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Against Juvenile Sex Offender Registration

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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 and who pay the price with the burdens and stigma of sex offender registration and community 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.

It is both unremarkable and true that children are different from adults. Indeed, the juvenile justice system is founded on this distinction, and recent Supreme Court decisions have highlighted the differences when banning certain juvenile mandatory sentencing practices as cruel and unusual punishment. Yet, played out against the backdrop of sex offender registration laws, the conversation takes an abrupt turn as children are made to endure harsh registration burdens intended for the most violent adult offenders, and are exposed to the shame of public notification specifically prohibited in juvenile court proceedings.

No matter the constitutionality of adult sex offender registration – and on that point, there is debate – this article argues that child sex offender registration violates the Eighth Amendment’s prohibition against cruel and unusual punishment. Tracking the shift in sex offender registration models from “likely to reoffend” to “conviction-based assessment,” automatic registration of children is an unstable proposition because a child’s criminal sexual 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 paper 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*. This article argues that 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.

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. In a debate clouded by emotion, it is increasingly clear that juvenile sex offender registration is cruel and unusual punishment.
AGAINST JUVENILE SEX OFFENDER REGISTRATION

CATHERINE L. CARPENTER

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

That is what happened to Leah¹ who, at ten years old, “flashed” her eight and five year old stepbrothers and simulated the sex act with them while they were all fully clothed.² Growing up in another generation, Leah’s actions may have been considered “playing doctor,”³ but not by today’s standards. Leah

¹ This law review article does not use the last names of child registrants. But Leah, herself, made the decision to go public about registration in the blog she started while in college. See So, Who is Leah DuBuc Anyway?, http://classes.kvcc.edu/eng155/21410/ldubuc/all_about_me.htm (describing her life as a child registrant).

² See Martha Moore, Sex Crimes Break the Lock on Juvenile Records, USA TODAY, 7/10/2006, http://usatoday30.usatoday.com/news/nation/2006-07-10-juvenile-offenders_x.htm?scp=34 (describing the impact of registration laws on child offenders); see also N.J. Case Raises Questions about Meghan’s Laws, ABC NEWS, http://abcnews.go.com/US/nj-case-raises-questions-meghans-laws/story?id=14171897&page=2, 7/27/2011 (recounting the harm done to juvenile registrants). In her college blog, Leah refutes the charges that were leveled against her. See So, Who is Leah DuBuc Anyway?, http://classes.kvcc.edu/eng155/21410/ldubuc/all_about_me.htm (alleging that her stepmother’s allegations against her were false and that she was coerced into pleading to the charges).

was convicted of criminal sexual conduct and placed on the state’s public sex offender registry when she was twelve years old. The Child Scarlet Letter, if you will.

In her college blog, Leah detailed the impact 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. No matter her acts of volunteerism or the education she secures, Leah will be required to remain on the state registry until she is thirty seven years old. When she will no longer have to register, Leah will still contend with lasting vestiges of Internet public notification because information disseminated via the Internet is forever “etched in cyberspace.” And all because of an act that she committed at ten years old.

For other child offenders, the consequences can be more devastating. Registration and notification burdens continue for life and often without any legal avenue for the child’s removal as for enjoying normal and which sexual play is not); Jose I. Concepcion, Understanding Preadolescent Sexual Offenders, 78-AUG Fla. B.J. 30 (2004) (West 2013) (“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’ in discussing a child offender’s adjudication of delinquency.

5 See Moore, supra note 2 (reporting that Leah’s request to go on a non-public registry was denied by the court because one of her stepbrothers was more than five years younger than she was at the time of the alleged incident; see also No Easy Answers: Sex Offender Laws in the US, HUMAN RIGHTS WATCH, 9/12/2007 [hereinafter No Easy Answers] http://www.hrw.org/en/reports/2007/09/11/no-easy-answers (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, where 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) (1850) (inviting the reader to criticize the Puritanical practice of shaming the adulteress).

7 So, Who is Leah DuBuc Anyway?, http://classes.kvcc.edu/eng155/21410/lubuc/all_about_me.htm (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”).


10 See, e.g., In re I.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 (I1l. 2003) (affirming lifetime registration for a twelve year old adjudicated delinquent). For a full exploration of the damaging effects of child registration see Raised on the Registry: The Irreparable Harm of Placing Children on Sex Offender Registries in the U.S., HUMAN RIGHTS WATCH, www.hrw.org/reports/2013/05/01/raised-registry-0 [hereinafter Raised on the Registry]
from the registry.11 As one Minnesota trial court commented in requiring 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 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 have been

(profiling Jacob C. who, at eleven years old, touched his sister’s genitals, and who was made to register as a sex offender for the rest of his life; id. at 35 (recounting the story of T.T. who was found guilty of aggravated sexual assault and forced to register for life for inserting a feminine hygiene product in his six-year-old half-brother’s anus).

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 In the Interest of 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).


14 See, e.g., Humphrey v. Wilson, 652 S.E.2d 501 (Ga. 2007) (concerning fifteen-year-old Genarlow Wilson who engaged in consensual oral sex with a fifteen year old girl); In the Matter of H.V., 2007 WL 1599207 (Minn. Ct. App. 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 Emanuella Grinberg, No Longer a Registered Sex Offender, but the Stigma Remains, CNN.com (Feb. 11, 2010), http://articles.cnn.com/2010-02-11/justice/oklahoma.teen.sex.offender_1_offender-registry-oklahoma-label (chronicling Ricky Blackman’s conviction as an adult offender for having sex with an underage girl when he was sixteen years old).

15 In re J.L., 800 N.W.2d 720 (S.D. 2011).
considered a misdemeanor because of lenient “Romeo and Juliet” statutory rape laws. However, because the girl was twelve years old, J.L.’s act was deemed an aggravated sexual offense, and that classification automatically subjected him to lifetime registration as a sex offender.

The treatment of J. L. 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.

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. SORNA reclassified registration, 16 SDCL § 22-22-7 (West 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. § 13-1407(F) (2001) (allowing a defense to sexual conduct with a minor if “the defendant is less than 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”).

For a comparison of Romeo and Juliet to modern day teenagers having consensual sex, see Steve James, The Age of Consent And A Call For Reform, 78 UMKC L. REV. 241, 242 (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.”).

See Catherine L. Carpenter, On Statutory Rape, Strict Liability, and the Public Welfare Offense, 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, drafted in recognition that sexual activity between high school age peers may not necessarily be meant for “the chilling and punitive reach of the criminal law”). See, e.g., 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); id. § 11.41.440 (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).

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

See, e.g., In re T.W., 291 Ill. App.3d 955, 959 (Ill. Ct. App. 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 the Matter of H.V., 2007 WL 1599207 (Minn. Ct. App. 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 STAT. § 2907.02 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).

dividing offenders into three categories or “tiers” based solely on the crimes they committed. Rather than assessing the offender’s future dangerousness on an 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.

Not only did SORNA change the way to classify offenders, the federal scheme also required that child sex offenders in the juvenile justice system are subject to the same registration and notification burdens as their adult counterparts. The state’s failure to comply with SORNA will result in a loss of federal funding. Although SORNA only mandated registration for those fourteen years or older, states have passed sex offender registration laws requiring children far younger to register.

In addition, adult and child registrants alike face ever-changing and increasingly harsh registration rules, and should

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23 See, e.g., State v. Bodyke, 933 N.E.2d 753, 759 (Ohio 2012) (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) (West 2006) (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 42 U.S.C. § 16925(a) (legislating that states would lose ten percent of certain federal funding if SORNA were not adopted).

26 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...); see also MONT. CODE ANN. § 46-23-502(10) (West 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); WISC. STAT. ANN. § 938.34(15m)(1) (West 2012) (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).

27 See, e.g., Starkey v. Okla. Dep’t of Corrections, __ P.3d __ 2013 WL 3193674 (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).
they relocate to another state, they must navigate conflicting registration schemes in the face of penalties for the failure to register. Consider Jacob C., who at eleven years old committed a sexual act against his younger sister. He touched her genitals. That act not only caused Jacob to lose his freedom—he was placed in a juvenile home because he was not allowed to live with his sister—that act continued to have life-altering consequences when he moved from Michigan to Florida at eighteen to start fresh. Jacob had great difficulty understanding Florida’s registration burdens and even greater difficulty meeting the state’s changing residency restrictions. In the end, he was arrested and convicted of the felony of failure to register. And all because of a criminal act that Jacob did when he was eleven years old.

This is the Child Scarlet Letter in force. Kids like Leah, J.L., and Jacob C. who commit criminal sexual acts when they are children, but who as adults, pay the price with the burdens of registration and notification originally intended for adult offenders. And in a game of “how low can you go?”, states have

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); Emanuella Grinberg, No Longer a Registered Sex Offender, but the Stigma Remains, CNN.com (Feb. 11, 2010), http://articles.cnn.com/2010-02-11/justice/oklahoma.teen.sex.offender_1_offender-registry-oklahoma-label (tracing the harsh requirements Ricky Blackman faced in Oklahoma despite the expungement of his conviction in Iowa).

29 See Raised on the Registry, supra note 10 (arguing that public registration laws 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, 581 F.3d 977, 979 (9th Cir. 2010) (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, 247 (Minn. Ct. App. 2002) (inviting the legislature “to review the prudence of requiring all juveniles adjudicated for criminal sexual conduct 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 his delinquency adjudication).

34 See http://www.metrolyrics.com/limbo-rock-lyrics-chubby-checker.html (referencing an oldie-but-goodie phrase from the lyrics of Limbo Rock popularized by singer Chubby Checkers). On Michigan’s practice to register children as young as nine years old, see
forced children as young as nine and ten years old onto state sex offender registries, some for the rest of their lives.

It is both unremarkable and true that juveniles are different from adults. Indeed, recent Supreme Court decisions have highlighted those differences in finding that juveniles are not deserving of the death penalty or life imprisonment without the possibility of parole because they have diminished culpability. Yet, under the federal mandate of SORNA, the conversation abruptly changes. Now, children have to endure harsh registration burdens originally intended for the most violent of adult sex offenders and suffer the shame of public notification not present in juvenile court dispositions.

Juveniles crowd Michigan sex offender registry. SEX OFFENDER REPORTS, CHARTS AND OTHER PAPERS, 05/03/2012, 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, WISTV, 08/12/2003, http://www.wistv.com/Global/story.asp?i=1398401&cclienttype (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).

See, e.g., MINN. STAT. ANN. § 243.166(6)(d) (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). Of the child registrants interviewed for Raised on the Registry, eight were 10 or younger when they were convicted and when registration began, “with the youngest being 9 years old.” Raised on the Registry, supra note 10, at 33. One interviewee was Max B. who started registration at ten years old for having inappropriately touched his eight year old sister. Id. at 33.

See, e.g., In re J.R.Z., 648 N.W.2d 241 (Minn. Ct. App. 2002) (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 In These Times: Barely a Teenager and Marked for Life, Caitlin Dickson, 09/03/2010, http://inthetimes.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).

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

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 non-homicide offense).

See, e.g., 42 U.S.C. § 16915-115(A)(3)(West 2006) (stating that a Tier III sex offender shall keep his or her registration current for life); 42 U.S.C. § 16916-116(3) (West 2006) (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-
This article asserts that requiring children to register and provide notification of their offenses to the community run counter to the prevailing and fundamental policies of rehabilitation and confidentiality of the juvenile justice system.\textsuperscript{41}

But, 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 SORNA\textsuperscript{42} – where the nature of the

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\item[(41)] See infra Part I.A. (reviewing the fundamental tenets of the juvenile justice system).
\item[(42)] See 42 U.S.C. § 16911-1-4 (West 2006) (classifying sex offenders in one of three tiers by the crime committed); see also United States 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).
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conviction determines future dangerousness of the actor – is an unstable proposition when applied to child offenders. Two basic reasons exist: children lack the intentionality and purpose of their adult counterparts,\footnote{See infra Part III.} and the commission of sex crimes by children does not portend future predatory behavior.\footnote{Id.}

And it is not just the nature of automatic registration that causes concern. It is that, depending on the triggering offense, a child offender might be subjected to mandatory registration \textit{for life}.\footnote{See 42 U.S.C. § 16915(a)(3) (West 2006) (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 (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”); K.S.A. § 22-4906(h) (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 K.S.A. § 22-4902(c), and such crime is an “off-grid felony or felony ranked in severity level 1 of the nondrug grid”).} It is true that sex offender registration is not a criminal punishment in the traditional sense of the word. After all, registration is not imprisonment.\footnote{See Hudson v. United States, 522 U.S. 93 (1997) (establishing a framework to determine what constitutes criminal punishment).} Yet, mandatory lifetime registration evokes the same concern that expressed in \textit{Graham v. Florida},\footnote{130 S. Ct. 2011 (2010) (offering reasons why juveniles deserve less serious punishment than their adult counterparts in non-homicide cases).} and \textit{Miller v. Alabama},\footnote{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).} which held that life imprisonment without the possibility of parole for a juvenile offender was cruel and unusual punishment because such a sentence treated juvenile conduct unredeemable and without the possibility of rehabilitation.\footnote{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, __F.3d__ 2013 WL 4011011 at *8 (9th Cir. 2013) (explaining that a juvenile sex offender’s sentencing of 254 years in prison is irconcilable with \textit{Graham’s} mandate); accord People v. Caballero, 55 Cal.4th 262 (Cal. 2012) (concluding that a juvenile’s sentence of 110 years violated \textit{Graham})}. So too mandatory lifetime registration. It is an official pronouncement that based solely on
the child’s sexual offense, that child remains a continual danger for life without any possibility of rehabilitation.50

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.51 Nor has the stigma associated with registration been deemed sufficient to constitute punishment52 or a denial of the registrant’s due process rights.53

Labeling the registration scheme as a civil regulation – that bar to a viable challenge under the Eighth Amendment – is, definitely a hurdle to overcome. But more challenging than this legal obstacle is the emotion that grips the debate.54 The legislative impetus to register child offenders demonstrates convincingly the pitfall that impacts all sex offender registration discussion – emotional rhetoric controls the legislative agenda, even in the face of compelling arguments to the contrary.55

50 Two recent 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, ___ N.E.2d ___ 2013 WL 3296334 (Ind. 2013) (rejecting automatic registration for life, requiring instead clear and convincing evidence before a child will be required to register for life).

51 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 finding an Eighth Amendment violation).

52 See infra Part II (discussing the stigmatizing impact of registration and notification).

53 See, e.g., State v. Eighth Jud. Dist. Ct. 2013 WL3864448 (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”).


55 See infra Part III (discussing misconceptions surrounding child sex offenders). Apart from misconceptions about sex offenders, scholars have argued that sex offender registration laws are not effective. 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
assumptions regarding high recidivism rates among child sex offenders and alleged predatory behavior only fan the flames.  

Part One 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. In direct conflict are SORNA’s requirements of mandatory registration of children and public notification of their confidential adjudications. This section will explore both the legal and emotional reasons why the tension between the two competing statutory aims has been settled in favor of SORNA.

Part Two will outline the particularly devastating and stigmatizing impact on the child offender of registration burdens and community notification. It will trace the practical implications of registration that includes 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 child sex offender registration laws are potentially unconstitutional under principles of ex post facto and substantive and procedural due process, this article explores only their


56 See infra Part I.C.

57 See infra Part I.A (tracing the development of the juvenile justice system).

58 Doe v. State, 189 P.3d 999 (Alaska 2008) (finding that ASORA’s registration requirements violates the Ex Post Facto Clause); 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 County 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 of Sex Offender Registration Laws, 63 HASTINGS L. J. 1071 (2012).
constitutionality under the Eighth Amendment’s prohibition of cruel and unusual punishment.\(^{59}\)

Part Three will make the case that child sex offender registration is a criminal penalty cast as a civil regulation and is, therefore, subject to analysis under the prohibition against cruel and unusual punishment. And under this application, it fails.

Employing the multi-factored test from *Kennedy v. Mendoza-Martinez*,\(^ {60}\) this section will assert that child sex offender registration is no longer a civil regulation as originally intended because registration is no longer rationally connected to its civil intent. Specifically, with respect to child offenders, this section will demonstrate that child sex offender registration is excessive legislation because it is predicated on a misguided sense that a child’s sexual crime portends future dangerousness as an adult.\(^ {61}\)

But even if the registration of children is constitutionally permissible, mandatory registration of children based solely on the crimes they have committed violates the underlying principles of the juvenile justice system and the prohibition against cruel and unusual punishment. As this section demonstrates, it is an example of excessive legislative drafting.

Compounding the problem is automatic lifetime registration for child offenders. This paper 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*. This article argues that 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

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\(^{59}\) 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, proof of which under *Rochin v. California*, 342 U.S. 165, 172 (1972) requires that the government activity “shock the conscience.” No greater evidence of this test exists than is the look of shock 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 on the subject, the reaction is the same: all are surprised and saddened to learn that children are required to register as sex offenders.

\(^{60}\) 372 U.S. 144, 168–69 (1963) (articulating seven factors to be used to determine whether a regulation is punitive).

\(^{61}\) See infra Part III. (offering statistics to refute the perception that child offenders recidivate).
sentencing practices to distinguish between adult and child offenders.62

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 argues that the current system of child sex offender registration is cruel and unusual punishment.

I. COMPETING GOALS OF THE JUVENILE JUSTICE SYSTEM AND SEX OFFENDER REGISTRATION

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 startling when we consider the long-standing history of treating child offenders differently from their adult counterparts.63

A. Fundamental Tenets of the Juvenile Justice System

From its founding, juvenile court was intended to be different from adult court.64 Unlike adult court proceedings,

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62 See Miller, 132 S. Ct. at 2458 (declaring that a mandatory penalty scheme that invokes such a harsh punishment “contravenes Graham and Roper’s foundational principle: that imposition of a State’s most severe penalties on juvenile offenders cannot proceed as thought they were not children”). See also infra Part III B2. for a detailed discussion of the arguments.

63 See United States 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).

64 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 in the Interest of Z.B., 757 N.W.2d 595, 606 (S.D. 2008) (Sabers, dissenting) (“The juvenile justice system is premised on a rehabilitative theory of justice, much unlike the harsher, more punitive adult system.”). Scholars have also written on the distinction between the two systems of justice. See, e.g., Linda M. B. Uttal and David H. Uttal, Children Are Not Little Adults: Developmental Differences and The Juvenile Justice System, 15 PUB. INT. L. REP. 234 (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
which are adversarial in nature and designed to punish, juvenile court was structured to encourage treatment and rehabilitation. 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.”

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

The belief that the juvenile justice system is best able to rehabilitate child offenders is illustrated in the Ohio case of In re confines and harshness of adult court where less culpable youngsters could be rehabilitated to reenter society as productive, law abiding adults”).

See, e.g., IND. CODE § 31-10-2-1(5) (West 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, Counting Juvenile Adjudications As Strikes Under California’s ‘Three Strikes’ Law: An Undermining Of The Separateness Of The Adult And Juvenile Systems, 19 JUV. L. 335 (1998) (explaining that when states followed Illinois’ 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”); Jarod K. Hofacket, 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 (2002) (emphasizing that the juvenile system revolves around rehabilitation while the adult systems focuses on punishment).

See, e.g., U.S. v. Juvenile Male No. 1, 47 F.3d 68, 70 (2d Cir. 1995) (quoting with approval the district court statement, “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”).
C.P. There, 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. Despite both the seriousness of the charges and that C.P. had been previously adjudicated as a delinquent when he was eleven years old for sexually abusing his half-sister, the juvenile court rejected the state’s request to transfer C.P. to adult court. In denying the request, the judge stated, “I think we have time within the juvenile system and we have resources within the juvenile system to work with this boy.”

Rehabilitation is the cornerstone of the juvenile justice system. In describing its development, the United States Supreme Court wrote in its landmark decision of Application of Gault, “The apparent rigidities, technicalities, and harshness, which [the reformers] observed in both substantive and procedural criminal law were therefore to be discarded.” Gault represents one of four cases from the 1960s in which the United States Supreme Court evaluated the balance of affording due process rights with the goal of maintaining a non-adversarial system. Although Gault provided juveniles with certain constitutional safeguards reserved for adults, it also upheld the guarantees of confidentiality and privacy associated

69 967 N.E.2d 729 (Ohio 2012).
70 Id. at 732.
71 Id. at 733.
72 Id.
73 387 U.S.1 (1967) (balancing the policies of the juvenile justice system with constitutional safeguards for juveniles).
74 387 U.S. 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. 1, 13-16 (2007).
75 See Kent v. United States, 383 U.S. 541 (1966) (holding that a waiver of jurisdiction must be attended by due process); In re Gault, 387 U.S. 1, 20 (1967) (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).
76 387 U.S. 1, 31-58 (determining that juveniles are entitled to notice of the charges, right to counsel, and the privilege against self-incrimination); accord In re W.Z., 957 N.E.2d 367, 370 (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.”).
with the juvenile justice system. These safeguards purposefully shield the child offender from the stigma associated with the delinquency adjudication through confidential and private proceedings and through the expungement of evidence pertaining to the arrest and delinquency. Unlike adult court proceedings that demand public scrutiny and a public trial because of retributive and penal results, juvenile court proceedings are private and confidential to stimulate rehabilitation and avoid the stigma connected to public condemnation. The child offender’s privacy is so zealously protected that the Federal Juvenile Delinquency Act, for example, expressly prohibits the use of the juvenile’s record for “employment, license, bonding, or any civil right or privilege,” and similarly, “neither the name nor picture of any juvenile shall be made public in connection with a juvenile delinquency proceeding.” The belief is that maintaining the privacy of the

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77 387 U.S 1.
78 See, e.g., In re C.P., 967 N.E.2d at 745 (emphasizing that “[c]onfidentiality has always been at the heart of the juvenile justice system”).
79 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 (Ct. App. Idaho 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 to obtain removal from the registry, see State v. K.H. 860 N.E.2d 1284 (Ind. Ct. App. 2007 (pleading, “It’s not that I want to expunge the record, the fact is that I know what I did is wrong…but my main concern is getting of the registry”).
80 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 MICH. L. REV. 965, 1012 (1995) (“The juvenile component of offenders’ criminal history often is not available because of the confidentiality of juvenile court records…”).
81 18 U.S.C. § 5038(a) (West 1996) (prohibiting release of record except in limited circumstances); accord V. A.M.S. 211.425(3) (West 2008) (stating that juveniles’ information contained on the registration forms shall be kept confidential and may only be released to those authorized to receive such information).
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.”

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 is Congressional intent to carve out an exception within the juvenile justice system for children who commit sexual offenses.

How to reconcile the important policies contained in FJDA with Congress’s desire to require child offenders to register? 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. They cannot coexist because registration

83 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 avoid the stigma of a prior criminal conviction and to encourage treatment and rehabilitation”).
85 See supra notes x and accompanying text (delineating the requirements that juveniles must register because of the commission of certain offenses).
86 See, e.g., U.S. v. Juvenile Male, 581 F.3d 977 (9th Cir. 2009) overruled by U.S. v. Juvenile Male, 131 S. Ct. 2860 (9th Cir. 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 at 746 (“Registration and notification requirements frustrate
burdens and notification to the community detrimentally impact a child’s chance for rehabilitation.\textsuperscript{87} 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 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.”\textsuperscript{88}

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 14 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.”\textsuperscript{89}

When statutes are in conflict, canons of construction dictate that the specific will trump the general.\textsuperscript{90} Faced with whether to preserve the core of the juvenile justice system or accede to Congressional intent to make children register, courts have taken the position that confidentiality and rehabilitation must give way to Congress's intent that child offenders pose such a danger to the community.\textsuperscript{91} On this point, the Family Court of Delaware wrote

In applying Megan’s Law to juveniles, many states, Delaware being no exception, suddenly appeared to disregard a concept with the American Criminal Justice System, indeed the criminal justice systems adopted in almost every country around the world, had recognized for

\textsuperscript{87} See, e.g., \textit{In re W.Z.}, 957 N.E.2d at 377 (“A one-time mistake is automatically, irrebuttably, and permanently presumed to be beyond redemption or rehabilitation.”).

\textsuperscript{88} \textit{Id.} at 725 (Meierhenry, Ret. J., concurring specially).

\textsuperscript{89} See \textit{Raised on the Registry}, supra note 10, at 52 (quoting then 16 year old Austin S. from Louisiana); see also \textit{US: More Harm Than Good}, \textsc{Human Rights Watch}, 05/01/2013, http://www.hrw.org/news/2013/05/01/us-more-harm-good (offering the statements of Dominic G. who was required to register for an offense he committed when he was 13. “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”).

\textsuperscript{90} See, e.g., \textit{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.”).

\textsuperscript{91} See, e.g., \textsc{U.S. v. Under Seal}, 709 F.3d 257, 262 (4th Cir. 2013).
over 100 years, that juveniles are different from adults and should be treated differently.\footnote{Fletcher v. State, 2008 WL 2912048 *6 (Fam. Ct. Del. 2008).}

No matter that Congress’s position is contradicted by significant statistical evidence and psychological analysis;\footnote{See infra note x (note to editor - citing to various studies on recidivism rates).} courts, nonetheless, have deferred to Congressional intent without much dispute.\footnote{See, e.g., In re J.R., 341 Ill.App.3d 784, (Ill. Ct. App. 2003) (rejecting claim that registration and notification violated procedural or substantive due process); State v. Eighth Jud. Dist. Ct., __P.3d___ 2013 WL 3864448 (Nev. 2013) (concluding that retroactive application of statute was constitutional as applied to child offender); In re J.L.E., 223 P.3d 323 (2010) (summarily finding obligation of child offender to register).} \textit{United States v. Under Seal} offers an excellent example of this reasoning.\footnote{709 F.3d 257, 262 (4th Cir. 2013).} In 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.”\footnote{See generally Lambert v. California, 355 U.S. 225, 228 (1957) (emphasizing the considerable weight that courts give to legislative authority); Liparota v. United States, 471 U.S. 419, 424 (1985) (“The definition of the elements of a criminal offense is entrusted to the legislature”).}

Acquiescence to legislative intent is not uncommon. To be sure, great deference is afforded legislative intent to craft parameters of offenses.\footnote{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 I may do so with absolute impunity, without any limitations whatsoever.”)} 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.\footnote{709 F.3d 257, 262 (4th Cir. 2013).} There must be occasions where principles control beyond interpreting legislative intent.

\textbf{C. Emotion that Clouds the Debate}
Reliance on formalism to settle the difference of competing statutory aims is a resolution that disregards an underlying but unspoken motivation for capitulation. In truth, deference to SORNA’s mandatory registration of children is not only an exercise in statutory construction; it is also fueled by the emotion that grips the discussion of sex offender registration.

To be sure, we are afraid of the sexual predator. Images from high profile cases continue to haunt us even as statistics on child abuse decline.\(^99\) Jerry Sandusky is that image. Trusted and respected assistant coach of a major college football team and founder of a charity for youth, he preyed on young boys from disadvantaged homes, showering them with attention and gifts.\(^100\) Grooming, it is called.\(^101\) After a lengthy investigation, Sandusky was convicted of 45 counts of sexual molestation of ten young boys.\(^102\)

But Jerry Sandusky is not the only image we have of the serial sexual predator. Philip Garrido, registered sex offender, abducted Jaycee Lee Dugard in broad daylight on her way to school when she was eleven years old, and he kept her captive for the next eighteen years, raping her repeatedly.\(^103\) All in plain sight. And 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.104

This horror is real. These images frighten us and they 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.105 In the case of Ariel Castro, his 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.106

Not only does the image of the serial predator haunt us, it spurs us to act.107 The separate and tragic deaths of three young children – Adam Walsh in 1981,108 Jacob Wetterling in 1992,109 and Megan Khanka in 1994110 – served as the catalyst for national legislation on sex offender registration laws111 and public

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111 42 U.S.C. § 14071 (establishing The Jacob Wetterling Crimes Against Children and Sexually Violent Offenders Registration Act).
notification statutes. In the state of New Jersey, where she was killed, 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.

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

Professor Walker Wilson writes that “our desire to exercise control over potential threats is a driving force behind much of human behavior.” 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.” As Professor Wayne Logan writes, “To students of the field, the laws – often enacted unanimously and without meaningful debate – serve as object lessons in legislative panic.”

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.

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112 Pub. L. No. 104-145, §2, 110 Stat. 1345 (1996) (codified as amended at 42 U.S.C. § 14071(e)(2) (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”).


114 See Timmendequas, 737 A.2d at 67-68.

115 See Lisa Anderson, Demand Grows to ID Molesters, States Weigh Children’s Safety Versus Offender’s Rights, CTRIB., Aug. 15, 1994 at 1 (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).


117 See Carpenter & Beverlin, supra note 58, 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).

offender.\textsuperscript{119} 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.\textsuperscript{120} He was required to register for ten years, a term that was subsequently upheld when he moved to Oklahoma a short time later.\textsuperscript{121} 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.\textsuperscript{122}

That fear – sometimes real, but sometimes imagined\textsuperscript{123} – has spilled over into our handling of children convicted of sex crimes.\textsuperscript{124} Our desire to protect our children from Jerry Sandusky, Philip Garrido, or 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 has described the phenomenon as a “social panic” where the “fear is wildly exaggerated and wrongly directed.”\textsuperscript{125} Jenkins writes:

\begin{itemize}
\item \textsuperscript{119} See Starkey v. Okla. Dep’t of Corrections, __ P.3d ____ 2013 WL 3193674 (Okla. 2013) (reviewing the harshening of Starkey’s registration requirements).
\item \textsuperscript{120} It is unclear from the record whether the adjudication was for sexual actions that were consented to or compelled. \textit{Id.} at *1.
\item \textsuperscript{121} \textit{Id.} at *2. \textit{But see id.} (examining whether Starkey was required to register at all in Oklahoma).
\item \textsuperscript{122} \textit{Id.}
\item \textsuperscript{123} See Richard G. Wright, \textit{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”). \textit{See also LORI DORFMAN & VINCENT SCHRALDI, BLDG. BLOCKS OF YOUTH, OFF BALANCE: YOUTH, RACE & CRIME IN THE NEWS 3 (2001), http://www.buildingblocksforyouth.org/media/media.pdf (“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.”).}
\item \textsuperscript{124} See, e.g., Elizabeth Garfinkle, \textit{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, \textit{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).
\item \textsuperscript{125} 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); \textit{see also} John Douard, \textit{Sex
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* 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*.

Sweeping generalizations and hastily passed legislation are hallmarks of the “social panic” that surround 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. Panic causes us to pass registration laws quickly and without much scrutiny.

While it is certainly true that a few child offenders demonstrate predatory behavior, panic also leads us to ignore evidence that child sex offenders are not likely to reoffend or...
that they commit sexual crimes for a myriad of reasons other than predatory inclinations.\textsuperscript{131}

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

II. ACKNOWLEDGING THE Stigma OF CHILD REGISTRATION

All sex offender registration is stigmatizing. Of that there is agreement, even among courts that have held registration schemes are only civil regulations.\textsuperscript{132} When one considers that the term stigma has been defined as a “mark or token of infamy, disgrace, or reproach,”\textsuperscript{133} one recognizes that registration is that token of infamy.

Being publicly labeled a “sex offender” is sufficiently derogatory to severely injure a person’s reputation, and the stigma associated with being labeled as a sex offender is well-recognized by the courts.\textsuperscript{134} The Ninth Circuit 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.”\textsuperscript{135}


\textsuperscript{131} See infra Part III.

\textsuperscript{132} See, e.g., Smith v. Doe, 538 U.S. at 99 (“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.”).


\textsuperscript{134} 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.”).

\textsuperscript{135} Neal v. Shimoda, 131 F.3d 818, 829 (9th Cir. 1997).
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 2003 Supreme Court decision of *Smith v. Doe* represents the seminal point of that discussion. The Court, in a 5-4 decision, analyzed Alaska’s sex offender registration scheme, finding that it was not sufficiently stigmatizing to be punitive for purposes of an *ex post facto* analysis under the Eighth Amendment.

From the registrants’ perspective in *Smith*, stigma flowed directly from the shame and humiliation accompanying registration and notification. As such, the argument continued, registration and notification were tantamount to the shaming punishments employed in Colonial times. 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 criminal record, most of which is already public.”

But herein lies the problem. The *Smith* analysis that notification is not a shaming punishment is premised on the public nature of an adult trial and the record it produces following a conviction. In fact, it is 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.”

Unlike adult proceedings, however, delinquency adjudications are not public. They are purposefully private to prevent stigma that may attach to the child offender into adult

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136 538 U.S. 84, 105-06 (2003) (“The Act is nonpunitive, and its retroactive application does not violate the *Ex Post Facto* Clause.”).
137 *Id.* at 97-100 (citing factors outlined in *Kennedy v. Mendoza Martinez*, 372 U.S. 144 (1963) to determine whether legislation is a civil regulation or criminal penalty).
138 *Id.* at 97-98.
139 *Id.* at 98.
140 *Id.* at 99 (emphasis added). See also ACLU v. Masto, 670 F.3d 1046 (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”).
years. Stigma flows, then, directly from notification and not from the delinquency adjudication, which but for the release of information, would remain confidential. That the public nature of adult criminal proceedings so swayed the Court suggests, at a minimum, reconsideration of Smith’s applicability to child sex offender registration.

Further, not all stigma is created equal. No matter the outcome of the discussion affecting 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. 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.” This echoes the reasoning of the Supreme Court in Graham v. Florida when it surmised that “[l]ife without parole is an especially harsh punishment on a juvenile... [A] juvenile will serve more years and a greater percentage of his life in prison than an adult offender.”

As well for the child registrant whose burdens are felt for a longer period of time and in ways more onerous than their adult counterparts. Child sex offender registration triggers residential dislocation, educational depravation, impactful residency

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141 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.”).
142 See Carpenter & Beverlin, supra note 58, at 1073 (labeling the serially-amended registration schemes “super-registration schemes”).
143 In re C.P. 967 N.E.2d at 741. In response to the position that registration burdens impossibly the child offender, some states have amended their statutes to reflect that position. See, e.g., Fletcher v. State, 2008 WL 2912048 *10 (Del. Fam. Ct. 2008) (explaining the newly enacted procedure of “de-registration” designed to ameliorate the burdensome nature of registration).
145 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., 204 Ill.2d 50, 80 (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
restrictions, and stigmatization and community isolation. 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.”

The feelings expressed by Christian W. sum up well 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 26, 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.”

Christian W. is not alone in combating thoughts of suicide. For Evan B., those thoughts turned into a reality. He was placed on the state offender registry after exposing himself in a high school bathroom to several female students. One year later, Evan B. shot and killed himself.

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.”

146 See So, Who is Leah DuBuc Anyway?, http://classes.kvcc.edu/eng155/21410/ldubuc/all_about_me.htm (describing the loss of employment that Leah DuBuc suffered because she was retroactively placed on the registry).
147 See infra Part III (examining the increasingly harsh residency restrictions and their impact on child offenders).
148 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).
150 See Raised on the Registry, supra note 10, at 51 (relaying a telephone interview with Christian W).
151 See No Easy Answers, supra note 5.
152 Id.
153 967 N.E.2d 729, 7412-742 (Ohio 2012).
III. Why Child Registration is Cruel and Unusual Punishment

No matter the stigmatizing nature of sex offender registration, alone it is insufficient to prove that registration laws are criminal penalties subject to Eighth Amendment constitutional scrutiny. After all, registration and notification burdens are not traditional forms of punishments. They do not deprive the offender of liberty in the way of “shackles, chains, or barred cells.”

Indeed, two decades of jurisprudence have produced a fairly consistent message regarding sex offender registration laws: they are civil regulations that do not trigger Eighth Amendment analysis. Employing the landmark case of Kennedy v. Mendoza Martinez to determine whether a law is a civil regulation or criminal penalty, the Supreme Court in Smith v. Doe concluded that registration and notification schemes are not criminal penalties, an affirmation of lower court holdings leading up to that important 2003 decision.

Since Smith, the jurisprudence has only grown, with courts concluding that Smith controls the analysis. Sex offender registration laws are not punitive, and that determination has

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154 Reno v. Flores, 507 U.S. 292, 302 (1993) (rejecting substantive due process violation because no traditional liberty interest was implicated). 155 538 U.S. 84, 105-06 (2003) (“The Act is nonpunitive, and its retroactive application does not violate the Ex Post Facto Clause.”). Federal courts have followed suit. See U.S. v. Young, 585 F.3d 199, 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). 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”). 156 538 U.S. 84, 97-106 (analyzing factors from Kennedy v. Mendoza Martinez, 372 U.S. 144 (1963) to determine whether Alaska’s sex offender registration scheme was a criminal penalty). 157 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); see also 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). 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). 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. App. Ala. 2004); State v.
been applied to adult and juvenile offenders alike.\textsuperscript{159} The Seventh Circuit’s analysis is illustrative. Referencing \textit{Smith}, the court wrote, “[W]hether a comprehensive registration regime targeting only sex offenders is penal...is not an open question.”\textsuperscript{160}

A. A Criminal Penalty Disguised as a Civil Regulation

Labeling whether a law is civil or criminal is an exercise in line drawing. \textit{Just how} punitive are registration and notification burdens on adult offenders. Where a law could be classified as either a criminal penalty or a civil regulation, courts rely on the two-part “intent-effects” test from \textit{Kennedy v. Mendoza-Martinez} to determine the classification.\textsuperscript{161} First is the intent: whether the

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Gragg, 137 P.3d 461, 464-65 (Ct. App. Id. 2005). \textit{But see} Wallace v. State, 905 N.E.2d 371, 379–84 (Ind. 2009) (applying the \textit{Mendoza-Martinez} factors to hold that Indiana’s sex offender registration scheme was punitive); \textit{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 Corrections, __ P.3d ___ 2013 WL 3193674 (Okla. 2013).

\textsuperscript{159} See, \textit{e.g.}, State v. May, 535 F.3d 912, 920 (8th Cir. 2008) (stating that SORNA’s registration requirements “demonstrate no congressional intent to punish sex offenders’’); \textit{see also} United States v. W.B.H., 664 F.3d 848 (11th Cir. 2011) (holding that registration is civil in nature); American Civil Liberties Union of Nevada v. Masto, 670 F.3d 1046 (9th Cir. 2012) (concluding that registration did not violate \textit{ex post facto} principles); (State v. Commonwealth v. Baker, 295 S.W.3d 437, 443 (Ky. 2009) (concluding that the registration scheme was civil in nature); State v. Haskell, 784 A.2d 4, 16 (Me. 2001) (adopting the legislature’s express statement that SORNA was intended to be civil); For similar cases involving juvenile sex offenders, see United States v. Juvenile Male, 670 F.3d 999 (9th Cir. 2012); \textit{In re} Alva, 14 Cal.4th 254, 260-262 (Cal. 2004).

\textsuperscript{160} U.S. v. Leach, 639 F.3d 769, 773 (7th Cir. 2011). Although a few Supreme Court decisions have addressed particular aspects of constitutionality of sex offender registration schemes, \textit{Smith} remains the only Court opinion to address whether sex offender registration schemes are punitive under the Eighth Amendment. \textit{See} Comm. Dep’t Pub. Safety v. Doe, 584 U.S. 1 (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 (2012) (defining the authority of the Attorney General to implement SORNA); U.S. v. Kebodeaux, 133 S. Ct. 2496 (2013) (finding that one convicted by a special court-martial of a sexual offense was already subjected to pre-SORNA registration requirements).

\textsuperscript{161} 372 U.S. 144, 168–69 (1963) (articulating seven factors to be used to determine whether a regulation is punitive). For a sample of cases that have analyzed sex offender registration schemes under the \textit{Mendoza-Martinez} factors, see Wallace v. State, 905 N.E.2d 371 (Ind. 2009) (analyzing the \textit{Mendoza-Martinez} factors to hold that Indiana’s amended sex offender registration laws were punitive); \textit{see also} 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 intents-effects test); Wallace v. State, 905 N.E.2d 371, 375 (Ind. 2009) (reviewing sex offender registration laws through the lens of the intent-effects test).
\end{footnotesize}
legislature intended the statute to be a civil remedy or punishment. 162 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.” 163

With respect to sex offender registration laws, courts have found that the first prong of Mendoza-Martinez has been easily established. Sex offender registration laws evince a regulatory intent in a host of ways: in the legislative history where the civil intent is articulated, 164 placement of the registration scheme outside the criminal code, 165 or in language in the statute’s preamble demonstrating such intent. 166

Yet, legislative intent alone is only the first step of analysis. A regulation may be deemed to impose a criminal penalty where the legislation is excessive in relation to its non-punitive purpose or where it no longer bears a rational relation to its regulatory

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162 See U.S v. Ursery, 518 U.S. 267, 277 (1996) (describing the first stage of inquiry into whether double jeopardy applied as whether Congress intended the forfeiture law to be a “remedial civil sanction”).

163 Hudson v. United States, 522 U.S. 93, 99 (1997); see also United States 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).

164 See, e.g., U.S. v. Under Seal, 709 F.3d 257 (4th Cir. 2013) (relying on legislative history to conclude that SORNA was non-punitive); 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 courts that have found their sex offender registration laws to be punitive have agreed that the legislature had a regulatory purpose. See State v. Letalien, 985 A.2d 4, 16 (Me. 2009) (agreeing 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, 346–47 (Ohio 2011) (acknowledging that the legislature intended the sex offender registration scheme to be remedial).

165 See, e.g., U.S. v. Under Seal, 709 F.3d 257, 264 (4th Cir. 2013) (justifying SORNA’s civil purpose by the code’s placement in the public health and welfare section of the code). 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.”); MICH. 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.”).
aim. Mendoza-Martinez identified seven factors to help guide this part of the analysis:

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.

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

Several reasons exist. First, registration burdens today are affirmative disabilities akin to punishment. No longer can one claim that registration burdens are benign, as was the conclusion reached in Smith when analyzing Alaska’s sex offender registration scheme from the 1990s. Under the Alaskan model, in-person registration was infrequent and only applied to a small class of registrants. Additionally, the Court found that under Alaska’s model, registrants were “free to move where they wish and to live and work as other citizens, with no supervision.”

However, modern registration schemes do not share the characteristics of the Alaskan registration scheme. Modern registration schemes require frequent in-person registration of many classes of registrants. So burdensome can be the

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167 See Hudson v. United States, 522 U.S. 93, 99 (1997). Generally, courts have found that the registration 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”).


169 Smith, 538 U.S. at 99 (“The Act’s obligations are less harsh than the sanctions of occupational debarment, which we have held to be nonpunitive.”).

170 Id. at 101. But see Id. at 110 (Stephens, J., dissenting) (“The [sex offender registration] statutes impose significant affirmative obligations and a severe stigma on every person to whom they apply.”).

171 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.
frequency of in-person registration that Maine’s 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.  

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 has categorized the offense committed by the child. Frequent in-person registration is not just a possibility; it is the norm. And its duration is far more significant than for an adult offender. Since SORNA demands lifetime registration for so many juvenile offenders, the number of years of in person registration every three months is often more intrusive and significant than on an adult offender.

Expanding residency restrictions also contribute significantly to the affirmative disability and restraint on registrants. Modern residency restrictions aggressively and essentially close off major portions of a particular state to sex offender registrants, countering the Court’s observation that registrants were free to change residences. When first


Letalien, 985 A.2d at 24-25.

See 42 U.S.C. § 16911(8) (West 2006) (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 analysis of the duration of such burdens, see In re C.P., 967 N.E.2d at 742 (calculating on average the number of years that a child offender must suffer registration burdens).

See, e.g., GA. CODE ANN. § 42-1-15 (2010) (preventing sex offenders from living within 1000 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).

Smith, 534 U.S. at 100 (“The Act does not restrain activities sex offenders may pursue but leaves them free to change jobs or residences.”)
introduced, buffer zones were 1,000 feet or less, and they were limited to traditional locations where children might congregate.\textsuperscript{177} Today, buffer zones are often 2,000 feet or more,\textsuperscript{178} and have expanded “where children congregate” to include bus stops\textsuperscript{179}, video arcades,\textsuperscript{180} and libraries.\textsuperscript{181} 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.”\textsuperscript{182}

As a result of escalating residency restrictions, numerous registrants have very limited residency options available to them.\textsuperscript{183} In a previous article I wrote, I expressed the view that

\begin{footnotes}
\item[177] See, e.g., 11 DEL. CODE ANN. tit. 11, § 1112 (Supp. 2007) (enacted 1995) (preventing sex offenders from living within 500 feet of school property); GA. CODE ANN. § 42-1-12(a)(3)(b) (West 2009) (prohibiting sex offenders from living within 1,000 feet of a school, day care center, or area where minors congregate); MICH. COMP. LAWS ANN § 28.733(f) (West Supp. 2009) (defining student safety zones as “1,000 feet or less from school property”).
\item[178] See, e.g., CAL. PENAL CODE § 3003.5 (West Supp. 2009) (enlarging buffer zone because of recently enacted Jessica’s Law; see also ALA. CODE § 15-20-26(a) (LexisNexis 2008)(enlarging buffer zone restriction zone from 1000 feet to 2000 feet); accord OKLA. ST. TT. 57 § 590A (Supp 2008).
\item[180] LA. REV. STAT. ANN. § 14:91.1(2) (2004) (including free-standing video arcades in the locations registered offenders may not visit).
\item[183] See Damien Cave, \textit{Roadside Camp for Miami Sex Offenders Leads to Lawsuit}, N.Y. Times, July 10, 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 2500 feet of where children gather); \textit{see also} Catharine Skipp & Arian Campo-Flores, \textit{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
\end{footnotes}
competition among legislators to excise sex offenders from their state has led to a “race to the harshest” in their establishment of residency restrictions designed to push residents from their states. One recent example is Southern California’s attempt to freeze out registrants through the calculated placement of slivers of parks that create artificial buffer zones intended to remove sex offenders from their homes.

In addition to suggesting that modern registration schemes are affirmative disabilities, there is a question whether sex offender registration schemes still bear a rational relationship to their original civil intent. The sheer weight and ambition of current sex offender registration schemes cast doubt on this connection. Modern schemes are drafted to cast a net so wide they ensnare those who pose no future danger to the community. With schemes that overextend, the regulatory aim of sex offender registration laws no longer appears rationally connected to its original purpose as considered under Mendoza-Martinez. As evidence of this, one need only consider the explosion of registerable offenses post-Smith. From an average of eight offenses that triggered registration in the 1990s to more

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184 See Catherine L. Carpenter, Legislative Epidemics: A Cautionary Tale of Criminal Laws that Have Swept the Country, 58 BUFF. L. REV. 1, 41 (2010). For a prophetic admonishment, see Corey Rayburn Yung, Banishment by a Thousand Laws: Residency Restrictions on Sex Offenders, 85 WASH. U. L. REV. 101 (2007) (foreshadowing that “the amount of real estate available to sex offenders will continue to decrease and more sex offender communities will emerge”).

185 See Angel Jennings, LA 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 2012 WL 5387360 (La. Ct. App. 2012) (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 the he believed she was of consenting age). For other examples, see infra notes and accompanying text (around Rainer)

187 See, e.g., Carpenter & Beverlin, supra note 58, at 1087-99. One recently added burden has been legislation that prohibits offenders from using social media. See State v. Puckingham, COA12-1287 (N.C. Ct. App) (8/20/13) (rejecting legislation that prevented registered offenders from accessing social networking sites as unconstitutionally vague and overbroad).
than forty offenses in some states.\textsuperscript{188} Modern sex offender registration laws reach offenders who engage in sexual behavior that would not have been previously considered predatory.\textsuperscript{189}

Not only are schemes broader in scope, they are categorically fixed without individualized assessment of those who may fall outside its purview.\textsuperscript{190} As a consequence, registration laws capture many child offenders who are not likely to reoffend. Justice Ginsburg’s 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 exceed this purpose. The Act applies to all convicted sex offenders, without regard to their future dangerousness.”\textsuperscript{191} This is especially problematic for the child offender because SORNA demands that child registrants convicted of certain offenses must register for life.\textsuperscript{192}

As a companion to this point, registerable offenses have been reclassified – often without debate – as more serious than previously determined.\textsuperscript{193} The effect has been to recast registrants as more dangerous than their conviction warrants, and impose upon them additional burdens that, according to Mendoza-Martinez’s counsel, are excessive in light of their potential for reoffense.\textsuperscript{194}

With the breadth of registration laws comes its rigid application to all offenders. Categorical assessment potentially suffers from excessive legislation in that it does not address

\textsuperscript{188} See, e.g., Carpenter & Beverlin, supra note 58, at 111 (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).
\textsuperscript{189} Carpenter & Beverlin, supra note 58, at 111.
\textsuperscript{190} See, e.g., 42 U.S.C. § 16911 (reclassifying registration based solely on the crimes committed).
\textsuperscript{191} Smith, 538 U.S. at 116 (Ginsburg, J., dissenting).
\textsuperscript{192} See 42 U.S.C. § 16911(6) (West 2006) (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...”).
\textsuperscript{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).
\textsuperscript{194} See Smith, 538 U.S. 116-17 (Ginsburg, J., dissenting) (criticizing that the “duration of reporting requirement is keyed not to any determination of a particular offender’s risk of reoffending, but to whether the offense of conviction qualifies as aggravated”).
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 that is devoid of individualized risk assessment. Absurd results of 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, registration was required under the statute because Rainer’s crime involved a “child victim.”197

With a similarly blind eye to the relevant facts, 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-

195 In re J.L., 800 N.W.2d 720 (S.D. 2011).
196 690 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 (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 1217 (“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 conceded did not commit a sexual offense is not . . .”).
199 Id.
old girlfriend who became pregnant. Despite marriage, 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. 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 because of political intervention. He was pardoned and removed from the registry.

Despite the quickly changing landscape of sex offender registration schemes, the Smith analysis continues to control: it remains the prevailing view that sex offender registration laws provide a rational relationship to their civil regulatory intent. But, in recognition of the significantly intrusive changes, a few courts have concluded that serially amended registration schemes – what I call super-registration schemes – are no longer rationally connected to their civil regulatory aims. As a consequence, these courts have found them to be criminal penalties subject to constitutional scrutiny under the Eighth Amendment.

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.


202 Id.

203 Id.

204 See, e.g., Doe v. Bresden, 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, 547 F. Supp. 2d 669, 676 (E.D. Ky. 2008); State v. Henry, 228 P.3d 900, 904 (Ariz. Ct. App. 2010).

205 See Carpenter & Beverlin, supra note 58, at 1073 (describing the escalation as the result of “a perfect storm of intersecting legislative action and judicial inaction”).

206 See Starkey v. Okla. Dep’t of Corrections, ___ P.3d ___ 2013 WL 3193674 (Okla. 2013) (rejecting retroactive application of sex offender registration laws because they were deemed punitive in nature); Doe v. Dep’t of Pub. Safety and 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 ACLU v. Mas to, 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,
B. Analyzing Cruel and Unusual Punishment

Finding that child sex offender registration is punishment is only the first step in proving that registration laws violate the Eighth Amendment’s prohibition against 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.” But as Justice O’Connor reminded us in *Roper*, “It is by now beyond serious dispute that the Eighth Amendment’s prohibition of ‘cruel and unusual punishments’ is not a static command.”

As interpretation of the clause evolved, barbaric punishments were replaced with questions of proportionality of the punishment to the crime. 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.”

Generally, there are two classifications of punishment to consider: the nature of the offense and length of sentence or the characteristics of the offender. To prove that a punishment is cruel and unusual, the court must 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.”

1. The National Consensus against Juvenile Registration

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due process and double jeopardy). That injunction was later overturned by the 9th Circuit. See American Civil Liberties Union of Nevada v. Masto, 670 F.3d 1046 (9th Cir. 2012).

207 U.S. Const. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).


209 543 U.S. at 589 (O’Connor, J., concurring).

210 Id.


212 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).

213 Graham, 130 S. Ct. at 2022; see also Atkins v. Virginia, 536 U.S. 304 (2002) (quoting Coker v. Georgia, 433 U.S. 584 (1977) that even where there is legislative consensus, “the Constitution contemplates that in the end [judicial] judgment will be brought to bear”).
National consensus overwhelmingly favors sex offender registration laws. In only the last decade, sex offender registration schemes have exploded with an increased number of registerable offenses, expanding reach of notification, introduction of residency restrictions, and GPS tracking. The increase in scope and severity of these laws – what I call super-registration schemes reflect an eagerness on the part of the public to embrace a system of control that it perceives, however ill-founded, will protect its citizens.

Given this climate, and despite the threat of loss of federal funding if states do not comply with SORNA, it is interesting to

214 See, e.g., Carpenter & Beverlin, supra note 58, 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).

215 See Carpenter & Beverlin, supra note 58, 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).

216 See Carpenter & Beverlin, supra note 58, 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).

217 Id. at 1090-95.

218 Id. at 1096-97.


220 Carpenter & Beverlin, supra note 58, at 1073 (2012) (labeling the second generation of registration schemes as “super-registration schemes” because of the expanded nature of registerable offenses, burdens, and notification requirements).


222 42 U.S.C. § 1695 (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”). Id. at 42 U.S.C. § 3750 et seq.
note that a number of states have rebelled at compliance.\textsuperscript{223} This reaction is all the more interesting when one considers state support for the first federal mandated sex offender registration laws passed in 1995.\textsuperscript{224}

Several thematic reasons emerge for the refusal. Specifically, states have rejected the federal mandate to require children in the juvenile court system to register as sex offenders;\textsuperscript{225} Additionally, refusal to comply is also about the expense; SORNA comes with a hefty price tag, which members of Congress have acknowledged.\textsuperscript{226} Texas state officials would agree. They estimated it would cost $38.7 million to comply with SORNA while failure to comply would only result in a loss of $1.4 million in federal funding.\textsuperscript{227} Finally, for other states, push-back comes from the perceived loss of control to form registration laws.\textsuperscript{228} When one combines all the reasons states have resisted complying with SORNA, the statistics by the General Accounting Office are startling. By February 2013, only nineteen of the 56 jurisdictions had substantially implemented SORNA, with only 16 states meeting compliance.\textsuperscript{229} The Supreme Court of Ohio, in

\textsuperscript{223} See infra note x (note to editor - providing accounting of compliance).
\textsuperscript{224} See 42 U.S.C. §§ 16925(a) (2010).
\textsuperscript{225} See Donna Lyons, Down to the Wire, http://www.ncsl.org/Portals/1/Documents/magazine/articles/2011/SL_0611-SexOffender.pdf (June 2011) (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).
\textsuperscript{226} See, e.g., 154 Cong. Rec. S9350-05 (Sept. 24 2008) (statement of Sen. Coburn) (“We promised everybody we would do it, but have barely funded it at all.”); accord Cong. Rec. S4588-02 (Statement of Sen. Hatch) (“Unfortunately, many of the enforcement provisions in the Adam Walsh Act have not been funded.”); 155 Cong. Rec. E611-03 (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.”).
\textsuperscript{228} See, e.g., LEG, http://www.ncleg.net/documents/sites/committees/JLOCJPS/October%202013.%20Meeting/RD_SORNA_General_Information_2011-10-13.pdf (stating, “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”).
its review of the national trend on resistance to compliance aptly referred to it as “national foot dragging.”

The trend to reject child sex offender registration is clear if one were to isolate only those statistics. Thirty-one of the 52 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.

Texas and New York offer excellent examples of the reasoning behind the states’ resistance. In a letter to the Department of Justice Office, 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.”

Similarly, in a letter to 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 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.”

And most recently, the State of Washington abolished child sex offender registration completely.

2. 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


230 In re C.P. 967 N.E.2d at 739.

231 See U.S. General Accounting Office, supra note 229. See also No Easy Answers, supra note 5 (imploring states to refuse to comply with SORNA).

232 See LEG.


233 Id.

court must entertain an independent review of whether the sentence is cruel and unusual punishment.\footnote{See Miller v. Alabama, 132 S. Ct. 2455 (2012).}

\paragraph{a. 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 – their actions and accompanying reasoning cannot be so easily classified. One size does not fit all.

Indeed, as the Supreme Court wrote, a child’s youth is far “more than a chronological fact.”\footnote{Id. at 2467 (quoting Eddings v. Oklahoma, 455 U.S. 104, 115 (1982); see also J.D.B. v. N. 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).} On how to give context to those words, the Supreme Court trilogy of \textit{Roper}, \textit{Graham}, and \textit{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 \textit{Roper} isolated the 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.”\footnote{\textit{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.”).} Psychological research pertaining to child sex offender registrants confirms that children and teenagers have a greater 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.\footnote{See \textit{Raised on the Registry}, supra note 10, at 26.}

Additionally, the Court found that children are more vulnerable to negative and outside pressures, an important factor when one considers that sexual offenses by children are

\footnote{\textit{Roper}, 543 U.S. at 569.}
often committed while in groups.\textsuperscript{240} Because they are more susceptible to peer pressure, they are also less able “to extricate themselves from a criminogenic setting.”\textsuperscript{241}

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.\textsuperscript{242} Thus, there is great possibility for a child to reform “with even the most depraved characteristics to be rehabilitated.”\textsuperscript{243}

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.\textsuperscript{244}

Unfortunately, the public’s desire to compel registration for child offenders is fueled by a faulty assumption that children who commit sexual offenses are likely to reoffend as adults.\textsuperscript{245} Once a sex offender always a sex offender. This perception calls to mind a 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.\textsuperscript{246}

\textsuperscript{241} Roper, 543 U.S. at 569.
\textsuperscript{242} Id.
\textsuperscript{243} Id.
\textsuperscript{244} See, e.g., State v. Null, No. 11–1080 (Iowa 2013) http://pub.bna.com/cl/111080.pdf. (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”).
\textsuperscript{245} See supra notes and accompanying text (note to editor – footnotes on recidivism).
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.\textsuperscript{247} 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.”\textsuperscript{248} Other studies similarly have found that child sex offenders do not recidivate at the rates imagined by the public,\textsuperscript{249} and when they do reoffend, it is likely for motivations other than serial predatory tendencies.\textsuperscript{250}

Even where a child’s sexual act was nonconsensual, it does not necessarily portend future dangerousness. In Joshua G.’s case, his act of inappropriately touching his nine-year old sister was in direct response to his being repeated raped between the ages of six and eight by neighborhood children.\textsuperscript{251} 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

\textsuperscript{247} 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 Chrysanthi Leon, David L. Burton, & Diana Alvare, Net-Widening in Delaware: The Overuse of Registration and Residential Treatment for Youth Who Commit Sex Offenses, 17 WIDENER L. REV. 127, 147 (2011) (describing the cross-sectional nature of the study).

\textsuperscript{248} Id. at 144 (2011).


\textsuperscript{250} See infra notes x 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 statistics that demonstrate adult sex offenders do not recidivate at higher rates than other criminal offenders); accord Center for Sex Offender Management, A Project of the Office of Justice Programs, U.S. Department of Justice, 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).

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.”

Given the low recidivism rates among child offenders, one sees the inherent difficulties of an automatic registration scheme that ensnares the non-reoffending child with the small percentage of children who will become sexual predators. 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.

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

In addition to these three categories, one scholar has written that sometimes, unlawful sexual activity by children is a matter of “opportunity and hormones.” 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

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252 Id.

253 Id.

254 Judging from one report, early adolescence is the peak age for offenses against younger children. See Finkelnhor, supra note 249, https://www.ncjrs.gov/pdffiles1/ojjdp/227763.pdf (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).

255 Id.

juvenile’s “immaturity, impetuosity, and failure to appreciate risks and consequences.”

With such varied reasons for a child’s commission of sexual acts, automatic categorical assessment, or a one-size-fits-all approach, is a flawed model. Rather than automatic conviction-based assessment that treats all child offenders alike, Professor Zimring argues that the answer lies in the development of a “solid data base” to predict the small subset of juvenile offenders who will become future predators.

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.”

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

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257 132 S. Ct. at 2468.
258 See ZIMRING, supra note 254 (arguing that first time child offenders should never provide the basis for registration).
259 Id. The American Bar Association has also urged that Congress reexamine categorical assessments under SORNA. See Subcommittee On Crime, Terrorism, And Homeland Security Of The Committee On The Judiciary House Of Representatives, One Hundred Eleventh Congress (March 2009) http://judiciary.house.gov/hearings/printers/111th/111-21_47923.PDF (urging that “juvenile court judges consider factors relevant to the specific offense and the individual juvenile offender”).
261 See In re C.P., 967 N.E.2d 729 (Ohio 2012).
262 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).
263 Id. at 735 (Ohio 2012) (offering in opposition R.C. 2152.13(D)(2)(a)(iii) which states that an adult sentence is stayed “pending the successful completion of the traditional juvenile
In finding that registration violated cruel and unusual punishment, the court was also influenced by the lack of discretion of the juvenile court judge. Discretion is critical to ensuring the fairness of the proceedings according to the court, “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.”

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

b. 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 will as well. To explore this question, it is helpful to consider recent Supreme Court decisions concerning juvenile sentencing. In declaring life imprisonment without the possibility of parole unconstitutional in non-homicide 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.

See, e.g., In re C.P., 967 N.E.2d 729, 748 (Ohio 2012).


When *Miller v. Alabama* established a “flat ban on life without parole,” its reasoning combined with *Graham* offered the potential to consider the two cases in a broader context. The language in *Miller* invites such an examination when 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.”

The question, therefore, is whether mandatory lifetime registration shares sufficiently similar attributes to life without parole to fall within the *Graham Miller* ambit. 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 required 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 about whether the cases should be read as limitedly a categorical ban on a small subset of sentences, or whether the Court has invited a broader interpretation of the cases.

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, whether sex offender registration is akin to a prison sentence, has been addressed earlier in this article. The second hurdle, and the one I want to explore here, is whether mandatory lifetime registration is the functional equivalent of life imprisonment without the possibility of parole. For this

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268 Id. at 2458.
269 See, e.g., N.J.S.A. 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.”).
270 Compare State v. Brown, __So. 3d ___ 2013WL1878911 (La. 2013) (rejecting contention that multiple sentences that exceeded the life expectancy of defendant violated *Graham*) with State v Null, No. 11–1080 at * 49-51(Iowa 2013) http://pub.bna.com/cl/111080.pdf (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).
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.”271

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. 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.272 With firearm enhancements attached to each attempted murder conviction, and with each sentence stacked consecutively by the trial court, the length of the sentence amounted to 110 years.273 In overturning the sentence because it violated the principles of *Graham*,274 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.”275

Sometimes whether a sentence is the ‘function equivalent’ is not that obvious. In *State v. Null*, rather than facing 110 years, the sixteen year old offender was facing a 52.5 year sentence.276 The Iowa supreme court reasoned that the spirit of *Roper, Graham*, and *Miller* necessitated a reading beyond their narrow applications.277 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

271 *Graham*, 130 S. Ct. at 2030.
272 55 Cal. 4th 262, 265 (Cal. 2012).
273 Id.
274 Id. at 268.
275 Id. See also *Moore v. Biter*, __F.3d__ (9th Cir. 2013) 2013 WL 4011011 at *7 (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).
277 Id. (providing extensive analysis of *Roper, Graham*, and *Miller* throughout the opinion on whether a 52.5 year sentence was constitutional).
offender would see the opportunity for release in his lifetime, or if released, it would be at such an advanced age.\textsuperscript{278}

Can the same rationale that underlies \textit{Caballero} and \textit{Null} be extended to mandatory lifetime registration? Although the trilogy of \textit{Roper}, \textit{Graham}, and \textit{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 \textit{Graham}, \textit{Caballero}, and \textit{Null}.

Like those punishments, lifetime sex offender registration is an irrevocable judgment devoid of rehabilitative hope. Such an 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.\textsuperscript{279}

And it explains precisely the sanctioned practice of lifetime sex offender registration for an eleven year old boy, as was upheld in \textit{In re J.R.Z.}\textsuperscript{280} 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 \textit{In re C.P.} when it overturned mandatory lifetime registration for child offenders under the rationale of \textit{Graham}.\textsuperscript{281} 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 begin.”\textsuperscript{282}

Such a practice also calls up \textit{Miller’s} caution that to be considered constitutional, harsh punishments must arise from sentencing practices that consider the differences between adults and children.

\textsuperscript{278} \textit{Id.} at * 49-51 (employing statistical evidence on the life expectancy of young male offenders).
\textsuperscript{279} See generally \textit{Raised on the Registry, supra} note 10 (collecting stories involving the lives of child registrants).
\textsuperscript{280} 648 N.W.2d 241 (Minn. Ct. App. 2002) (upholding registration of eleven year old); \textit{see also In re J.W.}, 204 Ill.2d 50 (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”).
\textsuperscript{281} 967 N.E.2d 729, 742-744 (employing \textit{Graham} principles to reject penalogical justification for mandatory lifetime registration).
\textsuperscript{282} \textit{Id.} at 742.
and children. 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. Even where it is statutorily authorized, the mechanism in place makes it very difficult to do so. In that regard, the word “meaningful opportunity” takes on special importance from Graham. 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.

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, 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.”

For the reasons outlined above, the Graham Miller analogy applies to mandatory registration for life for child offenders. One

283 132 S. Ct. at 2458. 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., F.S.A. § 943.0435(11) (West 2013) (stating that juvenile sex offenders must register for life unless he receives a full pardon or the convictions is set aside in a later proceeding, or unless he 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) (West 2013) (noting that a person may petition a court for removal of his designation as an offender and for removal of all his 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).
286 77 So. 3d 928 (La. 2011). But see Angel v. Com., 794 S.E.2d 386 (Va. 2011) (construing its conditional release provisions to offer a meaningful opportunity for release as required by Graham).
287 See also Michael Barajas, In Texas, Juvenile Sex Offenders Get Virtual Life Sentence, SAN ANTONIO CURRENT, 05/08/2013 (discussing the impact of sex offender registration laws on a young man who committed suicide months after he was removed from the registry).
288 Id.
cannot escape the observation that these pronouncements are akin to life imprisonment without the possibility of parole.

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 of cruel and unusual punishment.