FOURTEEN GOING ON FORTY: CHALLENGING SEX OFFENDER REGISTRATION FOR JUVENILES UNDER THE FOURTEENTH AMENDMENT EQUAL PROTECTION CLAUSE

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> It had the effect of a spell, taking her out of the ordinary relations with humanity, and enclosing her in a sphere by herself.
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> —Nathaniel Hawthorne, *The Scarlet Letter*[1]

INTRODUCTION

When Leah DuBuc was twelve years old, she was adjudicated delinquent of criminal sexual conduct.[2] Growing up, Leah had a chaotic home life and lacked supervision.[3] When she was ten, she and her two stepbrothers "flashed" each other and simulated sex while clothed.[4] At ten years old, after watching movies with her step siblings, she mimicked having sex with them "like we'd seen in the movies" and flashed them, which happened several more times.[5]

Leah was charged with eight counts of criminal sexual conduct in the first and second degree for those incidents.[6] Leah was frequently interviewed by authorities without the presence of a parent and giggled when she had to say "penis" and "vagina."[7] Her court-appointed attorney explained to her that if she pled guilty, she would be taken from her home; Leah obliged because she wanted to escape the difficult conditions at home.[8]

After her release, Leah thrived, easily reintegrating into her family and community.[9] She had straight A's, ran the Diversity Club and Students Against Drunk

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1 NATHANIEL HAWTHORNE, THE SCARLET LETTER 74 (Ross C. Murfin ed., Bedford Books 1991) (1850).

2 Sarah Stillman, *The List*, NEW YORKER (Mar. 6, 2016), https://www.newyorker.com/magazine/2016/03/14/when-kids-are-accused-of-sex-crimes [https://perma.cc/27XC-FDTA].

3 *Id.*

4 *Id.*

5 *Id.*

6 *Id.*

7 *Id.*

8 *Id.*

9 *Id.*

Driving, wrote for the school newspaper, performed in school plays, had a part time job, and went to Guatemala with church friends to build an orphanage.[10] When she graduated and turned eighteen, her name and personal information were published on the online sex offender registry.[11]

In college, she double majored in comparative religion and social work while earning dean's list honors and a Presidential Scholar award.[12] Despite her achievements, she received anonymous messages on her door and online, saying, "We know you're a sex offender. GET OUT OF OUR DORM. You're not wanted here."[13] She moved out of the dorm because she felt unsafe.[14] However, she needed a decent income to rent an apartment and she could not even get hired at entry-level food service jobs because of her offender status.[15] She had to move into a homeless shelter and sleep on couches to finish her degree.[16] She graduated with her master's degree in social work but once again, was unable to find a job in her field due to her status as a sex offender.[17] At the same time, she was subject to increasingly punitive state laws passed requiring registrants to report their place of work, volunteer activity, and education, and introducing "Student safety zone[s]" which prohibited convicted sex offenders from going within a thousand feet of a school.[18]

As a result, Leah felt like America no longer had a place for her.[19] She moved to Tokyo in part because Japan has no publicly accessible sex offender registry.[20] Leah only decided to return home to Michigan when the state legislature amended the registration requirements so that juveniles that were less than fourteen at the time of their offenses were removed from the registry.[21] She now lives in Michigan with her husband and two children, whom she works hard to protect from the experiences that defined her childhood.[22] She still lives in fear of vigilante violence and continues to track news stories of attacks on sex offender registrants across the county.[23]

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[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *See* MICH. COMP. LAWS ANN. § 28.734 (West) (repealed 2021) (criminalizing registered sex offenders living, working, or loitering within a "student safety zone," defined as within 1,000 feet of a school with few exceptions). The law was repealed after a Sixth Circuit decision held that its requirements were "very burdensome" and resembled "the ancient punishment of banishment." *See* Does #1–5 v. Snyder, 834 F.3d 696, 701 (6th Cir. 2016).
[19] Stillman, *supra* note 2.
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*

Leah DuBuc's story is far from rare: approximately 200,000 individuals are on sex offender registries for offenses committed when they were juveniles.[24] Upon release from juvenile detention or prison, they are subject to registration laws which are a set of procedures that offenders must follow to disclose and periodically update information. That process typically includes disclosing a current photograph, height, age, current address, school attendance, and place of employment in each jurisdiction in which they reside, work, and attend schools to law enforcement authorities; this process in addition to other collateral laws can define the rest of their lives.[25]

In the United States, up to 70% of sexual offenses against children are perpetrated by *other children*, not exclusively out of predation, but because of factors such as ignorance and impulsivity.[26] Young people face registration due to developmentally normal behavior, such as playing doctor or consensual teen romances,[27] most often committed by slightly older relatives, playmates, or consenting partners.[28] These offenders often face the same registration and community notification requirements as adult offenders, regardless of the severity of the crime.[29]

This is a sensitive and highly emotional topic: this Note is not meant to undermine the harm done to many young victims by juvenile sex offenders nor the deep concern for the well-being of children by advocates and lawmakers. The government has the obligation to promote public safety by holding offenders accountable and instituting effective crime prevention measures.[30] However, juvenile sex offender registration policies are not a solution to the very complex problem of sexual violence. This Note focuses on the largely undifferentiated harshness of the penalties levied upon juvenile offenders, analyzes the breadth of the accompanying collateral consequences, and asserts that such punishments are at odds with the traditional notions of juvenile justice and should be found unconstitutional.

Instances of sexual misconduct involving children typically exhibit less aggression, occur over a shorter duration, and tend to be more experimental than deviant.[31] Despite these important differences, the policy of sex offender registration applies indiscriminately, without regard to differential levels of dangerousness or severity of the crime.

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[24] *See* MALIK PICKETT ET AL., LABELED FOR LIFE: A REVIEW OF YOUTH SEX OFFENDER REGISTRATION LAWS 2 (Juv. L. Ctr. ed., 2020).

[25] NICOLE PITTMAN, RAISED ON THE REGISTRY: THE IRREPARABLE HARM OF PLACING CHILDREN ON SEX OFFENDER REGISTRIES IN THE US 2 (Hum. Rts. Watch ed., 2013).

[26] Elizabeth Letourneau & Luke Malone, *9-Year-Olds Are Being Forced to Register as Sex Offenders. That Might Finally Change*, SLATE (Feb. 1, 2022, 12:06 PM), https://slate.com/news-and-politics/2022/02/john-walsh-sex-offender-registry-change.html [https://perma.cc/ZV65-A4RY].

[27] PICKETT ET AL., *supra* note 24, at 2.

[28] *See* Letourneau & Malone, *supra* note 26.

[29] PICKETT ET AL., *supra* note 24, at 3.

[30] *See, e.g.*, United States v. Salerno, 481 U.S. 739, 750 (1987) ("[T]he Government's general interest in preventing crime is compelling . . . .").

[31] PITTMAN, *supra* note 25, at 28.

Juvenile sex offenders almost always receive harsher penalties because their crimes almost always involve other children, and federal and state laws generally subject those who offend against children to harsher penalties, largely without regard to the age of the offender. This is an ongoing gap in the law that affects as many as 200,000 individuals who are on sex offender registries for offenses committed while under the age of eighteen.[32]

Considering the Supreme Court's recognition that juvenile offenders have diminished culpability and a greater capacity for change, this Note argues that life terms on the sex offender registry for juveniles violate the Fourteenth Amendment Equal Protection Clause. While sex offender registries have been constitutionally challenged in a variety of other ways including through the Ex Post Facto Clause, the Fourteenth Amendment Due Process Clause, and the Eighth Amendment Cruel and Unusual Punishment Clause, the issue has been under-litigated on equal protection grounds.[33] However, as a legislative choice affecting individual rights, the line drawn by the legislature about who should be on the sex offender registry and who should not be is open to challenge under the Equal Protection Clause, an avenue Justice Souter endorsed in a concurrence.[34] This Note challenges juvenile sex offender registration policies only under the Equal Protection Clause.

Part I of this Note reviews the historical background leading to the development of sex offender registration laws and examines relevant Supreme Court precedent. Part II analyzes the principles of juvenile justice, the application of juvenile sex offender registration policies, and the collateral consequences of youth sex offender registration. Part III argues that registered juvenile offenders should be considered a quasi-suspect class and thus receive intermediate scrutiny in equal protection analysis, and challenges the constitutionality of juvenile sex offender registries, particularly the South Carolina statutory scheme. Part IV examines the turning legal tide against juvenile registration through the recent Model Penal Code draft and state supreme court decisions on the constitutionality of juvenile sex offender registration policies. Finally, Part V offers policy analysis and recommendations for state legislatures to create effective registration schemes for juvenile sex offenders, specifically tailored to the specific needs and circumstances of youth sex offenders.

I. HISTORICAL BACKGROUND OF REGISTRATION LAWS

Two cultural phenomena are responsible for the current state of overly punitive juvenile registration laws: the use of public humiliation and community surveillance

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[32] *See* PICKETT ET AL., *supra* note 24, at 2.

[33] *See, e.g.*, Smith v. Doe, 538 U.S. 84 (2003) (Ex Post Facto Clause); Conn. Dep't of Pub. Safety v. Doe, 538 U.S. 1 (2003) (Due Process Clause); *In re* C.P., 967 N.E.2d 729 (Ohio 2012) (Cruel and Unusual Punishment Clause).

[34] Conn. Dep't of Pub. Safety v. Doe, 538 U.S. 1, 10 (2003) (Souter, J., concurring).

as expressions of societal disgust of the accused, and a moral panic that over-inflated the risk of crimes perpetrated by and against children that began in the 1980s.

A. The Scarlet Letter in Colonial America and Beyond

Sex offender registries are a relatively modern development, but the impulses behind them are not. Public humiliation and shame were common instruments of punishment for criminal offenders in colonial America, much like the famous scarlet letter punishment.[35] In colonial America, imprisonment was reserved largely for debtors and those awaiting trial,[36] "[o]nce a suspect was convicted, the judge usually ordered them executed, flogged, or shamed."[37] While the stockade was the most popular punishment, judges often got creative.[38] For example, those convicted of moral offenses in colonial Virginia were frequently subjected to such punishments, like women "who had erred from the path of virtue" that had "to make [a] public confession while standing on stools in the church, with white sheets wrapped around them and white wands in their hands."[39] These punishments were inflicted to punish the offender and deter others from committing similar acts.[40] Critically, these punishments were limited in duration. While never explicitly declared unconstitutional, public shaming punishments have long since fallen out of favor as urbanization and migration undermined the power of these punishments around the time of revolutionary America.[41]

In 1910, the Supreme Court held in *Weems v. United States* that a term of imprisonment followed by constant police surveillance for the rest of one's life, as part of a criminal sentence, violated the Eighth Amendment's Cruel and Unusual Punishment Clause:

> His prison bars and chains are removed, it is true, after twelve years, but he goes from them to a perpetual limitation of his liberty. He is forever kept under the shadow of his crime, forever kept within voice and view of the criminal magistrate, not being

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[35] Stephen R. McAllister, *"Neighbors Beware": The Constitutionality of State Sex Offender Registration and Community Notification Laws*, 29 TEX. TECH L. REV. 97, 122 (1998). *See generally* HAWTHORNE, *supra* note 1.

[36] Brian Palmer, *Can We Bring Back the Stockades?*, SLATE (Nov. 15, 2012, 4:37 PM), https://slate.com/news-and-politics/2012/11/public-shaming-sentences-can-judges-subject-criminals-to-humiliation.html [https://perma.cc/EZ9G-2M8Z].

[37] *Id.*

[38] *Id.*

[39] Davis Y. Paschall, Crime and Its Punishment in Colonial Virginia: 1607–1776, at 27 (1937) (M.A. thesis, College of William & Mary) (on file with W&M Scholar Works).

[40] McAllister, *supra* note 35, at 123.

[41] *See* Palmer, *supra* note 36.

> able to change his domicil without giving notice to the "authority immediately in charge of his surveillance," . . . . Even that hope is taken from him, and he is subject to tormenting regulations that, if not so tangible as iron bars and stone walls, oppress as much by their continuity, and deprive of essential liberty. No circumstance of degradation is omitted. It may be that even the cruelty of pain is not omitted. He must bear a chain night and day.[42]

Sex offender registration policies derive from both of these impulses: public shaming and lifelong surveillance. Though these types of punishments have largely fallen out of favor or been declared unconstitutional, sex offender registries remain popular with the American public.[43]

B. "Stranger Danger" Kidnappings and the Legislative Response: SORNA and Megan's Law

Multiple high profile stranger danger kidnapping cases around the 1980s fueled Americans' anxieties about child kidnapping and exploitation, like those of Etan Patz, Jacob Wetterling, Adam Walsh, and Megan Kanka.[44] The emergent twenty-four hour news cycle publicized these stark and unique tragedies, the murder of innocent young children, leading some commentators to identify "a national epidemic" of child abductions and disappearances.[45] The grieving parents of the murdered children often appeared on television, which helped propel the emerging moral panic of widespread child abduction.[46] These advocates claimed that as many as 50,000 American children were abducted by strangers annually, although the actual number was somewhere between 100 to 300.[47] According to FBI statistics "on average, fewer than 350 people under the age of twenty-one were abducted by strangers in the United States per year since 2010."[48]

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[42] 217 U.S. 349, 366 (1910).

[43] *See* David P. Connor & Richard Tewksbury, *Public & Professional Views of Sex Offender Registration and Notification*, 18 CRIMINOLOGY, CRIM. JUST., L. & SOC'Y 1, 2–3 (2017).

[44] *See* PAUL M. RENFRO, STRANGER DANGER: FAMILY VALUES, CHILDHOOD, AND THE AMERICAN CARCERAL STATE 4–5, 12, 18 (2020).

[45] *Id.* at 4.

[46] *See id.* at 4–6. Moral panics are a phenomenon studied in the fields of sociology, criminology, and gender and sexuality studies. While there are many definitions, the definition used in the source material and for purposes of this Note is that a moral panic is a crusade waged by aggrieved parties and "moral entrepreneurs" who do so in the wake of a perceived epidemic or crisis, substantiated through emotional accounts and embellished statistics. Moral panics often follow a similar cycle: putative threat, collective outrage, demonization, and state repression before the panic dissipates.

[47] *Id.* at 4.

[48] *Kidnapped Children Make Headlines, but Abduction Is Rare in U.S.*, REUTERS (Jan. 11,

This cultural narrative had a profound impact on youth: a 1987 survey found that 76% of children surveyed were "very concerned" about kidnapping, the top fear in the poll, more than nuclear war or the spread of AIDS.[49] The comedian John Mulaney characterized his childhood experiences growing up in the height of the stranger danger panic: "I thought I was going to be murdered my entire childhood. In high school people were like, 'What are your top three colleges?' I was like, 'Top three colleges? I thought I would be dead in a trunk with my hand hanging out of the taillight by now.'"[50] While humorous, Mulaney's sentiment is indicative of the state of fear many Americans lived in.

At the same time, the idea of the "superpredator" became popular. The term characterized mostly Black teenage boys as "murderers, rapists, and muggers" who "place[d] zero value on the lives of their victims." This harmful caricature was based on the misleading statistic that 6% of the population of boys examined accounted for more than half of serious crimes and two-thirds of all violent crimes committed by the entire cohort.[51] In the wake of this panic, many states passed laws passed targeting juvenile sex offenders. The prediction of an emerging superpredator threat was not borne out when the juvenile murder arrests had fallen by two-thirds, but it did have a profound effect on the state criminalization of juvenile activities.[52]

A combination of emotional stories, cultural anxieties, and over-inflated statistics weaponized the stranger danger myth and changed the way Americans parent and govern, creating new legal and cultural mechanisms designed to keep children safe.[53] In response to the stranger danger panic, Congress passed multiple criminal reforms and created a system for sex offender registries.[54] The Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act of 1994 was the first federal law that addressed sex offender registration.[55] The Wetterling

2019, 3:31 PM), https://www.reuters.com/article/us-wisconsin-missinggirl-data/kidnapped-children-make-headlines-but-abduction-is-rare-in-u-s-idUSKCN1P52BJ [https://perma.cc/R6ZP-S7AH].

[49] RENFRO, *supra* note 44, at 4.

[50] JOHN MULANEY: KID GORGEOUS AT RADIO CITY (Netflix 2018) (beginning at 19:42).

[51] John DiLulio, *The Coming of the Super-Predators*, WASH. EXAM'R (Nov. 26, 1995, 12:00 AM), https://www.washingtonexaminer.com/weekly-standard/the-coming-of-the-super-predators [https://perma.cc/VJB3-XEBG].

[52] *See* Carroll Bogert & Lynnell Hancock, *"Superpredator": The Media Myth That Demonized a Generation of Black Youth*, MARSHALL PROJECT, https://www.themarshallproject.org/2020/11/20/superpredator-the-media-myth-that-demonized-a-generation-of-black-youth [https://perma.cc/3XQT-EBKY] (last visited Mar. 4, 2024).

[53] *See* RENFRO, *supra* note 44, at 4, 7.

[54] *See, e.g.*, 34 U.S.C.A. §§ 20911–932.

[55] 42 U.S.C. § 14071 (repealed by Adam Walsh Child Protection and Safety Act of 2006, 42 U.S.C. §§ 20911–932); *see* Stillman, *supra* note 2 (explaining that the statute was passed in response to the abduction and murder of Jacob Wetterling while riding his bicycle in a small town in Minnesota, strongly advocated by his mother, Patty Wetterling).

Act required states to create registries of offenders convicted of sexually violent offenses or crimes against children and established heightened registration requirements for highly dangerous sex offenders.[56] States had the discretion to communicate registration information to the public, but were not required to publish all of it.[57] State non-compliance would result in a 10% reduction of federal block grant funds for criminal justice.[58] However, the penalty would not be assessed if the federal Attorney General determined that a state has "substantially implement[ed]" the program or that the state had a "demonstrated inability to implement certain provisions that would place the jurisdiction in violation of its constitution, as determined by a ruling of the jurisdiction's highest court."[59]

In response to the abduction and murder of seven-year-old Megan Kanka, Congress amended the Wetterling Act two years later to require law enforcement agencies to release information about registered sex offenders that law enforcement deems relevant to protecting the public.[60] This was superseded by the Adam Walsh Protection and Safety Act in 2006, specifically Title I of the Act, the Sex Offender Registration and Notification Act (SORNA).[61] SORNA provides a set of federal guidelines that establish a comprehensive national sex offender registration system.[62] Specifically, the Zyla Amendment further expanded the breadth of the act to include certain juvenile court adjudications in the Act's definition.[63] The Zyla Amendment was spurred by the testimony of a teenager, Amie Zyla, who was sexually abused at age eight by another youth who went on to reoffend years later.[64] She said to Congress: "We cannot sit back and allow kids to continue to be hurt . . . . The simple truth is that juvenile sex offenders turn into adult predators."[65] Amie Zyla's testimony is a window into the debate surrounding juvenile sex offense: highly emotional and unsupported by data.

SORNA went beyond the initial scope of sex offender registration and notification, especially for juveniles, by: (1) mandating that children register;[66] (2) establishing a new federal and state criminal offense of failure to register, punishable by a term of imprisonment;[67] (3) requiring registration for offenses that are not necessarily

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[56] 42 U.S.C. § 14071.

[57] *See id.* § 14071(e)(1).

[58] *See id.* § 14071(g)(2).

[59] 34 U.S.C.A. § 20927(b)(1) (West).

[60] 42 U.S.C. § 14071(e)(2) (repealed 2006).

[61] *See* Adam Walsh Child Protection and Safety Act, 42 U.S.C. §§ 20911–932.

[62] *Id.*

[63] *See* 34 U.S.C.A. § 20911(8) (West).

[64] Kimberly Osias, *Teen Pushes Change in Youth Sex Offender Laws*, CNN (June 9, 2005, 9:06 PM), http://www.cnn.com/2005/US/06/09/amies.law/index.html?section=cnn_top stories [https://perma.cc/5XNS-3YE5].

[65] *Id.*

[66] 34 U.S.C.A. § 20911(8).

[67] 34 U.S.C.S. § 20913(e) (LexisNexis); 18 U.S.C.S. § 2250(a) (LexisNexis).

sexual in nature, like indecent exposure, kidnapping, false imprisonment,[68] and public urination; and (4) requiring jurisdictions to reclassify the level of risk for each sex offender based on the crime of conviction or adjudication, not individualized risk assessment.[69] The federal laws set a floor for state registration policies for juveniles, but many states have gone far above it.[70]

C. Supreme Court Precedent Challenging Registries

In the 2003 case *Smith v. Doe*, the Supreme Court held that Alaska's sex offender registry was a civil, nonpunitive regulatory scheme and that its retroactive application did not violate the Ex Post Facto Clause.[71] Critical to the finding that Alaska's registry was nonpunitive were the facts that: (1) the regulatory scheme has not been regarded in the nation's history and traditions as punishment; (2) the Act does not impose an affirmative disability or restraint; (3) it does not promote the traditional aims of punishment, even though it might deter future crimes; (4) the Act has a rational connection to the legitimate nonpunitive purpose of public safety; and (5) the regulatory scheme is not excessive without respect to the Act's purpose, but based on the issue whether the regulatory means chosen are reasonable in light of the nonpunitive objective.[72]

In the nineteen years following the *Smith* holding, more data has shown that the factual underpinnings of this opinion are no longer true, specifically with respect to juveniles.[73] The Supreme Court's stare decisis analysis includes temporal and doctrinal considerations of the evolving factual assumptions and understandings that are the basis of existing precedent.[74] The Court has described the inquiry as "whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification."[75] Juvenile sex offenders and their families face enormous collateral consequences and affirmative disabilities as a direct result of being listed on registries.[76]

Specifically, the Court found that there was no evidence that the registry led to substantial occupational or housing disadvantages for former sex offenders that would not have otherwise occurred.[77] Additionally, the Court found that the registration and

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[68] 34 U.S.C.A. § 20911(5) (West).

[69] 34 U.S.C.A. § 20911(2)–(4) (West).

[70] *See, e.g.*, *infra* notes 182–88.

[71] 538 U.S. 84, 105–06 (2003).

[72] *Id.* at 86–87.

[73] *See, e.g.*, Agostini v. Felton, 521 U.S. 203, 226 (1997) (overruling a prior decision because the factual premises are no longer valid); *see also infra* Part II.

[74] Randy J. Kozel, *Stare Decisis as Judicial Doctrine*, 67 WASH. & LEE L. REV. 411, 425–26 (2010).

[75] *Id.* at 426 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 855 (1991)).

[76] *See infra* Section II.B.

[77] Smith v. Doe, 538 U.S. 84, 100 (2003).

periodic update requirement did not impose an affirmative disability because it did not require updates to be made in person and did not restrict freedom to move, live, and work, only requiring registered offenders to inform the authorities after the fact.[78]

Finally, the Court found that sex offender registries do not promote the traditional aims of punishment because the dissemination of truthful information in furtherance of a legitimate governmental interest is not punishment.[79] The majority opinion compared the function of public registries to the normal transparency required by American criminal law—like public indictment, trial, and imposition of the sentence—and noted that there are often adverse social consequences for the defendant. The opinion distinguished public registries from the colonial shaming punishments because the State does not make the "publicity and the resulting stigma an integral part of the objective of the regulatory scheme."[80] The Court acknowledged that the extent to which a criminal conviction subjects the offender to public shame, the humiliation "increase[s] proportion to the extent of the publicity" and noted the danger of widespread dissemination through the internet because "the geographic reach of the Internet is greater than anything which could have been designed in colonial times."[81] The Court found that these facts do not render internet notification punitive, noting that Alaska's registry does not provide the public with the opportunity to comment underneath registry listings and that it took users three steps of navigating the website to locate individual postings.[82]

The Court's findings were disputed by Justice Souter in his concurrence in which he argued that widespread dissemination of offenders' names and information serves "not only to inform the public but also to humiliate and ostracize the convicts."[83] Additionally, he argued that it "bears some resemblance to shaming punishments that were used earlier in our history to disable offenders from living normally in the community."[84] Further, Justice Souter recognized the punitive character of registries, arguing that "[s]election makes a statement, one that affects common reputation and sometimes carries harsher consequences, such as exclusion from jobs or housing, harassment, and physical harm."[85]

Smith v. Doe was argued on November 13, 2002, and decided on March 5, 2003.[86] While the internet was a growing medium at the time, the digital landscape was far different than today's.[87] For example, MySpace launched in 2003 and

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[78] *Id.* at 98, 101.
[79] *Id.* at 99.
[80] *Id.* at 98–99.
[81] *Id.* at 99.
[82] *Id.*
[83] *Id.* at 109 (Souter, J., concurring).
[84] *Id.*
[85] *Id.*
[86] *Id.* at 84 (majority opinion).
[87] *See generally* Mary Madden & Lee Raine, *America's Online Pursuits*, PEW RSCH. CTR.

Facebook in 2004, both after the decision in *Smith*.[88] Now, private commercial databases retain all records that have ever been published online, even when the state removes individual offenders, with convenient prompts to "Just Click the Facebook Icon" and share the registration on social media for people to comment underneath.[89] The advancement in technology and the evolution of social media stand firmly in contrast to the Court's reasoning in *Smith*.[90]

Importantly, lower courts have held that the Supreme Court's holding in *Smith v. Doe* does not foreclose plaintiffs from claiming that state SORNA regimes are punitive.[91]

The Supreme Court only addressed sex offender registration laws for adults one other time; in *Connecticut Department of Public Safety v. Doe*, the Supreme Court held that even if public notification provisions of Connecticut's sex offender registration law deprived sex offenders of a liberty interest, the Due Process Clause did not entitle offenders to a hearing to determine whether they were currently dangerous before their inclusion in publicly disseminated sex offender registry because Connecticut's law decided that the registry requirement shall be based on previous conviction, not current dangerousness.[92] The majority "held that mere injury to reputation, even if defamatory, does not constitute the deprivation of a liberty interest."[93] In his concurrence, Justice Souter left open the possibility of an equal protection challenge between offenders considered eligible to seek discretionary relief from the courts and those who are not is a legislative choice that affects individual rights.[94]

II. APPLICATION AND MISAPPLICATION OF JUVENILE SEX OFFENDER REGISTRATION POLICIES

A. Principles of Juvenile Justice & Overview of State Registration Schemes

The juvenile justice system in this country was founded on the principles that children should be treated differently than adults and that rehabilitation is a more important consideration than the traditional aims of punishment, like retribution or

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(Dec. 22, 2003), https://www.pewresearch.org/internet/2003/12/22/americas-online-pursuits/ [https://perma.cc/4RKY-PPDG].

[88] *See* Niraj Chokshi, *Myspace, Once the King of Social Networks, Lost Years of Data From Its Heyday*, N.Y. TIMES (Mar. 19, 2019), https://www.nytimes.com/2019/03/19/business/myspace-user-data.html [https://perma.cc/AH6P-UTSQ]; *Smith*, 538 U.S. at 84.

[89] Stillman, *supra* note 2.

[90] *See* Stillman, *supra* note 2, at 5.

[91] *See* Does v. Wasden, 982 F.3d 784, 791 (9th Cir. 2020).

[92] 538 U.S. 1, 4, 6–7 (2003) (citing Paul v. Davis, 424 U.S. 683 (1976)).

[93] *Id.* at 6–7.

[94] *Id.* at 10 (Souter, J., concurring).

deterrence.[95] In recognition of this, juveniles are afforded greater protections in criminal proceedings: juvenile courtrooms are generally closed to the public,[96] and juveniles are adjudicated delinquent, rather than convicted of a crime, in the interest of protecting juveniles' employment and educational prospects.[97] These protections apply to almost all youth in juvenile criminal proceedings, except youth adjudicated delinquent of sex offenses.[98]

Thirty-eight states require youth to register as sex offenders.[99] Twelve states and the District of Columbia do not register any child offenders adjudicated delinquent in juvenile court, but require juveniles convicted of sex offenses in adult court to register.[100]

Four states statutorily require lifetime registration for some juvenile offenders: Florida, South Carolina, Virginia, and Wyoming.[101] Eight states require youth to register for twenty-five years.[102] Nineteen states have lifetime registration for some youth as well as a shorter period of registration based on the person's offense history or the severity of the offense.[103]

Sexual abuse of children is a grievous harm and a pressing issue, but the one-size-fits-all approach of public registration of juveniles is not an effective or constitutional policy solution. Juveniles convicted of sexual offenses are not "superpredators," and many on the registry commit sexually non-violent crimes, many of which are

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[95] *See* People v. Taylor, 850 N.E.2d 134, 170 (Ill. 2006) ("The policy that seeks to hold juveniles accountable for their actions and to protect the public does not negate the concept that rehabilitation remains a more important consideration in the juvenile justice system than in the criminal justice system . . .").

[96] *See* Smith v. Daily Mail Pub. Co., 443 U.S. 97, 107 (1979) ("[A] hallmark of our juvenile justice system in the United States that virtually from its inception at the end of [the Nineteenth] [C]entury its proceedings have been conducted outside of the public's full gaze and the youths brought before our juvenile courts have been shielded from publicity."). *See generally* VA. CODE ANN. § 16.1-302(C) (West) (excluding the general public from juvenile court hearings).

[97] *See, e.g.*, Kellum v. Tex. Workforce Comm'n, 188 S.W.3d 411, 414 (Tex. App. 2006) (providing that an adjudication is not a conviction for purposes of filling out a job application).

[98] *See, e.g.*, *infra* Section II.B.6.

[99] PITTMAN, *supra* note 25, at 17. The thirty-eight jurisdictions are: Alabama, Arizona, Arkansas, California, Colorado, Delaware, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nevada, New Hampshire, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Virginia, Washington, Wisconsin, and Wyoming.

[100] *Id.* The thirteen jurisdictions are: Alaska, Connecticut, District of Columbia, Georgia, Hawaii, Maine, Montana, Nebraska, New Mexico, New York, Utah, Vermont, and West Virginia.

[101] *Id.* at 4.

[102] *Id.*

[103] *Id.*

relatively harmless.[104] Thirty-two states registered flashers and streakers.[105] Thirteen states required individuals to register for urinating in public. In two additional states, urinating in public required registration only if a child was present.[106] Twenty-nine states required registration for teenagers who had consensual sex with another teenager.[107]

The advent of new technologies has made it far easier for many teens to be charged with crimes while participating in developmentally and socially appropriate activities.[108] For example, two high schoolers in a relationship who traded nude cellphone photos with no evidence of coercion or harassment were both charged with a felony of "exploiting a minor," which carries years of prison and decades on the sex offender registry.[109] The legislative intent behind criminalization of child pornography was to protect children from exploitation and abuse, not to criminalize consensual sex between minors.[110] Prosecutors and courts are weaponizing the application of the plain language of the statutes written before the internet was invented and popularized. For example, the Maryland Court of Appeals upheld the conviction of a teenage girl who had voluntarily self-produced and shared a graphic video of herself on the grounds that state legislators did not include exceptions in the law for consensual sex or for self-produced child pornography.[111] In the opinion, the Court explicitly recognized "that there may be compelling policy reasons for treating teenage sexting different than child pornography" and urged reconsideration by the Maryland General Assembly.[112]

While state laws and registration schemes vary widely, the largely consistent conclusion is that registration policies largely conflict with traditional notions of juvenile justice.

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[104] *See, e.g.*, HUM. RTS. WATCH, NO EASY ANSWERS: SEX OFFENDER LAWS IN THE US 39 (2007). Twenty-nine states required registration for teenagers who had consensual sex with another teenager.

[105] *Id.* at 40.

[106] *Id.*

[107] *Id.*

[108] *See* PICKETT ET AL., *supra* note 24, at 2.

[109] Erik Eckholm, *Prosecutors Weigh Teenage Sexting: Folly or Felony?*, N.Y. TIMES (Nov. 13, 2015), https://www.nytimes.com/2015/11/14/us/prosecutors-in-teenage-sexting-cases-ask-foolishness-or-a-felony.html [https://perma.cc/Z79G-DDPW].

[110] *See* New York v. Ferber, 458 U.S. 747, 756–57 (1982) (holding that states have a "compelling" interest in "safeguarding the physical and physiological well-being of a minor" from sexual abuse that occurs during the creation of traditional mediums of child pornography).

[111] *In re* S.K., 215 A.3d 300, 315 (Md. App. Ct. 2019); Ann E. Marimow, *Md.'s Top Court Upholds Child Pornography Charge Against Teen Who Texted Friends a Video of Herself*, WASH. POST (Aug. 28, 2018, 5:35 PM), https://www.washingtonpost.com/local/legal-issues/mds-top-court-upholds-child-pornography-charge-against-teen-who-texted-friends-a-video-of-herself/2019/08/28/95cd6ba6-822c-11e9-95a9-e2c830afe24f_story.html [https://perma.cc/W78K-J5FS].

[112] *In re* S.K., 215 A.3d at 315.

B. Collateral Consequences of Juvenile Sex Offender Registration Policies

Registration policies for juvenile offenders produce consequences that are antithetical to the ideals that the juvenile justice system is founded upon and encourages the harms the juvenile justice system was designed to prevent. Some of the consequences, such as harm to mental health, vulnerability to sexual predation, negative impacts on education and accompanying prosocial activities, increased levels of homelessness and housing insecurity, severely limited privacy, and exposure to vigilante violence are explained below.

1. Mental Health

The scarlet letter effect of sex offender registries can have a severe impact on the social relationships and the mental health of the youth on the registries. Children on sex offender registries tend to be more depressed and anxious than their peers.[113] 84.5% of children in a study described negative psychological impacts due to their status as a registered sex offender, including depression, isolation, difficulty forming or maintaining relationships, and suicidal ideation.[114] Registered youth are four times more likely to report a recent suicide attempt compared to non-registered children who have engaged in harmful or illegal sexual behavior.[115]

Additionally, 76.7% of youth offenders state that their registration status has had serious repercussions for their families and family relationships.[116] These repercussions can include adding to family economic challenges and causing difficulty in securing and maintaining an approved residence.[117] Youth sex offenders are alienated and face long-term public humiliation and barriers to education and to employment, all of which exacerbate the mental health difficulties that many youth offenders face.

Victims of sexual assault face many mental health challenges, including depression, self-harm, substance abuse, and post-traumatic stress disorder.[118] Juvenile sex

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[113] Rebecca Beitsch, *States Slowly Scale Back Juvenile Sex Offender Registries*, PEW RSCH. CTR. (Nov. 19, 2015, 12:00 AM), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2015/11/19/states-slowly-scale-back-juvenile-sex-offender-registries [https://perma.cc/GN5V-USH4].

[114] PITTMAN, *supra* note 25, at 51.

[115] Riya Saha Shah, *Ten Ways Youth Sex Offender Registration Harms Kids*, ABA (Dec. 10, 2018), https://www.americanbar.org/groups/litigation/committees/childrens-rights/practice/2018/ten-ways-youth-sex-offender-registration-harms-kids/ [https://perma.cc/8N4S-ZANT].

[116] PITTMAN, *supra* note 25, at 58.

[117] *Id.*

[118] *Effects of Sexual Violence*, RAPE, ABUSE & INCEST NAT'L NETWORK (RAINN), https://www.rainn.org/effects-sexual-violence [https://perma.cc/S7HX-4XZM] (last visited Mar. 4, 2024).

offender registries do not adequately stop sexual assault, so the mental health harms caused by registration policies are additional to the harms suffered by the victims.

2. Vulnerability to Sexual Predation

A 2017 study reveals that registered children are nearly twice as likely to have experienced an unwanted sexual assault that involved contact or penetration in the past year, when compared to non-registered children who have also engaged in harmful or illegal sexual behaviors.[119] For female juvenile offenders, inclusion on the sex offender registry can reinforce harmful stereotypes exacerbated by the easy availability of registrants' addresses and contact information. For example, one female youth sex offender stated that "[r]andom men called [her] house wanting to 'hook up' with" her because they assumed that she was sexually promiscuous.[120]

3. Education

Children adjudicated of sex offenses can be expelled from public school and prohibited from participating in healthy prosocial activities such as sports and youth clubs.[121] 52.4% of respondents in one study stated that they had experienced severe interruptions in their primary or secondary education as a result of their registration.[122]

The harassment Leah DuBuc received in college is far from an isolated experience. Youth sex offenders often face targeting from fellow students and campus police due to the stigma of registration. Anecdotally, students report dropping out due to this harassment.[123]

This is exemplified by the story of Luke Heimlich, the number one college baseball pitcher in the country for Oregon State University.[124] As a fifteen-year-old, he pled guilty to a charge of sexually molesting a six-year-old family member.[125] As part of the plea deal, Heimlich was placed on two years' probation, attended court ordered classes, had to register for five years as a Level One sex offender in Washington as

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[119] Elizabeth J. Letourneau et al., *Effects of Juvenile Sex Offender Registration on Adolescent Well-Being: An Empirical Examination*, 24 PSYCH. PUB. POL'Y & L. 105, 114 (2017).

[120] PITTMAN, *supra* note 25, at 58 (quoting Interview by Hum. Rts. Watch with Molly K., in Dover, Del. (Aug. 2012)).

[121] Lisa Ann Minutola & Riya Saha Shah, *A Lifetime Label: Juvenile Sex Offender Registration*, DEL. LAW., Winter 2015–2016, at 8, 10.

[122] PITTMAN, *supra* note 25, at 72.

[123] *Id.* at 1 ("Jacob attended a local university in Big Rapids, Michigan, but ended up dropping out. '[I was] harassed for being on the registry,' he said. 'The campus police followed me everywhere.'").

[124] Kurt Streeter, *He Was Convicted of Molesting a 6-Year Old. Should He Have a Future in Baseball?*, N.Y. TIMES (May 7, 2018), https://www.nytimes.com/2018/05/07/sports/luke-heimlich-sex-crime.html [https://perma.cc/NJG8-JPEM].

[125] *Id.*

someone who was low risk and unlikely to become a repeat offender, and write a letter apologizing to the victim.[126] Heimlich denied committing the crime and insisted that he plead guilty in an effort to quickly dispense with the matter, avoid a lengthy felony trial that would necessarily involve his niece testifying, and move forward as a family matter.[127]

As a juvenile, his records were sealed.[128] Due to a clerical error by the state and local police departments in Oregon, he was issued a citation for failure to register as a sex offender despite registering before arriving to campus as a freshman and notifying the police every time he moved.[129] The charge was easily dismissed, and Heimlich continued to be a standout college player and top prospect for major league baseball.[130] However, the dismissed charge remained in Oregon's court records, leading to headlines like "THE STAR OF COLLEGE BASEBALL'S BEST TEAM IS A CHILD MOLESTER."[131] Despite being a projected top pick in the Major League Baseball Draft, he went undrafted in 2017 and 2018, was disallowed from playing in the Chinese Professional Baseball League, and finally landed in the Mexican League.[132] Everywhere he goes, the stigma follows him and will likely continue to for the rest of his life for an offense he allegedly committed when he was fifteen.

4. Employment

Youth report losing their jobs or not being hired when an employer learns of their sex offender status and are categorically barred from certain professions altogether.[133] Many states expressly prohibit individuals on a registry from obtaining licensees for certain jobs by statute like in health care, education, and child-development.[134]

5. Housing and Homelessness

Lifetime registrants are ineligible for public housing, and many private landlords refuse to rent to those on the sex offender registry.[135] Eight states impose residency

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[126] *Id.*

[127] *Id.*

[128] *Id.*

[129] *Id.*

[130] *Id.*

[131] Anthony Barstow, *The Star of College Baseball's Best Team Is a Child Molester*, N.Y. POST (June 8, 2017), https://nypost.com/2017/06/08/the-star-of-college-baseballs-best-team-is-a-child-molester/ [https://perma.cc/UF37-C7Z2].

[132] James Wagner, *Luke Heimlich, College Star Convicted of Sex Crime, Quietly Makes Pro Debut in Mexico*, N.Y. TIMES (Apr. 10, 2019), https://www.nytimes.com/2019/04/10/sports/luke-heimlich-mexican-league.html [https://perma.cc/5BS5-3XSX].

[133] PITTMAN, *supra* note 25, at 73–75.

[134] *Id.* at 73.

[135] 42 U.S.C. § 13663(a) (1999); 24 C.F.R. § 960.204; HUM. RTS. WATCH, *supra* note 104, at 93.

restrictions on registered youth: Iowa, Michigan, Minnesota, Montana, North Dakota, Rhode Island, South Carolina, and Tennessee.[136] Families of youth sex offenders often must also abide by residency restrictions if they want to live together.[137] Municipal restrictions often prohibit registered individuals from living near places where children most often congregate like parks, schools, daycare centers, and playgrounds.[138] In some cities, these restrictions leave very few options for both juvenile and adult offenders. In the entire state of South Carolina, a study found that nearly half (45.4%) of all houses in the state would be restricted under the local 1,000-foot restriction zone.[139] Logically, finding housing is made even more difficult in more dense areas like cities. A study conducted in Orange County, Florida, found that the residency restrictions enacted would allow registered offenders to live in less than 4% of the county.[140] 44% of youth offenders in one study shared that they had experienced at least one period of homelessness because of residency restrictions.[141]

Additionally, residency restrictions often stipulate that offenders cannot live in or near the victim, as is often the case with abuse within the family, presenting parents with the difficult choice of deciding which child to keep within the family home.[142]

6. Privacy

Fifteen states publish juvenile offenders' names, addresses, and photos on a publicly available website, and those states that do not still publish those who offended as a juvenile once they turn eighteen.[143]

Sex offender laws often trump laws designed to keep juvenile criminal records private. For example, under Michigan's Holmes Youthful Trainee Act (HYTA), judges have discretion to allow a young offender to plead guilty.[144] If a young offender pleads guilty and completes a period of supervision without incident, the court's disposition is expunged, and the defendant's record is sealed with no

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[136] PICKETT ET AL., *supra* note 24, at 6.

[137] PITTMAN, *supra* note 25, at 6.

[138] HUM. RTS. WATCH, *supra* note 104, at 2–3.

[139] J.C. Barnes et al., *Predicting the Impact of a Statewide Residence Restriction Law on South Carolina Sex Offenders*, CRIM. JUST. POL'Y REV. 21, 28 (2008).

[140] Paul A. Zandbergen & Timothy C. Hart, *Reducing Housing Options for Convicted Sex Offenders: Investigating the Impact of Residency Restriction Laws Using GIS*, JUST. RSCH. & POL'Y 1, 18 (2006).

[141] PITTMAN, *supra* note 25, at 65.

[142] *Id.*

[143] Rebecca Beitsch, *States Slowly Scale Back Juvenile Sex Offender Registries*, PEW RSCH. CTR. (Nov. 19, 2015), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2015/11/19/states-slowly-scale-back-juvenile-sex-offender-registries [https://perma.cc/9H4N-6NYN].

[144] MICH. COMP. LAWS ANN. § 762.11 (West 2021).

conviction on record.[145] However, juvenile sex offenders who accepted a plea deal under HYTA are still required to register as sex offenders, despite not having a criminal record.[146] Plaintiffs adjudicated under HYTA and listed on the public sex offender registry sued in federal court and submitted affidavits describing how many were fired, unable to attend college, denied employment, evicted, expelled from law school, or unable to live with their child in subsidized housing.[147] The simple truth is that being listed on the sex offender registry was the but-for cause of substantial occupational and housing disadvantages for these plaintiffs, many of whom were juvenile offenders whose criminal records would otherwise be sealed.[148]

Even when someone is removed from a registry, the information can remain on nongovernmental sites for years. At age ten, Charla Roberts of Texas pulled down the pants of a male classmate at her public elementary school, a hurtful prank, but hardly a sexual act or a sex crime.[149] Roberts was adjudicated delinquent of indecency with a child and added to the state's online offender database for the next ten years.[150] She was removed from the registry in her early twenties with the help of Legal Aid.[151] However, in her case and many others, commercial databases still retain records of those expunged from state-published online registries.[152] Roberts learned that her information was on a commercial database which featured her photograph, race, age, and home address with the message: "To alert others about Charla Lee Roberts's Sex Offender Record . . . Just Click the Facebook Icon."[153] These companies demand that offenders pay steep fees to have the damaging and humiliating data removed.[154] One offender reported having to pay over $3,000 total to have their information removed from a multitude of commercial websites.[155]

Public registration puts children's safety at risk. More than 50% of registered youth report experiencing violence or threats of violence against themselves or family members that they directly attribute to their registration.[156] While these acts of vigilante violence can be as simple as vandalism, offenders remain a target for more serious crimes like assault and threats of death. In 2013, a South Carolina couple murdered a man they found on the South Carolina registry as well as his

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[145] *Id.*
[146] HUM. RTS. WATCH, *supra* note 104, at 76.
[147] Doe v. Sturdivant, No. 05-70869, 2005 WL 2769000, at *8 (E.D. Mich. Oct. 25, 2005), *aff'd sub nom.* Doe v. Mich. Dep't of State Police, 490 F.3d 491 (6th Cir. 2007); HUM. RTS. WATCH, *supra* note 104, at 76.
[148] *Doe*, 2005 WL 2769000, at *6.
[149] Stillman, *supra* note 2.
[150] *Id.*
[151] *Id.*
[152] *Id.*
[153] *Id.*
[154] *Id.*
[155] PITTMAN, *supra* note 25, at 49.
[156] *Id.* at 58 n.211.

wife, who was not a sex offender because "[t]hat's what child molesters get."[157] Because many of the offenses associated with juvenile registration occur in the home, the vigilantes end up terrorizing both the offender and the victim.[158] The rising tide of fringe conspiracy theories like QAnon and the belief that the 'deep state' and elites are pedophiles and child murderers engaged in child sex trafficking encourage vigilante violence against those registered, and provide vigilantes with an easy map to their house due to offenders' publicly accessible addresses.[159]

7. Effects from Race and Socioeconomic Levels

Registration policies disproportionately impact the most vulnerable youth: youth of color, youth with disabilities, LGBTQ+ youth, and low-income youth.

Youth of color are disproportionately represented on public sex offender registries, despite there being no evidence that youth of color are more likely to commit sexual offenses.[160] In California, 76% of registered youth are youth of color, while white youth make up only 24% of registered youth.[161] In Texas, there is a significantly higher percentage of Black juvenile offenders (25%) and Black adult offenders (21%) on the registry as compared to the populations of Black youths and adults (13.4%) in the state.[162]

Additionally, many juveniles on sex offender registries are on the autism spectrum or struggling with disabilities, but prosecutors and judges refuse to make exceptions out of fear of being "looked at as soft on sex offenders."[163] People on the spectrum often struggle with social communication, awareness, and experience, and often have intense interests, repetitive behaviors, and sensory differences, which can cause issues as they start dating and exploring their sexuality.[164] Additionally, people with

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[157] Eliott C. McLaughlin & Marlena Baldacci, *Neo-Nazis Feign Remorse, Taunt Family of Murdered Sex Offender*, CNN (May 8, 2014, 2:24 AM), https://www.cnn.com/2014/05/07/justice/south-carolina-neo-nazis-murder-sex-offender/index.html [https://perma.cc/8JRZ-2FH3].

[158] Beitsch, *supra* note 113.

[159] Kaitlyn Tiffany, *The Great (Fake) Child-Sex-Trafficking Epidemic*, THE ATLANTIC (Dec. 9, 2021), https://www.theatlantic.com/magazine/archive/2022/01/children-sex-trafficking-conspiracy-epidemic/620845/ [https://perma.cc/NV52-NEGE].

[160] PICKETT ET AL., *supra* note 24, at 2.

[161] *Id.*

[162] Sarah W. Craun & Poco D. Kernsmith, *Juvenile Offenders and Sex Offender Registries: Examining the Data Behind the Debate*, 70 FED. PROB. J. 45, 45 (2006); *QuickFacts: Texas*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/TX [https://perma.cc/8QKH-CTK9] (last visited Mar. 4, 2024).

[163] Mitchell Sunderland, *The Autistic Children Who Are Labeled as Sex Offenders*, VICE NEWS (Sept. 28, 2017, 1:22 PM), https://www.vice.com/en/article/kz7zxa/the-autistic-children-who-are-labeled-as-sex-offenders [https://perma.cc/EF46-YWBH].

[164] Melinda Wenner Moyer, *When Autistic People Commit Sexual Crimes*, SPECTRUM

intellectual disabilities often do not receive sex education. According to a 2014 survey, less than half as many autistic adults as compared to the control group responded that their parents and teachers had talked to them about sex.[165] Many of these factors combined with the rigidity of sex offense laws mean that thousands of juveniles on the spectrum are on sex offender registries. For example, a fourteen-year-old autistic boy had a crush to whom he made awkward and unrequited advances, which was encouraged by other children who thought it was cute.[166] However, he got frustrated and sent his crush a picture of his genitals.[167] His crush's parents requested that authorities press charges against him and he can no longer attend school or be left alone in a room with his little brothers.[168]

Additionally, registered youth are disproportionately from out-of-home care settings like group homes and foster care that have high supervision and mandatory reporting requirements.[169]

8. Penalties for Failure to Comply with Registration Requirements

Thirty states impose felony liability for failure to comply and ten others impose misdemeanor liability, despite the difficulty of registration and continuous updates.[170] Ten states impose a minimum term of incarceration, ranging from thirty-five days to two years minimum.[171] Seventeen states impose fines, ranging from $500–$10,000.[172] Fees associated with registration pose another burden on low-income individuals.[173]

C. Offenders Lacking Sexual Motivation and Predatory Intent

The one-size-fits-all sex-offender laws ignore the fact that many perpetrators are not sexually motivated, and that, therefore, the legislatively imposed punishments may have little relation to the individual perpetrator.[174]

In addition to this, many sexual offenses committed by juveniles are done out of immaturity, impulsivity, and sexual curiosity, rather than predatory intent.[175] Like

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NEWS (July 17, 2019), https://www.spectrumnews.org/features/deep-dive/when-autistic-people-commit-sexual-crimes/ [https://perma.cc/HM5H-MN34].

[165] S.M. Brown-Lavoie, M.A. Viecili & J.A. Weiss, *Sexual Knowledge and Victimization in Adults with Autism Spectrum Disorders*, J. AUTISM & DEV. DISORDERS 2188, 2191 (2014).

[166] Sunderland, *supra* note 163.

[167] *Id.*

[168] *Id.*

[169] PICKETT ET AL., *supra* note 24, at 2.

[170] *Id.* at 6.

[171] *Id.*

[172] *Id.* at 7.

[173] PITTMAN, *supra* note 25, at 75.

[174] *See supra* Section II.B.7.

[175] PITTMAN, *supra* note 25, at 28.

Leah DuBuc, these children are saddled with a label meant to be applied to dangerous predators that profoundly affects the rest of their lives, an especially disproportionate outcome considering important differences of intent.

Each of these aspects demonstrate that sex offender registries for juveniles serve as punishment, and are not rationally related to a state's asserted intent of protecting the public, instead functioning as a "scarlet letter" that is intrafamilial and multigenerational.[176]

The one-size-fits-all approach is overbroad and sweeps in teens consensually sexting, kids who 'pantsed' each other on the playground, and many autistic children who are unable to understand the effects of their actions.[177] Practically, this means that sex offender registries, undifferentiated by their dangerousness or likelihood to recidivate, are no longer useful tools for law enforcement and serve only a punitive function.

In fact, these well-meaning but misguided laws often have negative impacts for public safety because poor social support and psychological stress are important risk factors for sexual recidivism.[178] Successful reintegration into society requires stable living arrangements, supportive family, and steady employment.[179] The burdens imposed by registration actively hinder recovery and aggravate the risk of reoffending.[180] "Because these criminogenic effects can increase registrant recidivism, they tend to outweigh any public-safety benefits of self-protection and the enhanced possibilities for surveillance and deterrence of registrants."[181]

D. South Carolina State Registration Statute

South Carolina has some of the harshest laws and collateral consequences for juveniles adjudicated delinquent of sex crimes. Prior to May 2022, all youth adjudicated delinquent for *all* sexually based offenses were required to register as sex offenders, with no age restrictions.[182] By statute, registration was mandatory and for life.[183] Additionally, those adjudicated delinquent as juveniles cannot live in campus student housing, live within 1000 feet of places that often have children present, and must report their internet accounts.[184] The expungement statute only includes

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[176] *Id.* at 5.

[177] Stillman, *supra* note 2; *supra* Section II.B.7.

[178] MODEL PENAL CODE § 213.11 (AM. L. INST., Tentative Draft No. 5, 2022) (Reporters' Notes).

[179] *Id.*

[180] *Id.* ("Registration of juveniles has had distinctively harsh consequences, and assessments of its value have been especially negative.").

[181] *Id.*

[182] S.C. CODE ANN. § 23-3-430(A)(C) (2015).

[183] S.C. CODE ANN. § 23-3-430(A), -460 (2015).

[184] S.C. CODE ANN. §§ 23-3-465, -535, -555 (2015).

misdemeanors and status offenses, so registerable offenses are not eligible for expungement and there is no mechanism for removal from the registry.[185]

The South Carolina Supreme Court held in *Powell v. Keel* in 2021 that the requirement that sex offenders register for life without any opportunity for judicial review violates due process because it is arbitrary and not rationality related to the South Carolina General Assembly's stated purpose of protecting those with a high risk of reoffending.[186] On May 23, 2022, Governor Henry McMaster signed Act 221 into law which affords sex offenders in South Carolina a mechanism to seek removal from the lifetime sex offender registry.[187]

The Act overhauled the treatment of juvenile sex offenders, creating four categories: (1) a child fourteen or older adjudicated delinquent for any Tier III offense is required to register for life;[188] (2) a child who is fourteen or older and adjudicated delinquent of any other offense at the discretion of the court; (3) a child twelve or older but less than fourteen years old who has been adjudicated delinquent by a family court for any Tier III offense may be required at the discretion of the court; and (4) a resident child adjudicated delinquent in any other state is required to register in South Carolina subject to the requirements of the sentencing jurisdiction.[189] Juveniles adjudicated delinquent of Tier I offenses may file for request for termination of the registration requirement after being registered for at least fifteen years, Tier II offenders may file a request after having been registered for at least twenty-five years, and a Tier III offender after thirty years.[190] An offender whose request is denied may apply again no sooner than five years after the denial or appeal to the general sessions court in which the conviction occurred.[191]

While the recently updated statute is more lenient than its past iterations, it is far from perfect. This Note challenges the constitutionality of all juvenile offender registration statutes, but specifically will use South Carolina's application as an example analysis under the Equal Protection Clause.

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[185] S.C. CODE ANN. § 63-19-2050 (2015).

[186] Powell v. Keel, 860 S.E.2d 344, 351–52 (2021).

[187] *Sex Offender Registry (SOR) Removal*, S.C. STATE L. ENF'T DIV., https://www.sled.sc.gov/sor_removal [https://perma.cc/R9WX-25B9] (last visited Mar. 4, 2024); Braley Dodson, *SLED Begins Receiving Applications for Sex Offenders to Get Off South Carolina Registry*, WSPA 7 NEWS (July 9, 2022, 5:46 PM), https://www.wspa.com/news/state-news/sled-begins-receiving-applications-for-sex-offenders-to-get-off-south-carolina-registry/ [https://perma.cc/742P-LFY7].

[188] *Sex Offender Registry (SOR) Removal*, *supra* note 187. Tier III offenses are: criminal sexual conduct in the first degree (§ 16-2-652); first degree criminal sexual conduct with minors (§ 16-3-655(A)); criminal sexual conduct: assaults with intent to commit sexual conduct (§ 16-3-656); kidnapping a person under eighteen unless committed by a parent (§ 16-3-910); criminal sexual conduct when the victim is a spouse (§ 16-3-658); and sexual battery of a spouse (§ 16-3-615).

[189] *Id.*

[190] *Id.*

[191] *Id.*

III. EQUAL PROTECTION

Under the Fourteenth Amendment, no state shall "deny to any person within its jurisdiction the equal protection of its laws."[192] The Equal Protection Clause is "essentially a direction that all persons similarly situated should be treated alike."[193] As Justice Souter noted in his concurrence in *Connecticut Department of Public Safety v. Doe*, "[t]he line drawn by the legislature between offenders who are sensibly considered eligible to seek discretionary relief from the courts and those who are not is, like all legislative choices affecting individual rights, open to challenge under the Equal Protection Clause."[194]

The Supreme Court has never heard an Equal Protection Challenge to either sex offender registries or juveniles listed on those registries. This Note argues that juvenile offenders should be considered a suspect class and receive heightened judicial scrutiny and challenges the legislative distinction between youths adjudicated delinquent of sexual offenses and subject to mandatory public registration for life and juveniles adjudicated delinquent of sexual offenses, not listed on public sex offender registries.

A. Juvenile Offenders as a Suspect Class

Under the Equal Protection Clause, some classifications of individuals are afforded more rigorous scrutiny than others.[195] Footnote Four of the Supreme Court's decision in *Carolene Products* first established the principle that "discrete and insular minorities" should be afforded a "correspondingly more searching judicial inquiry" because they lack access to the political process.[196] Since they are powerless in the majoritarian political process, the "courts have a duty to step in to end the unfair treatment."[197]

Footnote Four did not specify what minority groups should receive heightened scrutiny.[198] In later jurisprudence, the Court decided that facial classifications based on race, national origin, and religion should receive strict scrutiny, under which the

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[192] U.S. CONST. amend. XIV, § 1.

[193] City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985).

[194] 538 U.S. 1, 10 (2003) (Souter, J., concurring).

[195] *See, e.g.*, Korematsu v. United States, 323 U.S. 214, 216 (1944) ("[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. . . . It is to say that courts must subject them to the most rigid scrutiny.").

[196] 304 U.S. 144, 152 n.4 (1938) ("[W]hether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.").

[197] Heather L. McKay, *Fighting for Victoria: Federal Equal Protection Claims Available to American Transgender Schoolchildren*, 29 QUINNIPIAC L. REV. 493, 504 (2011).

[198] *See Carolene Prod. Co.*, 304 U.S. at 152 n.4.

government must demonstrate that the classification at issue is narrowly tailored to further a compelling state interest.[199] Gender and illegitimacy are quasi-suspect classes, which receive intermediate scrutiny.[200] Under this standard, the government must demonstrate that the classification is rationally related to an important or substantial government interest.[201]

The Court has identified relevant, but not exhaustive, factors for determining whether a class is suspect: (1) evidence of historical class-based discrimination; (2) political powerlessness, and; (3) the immutability of the class's defining trait.[202] In the alternative of a finding of a suspect class, courts analyze the classification under rational basis review, by which the government must show that the classification is rationally related to a legitimate government purpose.[203]

The Court specifically ruled that age is not a suspect class in regard to older age because there has not been a "history of purposeful unequal treatment" or because the youths have not "been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities."[204] This Note argues that juvenile adjudicated delinquent of sexual offenses and on public registrations should be considered a suspect or quasi-suspect class, and that courts should thus apply heightened scrutiny.

1. Evidence of Historical Class-Based Discrimination

A requirement of the suspect class analysis is that the group must experience a history of discrimination.[205] Registered juvenile offenders have historically faced outright discrimination in education, employment, and housing.[206] While the classification of a registered juvenile sex offender is relatively modern,[207] offenders still face a "history of purposeful unequal treatment,"[208] as many of the agents of discrimination that harm youth offenders are state-created and codified in law.[209]

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[199] Marcy Strauss, *Reevaluating Suspect Classifications*, 35 SEATTLE U. L. REV. 135, 146 (2011). *See generally* Williams-Yulee v. Fla. Bar, 575 U.S. 433, 433 (2015) (applying the principles of strict scrutiny).

[200] Strauss, *supra* note 199, at 146.

[201] Lalli v. Lalli, 439 U.S. 259, 265 (1978).

[202] Ben Geiger, *The Case for Treating Ex-Offenders as a Suspect Class*, 94 CALIF. L. REV. 1191, 1210–13 (2006).

[203] Plyler v. Doe, 457 U.S. 202, 216 (1982) ("In applying the Equal Protection Clause to most forms of state action, we thus seek only the assurance that the classification at issue bears some fair relationship to a legitimate public purpose.").

[204] Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976).

[205] Geiger, *supra* note 202, at 1212.

[206] *See infra* Section II.B.

[207] *See* Adam Walsh Child Protection and Safety Act, 42 U.S.C. §§ 20911–932.

[208] Geiger, *supra* note 202, at 1213 (quoting *Mass. Bd. of Ret.*, 427 U.S. at 314 (1976)).

[209] S.C. CODE ANN. § 23-3-465 (prohibiting juveniles adjudicated delinquent of sexual offenses from living in campus student housing).

2. Political Powerlessness

Groups awarded suspect classification must be a "discrete and insular minorit[y],"[210] that is "relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."[211] As a class, registered juvenile offenders should be considered a discrete and insular minority.

A group is discrete when they are "separate or distinct,"[212] or "when its members are marked out in ways that make it relatively easy for others to identify them."[213] While it is impossible to tell from appearance alone whether a child is a registered juvenile sex offender, Court precedent does not require that identification be based on some immediately identifiable physical characteristic as with non-citizens and children of non-married parents.[214] The ease of access to online sex offender registries ensures that registered juvenile offenders are easily identifiable with their names, addresses, and photographs posted publicly, even if their juvenile court records are sealed.

A group's insularity depends on the "tendency of group members to interact with great frequency in a variety of social contexts."[215] While registered juvenile sex offenders do not exclusively interact with each other, residency restrictions and other collateral consequences of registration often push juveniles into social isolation or limited pockets of urban areas in which they are able to reside.[216] However, it is unclear whether registered juvenile offenders should be considered insular.

In the alternative, some scholars argue that a group is "discrete and insular" if they are "blocked from accessing the political process," thus their interest are unrepresented in the majoritarian political process, and they may be "force[d] to bear unjustifiably heavy burdens."[217] Juveniles are, by definition, excluded from the political process until they turn eighteen.[218] However, traditionally, children do not qualify as a suspect class because their parents represent their interests; therefore, children practically have representation in the political process.[219] While youth offenders are legally allowed to vote when they turn eighteen, those incarcerated in juvenile detention centers do not have the opportunity to exercise that right because

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[210] United States v. Carolene Prod. Co., 304 U.S. 144, 153 n.4 (1938).

[211] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).

[212] Geiger, *supra* note 202, at 1226 (quoting Louis Lusky, *Footnote Redux: A* Carolene Products *Reminiscence*, 82 COLUM. L. REV. 1093, 1105 n.72 (1982)).

[213] *Id.* (quoting Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713, 729 (1985)).

[214] *Id.*

[215] Ackerman, *supra* note 213, at 726.

[216] *See supra* Section II.B.5.

[217] Richard C. Worf, *The Case for Rational Basis Review of General Suspicionless Searches and Seizures*, 23 TOURO L. REV. 93, 152 (2007).

[218] U.S. CONST. amend. XXVI, § 1.

[219] Worf, *supra* note 217, at 153.

they are denied the chance to register or request an absentee ballot.[220] Youth offenders who turn eighteen and are not incarcerated face no state-created barriers to voting. However, they are still members of a politically unpopular group and face great stigma and barriers to any legislative reform to the "tough-on-crime" policies that characterized American government in the 1990s.[221]

This theory of representation lets the most vulnerable children fall through the cracks. Juveniles adjudicated delinquent of sexual offenses are often among the most vulnerable because they often lack adult supervision,[222] act out due to abuse they experienced,[223] are often mentally disabled,[224] are in foster care and group home settings,[225] or belong to racial and ethnic minority groups.[226] Considering the totality of the circumstances, it is unlikely that juvenile offenders under eighteen have voting-age surrogates to represent their interests. Even so, juvenile offenders over eighteen are a politically unpopular group who are often unable to effect change through the democratic process.

3. Immutability

While age is clearly not an immutable trait, or one that is not capable or susceptible of change, public registration is immutable. While many state laws, including South Carolina's updated statute, offer opportunities for removal after a defined term of years,[227] the internet is forever, and private commercial databases retain expunged registration records. The Supreme Court has deemed the undocumented status of youths brought to the United States an immutable trait because it is "a legal characteristic over which children can have little control," even though undocumented youths can later gain legal status.[228] The public registration status of youths should be similarly regarded by courts.

Since lifetime registration of juvenile offenders is an immutable characteristic and registered youth offenders have faced historical class-based discrimination and

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[220] Liz Ryan, *Incarcerated Youth, the Forgotten Millennial Voters*, THE HILL (Sept. 27, 2016, 4:09 PM), https://thehill.com/blogs/pundits-blog/civil-rights/298110-incarcerated-youth-the-forgotten-millennial-voters/ [https://perma.cc/32BX-CTSE].

[221] *See supra* Section II.B.7.

[222] Stillman, *supra* note 2.

[223] *Fact Sheet on Youth Who Commit Sex Offenses*, NAT'L JUV. JUST. NETWORK, https://www.acacamps.org/sites/default/files/resource_library/Fact-Sheet-Youth-Offenders.pdf [https://perma.cc/9WBM-YVEY] ("Youth who commit sex offenses have frequently been sexually abused themselves; approximately 40 to 80% of juvenile sex offenders have been sexually abused as children and 25–50% have been physically abused.").

[224] Sunderland, *supra* note 163.

[225] PICKETT ET AL., *supra* note 24, at 2.

[226] *Id.*

[227] *Sex Offender Registry (SOR) Removal*, *supra* note 187.

[228] Plyler v. Doe, 457 U.S. 202, 220 (1982).

are politically powerless, they should be awarded suspect classification and courts should apply heightened scrutiny in equal protection analyses.

B. State Interest

Without question, states have a compelling interest in preventing child sexual abuse and child pornography,[229] which is clearly implicated in juvenile sex offender registration policies as most sexual harms committed by youths are against other youths.[230] There are many serious effects of sexual assault, including, self-harm, substance abuse, disassociation, panic attacks, eating disorders, pregnancy, sleep disorders, and suicide.[231]

South Carolina's intent in enacting the registration statute was to protect the public from those sex offenders who may reoffend and to aid law enforcement in solving sex crimes.[232] However, comparing the breadth of the law to the reasons offered for it, this purpose fails even rationality review.[233]

C. Equal Protection Analysis

In approximately the last decade, the Supreme Court has recognized the differences between juveniles and adults and articulated reasons why juveniles should be treated differently and afforded greater leniency than adults. In *Miller v. Alabama*, the Supreme Court held that mandatory life imprisonment without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on cruel and unusual punishments.[234] Additionally, the Supreme Court recognized in *Montgomery v. Louisiana* that children are constitutionally different from adults in their levels of culpability and have a "heightened capacity for change."[235] The Supreme Court continues to identify and differentiate the reasons why juveniles should be treated differently than adults: (1) children have a lack of maturity and an underdeveloped sense of responsibility, which leads to recklessness, impulsivity, and heedless risk taking;[236] (2) children are more vulnerable to negative

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[229] *See* New York v. Ferber, 458 U.S. 747, 756–57 (1982) (holding that states have a compelling interest in safeguarding the physical and physiological well-being of minors from sexual abuse); Elizabeth C. Eraker, *Stemming Sexting: Sensible Legal Approaches to Teenagers' Exchange of Self-Produced Pornography*, 25 BERKELEY TECH. L.J. 555, 582–83 (2010).

[230] *Effects of Sexual Violence*, *supra* note 118; Letourneau & Malone, *supra* note 26.

[231] *Effects of Sexual Violence*, *supra* note 118.

[232] State v. Walls, 558 S.E.2d 524, 526 (2002).

[233] Romer v. Evans, 517 U.S. 620, 632 (1996) ("[I]ts sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests.").

[234] *See* 567 U.S. 460, 489 (2012).

[235] *See* 577 U.S. 190, 195 (2016) (quoting *Miller*, 567 U.S. 479).

[236] Roper v. Simmons, 543 U.S. 551, 569 (2005).

influences and outside pressures from their family and peers, have limited control over their own environment, and lack the ability to extricate themselves from horrific, crime-producing settings;[237] and (3) a child's character is not "well formed" as an adult's, and his actions are less likely to be "evidence of irretrievabl[e] deprav[ity]."[238] In regard to sexual offenses, many harmful acts done by juveniles are a result of immaturity, impulsivity, and sexual curiosity, rather than irretrievable depravity. The question remains: Why should juveniles be subject to lifetime registration requirements without the availability of review for an extended term of years or individual risk analysis?

Under both intermediate scrutiny and rationality review, South Carolina's mandatory lifetime registration for juveniles violates the Equal Protection Clause. Given that states have a compelling interest in preventing child sexual abuse,[239] an equal protection challenge must examine if the law is rationally related to the state's asserted interest.

Decades of studies have found the assumption that juvenile sex offenders have high likelihood to recidivate is unfounded. Necessarily, registration policies can only exist to prevent future harm by notifying prospective victims of persons known to have been adjudicated delinquent or by deterring future criminal conduct. However, these policies have no deterrent effect and no bearing on recidivism.

A meta-analysis that reviewed thirty-three studies across behavior types show that 97–99% of children charged with sexual offenses never harm sexually again.[240] Importantly, research has shown that sex offender registration and notification (SORN) policies do not have a statistically significant impact on the reduction of recidivism.[241]

There is no general deterrent effect for juvenile offenders.[242] In addition, studies have shown both no effects on specific deterrence and that the South Carolina SORN registration scheme failed to improve community safety.[243] Research has also found that the recidivism rate is not measurably different for registered and unregistered children who committed sexual offenses.[244] The data supports Supreme Court

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[237] *Id.*

[238] *Id.* at 570.

[239] *See* New York v. Ferber, 458 U.S. 747, 756–57 (1982).

[240] *See* Michael F. Caldwell, *Quantifying the Decline in Juvenile Sexual Recidivism Rates*, 22 PSYCH. PUB. POL'Y & L. 414, 419 (2016).

[241] *See* Kristen M. Zgoba & Meghan M. Mitchell, *The Effectiveness of Sex Offender Registration and Notification: A Meta-Analysis of 25 Years of Findings*, 19 J. EXPERIMENTAL CRIMINOLOGY 71 (2021).

[242] *See* Elizabeth Letourneau et al., *Do Sex Offender Registration and Notification Requirements Deter Juvenile Sex Crimes?*, 37 CRIM. JUST. & BEHAV. 553, 564–65 (2010).

[243] *Id.* at 565.

[244] *See* Elizabeth Letourneau & Kevin Armstrong, *Recidivism Rates for Registered and Nonregistered Juvenile Sexual Offenders*, 20 SEXUAL ABUSE: J. RES. & TREATMENT 393, 405 (2008) ("[M]atched and unmatched registered offenders did not differ significantly with

holdings that recognize the necessity for differential treatment between youth and adult sexual offenders, particularly regarding children's capacity for change.[245]

In fact, evidence suggests that registration policies can have the opposite effect by ostracizing offenders and creating a more difficult reentry process.[246] Contrary to common public perceptions, the empirical evidence suggests that putting youth offenders on registries does not advance community safety—instead, it overburdens law enforcement with large numbers of people to monitor, undifferentiated by their dangerousness.[247]

Given the data and extreme burden of collateral consequences, the only logical conclusion is that juvenile sex offender registration policies are punitive in nature and not rationally related to the state's asserted interest in preventing child abuse. The only state interest that remains is the "bare [] desire to harm a politically unpopular group" and "if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."[248]

Process theory posits that courts may justifiably intervene in the political arena when institutional obstacles impede corrective action by political actors themselves.[249] As a politically unpopular and powerless group, juvenile sex offenders clearly merit judicial intervention as the they are frequently demonized and scapegoated in the majoritarian legislative process.[250] For example, an Illinois State Representative stated that "[t]he reality is that sex offenders are a great political target, but that doesn't mean any law under the sun is appropriate."[251] Prosecutors and judges often refuse to make exceptions out of fear of being seen as "soft" on sex offenders.[252] The political process is clearly failing youth on sex offender registries; courts may and should intervene.

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respect to sexual recidivism rates, a primary consideration for registration policies (i.e., even putatively higher risk youth with more prior criminal offenses did not have significantly higher rates of sexual recidivism).").

[245] *See, e.g.*, Montgomery v. Louisiana, 577 U.S. 190 (2016).

[246] *See* MODEL PENAL CODE § 213.11 (AM. L. INST., Tentative Draft No. 5, 2022) (Reporters' Notes).

[247] PITTMAN, *supra* note 25, at 3.

[248] U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973).

[249] *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980); Michael C. Dorf & Samuel Issacharoff, *Can Process Theory Constrain Courts?*, 72 U. COLO. L. REV. 923 (2001).

[250] *See, e.g.*, MICH. COMP. LAWS ANN. § 28.734 (West) (repealed 2021) (criminalizing registered sex offenders living, working, or loitering within a 'student safety zone,' defined as within 1,000 feet of a school with few exceptions); *supra* text accompanying note 17.

[251] HUM. RTS. WATCH, *supra* note 104, at 2 (quoting Ryan Keith, *Illinois Measure Would Move Some from Sex Offender List*, ASSOCIATED PRESS (June 24, 2006)).

[252] Sunderland, *supra* note 163.

IV. CHANGING CROSSWINDS

Across many states, the tide is turning against registration for youth. Patty Wetterling, whose advocacy efforts after the murder of her eleven-year-old son helped create the first sex offender registries, now advocates against the use of registries for youth: "'People would call me and they would be very proud that they had kids as young as [ten] on their sex offender registry, and I'm like, 'No, that's not what it was for,' she said, adding that we shouldn't even be referring to children as juvenile sex offenders."[253] "They are kids. The terminology is all wrong because that throws them into the same pot as the man that kidnapped and murdered Jacob. It's not fair."[254]

Many state supreme courts, state legislatures, and advocacy groups are reexamining the effectiveness of and consequences of juvenile sex offender registration policies, especially with regards the constitutional rights of the youth under the Fourteenth Amendment.

A. Model Penal Code

Article 213 of the American Law Institute's Model Penal Code approved Tentative Draft No. 5 which provides that no juvenile offenders shall be required to register with one exception for Sexual Assault with Aggravated Physical Force or Restraint where the offender was at least sixteen.[255] The drafters did so with the intent of "minimiz[ing] or eliminat[ing] unnecessarily harsh and counterproductive features of currently prevalent law."[256] The Institute found that public support of registration is "based on emotions and intuitions not easily dislodged."[257] The National Association of Attorneys General cited the recommendation as a "grave concern," arguing that the proposal significantly affects the safety of survivors and victims.[258] This opinion ignores the decades of empirical results showing that registration policies and the associated burdens are paradoxical to states' interest in public safety.[259]

B. State Supreme Court Decisions

In addition to the South Carolina Supreme Court,[260] other state supreme courts have addressed juvenile sex offender registration policies and invalidated their state

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253 Letourneau & Malone, *supra* note 26.
254 *Id.*
255 MODEL PENAL CODE §§ 213.8, 213.11A(3) (AM. L. INST., Tentative Draft No. 5, 2022).
256 *Id.* § 213.11 (Reporters' Notes).
257 *Id.*
258 *Letter RE: ALI Model Penal Code on Sexual Assault and Related Offenses*, NAT'L ASS'N ATT'YS GEN. (Dec. 9, 2021), https://naagweb.wpenginepowered.com/wp-content/uploads/2021/12/ALI-NAAG-Letter-Final.pdf [https://perma.cc/8C7P-YX77].
259 MODEL PENAL CODE § 213.8 (AM. L. INST., Tentative Draft No. 5, 2022).
260 Powell v. Keel, 860 S.E.2d 344, 344 (S.C. 2021).

statutes under the Fourteenth Amendment within the last decade. In 2012, the Pennsylvania Supreme Court held that the Sex Offender Registration and Notification Act (SORNA) was unconstitutional as applied to juveniles because it violates juvenile offenders' due process rights through the use of an irrebuttable presumption.[261] The presumption is that all juvenile offenders pose a high risk of committing additional sexual offenses, which is not universally true.[262] The court held that a reasonable alternative means currently exists for determining which juvenile offenders are likely to reoffend, which would not encroach upon juvenile offenders' constitutionally protected interest in their reputation.[263]

The Court interrogated the legislative findings that sexual offenders pose a high risk of reoffending, and that registration would further the governmental interests of public safety to show that the presumption was far from universal.[264] The 2–7% recidivism rate for juvenile offenders subject to SORNA registration was indistinguishable from the recidivism rates for non-sexual juvenile offenders who are not subject to SORNA registration.[265] The findings of the legislature were further undercut by the constitutionally recognized differences between juveniles and adults and the goals of the juvenile court system, which are to enable children to become responsible and productive members of the community, while providing accountability to victims and society.[266] The Pennsylvania Supreme Court found that individual risk assessment is a reasonable alternative means of determining which juvenile offenders pose a high risk of recidivating.[267]

In 2012, the Ohio Supreme Court held that a statute that imposed automatic, lifelong registration and notification requirements on juvenile sex offenders tried in the juvenile system was unconstitutional because it violated the prohibition on cruel and unusual punishment in the Eighth Amendment to the U.S. Constitution and the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.[268]

The Ohio Supreme Court found that there was no national consensus that favored publication of juvenile sex offenders' personal information and that the Court's independent review found that juveniles are less culpable than adults, their bad acts are less likely to reveal an unredeemable corruptness, and they are more capable of change than adult offenders.[269] Even further, the Court emphasized several societal concerns:

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[261] *In re* J.B., 107 A.3d 1, 2 (Pa. 2014).
[262] *Id.*
[263] *Id.*
[264] *Id.* at 16–17.
[265] *Id.* at 17–18.
[266] *Id.* at 18.
[267] *Id.* at 19.
[268] *In re* C.P., 967 N.E.2d 729, 732 (Ohio 2012).
[269] *Id.* at 740–41.

> Registration and notification necessarily involve stigmatization. For a juvenile offender, the stigma of the label of sex offender attaches at the start of his adult life and cannot be shaken. With no other offense is the juvenile's wrongdoing announced to the world. Before a juvenile can even begin his adult life, before he has a chance to live on his own, the world will know of his offense. He will never have a chance to establish a good character in the community. He will be hampered in his education, in his relationships, and in his work life. His potential will be squelched before it has a chance to show itself. A juvenile—one who remains under the authority of the juvenile court and has thus been adjudged redeemable—who is subject to sex-offender notification will have his entire life evaluated through the prism of his juvenile adjudication. 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.[270]

While both the Ohio and Pennsylvania Supreme Courts have invalidated juvenile registration policies on different grounds, both illuminate a clear possibility for impact litigation challenging state statutes. This is an especially important avenue for change on the state level because states would not be assessed the federal non-compliance penalty of the 10% reduction in block grant funds for criminal justice if the state has a "demonstrated inability to implement certain provisions that would place the jurisdiction in violation of its constitution, as determined by a ruling of the jurisdiction's highest court."[271]

V. POLICY ANALYSIS AND RECOMMENDATIONS

Sexual violence is an extremely complex problem. Registries are not the only solution. The United States stands alone on the global stage in terms of sex offender registration policies, as one of six countries with sex offender registration laws, one of two that has community notification laws, and the only country with residency restrictions on registered sex offenders.[272]

Within the United States, there has been no legislative or judicial action on the federal level, but some state legislatures are taking steps to roll back their juvenile sex offender registration and notification requirements. The state legislatures of Delaware and Oregon have enacted revisions that restrict the registration of youths

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[270] *Id.* at 741–42.

[271] 34 U.S.C.A. § 20927(b)(1) (West).

[272] HUM. RTS. WATCH, *supra* note 104, at 10.

in comparison to their earlier policies.[273] These steps are critical seeing as states have significant latitude to set their own registration schemes under the Adam Walsh Act.[274]

However, there are still many proponents of registration of juvenile offenders. In 2017, then Missouri Governor Jeremiah Nixon vetoed a bill that would remove children from Missouri's public registry and provide those registered with the opportunity to petition for relief after five years.[275] Former Governor Nixon characterized the bill as one that would be detrimental to public safety, focusing on the most violent of past crimes.[276] However, empirical evidence proves that registration has no effect on the already low recidivism rates and registration has no demonstrated effect on community safety.[277]

Oklahoma's juvenile registration statutory scheme offers a model for state legislatures to follow. In Oklahoma, children adjudicated delinquent of sex offenses are treated in a manner more consistent with the juvenile justice system overall.[278] A child accused of committing a registerable sex offense undergoes a risk evaluation process, reviewed by a panel of experts and a juvenile court judge with a preference for treatment, not registration.[279] Qualifying offenses for registration are limited to forcible sodomy, rape, rape by instrumentation, and rape in the first or second degree.[280] Most high-risk youth are placed in treatment programs with registration decisions deferred until release, where they may no longer be high-risk.[281] Of the few youths who are ultimately registered, their information is only disclosed to law enforcement and are removed once they turn twenty-one years old.[282] In the first ten years of implementation, just ten Oklahoma children were registered.[283] Importantly, this statutory scheme is still in compliance with the Adam Walsh Act.[284]

This policy better protects the interest of youth and functions as a more effective tool for law enforcement and allow registries to serve their original intended purpose. Currently, overly broad registration policies sweep in those unlikely to reoffend and

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[273] *See* H.R. 182, 147th Gen. Assemb., Reg. Sess. (Del. 2013); H.R. 2320, 78th Leg. Assemb., Reg. Sess. (Or. 2015).

[274] *See* Adam Walsh Child Protection and Safety Act, 42 U.S.C. §§ 20911–932.

[275] Brittany Ruess, *Governor Defends Veto of Sex Offender Registry Bill*, MO. TIMES (Aug. 22, 2013), https://themissouritimes.com/governor-defends-veto-of-sex-offender-registry-bill/ [https://perma.cc/P8X9-QUJ2].

[276] *Id.*

[277] *See supra* Section III.B.

[278] Donna Vandiver & Raymond Teske, *Juvenile Registration and Notification Are Failed Policies That Must End*, *in* SEX OFFENDER REGISTRATION AND COMMUNITY NOTIFICATION LAWS: AN EMPIRICAL EVALUATION 167 (Wayne Logan & J.J. Prescott eds., 2006).

[279] *See* OKLA. STAT. tit. 10A, § 2-8-104 (2009).

[280] *See id.* § 2-8-102.

[281] *See id.* § 2-8-104.

[282] *See id.* § 2-8-108.

[283] Vandiver & Teske, *supra* note 278, at 167.

[284] *See* Adam Walsh Child Protection and Safety Act, 42 U.S.C. §§ 20911–932.

places a large burden on law enforcement.[285] Registries in their current form are not establishing their initial goal and are ineffective tools for law enforcement.[286]

CONCLUSION

Juvenile sex offender registration statutes are clearly harmful to juveniles, with no clear benefit to community safety and should be found unconstitutional. Twelve-year-old, now twenty-eight-year-old, Leah DuBuc's entire life has been defined by her inclusion on an online public sex-offender registry.[287] She made a mistake when she was ten, it should not define her life.[288]

If not for actions from the court and change from the legislature, Leah would be living an entirely different life.[289] There are 200,000 people in America with similar stories and who bear the same scarlet letter.[290]

These scarlet letters and moral panics are not limited to the past. As the vicious cycle of moral panics continue to scapegoat politically unpopular groups, courts have a duty to stop these harms against vulnerable children who do not have the power to advocate for themselves.

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[285] *See* Cheryl W. Thompson, *Sex Offender Registries Often Fail Those They Are Designed to Protect*, NPR NEWS (Aug. 25, 2020, 5:00 AM), https://www.npr.org/2020/08/25/808229392/sex-offender-registries-often-fail-those-they-are-designed-to-protect [https://perma.cc/Q7LP-QFRQ].

[286] *Id.*; *see also* Letourneau & Malone, *supra* note 26 ("People would call me and they would be very proud that they had kids as young as [ten] on their sex offender registry, and I'm like, 'No, that's not what it was for.'").

[287] *See* Stillman, *supra* note 2.

[288] *Id.*

[289] *See id.*

[290] *See generally* PICKETT ET AL., *supra* note 24.