873 So. 2d 1205, 1212 (Fla. 2004) (“Robinson’s designation as a ‘sexual predator’ certainly constitutes a stigma. No one can deny that such a designation affects one’s good name and reputation.”).

133. *Neal v. Shimoda*, 131 F.3d 818, 829 (9th Cir. 1997).

134. *Doe v. Dep’t of Pub. Safety ex rel. Lee*, 271 F.3d 38, 47 (2d Cir. 2001), *rev’d on other grounds* Conn. Dep’t of Pub. Safety v. Doe, 538 U.S. 1 (2003) (quoting THE AMERICAN HERITAGE DICTIONARY OF ENGLISH LANGUAGE 1702 (4th ed. 2000)).

135. *Smith*, 538 U.S. at 105–06 (2003) (“The Act is nonpunitive, and its retroactive application does not violate the Ex Post Facto Clause.”).

136. *Id.* at 97–100 (citing factors outlined in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963), to determine whether legislation is a civil regulation or criminal penalty).

137. *Id.* at 97–98.

criminal record, most of which is already public.”¹³⁸ The Court’s conclusion that notification is not the equivalent of a shaming punishment was premised on the public nature of an adult trial and the record it produces following a conviction. In fact, it was central to the Court’s reasoning. In favoring the constitutionality of notification, the Court wrote, “Our system does not treat the dissemination of truthful information in furtherance of a legitimate government objective as punishment. On the contrary, our criminal law tradition insists on *public* indictment, *public* trial, and *public* imposition of sentence.”¹³⁹

But herein lies the problem of applying the *Smith* rationale to child registration. Unlike adult proceedings, delinquency adjudications are not public. They are purposefully private to prevent stigma that may attach to the child offender into adult years.¹⁴⁰ Stigma flows directly from the notification and not from the delinquency adjudication, which would remain confidential but for the notification requirement. That the public nature of adult criminal proceedings so shaped the Court’s reasoning suggests, at a minimum, reconsideration of *Smith*’s applicability to child sex offender registration.

Further, not all stigma is created equal. No matter the impact on adult offenders, *Smith* did not contemplate the profound shame inflicted on child registrants. One need only consider the practical implications of registration and notification burdens on children to appreciate the truth of it. Registration and notification cast a long and punitive shadow over the registrants’ lives as registrants face ever-changing and harshening burdens.¹⁴¹ As the court in *In re C.P.* observed, “Registration and notification requirements for life, with the possibility of having them lifted only after 25 years, are especially harsh punishments for a juvenile.”¹⁴² This echoes the reasoning of the Supreme Court in *Graham v. Florida*, where the Court surmised that “[l]ife without parole is an especially harsh punishment on a juvenile [offender] [A]

138. *Id.* at 98.

139. *Id.* at 99 (emphasis added). See also *A.C.L.U. of Nev. v. Mastro*, 670 F.3d 1046 (9th Cir. 2012) (relying on *Smith* to find that “[a]ctive dissemination of an individual’s sex offender status does not alter the [*Smith*] Court’s core reasoning that stigma [comes from] the dissemination of accurate information about a criminal record”).

140. See *In re C.P.*, 967 N.E.2d 729, 746 (Ohio 2012) (“Registration and notification requirements frustrate two of the fundamental elements of juvenile rehabilitation: confidentiality and the avoidance of stigma.”).

141. See *Carpenter & Beverlin*, *supra* note 57, at 1073 (labeling the serially-amended registration schemes “super-registration schemes”).

142. *In re C.P.*, 967 N.E.2d at 741. In response to the position that registration impermissibly burdens the child offender, some states have amended their statutes to reflect that position. See, e.g., *Fletcher v. State*, No. 0404010688, 2008 WL 2912048, at *10 (Del. Fam. Ct. Jun. 16, 2008) (explaining the newly enacted procedure of “deregistration” designed to ameliorate the burdensome nature of registration).

juvenile will serve more years and a greater percentage of his life in prison than an adult offender.”¹⁴³ As well for the juvenile offender who, post-imprisonment, must register as a sex offender. Registration and notification burdens are felt for a longer period of time and in ways more onerous for juveniles than their adult counterparts.

Child sex offender registration triggers residential dislocation,¹⁴⁴ educational deprivation,¹⁴⁵ impactful residency restrictions,¹⁴⁶ and stigmatization and community isolation.¹⁴⁷ In a compelling essay, Dr. Janis Bremer argues that punitive responses directed at children in the form of isolation and stigmatization “create a negative feedback loop where young people are placed in a one-down dependent position with no hope of regaining a position of equality in society.”¹⁴⁸

The feelings expressed by Christian W. encapsulate the devastating experience of child sex offender registration. Christian was fourteen years old when he went on the registry for inappropriately touching his younger cousin. At age twenty-six, Christian said, “I live in a general sense of hopelessness, and combat suicidal thoughts almost daily due to the life sentence [registration] and punishment of being a registrant. The stigma and shame will never fully go away, people will always remember.”¹⁴⁹

Christian W. is not alone in combating thoughts of suicide. For Evan B., those thoughts turned into a reality.¹⁵⁰ He was placed on the state offender registry after exposing himself in a high school bathroom to

143. *Graham v. Florida*, 130 S. Ct. 2011, 2028 (2010).

144. See *RAISED ON THE REGISTRY*, *supra* note 10, at 1–2 (recounting that Jacob C. was required to live in a group home because he was not allowed to live with his family); *In re J.W.*, 787 N.E.2d 747, 765 (Ill. 2003) (involving juvenile’s banishment from his neighborhood as a condition of probation). And although not a child registrant, nineteen year old Frank Rodriguez was forced to move from his family home and his twelve year old sister because he was on the Texas registry for having sex with his fifteen year old girlfriend. See John Stossel, Gena Binkley & Andrew G. Sullivan, *The Age of Consent: When Young Love Is a Sex Crime*, ABC NEWS, Mar. 7, 2008, <http://abcnews.go.com/2020/Stossel/Story?id=4400537>.

145. See DuBuc, *supra* note 1 (last visited Jan. 28, 2014) (describing the loss of educational opportunities that Leah DuBuc suffered because she was retroactively placed on the registry).

146. See *infra* Part IV (examining the increasingly harsh residency restrictions and their impact on child offenders).

147. For an excellent discussion, see *RAISED ON THE REGISTRY*, *supra* note 10 (reviewing many stories of child offenders whose lives have been severely impacted by registration and notification).

148. Bremer, *supra* note 129, at 1089.

149. See *RAISED ON THE REGISTRY*, *supra* note 10, at 51 (relaying a telephone interview with Christian W.).

150. See *NO EASY ANSWERS*, *supra* note 5 (detailing the account of the young man’s suicide without releasing his name). Evan B.’s story was recounted elsewhere with his name included. See, e.g., Lara Geer Farley, *The Adam Walsh Act: The Scarlet Letter of the Twenty-First Century*, 47 WASHBURN L. REV. 471 (2008); see also *State Sex Offender Registration*, THE CRIMINAL DEFENSE LAWYER, <http://www.criminaldefenselawyer.com/resources/state-sex-offender-registration.htm> (last visited June 13, 2014).

several female students. One year later, Evan B. shot and killed himself.¹⁵¹

Sometimes, it is important to articulate the obvious. That is the value of the court's observation in *In re C.P.* when it wrote, "For a juvenile offender, the stigma of the label of sex offender attaches at the start of his adult life and cannot be shaken It will be a constant cloud, a once-every-three month reminder to himself and the world that he cannot escape the mistakes of his youth."¹⁵²

IV. REGISTRATION AS PUNISHMENT: A CRIMINAL PENALTY DISGUISED AS A CIVIL REGULATION

No matter the stigmatizing nature of sex offender registration, courts have deemed it insufficient to prove that registration laws are criminal penalties subject to Eighth Amendment constitutional scrutiny.¹⁵³ After all, registration and notification burdens are not traditional forms of punishments in that they do not deprive the offender of liberty in the way of "shackles, chains, or barred cells."¹⁵⁴

Labeling whether a law is civil or criminal is often an exercise in line drawing. Just how punitive is the regulation?¹⁵⁵ On this point, two decades of jurisprudence, capped by *Smith v. Doe*, have produced a fairly consistent message regarding sex offender registration laws: they are not sufficiently punitive to trigger Eighth Amendment analysis.¹⁵⁶ Since *Smith*, the jurisprudence affirming registration schemes as civil regulations has only grown,¹⁵⁷ with courts concluding that *Smith*

151. See NO EASY ANSWERS, *supra* note 5 (attributing Evan B.'s suicide to the burdens associated with his requirement to register as a sex offender).

152. *In re C.P.*, 967 N.E.2d 729, 741–42 (Ohio 2012).

153. See *infra* note 156.

154. *Reno v. Flores*, 507 U.S. 292, 302 (1993) (rejecting substantive due process violation because no traditional liberty interest was implicated); *Cf. Helman v. State*, 784 A.2d 1058, 1064 (Del. 2001) (concluding that the "assignment of a convicted sex offender to a statutorily-mandated Risk Assessment Tier does not implicate a protected liberty interest under the State or Federal Constitution").

155. See *Austin v. U.S.*, 509 U.S. 602, 610 (1993) ("Thus, the question is not, as the United States would have it, whether forfeiture . . . is civil or criminal, but rather whether it is punishment.").

156. *Smith v. Doe*, 538 U.S. 84, 105–06 (2003) ("The Act is nonpunitive, and its retroactive application does not violate the *Ex Post Facto* Clause."). Lower courts had similarly concluded. See, e.g., *Doe v. Poritz*, 662 A.2d 367, 372 (N.J. 1995) (concluding that registration and notification laws were designed to protect the public and not to punish the offender); *accord State v. Myers* 923 P.2d 1024 (Kan. 1996); *State v. Young*, 544 N.W.2d 808 (Neb. 1996); *In re Meyer*, 16 P.3d. 563 (Wash. 2001) (en banc). But see *Doe v. Att'y Gen.*, 686 N.E.2d 1007 (Mass. 1997) (concluding that registration and notification requirements were unconstitutional as applied to the lowest level of offender). Following *Smith*, federal courts have followed suit. See *U.S. v. Young*, 585 F.3d 199, 204 n.26 (5th Cir. 2009) (citing to decisions in the 4th, 6th, 8th, 9th, 10th, and 11th circuits that concluded sex offender registration schemes are not punitive).

157. See, e.g., *U.S. v. May*, 535 F.3d 912, 920 (8th Cir. 2008), *abrogated by Reynolds v. U.S.*, 132 S. Ct. 795 (2012) (finding that SORNA's registration requirements "demonstrate no congressional

controls the analysis.¹⁵⁸ The Seventh Circuit's reasoning is illustrative. Referencing *Smith*, the court wrote, "[W]hether a comprehensive registration regime targeting only sex offenders is penal . . . is not an open question."¹⁵⁹

Guiding *Smith* is the two-part "intent-effects" test from *Kennedy v. Mendoza-Martinez*.¹⁶⁰ First is the intent: whether the legislature intended the statute to be a civil remedy or criminal penalty.¹⁶¹ Second, is the effect of the legislation: whether despite the regulatory aim of the law, it nonetheless is "so punitive either in purpose or effect . . . as to transform what was clearly intended as a civil remedy into a criminal penalty."¹⁶²

Applying the first prong of *Mendoza-Martinez* has been relatively easy. Courts have found evidence of regulatory intent underlying sex offender registration laws in the legislative history where the civil intent

intent to punish sex offenders"); see also *U.S. v. W.B.H.*, 664 F.3d 848 (11th Cir. 2011) (holding that registration is civil in nature); *A.C.L.U. of Nev. v. Mastro*, 670 F.3d 1046 (9th Cir. 2012) (concluding that registration did not violate ex post facto principles); *Commonwealth v. Baker*, 295 S.W.3d 437, 443 (Ky. 2009) (stating that the registration scheme was civil in nature). For similar cases involving juvenile sex offenders, see *U.S. v. Juvenile Male*, 670 F.3d 999 (9th Cir. 2012); *In re Alva*, 92 P.3d 311, 313 (Cal. 2004).

158. See, e.g., *In re W.M.*, 851 A.2d 431, 435 (D.C. 2004) ("In line with the reasoning in [*Smith*], we hold that the District's SORA is not punitive."); see also *U.S. v. Parks*, 698 F.3d 1, 5–6 (1st Cir. 2012) (relying extensively on the analysis of *Smith* to find that Maine's sex offender registration scheme was not punitive); accord *Doe v. Bredesen*, 507 F.3d 998, 1003–07 (6th Cir. 2007); *Lee v. State*, 895 So.2d 1038, 1041–43 (Ct. Crim. App. Ala. 2004). But see *Wallace v. State*, 905 N.E.2d 371, 379–84 (Ind. 2009) (applying the *Mendoza-Martinez* factors to hold that Indiana's sex offender registration scheme was punitive); accord *State v. Letalien*, 985 A.2d 4, 16–26 (Me. 2009); *State v. Williams*, 952 N.E.2d 1108, 1113 (Ohio 2011); *Starkey v. Okla. Dep't of Corrs.*, 305 P.3d 1004 (Okla. 2013).

159. *U.S. v. Leach*, 639 F.3d 769, 773 (7th Cir. 2011). Although a few Supreme Court decisions have addressed particular aspects of the constitutionality of sex offender registration schemes, *Smith* remains the only Court opinion to address whether sex offender registration schemes are punitive under the Eighth Amendment. See *Conn. Dep't Pub. Safety v. Doe*, 538 U.S. 1, 3–4 (2003) (holding that procedural due process did not demand hearing to determine offender's future dangerousness where all offenders were listed on state registry for public notification); *Carr v. U.S.*, 560 U.S. 438 (2010) (determining that burdens attached to failure to register were intended to apply to prospective travelers only); *Reynolds v. U.S.*, 132 S. Ct. 975, 981–84 (2012) (defining the authority of the Attorney General to implement SORNA); *U.S. v. Kebodeaux*, 133 S. Ct. 2496, 2504–05 (2013) (finding that one convicted by a special court-martial of a sexual offense was already subjected to pre-SORNA registration requirements).

160. 372 U.S. 144, 168–69 (1963) (articulating seven factors to be used to determine whether a regulation's effect is punitive). For a sample of cases that have analyzed sex offender registration schemes under *Mendoza-Martinez*, see *Wallace v. State*, 905 N.E.2d 371 (Ind. 2009) (analyzing the *Mendoza-Martinez* factors to hold that Indiana's amended sex offender registration laws were punitive); *U.S. v. Under Seal*, 709 F.3d 257 (4th Cir. 2013); *Femedeer v. Haun*, 227 F.3d 1244, 1248 (10th Cir. 2000) (utilizing the intent-effects test).

161. See *U.S. v. Ursery*, 518 U.S. 267, 277 (1996) (describing the first stage of inquiry as whether Congress intended the forfeiture law to be a "remedial civil sanction").

162. *Hudson v. U.S.*, 522 U.S. 93, 99 (1997); see also *U.S. v. Juvenile Male*, 590 F.3d 924, 940–41 (9th Cir. 2009) (applying *Hudson* to find that the public dissemination of a juvenile sex offender's information is punitive in effect because of the high degree of confidentiality afforded juveniles).

is articulated,¹⁶³ in the placement of the registration scheme outside the criminal code,¹⁶⁴ or in language in the statute's preamble demonstrating such intent.¹⁶⁵

Yet, legislative intent alone is only the first step of analysis to determine that the law is a civil regulation and not a criminal penalty. The second step requires analysis of the effects of the law. Under this analysis, a regulation may be deemed to impose a criminal penalty where the legislation is excessive in relation to its nonpunitive purpose, or where it no longer bears a rational relation to its regulatory aim.¹⁶⁶ *Mendoza-Martinez* identified seven factors to help guide the determination:

[1] Whether the sanction involves an affirmative disability or restraint, [2] whether it has historically been regarded as a punishment[,] [3] whether it comes into play only on a finding of *scienter*, [4] whether its operation will promote the traditional aims of punishment—retribution and deterrence, [5] whether the behavior to which it applies is already a crime, [6] whether an alternative purpose to which it may rationally be connected is assignable for it, and [7] whether it appears excessive in relation to the alternative purpose assigned.¹⁶⁷

Analysis of these factors exposes the constitutional vulnerability of sex offender registration laws as applied to children. While the intent of the scheme is purportedly civil in nature, the effect is not.

163. See, e.g., *U.S. v. Under Seal*, 709 F.3d 257 (4th Cir. 2013) (relying on legislative history to conclude that SORNA was nonpunitive); *Commonwealth v. Baker*, 295 S.W.3d 437, 443 (Ky. 2009) (finding that the legislature intended its registration scheme to be civil in nature). Even where courts have found their state's sex offender registration laws to be punitive, they have nonetheless found that the legislature had a regulatory purpose for enacting the laws. See *State v. Letalien*, 985 A.2d 4, 16 (Me. 2009) (acknowledging that the legislature intended registration to be a civil regulation because the laws were "entirely outside of the Criminal Code"); *State v. Williams*, 952 N.E.2d 1108, 1110–11 (Ohio 2011) (recognizing that the legislature intended the sex offender registration scheme to be remedial).

164. See, e.g., *Under Seal*, 709 F.3d at 264 (4th Cir. 2013) (justifying SORNA's civil purpose by the code's placement in the public health and welfare section of the code).

165. It is not uncommon for legislative preambles to articulate the civil purpose of the registration scheme. See, e.g., IDAHO CODE ANN. § 18-8302 (2011) ("The legislature further finds that providing public access to certain information about convicted sexual offenders assists parents in the protection of their children."); ME. REV. STAT. tit. 34-A, § 11201 (1996) *invalidated by* *State v. Letalien*, 985 A.2d. 4 (2009) ("The purpose of this chapter is to protect the public from potentially dangerous registrants and offenders by enhancing access to information concerning those registrants and offenders."); MICH. COMP. LAWS § 28.721a (2011) ("The legislature has determined that a person who has been convicted of committing an offense covered by this act poses a potential serious menace and danger to the health, safety, morals, and welfare of the people, and particularly the children, of this state.").

166. See *Hudson v. U.S.*, 522 U.S. 93, 99 (1997). Generally, courts have found that the requirement to register bears a rational relationship to its regulatory aim. See, e.g., *In re J.W.*, 204 Ill.2d 50 (Ill. 2003) (affirming lifetime registration for a twelve year old adjudicated delinquent reasoning that "there is a rational relationship between the registration of juvenile sex offenders and the protection of the public from such offenders").

167. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1962).

A. An Affirmative Disability Akin to Punishment

Although registration does not share all the attributes of imprisonment, modern registration burdens are, in fact, affirmative disabilities designed to restrict the registrant's liberty. No longer can one claim that registration burdens are benign as was the conclusion reached in *Smith* with respect to Alaska's sex offender registration scheme from the 1990s. The *Smith* court found that registration under the Alaskan model did not appear to restrict movement because in-person registration was infrequent and only applied to a small class of registrants.¹⁶⁸ Additionally, registrants were "free to move where they wish and to live and work as other citizens, with no supervision."¹⁶⁹

Modern registration schemes, however, are different. Modern registration schemes require frequent in-person registration by many classes of registrants.¹⁷⁰ So burdensome can be the frequency of in-person registration that the Maine Supreme Court stated:

It belies common sense to suggest that a newly imposed lifetime obligation to report to the police station every ninety days to verify one's identification, residence, and school, and to submit to fingerprinting and provide a current photograph, is not a substantial disability or restraint on the free exercise of individual liberty.¹⁷¹

For the child offender, the disability is exacerbated. SORNA's classification of crimes results in automatic frequent in-person registration of all child offenders because of the way SORNA categorizes offenses committed by the child offenders.¹⁷² Frequent in-person registration is not just a possibility; it is the norm. In addition, the duration of registration is far more significant for a child offender than for an adult offender. Since SORNA demands lifetime registration for many juvenile offenders, the number of years a child will suffer in-person registration every three months is a more intrusive burden on a child offender than on an adult offender.¹⁷³

168. *Smith v. Doe*, 538 U.S. 84, 99 (2003) ("The Act's obligations are less harsh than the sanctions of occupational debarment, which we have held to be nonpunitive.").

169. *Id.* at 101. But see *id.* at 110 (Stevens, J., dissenting) ("The [sex offender registration] statutes impose significant affirmative obligations and a severe stigma on every person to whom they apply.").

170. See, e.g., *Doe v. State*, 189 P.3d 999, 1009 (Alaska 2008) (describing Alaska's in-person registration requirements); *Wallace v. State*, 905 N.E.2d 371, 379 (Ind. 2009) (detailing Indiana's in-home personal visitation to verify an offender's address); *State v. Letalien*, 985 A.2d 4, 24–25 (Me. 2009) (referencing Maine's requirement to register in-person every ninety days).

171. *Letalien*, 985 A.2d at 24–25.

172. See 42 U.S.C. § 16911(8) (2012) (defining the term "convicted" to include "adjudicated delinquent as a juvenile for that offense, but only if the offender is 14 years of age or older at the time of the offense . . .").

173. For an interesting analysis of the duration of such burdens, see *In re C.P.*, 967 N.E.2d 729,

Modern residency restrictions also contribute significantly to the affirmative disability and restraint on registrants. Current residency restrictions aggressively and essentially close off major portions of a particular state to sex offender registrants,¹⁷⁴ countering *Smith's* observation that registration does not preclude registrants from changing residences.¹⁷⁵ When first introduced, buffer zones were 1,000 feet or less and were limited to traditional locations where children might congregate.¹⁷⁶ Today, buffer zones are often 2,000 feet or more,¹⁷⁷ and statutes have expanded the concept of "where children congregate" to include bus stops,¹⁷⁸ video arcades,¹⁷⁹ and libraries.¹⁸⁰ One offender recounted the difficulties in honoring the buffer zones:

Because I can't come in contact with anyone under the age of eighteen, I find myself going to the store on a regular basis at night to make sure there are no minors there. It makes me nervous just because if they wave at you or make some look at you, you know you could potentially get in trouble for that.¹⁸¹

742 (Ohio 2012) (calculating on average the number of years that a child offender must suffer registration burdens).

174. See, e.g., GA. CODE ANN. § 42-1-15 (2010) (preventing sex offenders from living within 1,000 feet of a school, day care center, or area where minors congregate); 720 ILL. COMP. STAT. § 5/11-9.3(b) (2009) (barring sex offenders from loitering within 500 feet of a playground, child care centers, or facilities that offer programs for children); KY. REV. STAT. ANN. § 17.545 (West 2007) (barring sex offenders from residing within 1000 feet of any preschool, primary or secondary school public playground or licensed child day care facility); UTAH CODE ANN. § 77-27-21.7 (2011) (prohibiting sex offenders from being in the area, on foot or in or on any motorized or nonmotorized vehicle, of any day care facility, public park, or primary or secondary school).

175. *Smith v. Doe*, 538 U.S. 84, 100 (2003) ("The Act does not restrain activities sex offenders may pursue but leaves them free to change jobs or residences.").

176. See, e.g., 11 DEL. CODE ANN. tit. 11, § 1112 (2013) (preventing sex offenders from living within 500 feet of school property); GA. CODE ANN. § 42-1-12(a)(3)(b) (2009) (prohibiting sex offenders from living within 1,000 feet of a school, day care center, or area where minors congregate); MICH. COMP. LAWS § 28.733(f) (2009) (defining student safety zones as "1,000 feet or less from school property").

177. See, e.g., CAL. PENAL CODE § 3003.5 (2013) (enlarging buffer zone because of the enactment of Jessica's Law); see also ALA. CODE § 15-20-26(a) (2013) (expanding buffer zone from 1,000 feet to 2,000 feet); accord OKLA. STAT. tit. 57, § 590(A) (2013).

178. GA. CODE ANN. § 42-1-12(a)(3) (2009) (including bus stops); accord H.R. 4323, Gen. Assembly, 116th Sess. (S.C. 2006) (prohibiting certain sex offenders from residing within 1,000 feet of bus stops).

179. LA. REV. STAT. ANN. § 14:91.1(2) (2004) (including free-standing video arcades in the locations registered offenders may not visit).

180. H.R. 7621, 2006 Gen. Assem., Jan. Sess. (R.I. 2006) (prohibiting sex offenders from residing within 500 feet of libraries).

181. *True Life: I'm a Sex Offender* (MTV television broadcast Jan. 19, 2012), available at <http://www.mtv.com/videos/true-life-im-a-sex-offender/1677462/playlist.jhtml>; see also Lee Higgins, *Young Pittsfield Township Man Struggles with Sex Offender Label*, ANN ARBOR.COM NEWS (Dec. 15, 2009, 7:05 AM), <http://www.annarbor.com/news/a-young-man-struggles-with-the-sex-offender-label> (describing a young man on the registry for voluntary sexual intercourse with underage girlfriend who was charged with violating the residency restriction for living illegally within 1,000 feet of a school).

As a result of expanding residency restrictions, numerous registrants have very limited residency options available to them.¹⁸² Competition among legislators to remove sex offenders from their community has led to a “race to the harshest” in the form of aggressive residency restrictions.¹⁸³ Indeed, so little real estate was left in San Diego County following the enactment of Jessica’s Law, that experts estimated only 2.3% of residential parcels complied with residency restrictions and were affordable.¹⁸⁴ One recent example is Southern California’s calculated placement of pocket parks that create artificial buffer zones intended to remove sex offenders from their homes.¹⁸⁵

B. Excessive Legislation in Relation to Civil Intent

In addition to suggesting that modern registration schemes are affirmative disabilities, this Subpart questions whether sex offender registration schemes still bear a rational relationship to their original civil intent. The sheer weight and scope of current sex offender registration schemes cast doubt on whether this is possible. Modern registration schemes are drafted to cast a net so wide they ensnare those who pose no future danger to the community.¹⁸⁶

But see Lee Higgins, *Prosecutor Expected to Dismiss Case Against Matthew Freeman*, ANN ARBOR.COM NEWS (Mar. 2, 2010, 7:50 PM), <http://www.annarbor.com/news/prosecutors-expected-to-dismiss-case-against-matthew-freeman>.

182. *See, e.g., In re Taylor*, 147 Cal. Rptr. 3d 64, 67–71 (Cal. Ct. App. 2012), *review granted and opinion superseded by* 290 P.3d 1171 (Cal. 2013) (recounting the extreme difficulties for the four lead plaintiffs to secure housing under newly-enacted California buffer zones). For articles on the plight of registrants to find housing, see Damien Cave, *Roadside Camp for Miami Sex Offenders Leads to Lawsuit*, N.Y. TIMES, July 9, 2009, at A14 (reporting that numerous sex offenders are forced to camp out under Miami’s Julia Tuttle Causeway without electricity or water because of an unusually expansive residency restriction that bars registrants from living within 2,500 feet of where children gather); Catharine Skipp & Arian Campo-Flores, *A Bridge Too Far*, NEWSWEEK, Aug. 3, 2009, at 49 (collecting stories of displaced residents around the country, which included a group of homeless offenders in New York who “were crammed into a trailer that periodically moved around until finally settling on the grounds of the county jail”); Bill Ainsworth, *Law Creates Homeless Parolees, Report Says: Sex Offenders Limited by Residency Rules*, SAN DIEGO UNION-TRIB., Feb. 22, 2008, at A1 (chronicling the numerous registrants made homeless by the enactment of Jessica’s Law in 2006).

183. *See* Carpenter, *supra* note 53, at 41. For a prophetic admonishment, see Corey Rayburn Yung, *Banishment by a Thousand Laws: Residency Restrictions on Sex Offenders*, 85 WASH. U. L. REV. 101, 149 (2007) (foreshadowing that “the amount of real estate available to sex offenders will continue to decrease and more sex offender communities will emerge”).

184. *Taylor*, 147 Cal. Rptr. 3d at 71–72 (Cal. Ct. App. 2012).

185. *See* Angel Jennings, *L.A. Sees Parks as a Weapon Against Sex Offenders*, LA TIMES (Feb. 28, 2013), <http://articles.latimes.com/2013/feb/28/local/la-me-parks-sex-offenders-20130301> (reporting on the construction of pocket parks designed with the express purpose of forcing registrants to move from their homes, and which are so small, they will “barely have room for two jungle gyms, some benches and a brick wall”).

186. The case of Marc Fruge, who was convicted of strict liability statutory rape, serves as an excellent example. *See* State v. Fruge, No. 2012 KA 0066, 2012 WL 5387360 (La. Ct. App. 2012)

With schemes that overextend, the regulatory aim of sex offender registration laws no longer appears rationally related to its original purpose. As evidence of this, one need only consider the explosion of registerable offenses post-*Smith*.¹⁸⁷ From an average of eight offenses that triggered registration in the 1990s to more than forty offenses in some states,¹⁸⁸ modern sex offender registration laws reach offenders who engage in sexual behavior that would not have been previously considered predatory.¹⁸⁹

Not only are registration schemes broader in scope, they are categorically fixed without individualized assessment of those who may fall outside its purview.¹⁹⁰ As a consequence, registration laws capture many child offenders who are not likely to reoffend. Justice Ginsburg expressed such a concern when she wrote of the Alaskan sex offender registration scheme: “[T]he Act has a legitimate civil purpose But its scope notably exceeds this purpose. The Act applies to all convicted sex offenders, without regard to their future dangerousness.”¹⁹¹ This is especially problematic for the child offender because SORNA demands that child registrants convicted of certain offenses must register for life.¹⁹²

As a companion to this point, registerable offenses have been reclassified—often without debate—as more serious than previously determined.¹⁹³ The effect has been to recast registrants as more dangerous than their conviction warrants and to impose upon them additional burdens that, according to *Mendoza-Martinez*’s counsel, are

(affirming registration despite the concession by the State that the underage girl had misrepresented her age in such a way as to give credibility to Fruge’s claim that he believed she was of consenting age). For other examples, see *infra* notes 196–197 and accompanying text.

187. See, e.g., Carpenter & Beverlin, *supra* note 57, at 1087–99. One recently added burden has been legislation that prohibits offenders from using social media. See *Doe v. Indiana*, 705 F.3d 694 (7th Cir. 2012) (overturning legislation that would have barred registrants from using social media websites and services because the law was overbroad); accord *State v. Packingham*, 748 S.E.2d 146 (N.C. Ct. App. 2013).

188. See, e.g., Carpenter & Beverlin, *supra* note 57, at 1081 (cataloging the changes in Indiana and other states). For specific court commentary on the significant changes, see *Wallace v. State*, 905 N.E.2d 371, 375 (Ind. 2009) (tracing the increase of registerable offenses in Indiana); accord *State v. Letalien*, 985 A.2d 4, 8–11 (Me. 2009).

189. Carpenter & Beverlin, *supra* note 57, at 1081.

190. See, e.g., 42 U.S.C. § 16911 (2011) (reclassifying registration based solely on the crimes committed).

191. *Smith v. Doe*, 538 U.S. 84, 116 (2003) (Ginsburg, J., dissenting).

192. See 42 U.S.C. § 16911(8) (2011) (defining the term “convicted” to include “adjudicated delinquent as a juvenile for that offense, but only if the offender is 14 years of age or older at the time of the offense . . .”).

193. See, e.g., *Lemmon v. Harris*, 949 N.E.2d 803, 804–05 (Ind. 2011) (stating that the defendant, who was originally required to register for ten years, was later notified that his conviction had been reclassified to require registration for life); *Wiesart v. Stewart*, 665 S.E.2d 187, 187–88 (S.C. Ct. App. 2008) (chronicling the changes in registrant’s classification).

excessive in light of their potential for reoffense.¹⁹⁴

With the breadth of registration laws comes the rigid application of those laws to all offenders. Categorical assessment suffers from excessive legislation in that it does not address whether an individual offender's behavior portends future dangerousness. This inflexibility leads to absurd results as it did in J.L.'s case when, at fourteen, he was required to register for life because he engaged in voluntary sexual relations with his twelve-year-old girlfriend.¹⁹⁵ The automatic nature of J.L.'s disposition highlights the danger of a conviction-based assessment devoid of individualized risk assessment.

Absurd results that arise from automatic sex offender registration are not limited to the disposition of child sex offenders. The move from individualized risk assessment to conviction-based assessment has impacted adult registration as well. Three cases stand out, and all for the same reason: the inflexibility of the statute's construction leads to mandatory registration for offenders who are not sexual predators.

In *Rainer v. State*, the Georgia Supreme Court affirmed automatic sex offender registration of an eighteen-year-old male drug buyer who robbed his seventeen-year-old female drug dealer, even though he had no sexual motive.¹⁹⁶ According to the court, the statute required Rainer to register as a sex offender because his crime involved a "child victim."¹⁹⁷

With a similarly blind eye to the rationale for registration laws, Dean Edgar Wiesart was required to register as a sex offender in South Carolina for having been convicted of skinny-dipping in a hotel swimming pool in Maryland twenty years earlier.¹⁹⁸ His attempt to have a hearing on whether he should have to register was rejected.¹⁹⁹

Probably the most disturbing is Florida's punitive reaction to Grayson A. who at eighteen had sex with his then-fifteen-year-old girlfriend who

194. See *Smith*, 538 U.S. at 116–17 (Ginsburg, J., dissenting) (criticizing that the "duration of the reporting requirement is keyed not to any determination of a particular offender's risk of reoffending, but to whether the offense of conviction qualified as aggravated").

195. *In re J.L.*, 800 N.W.2d 720 (S.D. 2011).

196. *Rainer v. State*, 690 S.E.2d 827 (Ga. 2010).

197. *Id.* at 829–30 (holding that robbery of a minor triggers the requirement to register as a sex offender under Georgia law). Cf. *U.S. v. W.B.H.*, 664 F.3d 848 (11th Cir. 2011) (requiring defendant to register as a sex offender in 2009 following conviction for conspiracy to violate drug laws because he had been convicted of rape in 1987). But see *State v. Robinson*, 873 So. 2d 1205, 1217 (Fla. 2004) (rejecting sex offender registration for person who stole a car with a sleeping baby inside, but who prosecution conceded had no intent to commit a sexual offense upon the child). *Id.* at 1215 ("Although the Legislature's concern for protecting our children from sexual predators may be reasonable, however, the application of this statute to a defendant whom the State concedes did not commit a sexual offense is not.").

198. *Wiesart v. Stewart*, 665 S.E.2d 187, 187–88 (S.C. Ct. App. 2008).

199. *Id.*

became pregnant.²⁰⁰ Grayson was convicted of “lewd and lascivious molestation,” imprisoned for two years, and required to register as a sex offender for the rest of his life.²⁰¹ His marriage to his girlfriend did nothing to ameliorate the situation. The toll of registration was enormous: Grayson lost countless jobs, and because his wife was also his victim, he was not allowed to live with her. Two children and thirteen years later, Grayson was only freed of the burdens of registration through political intervention.²⁰² He was pardoned and removed from the registry.²⁰³

Despite the quickly changing landscape of sex offender registration schemes, *Smith* remains the prevailing view that sex offender registration laws are rationally related to their civil regulatory intent.²⁰⁴ However, in recognition of the significantly intrusive changes, a few courts have concluded otherwise, finding instead that they are criminal penalties subject to constitutional scrutiny under the Eighth Amendment.²⁰⁵

V. WHY REGISTRATION IS CRUEL AND UNUSUAL PUNISHMENT

Originally, the prohibition against cruel and unusual punishment was intended to apply to the “imposition of inherently barbaric punishments under all circumstances.”²⁰⁶ But as Justice O’Connor reminded us in

200. See RAISED ON THE REGISTRY, *supra* note 10, at 38. Grayson A. is a pseudonym for Virgil Frank McCranie whose story made headline news because he was ultimately pardoned by Florida’s governor.

201. See Bill Kaczor, *Crist Delays Decision on Florida ‘Romeo-Juliet’ Case*, SOUTH FLORIDA SUN-SENTINEL (June 11, 2009, 4:32 PM), <http://www.sun-sentinel.com/news/local/florida/sfl-romeo-juliet-sex-offender-061009,0,1939750.story>.

202. *Id.*

203. *Id.*

204. See, e.g., *Doe v. Bredesen*, 507 F.3d 998 (6th Cir. 2007) (relying on *Smith* throughout the opinion to affirm registration as a civil regulation); *accord* *U.S. v. Young*, 585 F.3d 199, 204 n.21 (5th Cir. 2009); *U.S. v. Samuels*, 543 F. Supp. 2d 669, 676 (E.D. Ky. 2008); *State v. Henry*, 228 P.3d 900, 904 (Ariz. Ct. App. 2010).

205. See *Starkey v. Okla. Dep’t of Corrs.*, 305 P.3d 1004 (Okla. 2013) (rejecting retroactive application of sex offender registration laws because they were deemed punitive in nature); *Doe v. Dep’t of Pub. Safety & Corr. Servs.*, 62 A.3d 123 (Md. 2013) (overturning Maryland’s sex offender registration schemes in a plurality opinion); *State v. Williams*, 952 N.E.2d 1108, 1113 (Ohio 2011) (ruling that sections of the state’s sex offender laws unconstitutionally increase the punishment for crimes committed before the law took effect); *Wallace v. State*, 905 N.E.2d 371, 384 (Ind. 2009) (concluding that Indiana’s amended scheme violates Indiana’s constitutional principles); *State v. Letalien*, 985 A.2d 4, 26 (Me. 2009) (determining that the amended registration schemes violate ex post facto principles). In an interesting development, the district court in *A.C.L.U. of Nev. v. Masto*, 719 F. Supp. 1258 (Nev. D. Ct. 2008), issued a permanent injunction over the implementation of Nevada’s sex offender registration laws, finding that the amendments violated ex post facto, due process, and double jeopardy. That injunction was overturned by the 9th Circuit. See *A.C.L.U. of Nev. v. Masto*, 670 F.3d 1046 (9th Cir. 2012).

206. *Graham v. Florida*, 560 U.S. 48, 59 (2010).

Roper, “It is by now beyond serious dispute that the Eighth Amendment’s prohibition of ‘cruel and unusual punishments’ is not a static command.”²⁰⁷

As interpretation of the clause evolved, barbaric punishments were replaced with questions of proportionality of the punishment to the crime.²⁰⁸ However, the Eighth Amendment’s essence remains that “[i]ts very function is, at the margins, to prevent the majoritarian branches of government from overreaching and enacting overly harsh punishments.”²⁰⁹

Generally, there are two classifications of punishment to consider: the nature of the offense and length of sentence or the characteristics of the offender.²¹⁰ To prove that a punishment is cruel and unusual, a court must first consider whether there is a national consensus against the sentencing practice, and second, “in the exercise of its own independent judgment, whether the punishment violates the constitution.”²¹¹

A. The National Consensus Against Juvenile Registration

Although national consensus overwhelmingly favors sex offender registration laws,²¹² a national majority does not favor the registration of children.²¹³ Only in the last decade have sex offender registration schemes exploded with an increased number of registerable offenses,²¹⁴ more intrusive registration burdens,²¹⁵ expanding reach of notification,²¹⁶ introduction of residency restrictions,²¹⁷ and GPS

207. *Roper v. Simmons*, 543 U.S. 551, 589 (2005) (O’Connor, J., concurring).

208. *Id.*

209. *State v. Null*, 836 N.W.2d 41, 53–54 (Iowa 2013).

210. *In re C.P.*, 967 N.E.2d 729, 737 (Ohio 2012). See *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (serving as an example of the analysis used involving the particular offense).

211. *Graham*, 560 U.S. at 61; see also *Atkins v. Virginia*, 536 U.S. 304, 312 (2002) (quoting *Coker v. Georgia*, 433 U.S. 584, 597 (1977), for the proposition that even where there is legislative consensus, “the Constitution contemplates that in the end [judicial] judgment will be brought to bear”).

212. See, e.g., *Carpenter & Beverlin*, *supra* note 57, at 1076–1100 (tracking the explosion of sex offender registration schemes around the country); see also *Doe v. Poritz*, 662 A.2d 367, 376 (N.J. 1995) (characterizing sex offender registration laws as a “national trend reflecting a national problem”). Sometimes, an absence can indicate a national consensus as well. See, e.g., *Graham*, 130 S. Ct. at 2024 (2010) (relying on the rarity of juveniles sentenced to life imprisonment without the possibility to conclude that there was a national trend against such sentences).

213. See *infra* notes 224–225 and accompanying text.

214. See *Carpenter & Beverlin*, *supra* note 57, at 1081–86 (detailing the “dramatic increase” in registration-worthy offenses since the 1990s); see also *Wallace v. State*, 905 N.E.2d 371, 375 (Ind. 2009) (tracing the increase of registerable offenses in Indiana); accord *State v. Letalien*, 985 A.2d 4, 8–11 (Me. 2009).

215. See *Carpenter & Beverlin*, *supra* note 57, at 1087–90 (describing the added burdens that registrants face including the personal information required, length of registration, and whether in-person reporting is required).

216. *Id.* at 1090–95.

tracking of registrants.²¹⁸ The increase in scope and severity of these laws reflect eagerness on the public's part, however ill-founded, to embrace a system of control that it perceives will protect its citizens.²¹⁹

Given this climate, and despite the threat of loss of federal funding if states do not comply with SORNA,²²⁰ a number of states have rebelled at compliance.²²¹ This reaction is all the more compelling when one considers that there was overwhelming state support for the first federally mandated sex offender registration laws passed in 1995.²²²

Several reasons emerge for the refusal. Specifically, states have balked at requiring children in the juvenile court system to register as sex offenders.²²³ Refusal to comply is also about the expense. SORNA comes with a hefty price tag.²²⁴ Texas state officials estimated it would cost \$38.7 million to comply with SORNA compared with a loss of only \$1.4 million in federal funding for noncompliance.²²⁵ Finally, pushback comes from the perceived loss of state control to craft registration

217. *Id.* at 1096–97.

218. 42 U.S.C. § 16981(a)(1)(A)(i) (2012) (permitting grants to states and local governments that create programs to outfit sex offenders with electronic monitoring units). For examples of statutes that have GPS monitoring programs, see ALA. CODE § 15-20A-20 (2013); ARIZ. REV. STAT. ANN. § 13-902(G) (2013); CAL. PENAL CODE § 3004 (2013); FLA. STAT. § 947.1405(7) (2013); GA. CODE ANN. § 42-1-14 (2013); N.C. GEN. STAT. § 14-208.40B (2012).

219. See Carpenter, *supra* note 53, at 52–61 (exploring the emotionally-laden rhetoric that impels passage of more punitive sex offender registration laws).

220. 42 U.S.C. § 16925 (2012) (stating that “for any fiscal year after the end of the period for implementation, a jurisdiction that fails, as determined by the Attorney General, to substantially implement this title shall not receive 10 percent of the funds that would otherwise be allocated for that fiscal year to the jurisdiction under subpart 1 of part E of title I of the Omnibus Crime Control and Safe Streets Act of 1968”); 42 U.S.C. § 3750 (2012).

221. See *infra* note 227.

222. See 42 U.S.C. § 16925(a) (2012).

223. See Donna Lyons, *Down to the Wire*, STATE LEGISLATURES MAGAZINE, June 2011, at 26, 27, available at http://www.ncsl.org/Portals/1/Documents/magazine/articles/2011/SL_0611-SexOffender.pdf (citing federal officials who reported that requiring juveniles to register is the “most significant barrier” to compliance); see also *In re C.P.*, 967 N.E.2d 729, 738 (Ohio 2012) (reviewing some states’ refusal to comply and federal response to the refusal).

224. Members of Congress have acknowledged the cost to implementing SORNA. See, e.g., 154 CONG. REC. S9349, 9352 (daily ed. Sept. 24, 2008) (statement of Sen. Coburn) (“We promised everybody we would do it, but have barely funded it at all.”), available at <http://www.gpo.gov/fdsys/pkg/CREC-2008-09-24/pdf/CREC-2008-09-24-pt1-PgS9352.pdf#page=1>; accord 154 CONG. REC. S4559, 4589 (daily ed. May 21, 2008) (Statement of Sen. Hatch) (“Unfortunately, many of the enforcement provisions in the Adam Walsh Act have not been funded.”), available at <http://www.gpo.gov/fdsys/pkg/CREC-2008-05-21/pdf/CREC-2008-05-21-pt1-PgS4588-2.pdf#page=2>; 155 Cong. Rec. E601, 611 (daily ed. Mar., 10, 2009) (statement of Rep. Smith) (“Unfortunately, many of the programs authorized by the Adam Walsh Act . . . have received insufficient or no direct funding from Congress.”), available at <http://www.gpo.gov/fdsys/pkg/CREC-2009-03-10/pdf/CREC-2009-03-10-pt1-PgE611-5.pdf#page=1>.

225. See Lyons, *supra* note 223, at 26 (quoting Texas officials on their calculations of the cost of SORNA).

laws.²²⁶

When one combines the reasons for failure to comply with SORNA, the compliance statistics compiled by the General Accounting Office are startling. By February 2013, only nineteen of the fifty-six jurisdictions had substantially implemented SORNA, with only sixteen states meeting compliance.²²⁷ The Supreme Court of Ohio, in its review of the national trend on the lack of compliance, aptly referred to it as “national foot dragging.”²²⁸

The national trend to reject child sex offender registration is clear if one isolates the statistics according to the reason for noncompliance. Thirty-one of the fifty-two jurisdictions reported that the inclusion of child registration was a hurdle to implementation of SORNA. Twenty of those jurisdictions indicated it was a major challenge to compliance.²²⁹

Symbolic of the national consensus to resist child registration are explanations by the states of Texas and New York for their refusal to comply with SORNA. In a letter to the U.S. Department of Justice, the General Counsel and Acting Chief of Staff of the Texas Governor wrote, “In dealing with juvenile sex offenders, Texas law more appropriately provides for judges to determine whether registration would be beneficial to the community and the juvenile offender in a particular case.”²³⁰

Similarly, from the State of New York, the Director of the Office of Sex Offender Management wrote, “New York has a long standing public policy of treating juvenile offenders differently from adult

226. See, e.g., *id.* (“Texas is one of the states that classify sex offenders and set their registration requirements based on a risk assessment. SORNA, instead, has states using a three-tier classification system based solely upon the offense. . . . [W]ork in Texas to narrow the sex offender registry to those who are most likely to be dangerous would be undone by SORNA’s rules.”).

227. See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-13-211, OFFENDER REGISTRATION AND NOTIFICATION ACT: JURISDICTIONS FACE CHALLENGES TO IMPLEMENTING THE ACT AND STAKEHOLDERS REPORT POSITIVE AND NEGATIVE EFFECTS 13 (2013), available at <http://www.gao.gov/assets/660/652032.pdf>; see also Nat’l Conference of State Legislatures, *Adam Walsh Child Protection and Safety Act: Compliance*, NCSL.ORG (Aug. 1, 2013), <http://www.ncsl.org/research/civil-and-criminal-justice/adam-walsh-child-protection-and-safety-act.aspx> (reporting compliance by the following jurisdictions: Alabama, Delaware, Florida, Kansas, Louisiana, Maryland, Michigan, Mississippi, Missouri, Nevada, Ohio, Pennsylvania, South Carolina, South Dakota, Tennessee, and Wyoming, and the United States territory of Guam, the Commonwealth of Northern Mariana Islands, and the U.S. Virgin Islands).

228. *In re C.P.*, 967 N.E.2d 729, 739 (Ohio 2012).

229. See U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 227. See also NO EASY ANSWERS, *supra* note 5 (imploiring states to refuse to comply with SORNA).

230. See Letter from Jeffery S. Boyd, General Counsel and Acting Chief of Staff for the Governor of Texas, to Linda M. Baldwin, Director of the SMART Office in the Dept. of Justice, (Aug. 17, 2011), available at http://mobile.ncleg.net/documentsites/committees/JLOCJPS/2011-12%20Interim/October%2013,%202011%20Meeting/RD_SORNA_General_Information_2011-10-13.pdf.

offenders so that juveniles have the best opportunity of rehabilitation and reintegration. The federal requirement that juveniles be placed on the Sex Offender Registry under SORNA is in direct conflict with that public policy.”²³¹ Most recently, the State of Washington abolished child sex offender registration completely.²³²

B. Through the Lens of Independent Judicial Review

Whether national consensus favors a particular trend in sentencing is only one aspect of the analysis. Separately, the court must entertain an independent review of whether the sentence is cruel and unusual punishment.²³³ On this point, one theme emerges: similar treatment of child and adult offenders violates fundamental principles that require sentencing practices to distinguish between the two groups of offenders.

1. The Flaw in Automatic Child Registration: One Size Does Not Fit All

Automatic conviction-based registration for adults may be grounded in greater legitimacy than automatic conviction-based registration for children. That is because of the obvious truth that children are different from adults. A child’s actions and accompanying reasoning cannot be so easily classified. In this case, one size does not fit all.

As the Supreme Court wrote, a child’s youth is far “more than a chronological fact.”²³⁴ On how to give context to those words, the Supreme Court trilogy of *Roper*, *Graham*, and *Miller* provides important guidance on the appropriate distinctions that must be drawn in the treatment of adult and child offenders. At its heart, the trilogy signified that sentencing practices must account for key distinctions that separate adult and child offenders.

To determine whether the sentence of death was appropriate for a juvenile, the Court in *Roper* isolated certain characteristics that separated children from their adult counterparts. The first characteristic is that children have a “lack of maturity and an underdeveloped sense of responsibility.”²³⁵ Psychological research pertaining to child sex offender registrants confirms that children and teenagers have a greater

231. *Id.*

232. See WASH. REV. CODE § 9.94A.540 (2013).

233. See *Miller v. Alabama*, 132 S. Ct. 2455 (2012).

234. *Id.* at 2467 (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982)); see also *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2403 (2011); *Roper v. Simmons*, 543 U.S. 551, 569 (2005); *Johnson v. Texas*, 509 U.S. 350, 367 (1993).

235. *Roper*, 543 U.S. at 569 (“In recognition of [their] comparative immaturity and irresponsibility . . . almost every State prohibits those under 18 years of age from voting, serving on juries, and marrying without parental consent.”).

tendency than adults to make decisions involving sexual conduct based on emotions, such as anger or fear, rather than any predetermined trait that predicts the child's future sexual dangerousness.²³⁶

Additionally, the Court found that children are more vulnerable to negative and external pressures,²³⁷ an important factor when one considers that sexual offenses by children are often committed while in groups.²³⁸ Because they are more susceptible to peer pressure, children are also less able "to extricate themselves from a criminogenic setting."²³⁹

Finally, children do not have fully formed characters or identities. With less fixed personality traits, children have the potential to mature and form a settled identity.²⁴⁰ Thus, there is great possibility for a child "with even the most depraved characteristics to be rehabilitated."²⁴¹

Interestingly, these three traits not only impact a child's decision-making process of whether to initiate a sexual crime, these traits are as likely the explanation for why children do not reoffend. Growth in maturity, change in situational and environmental factors, and greater impulse control all help to explain why child sex offenders have very low recidivism rates.²⁴²

Unfortunately, the public's desire to compel child registration is fueled by a faulty assumption that children who commit sexual offenses are likely to reoffend as adults.²⁴³ *Once a sex offender always a sex offender.* This assumption calls to mind a similar viewpoint regarding the ability to forecast whether a child will become an adult serial murderer. According to some psychological studies, adult serial murderers demonstrate propensity to serial violence when they are children because of certain behaviors they exhibited or environmental factors they suffered.²⁴⁴

236. See RAISED ON THE REGISTRY, *supra* note 10, at 26.

237. *Roper*, 543 U.S. at 569.

238. See David Finkelhor, Richard Ormrod & Mark Chaffin, *Juveniles Who Commit Sex Offenses Against Minors*, JUVENILE JUSTICE BULLETIN, Dec. 2009, at 4, available at <http://www.unh.edu/ccrc/pdf/CV171.pdf>.

239. *Roper*, 543 U.S. at 569.

240. *Id.*

241. *Id.*

242. See, e.g., *State v. Null*, 836 N.W.2d 41, 55 (Iowa 2013) (Reiterating that "the science establishes that for most youth, the qualities [that make them offend] are transient. That is to say, they will age out.").

243. See *supra* note 129, *infra* note 248 and accompanying text.

244. See, e.g., *Serial Killer as Child*, MACALESTER.EDU, <http://www.macalester.edu/psychology/whathap/UBNRP/serialkillers/childhood.html> (last accessed May 7, 2014) (reporting on a study by FBI agents regarding common traits of 36 serial killers they examined); see also Shirley Lynn Scott, *What Makes Serial Killers Tick?* CRIMELIBRARY, http://www.trutv.com/library/crime/serial_killers/notorious/tick/events_5.html (last accessed May 7, 2014). However, even the view that serial murderers share common traits includes its share of myths.

Although it is tempting to borrow a serial murderer model of predictive analysis, it does not help determine future predatory behavior of children who commit sexual offenses. Sadly, it only confuses the discussion.²⁴⁵ That is what social scientist David Burton concluded in analyzing the results of an extensive database on sex offenders: “[Registration schemes] assume that past offenders will be future offenders. But when it comes to sexual offending, several decades of research prove otherwise.”²⁴⁶ Dr. Michael Caldwell’s work supports this observation.²⁴⁷ His review of 22 studies found a juvenile recidivism rate of less than 5%. In one study of 11,219 juvenile sex offenders, the mean sexual recidivism rate was slightly higher at 7% but was still six times lower than the general recidivism rate of 43%.²⁴⁸ Dr. Caldwell’s conclusion: the data does not support any basis for singling out child sex offenders as a subgroup of juvenile offenders.²⁴⁹ Other studies similarly have found that child sex offenders do not recidivate at the rates imagined by the public,²⁵⁰ and when children do reoffend, they likely do so for motivations other than serial predatory tendencies.²⁵¹

Individual stories confirm these findings. Even where a child’s

See FEDERAL BUREAU OF INVESTIGATION, SERIAL MURDER: MULTI DISCIPLINARY PERSPECTIVES FOR INVESTIGATORS (Robert J. Morton et al. eds., 2005) (debunking common myths about serial murderers), available at <http://www.fbi.gov/stats-services/publications/serial-murder>. Sometimes fiction imitates life. See JEFF LINDSAY, DARKLY DREAMING DEXTER (2004) (fictionalizing a serial killer whose tendencies toward serial violence began at the age of two when he witnessed his mother’s brutal killing).

245. The genesis of this confusion may have originated with a small study in which adult offenders were asked whether they had offended as juveniles. See Leon, *supra* note 22, at 147 (describing the cross-sectional nature of the study).

246. *Id.* at 144.

247. Michael F. Caldwell, *Juvenile Sex Offenders*, in CHOOSING THE FUTURE FOR AMERICAN JUVENILE JUSTICE (D. Tanenhaus & F. Zimring eds., 2014) (analyzing empirical data on juvenile sex offenses to conclude that categorical assumptions about child offenders is not supported by the data).

248. *Id.* at 7.

249. *Id.* at 10 (“In brief, juvenile sex offenders as a group appear to be no more likely to engage in sexual violence than similar non-sex offending delinquents.”).

250. See, e.g., INDIANA DEPT. OF CORRECTIONS, JUVENILE RECIDIVISM RATES (2008), available at <http://www.in.gov/idoc/files/2008JuvRecidivismRpt.pdf>, (reporting that juvenile sex offenders in Indiana were less likely to recidivate than nonsexual offenders); RICK McELFRESH, JIAHUI YAN & ANNE JANKU, JUVENILE OFFENDER RECIDIVISM REPORT 5 (2009) (finding that juvenile sex offenders had the lowest rate of recidivism among juvenile offenders); Finkelhor, *supra* note 238; Bremer, *supra* note 129, at 1087–88 (reporting statistics that confirm child offenders are not likely to reoffend).

251. See *supra* notes 129, 243 and accompanying text. Similar studies disprove this perception as it pertains to adult offenders. See U.S. DEP’T OF JUSTICE, CRIMINAL OFFENDER STATISTICS, <http://www.ojp.usdoj.gov/bjs/crimoff.htm#> (reporting that 5.3% of released sex offenders were rearrested for another sex offense); accord Center for Sex Offender Management, *Myths and Facts About Sex Offenders*, DEP’T OF JUSTICE (Mar. 9, 2014, 6:07 PM), <http://www.csom.org/pubs/mythsfacts.html> (disputing myth of reoffense with statistics that suggest sex offenders reoffend at lower rates). See also Doron Teichman, *Sex, Shame, and the Law: An Economic Perspective on Megan’s Laws*, 42 HARV. J. ON LEGIS. 355, 382–83 (2005) (refuting the simplistic way recidivism rates are compiled).

sexual act is nonconsensual, it does not necessarily signify future dangerousness. In Joshua G.'s case, his act of inappropriately touching his nine-year old sister was in direct response to his being repeatedly raped between the ages of six and eight by neighborhood children.²⁵² His inability to control the environment combined with his immaturity led to his acting out. As he explains now, "Everything that I did with my sister came directly from the things I had experienced in the abuse. I was sexually confused, and it started to play out with my sister."²⁵³

Given the low recidivism rates among child offenders, one sees the inherent inequities of an automatic registration scheme that ensnares the nonreoffending child with the small percentage of children who will become sexual predators.²⁵⁴ On this point, the research is clear. A child offender's actions are impelled by "more varied and more complicated" reasons than the simplistic idea that the offender is a serial predator in the making.²⁵⁵

Noted scholar Professor Franklin Zimring argues that empirical evidence supports the proposition that child offenders do not fit a single stereotypic model. He instructs that, at a minimum, they fall into three general categories: "first-time offenders," who engage in force or coercion, but who will generally not reoffend; "status offenders," who engage in consensual, but unlawful, sexual activity with peers close in age; and "repeat offenders," only a small percentage of whom will grow into sexual predators.²⁵⁶

In addition to these three categories, sometimes unlawful sexual activity by children is a matter of "opportunity and hormones."²⁵⁷ A sentiment, perhaps, that is embodied in the statement from *Miller* when it expressed significant concerns with mandatory sentencing schemes that did not take into account factors that are particular to children, including a juvenile's "immaturity, impetuosity, and failure to

252. See Emily DePrang, *Life on the List*, TEXAS OBSERVER (May 31, 2012, 2:52 PM), <http://www.texasobserver.org/life-on-the-list>.

253. *Id.*

254. Judging from one report, early adolescence is the peak age for offenses against younger children. See Finkelhor, *supra* note 238 (reporting that offenses against teenagers "surge during mid to late adolescence, while offenses against victims under age 12 decline"). These statistics create conflict in SORNA's registration scheme because it requires child offenders fourteen years of age and older who have committed the most serious of sexual offenses to register for life. See 42 U.S.C. § 16916(3) (2012).

255. See FRANKLIN E. ZIMRING, AN AMERICAN TRAVESTY: LEGAL RESPONSES TO ADOLESCENT SEX-OFFENDING (2004), available at <http://www.adjj.org/downloads/4424American%20Travesty.pdf> (arguing that first time child offenders should never have to register because the motivational factors are too complex).

256. *Id.*

257. Suzanne Meiners-Levy, *Challenging the Prosecution of Young "Sex Offenders": How Developmental Psychology and the Lessons of Roper Should Inform Daily Practice*, 79 TEMP. L. REV. 499, 506 (2006) (criticizing the assumption that child sexual behavior is always predatory).

appreciate risks and consequences.”²⁵⁸

With such varied reasons for a child’s commission of sexual acts, the automatic categorical assessment, or a one-size-fits-all approach, is a flawed model.²⁵⁹ Rather than automatic conviction-based categorical assessment that treats all child offenders alike, Professor Zimring argues that we need to develop a solid database to predict the small subset of juvenile offenders who will become future predators.²⁶⁰

The State of Texas would agree. In refusing to comply with SORNA, the State of Texas underscored the concern over categorical assessment when it wrote, “Texas is one of the states that classify sex offenders and set their registration requirements based on a risk assessment. . . . Work in Texas to narrow the sex offender registry to those who are most likely to be dangerous would be undone by SORNA’s rules.”²⁶¹

The Supreme Court of Ohio’s examination of automatic registration in *In re C.P.* is also instructive on the issue.²⁶² Of great concern to the court was that the child offender was automatically labeled a Tier III offender for the commission of certain offenses.²⁶³ The court found that “[this statutory requirement] changes the very nature of [a Serious Youth Offender disposition], imposing an adult penalty immediately upon the adjudication.”²⁶⁴

The court was also concerned that automatic registration precluded exercise of discretion by juvenile court judges, which is critical to ensuring the fairness of the proceedings. The court wrote, “The disposition of a child is so different from the sentencing of an adult that fundamental fairness to the child demands the unique expertise of a juvenile judge.”²⁶⁵ The Supreme Court of Ohio has been joined by the Supreme Court of Indiana. When faced with whether to condone the automatic registration of a child offender, the Supreme Court of Indiana

258. *Miller v. Alabama*, 132 S. Ct. 2455, 2468 (2012).

259. See ZIMRING, *supra* note 255 (arguing that first time child offenders should never provide the basis for registration).

260. *Id.* The American Bar Association has also urged that Congress reexamine categorical assessments under SORNA. See *Sex Offender Notification and Registration Act (SORNA): Barriers to Timely Compliance by States Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on The Judiciary*, 111th Cong. 4 (2009) (statement by Anthony Joseph, Chair of Criminal Justice Section of the American Bar Association) (urging that “juvenile court judges consider factors relevant to the specific offense and the individual juvenile offender”) available at http://judiciary.house.gov/_files/hearings/printers/111th/111-21_47923.pdf.

261. See Lyons, *supra* note 223, at 26.

262. See *In re C.P.*, 967 N.E.2d 729 (Ohio 2012).

263. *Id.* at 733–34 (explaining that public-registry-qualified juvenile offenders are automatically labeled as Tier III sex offenders which triggers registration burdens even if the juvenile completes faithfully the juvenile disposition).

264. *Id.* at 735.

265. See, e.g., *In re C.P.*, 967 N.E.2d at 748.

concluded that the juvenile may not be placed on a sex offender registry unless an evidentiary hearing is conducted and the juvenile judge finds by clear and convincing evidence that the child is likely to reoffend.²⁶⁶

2. The Unconstitutionality of Lifetime Registration: Applying the Trilogy of *Roper*, *Graham*, and *Miller* to Mandatory Lifetime Registration

Assuming mandatory registration of children continues to survive constitutional scrutiny, the question remains whether mandatory lifetime registration survives as well. To explore this issue, it is helpful to consider recent Supreme Court decisions concerning juvenile sentencing. In declaring life imprisonment without the possibility of parole unconstitutional in nonhomicide cases, *Graham v. Florida* stated that this sentence reflects “an irrevocable judgment about [an offender’s] value and place in society,” which is at odds with a child’s capacity for change.²⁶⁷ When *Miller v. Alabama* established a “flat ban on life without parole,”²⁶⁸ its reasoning, combined with the analysis in *Graham*, offered the potential to consider the two cases in a broader context. The language in *Miller* invites such an examination. There, the Court wrote, “The mandatory penalty scheme [of life without parole] . . . contravenes *Graham* and also *Roper*’s foundational principle that imposition of a State’s most severe penalties on juvenile offenders cannot proceed as though they were not children.”²⁶⁹

The question, therefore, is whether mandatory lifetime registration shares sufficiently similar attributes to life without parole to fall within the *Graham/Miller* ambit.²⁷⁰ Does a state’s imposition of lifetime registration on children in the same manner as on adult offenders violate the principles of *Graham* and *Miller*, which require that any sentencing practice take into account the distinctions between adults and children?

Jurisprudence surrounding the *Graham/Miller* prohibition has only begun to develop. However, there is already growing tension over whether the opinions should be read to create a limited categorical ban on a small subset of sentences, or whether the Court has invited a

266. See *N.L. v. State*, 989 N.E.2d 773 (Ind. 2013).

267. *Graham v. Florida*, 130 S. Ct. 2011, 2030 (2010). See generally Cara H. Drinan, *Graham on the Ground*, 87 WASH. L. REV. 51, 54, 62–63 (2012).

268. *Miller v. Alabama*, 132 S. Ct. 2455, 2465 (2012).

269. *Id.* at 2458.

270. See, e.g., N.J. STAT. ANN. 2C:7-2(g) (West 2008) (“A person required to register under this section who has been . . . adjudicated delinquent . . . for more than one sex offense . . . or who has been . . . adjudicated delinquent . . . for aggravated sexual assault pursuant to [certain crimes] is not eligible . . . to make application . . . to terminate the registration obligation.”).

broader interpretation of the prohibition.²⁷¹

Assuming *Graham* and *Miller* can be read more broadly, there is still work to be done to make the analogy fit mandatory registration for life. Two major obstacles stand in the way. The first obstacle, whether sex offender registration is akin to a prison sentence, has been addressed earlier in this Article. The second obstacle, which has not yet been addressed, is whether mandatory lifetime registration is the functional equivalent of life imprisonment without the possibility of parole. For this examination, the Court's cautionary language in *Graham* is particularly instructive: juveniles should be given "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."²⁷²

Whether a particular sentence affords a juvenile some meaningful opportunity for release surfaces in cases where a juvenile has been given a sentence that extends beyond life expectancy, or where sentences are stacked upon each other. Consider, for example, *People v. Caballero*, where a sixteen-year-old gang member who opened fire on three rival gang members was convicted of three counts of attempted murder.²⁷³ With firearm enhancements attached to each attempted murder conviction and with each sentence stacked consecutively by the trial court, the aggregate sentence amounted to 110 years.²⁷⁴ In overturning the sentence because it violated the principles of *Graham*,²⁷⁵ the court found that the length of the sentence denied the defendant the "opportunity to 'demonstrate growth and maturity' to try to secure his release."²⁷⁶

Sometimes determining whether a sentence is the 'function equivalent' is not nearly as obvious. In *State v. Null*, rather than facing

271. Compare *State v. Brown*, 118 So. 3d 332 (La. 2013) (rejecting contention that multiple sentences that exceeded the life expectancy of defendant violated *Graham*) with *State v. Null*, 836 N.W.2d 41, 71 (Iowa 2013) (holding that 52.5 year sentence did not provide meaningful opportunity for juvenile's release during his lifetime). Justice Alito's dissenting words in *Graham* might offer support for a narrow reading of *Graham* when he stated: "[N]othing in the Court's opinion affects the imposition of a sentence to a term of years without the possibility of parole." *Graham*, 130 S. Ct. at 2058 (Alito, J., dissenting).

272. *Graham*, 130 S. Ct. at 2030.

273. *People v. Caballero*, 282 P.3d 293, 265 (Cal. 2012).

274. *Id.*

275. *Id.* at 268.

276. *Id.* See also *Moore v. Biter*, 725 F.3d 1184, 1129 (9th Cir. 2013) (overturning a 254 year sentence because it meant that "Moore must live the remainder of his life in prison, knowing that he is guaranteed to die in prison regardless of his remorse, reflection, or growth"); *Floyd v. State*, 87 So. 3d 45 (Fla. Ct. App. 2012) (holding that consecutive forty year sentences was the functional equivalent of life imprisonment without the possibility of parole under *Graham*). But see *Bunch v. Smith*, 685 F.3d 546 (6th Cir. 2012) (ruling that Ohio was free under *Graham* to uphold stacked sentence that extended beyond juvenile's life).

110 years, the sixteen-year-old offender faced a 52.5 year sentence.²⁷⁷ The Iowa Supreme Court reasoned that the spirit of *Roper*, *Graham*, and *Miller* necessitated a reading beyond their narrow applications.²⁷⁸ It concluded that a sentence of 52.5 years was the functional equivalent of life imprisonment without the possibility of parole because of the unlikelihood that the sixteen-year-old offender would see the opportunity for release in his lifetime, or if released, he would be at such an advanced age.²⁷⁹

Can the same rationale underlying *Caballero* and *Null* be extended to mandatory lifetime registration? Although the trilogy of *Roper*, *Graham*, and *Miller* pertained to sentencing practices, the Court's evaluation of the appropriateness of those sentences applies equally to mandatory lifetime registration of child sex offenders. Mandatory lifetime sex offender registration shares many of the same characteristics of the sentences that caused concern in *Graham*, *Caballero*, and *Null*.

Like those punishments, lifetime sex offender registration is an irrevocable judgment devoid of rehabilitative hope. This observation is not dramatic license. It gives credence to the feelings shared by child registrants who feel the hopelessness and despair arising from their registration and the bleakness they experience in their future.²⁸⁰

The observation also precisely describes the sanctioned practice of requiring lifetime sex offender registration for an eleven-year-old boy, which was upheld in *In re J.R.Z.*²⁸¹ Such judgment of an eleven-year-old boy shows that the system never intended to offer the child rehabilitative hope. In fact, this was the central point of the Supreme Court of Ohio's decision in *In re C.P.* when it overturned mandatory lifetime registration for child offenders under the rationale of *Graham*.²⁸² The court reasoned that no penalogical justification exists for the imposition of such a harsh penalty on a child, for whom such a pronouncement "will define his adult life before it has a chance to truly

277. *State v Null*, 836 N.W.2d 41, 71 (Iowa 2013).

278. *Id.* (providing extensive analysis of *Roper*, *Graham*, and *Miller* throughout the opinion on whether a 52.5 year sentence was constitutional).

279. *Id.* at 71 (employing statistical evidence on the life expectancy of young male offenders).

280. See generally *RAISED ON THE REGISTRY*, *supra* note 10 (collecting stories involving the lives of child registrants).

281. 648 N.W.2d 241 (Minn. Ct. App. 2002) (upholding registration of eleven year old); see also *In re J.W.*, 787 N.E.2d 747 (Ill. 2003) (concluding that lifetime registration for a twelve year old was constitutional because "there is a rational relationship between the registration of juvenile sex offenders and the protection of the public from such offenders").

282. *In re C.P.*, 967 N.E.2d 729, 742–44 (Ohio 2012) (employing *Graham* principles to reject penalogical justification for mandatory lifetime registration). This reasoning was echoed by the trial court in *In re J.B.*, No. CP-67-JV-0000726-2010, at 35-36 (Penn. Ct. Com. Pl. Nov. 4, 2013).

begin.”²⁸³

Mandatory lifetime registration for children also evokes *Miller*’s warning that to be considered constitutional, harsh punishments must arise from sentencing practices that consider the differences between adults and children.²⁸⁴ The lack of discretion to consider differences between adult and child offenders is at odds with the core reasoning of *Graham* and *Miller*.

Mandatory lifetime registration also does not provide an avenue for the child to show eligibility for removal from the registry.²⁸⁵ Even where an avenue for removal is statutorily authorized, the mechanism in place makes it very difficult to do so.²⁸⁶ In that regard, the words “meaningful opportunity,”²⁸⁷ from *Graham*, take on special importance. As the Louisiana Supreme Court reasoned in *State v. Dyer* when it deleted the statutorily imposed restriction on parole eligibility, “meaningful opportunity” under *Graham* cannot be based on an ad hoc decision-making process.²⁸⁸

One is also reminded that removal from the registry can never fully remove the stigma. The case of one child registrant serves as an example. He committed suicide only months after being removed from the registry,²⁸⁹ an act his mother explained in the following way, “Everyone in the community knew he was on the sex offender registry, it didn’t matter to them that he was removed.”²⁹⁰

283. *In re C.P.*, 967 N.E.2d at 742.

284. *Miller v. Alabama*, 132 S. Ct. 2455, 2458 (2012). *See also id.* at 2468 (“[I]n imposing a State’s harshest penalties, a sentencer misses too much if he treats every child as an adult.”).

285. *See, e.g., In re Z.B.*, 757 N.W.2d 595, 597 (S.D. 2008) (overturning South Dakota law that required a child registrant to remain on the sex offender registry for life without the possibility of removal). For a sampling of states that do not offer mechanisms for removal see COLO. REV. STAT. § 16-22-111 (2011); FLA. STAT. §§ 943.0435(1)(a)(3), 943.04354 (2011); ME. REV. STAT. tit. 34-A, §§ 11221, 11225-A (2011); TEX. CODE CRIM. PROC. ANN. art. 62.101 (2009).

286. *See, e.g., FLA. STAT. § 943.0435(11)* (2013) (stating that a juvenile sex offender must register for life unless receiving a full pardon or the conviction is set aside in a later proceeding, or unless the offender has been released for at least 25 years and has not been arrested since release, at which point the court may either grant or deny relief); *see also IND. CODE § 11-8-8-22(d)-(k)* (2013) (noting that a person may petition a court for removal of the designation as an offender and for removal of all personal information from the public registry website by filing a petition in the appropriate court, and that the court may summarily deny the petition or give notice to the appropriate authorities to set the matter for hearing).

287. *Graham v. Florida*, 130 S. Ct. 2011, 2030 (2010).

288. *State v. Dyer*, 77 So. 3d 928 (La. 2011). *But see Angel v. Virginia*, 794 S.E.2d 386 (Va. 2011) (construing its conditional release provisions to offer a meaningful opportunity for release as required by *Graham*).

289. *See also Michael Barajas, In Texas, Juvenile Sex Offenders Get Virtual Life Sentence*, SAN ANTONIO CURRENT (May 8, 2013), <http://sacurrent.com/news/in-texas-juvenile-sex-offenders-get-virtual-life-sentence-1.1484813> (discussing the impact of sex offender registration laws on a young man who committed suicide months after he was removed from the registry).

290. *Id.*

At first blush, registration may not seem to fit the parameters of life imprisonment without the possibility of parole. But on further reflection, one cannot escape the conclusion that mandatory registration for life shares sufficiently similar features, and thus, lifetime registration for child offenders is unconstitutional under the reasoning of *Graham* and *Miller*.

VI. CONCLUSION

Scrutiny of child sex offender registration laws places front and center the issue of what it means to judge our children. And on that issue, we are failing. The public's desire to punish children appears fixed despite our understanding that child sexual offenders pose little danger of recidivism, possess diminished culpability, and have the capacity for rehabilitation.

The best avenue for change resides in the courts' reexamination of the constitutionality of such practices. This Article has demonstrated that at least one constitutional challenge is viable: child sex offender registration laws are unconstitutionally punitive under the Eighth Amendment's prohibition against cruel and unusual punishment.