Comments

A Better Approach to Juvenile Sex Offender Registration in California

By Christina D. Rule*

Introduction

In March 2004, fifteen-year-old David F. laid on top of a roommate at a group home and forced the roommate to orally copulate him.¹ Then, in October 2004, David forced a developmentally disabled thirteen-year-old boy to orally copulate him while a third person sodomized the boy.² David later admitted the allegations of felony oral copulation with a person incapable of giving consent by reason of mental or developmental disorder as well as misdemeanor false imprisonment.³ The juvenile court placed David in a residential sex offender treatment program instead of youth prison and attempted to order him to register as a sex offender.⁴

This Comment argues that the legitimate goals of juvenile sex offender registration—public safety, retribution, and rehabilitation—

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1. In re David F., No. A111174, 2006 WL 242610, at *1 (Cal. Ct. App. Jan. 31, 2006) (unpublished decision), abrogated by In re Derrick B., 139 P.3d 485 (Cal. 2006). In In re Derrick B., the California Supreme Court upheld In re Bernardino S., 5 Cal. Rptr. 2d 746 (Ct. App. 1992). See In re Derrick B., 139 P.3d at 489. The California Court of Appeal in Bernardino S. held that the juvenile court lacked the power to impose registration without committing the juvenile sex offender to the California Youth Authority. 5 Cal. Rptr. 2d at 752. Though David F. is an unpublished decision, I am only citing it for the facts of the case.


3. Id. California Penal Code section 288a(g) punishes "any person who commits an act of oral copulation, and the victim is at the time incapable, because of a mental disorder or developmental or physical disability, of giving legal consent, and this is known or reasonably should be known to the person committing the act." CAL. PENAL CODE § 288a(g) (West 1999 & Supp. 2007). California Penal Code section 236 punishes as false imprisonment "the unlawful violation of the personal liberty of another." Id. § 236 (West 1999).

cannot be effectively implemented or realized under California's current juvenile registration statute. The inflexible registration law inappropriately constrains judges to the detriment of the community's and victims' safety and at the expense of retribution for and rehabilitation of offenders like David. The law has prevented judges like the one in David's case from requiring juvenile offenders to register for reasons unrelated to the purposes and merits of registration.

Rather, for reasons related to history, not logic, judges can only require registration if they refer juvenile offenders to the California Youth Authority\(^5\) ("CYA"). Juvenile court judges do not have discretion to require sex offenders to register for an offense not listed under California law or in the absence of a commitment to CYA.\(^6\) In formally interpreting California law, California courts have reinforced the legislature's intent to require both a commitment to CYA and commission of a listed offense in order for a judge to impose registration.\(^7\) Unfortunately, CYA has failed so terribly to provide humane, effective facilities and treatment programs for juvenile offenders that judges do not send even deserving juvenile offenders there. As a result, lack of commitment to CYA no longer indicates that an offender is not among the worst juvenile offenders,\(^8\) and dangerous juvenile sex offenders circumvent the registration requirement, rendering the registration statute ineffective.

The registration system must be fixed to serve the legitimate purposes that the legislature originally designed it to serve and to have the effect that the legislature thought it had created, rather than remain contingent on a factor that has proven to be as unstable as CYA.

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5. The departments and boards of the former Youth and Adult Correctional Agency, including the California Youth Authority and the Youthful Offender Parole Board, were reorganized in 2005 into the California Department of Corrections and Rehabilitation ("CDCR"). Nat'l Ctr. for Juvenile Justice ("NCJJ"), State Juvenile Justice Profiles: California, http://www.ncjj.org/stateprofiles/profiles/CA06.asp (last visited Sept. 14, 2007). The CDCR now consists of three divisions: Adult Operations, Adult Programs, and the Department of Juvenile Justice ("DJJ"). Id. However, for purposes of this Comment, I will continue to refer to the Youth Authority as CYA since most people still know it as such, and all sources I have used refer to it as such.

6. In re Derrick B., 139 P.3d at 487–92 (finding that a subdivision of the sex offender registration statute applicable to adults authorizing a court to require registration for unlisted offenses is not applicable to juveniles). Derrick B. further upheld Bernardino S., which held that a juvenile who is not sent to CYA cannot be required to register. In re Bernardino S., 5 Cal. Rptr. 2d at 752; see also Cal. Penal Code § 290(d) (West 1999 & Supp. 2007).

7. See In re Derrick B., 139 P.3d at 487–89; In re Bernardino S., 5 Cal. Rptr. 2d at 752.

8. See In re Bernardino S., 5 Cal. Rptr. 2d at 749 (stating that commitment to the Youth Authority is "the most restrictive of all juvenile court dispositions" reserved for dangerous, violent, or repeat offenders).
commitment. Even if CYA improves within the next few years, it can easily deteriorate again in the future. This unpredictability evidences the need for a more enduring registration statute. Though there is debate about the benefit of registration for juvenile sex offenders, the California Legislature has included juveniles in the sex offender registration statute. Given the legality of juvenile sex offender registration in California, the registration system should at least be given a chance to accomplish what the legislature intended it to accomplish—public safety, retribution, and rehabilitation. The registration system should not be undermined just because of the unrelated problems with CYA.

Removing the rigid CYA requirement and implementing judicial discretion will add stability to a broken system. The California Legislature must amend current law to allow for guided judicial discretion in requiring juvenile sex offenders to register for the listed offenses. The legislature should establish the following clear factors for judges to consider, which best reflect the public safety, retributive, and rehabilitative purposes of registration: (1) the ages of the minor and the victim; (2) the circumstances and gravity of the sex offense committed by the minor; (3) the minor’s previous history of sex offenses and future danger to the community; and (4) the minor’s living situation and environment. Judicial discretion in considering these factors in each juvenile offender’s case incorporates the traditional rehabilitative nature of the juvenile justice system, emphasizing individualized consideration of each juvenile offender, while furthering the public safety and retributive purposes of registration. In addition to being a histori-

9. See Timothy E. Wind, The Quandary of Megan’s Law: When the Child Sex Offender is a Child, 37 J. MARSHALL L. REV. 73, 123–24 (2003) (arguing that “Megan’s Laws pose an onerous burden and a shameful effect on child sex offenders, which is worn for a lifetime like Hester Prynne’s Scarlet Letter”); Elizabeth Garfinkle, Comment, Coming of Age in America: The Misapplication of Sex-Offender Registration and Community-Notification Laws to Juveniles, 91 CAL. L. REV. 163, 164 (2003) (arguing that “Megan’s Laws are an inappropriate and ineffective means of preventing violent sexual offenses in general and that these problems are magnified when the laws are applied to juveniles”); Pamela S. Richardson, Note, Mandatory Juvenile Sex Offender Registration and Community Notification: The Only Viable Option to Protect All the Nation’s Children, 52 CATH. U. L. REV. 237, 267 (2002) (arguing that juvenile sex offender registration statutes can balance the rehabilitative interest of the juvenile justice system with protecting society).

10. CAL. PENAL CODE § 290(d).

11. See S.B. 888, 1985–86 Reg. Sess. (Cal. 1985) (Legislative Counsel’s Digest) (stating that the amendments would “expand[] the category of persons to which a criminal penalty is applicable”); see also S.B. 888, 1985–86 Reg. Sess. (Cal. 1985) (Assembly Third Reading, as amended Sept. 12, 1985) (stating that “[a] registration system under which the duty of juveniles to register ends at age 25 will serve the goal of public protection while allowing rehabilitated minors to be free from the stigma of registration”).
cal or traditional hallmark of the juvenile justice system, judicial discretion in sex offense cases is particularly necessary because sex offenses are highly emotional and characteristically different from other crimes; they do not lend themselves to rigid rules.

Part I of this Comment reviews the background of current law governing juvenile sex offender registration in California. Part II discusses the important purposes of registration in general and for juveniles in particular, given the increasingly punitive nature of the juvenile justice system and the legislative intent of the registration statute. Part III illustrates how California courts have formalistically interpreted the current registration statute, rather than addressed its merits or purposes, leaving open the possibility of amending the statute to allow for judicial discretion. Part IV demonstrates that the reluctance of judges to send juvenile sex offenders to CYA has created an unintended obstacle to registration. Part V shows how judicial discretion can better promote the purposes of registration and explains my proposal for amending the current sex offender registration statute. Part VI briefly concludes.

I. Background: Current Law Governing Juvenile Sex Offender Registration

California Penal Code section 290 governs sex offender registration, and subsection (d) pertains to juvenile sex offenders by providing that:

Any person who . . . is discharged or paroled from the Department of Corrections and Rehabilitation [CYA] to the custody of which he or she was committed after having been adjudicated a ward of the juvenile court pursuant to Section 602 of the Welfare and Institutions Code because of the commission or attempted commission of any offense described in paragraph (3) shall be subject to registration under the procedures of this section.

12. See Richardson, supra note 9, at 251.
15. Id. § 290(d)(1). Section 602 of the Welfare and Institutions Code, as referenced in section 290, provides that:

[A]ny person who is under the age of 18 years when he or she violates any law of this state or of the United States or any ordinance of any city or county of this state defining crime . . . is within the jurisdiction of the juvenile court, which may adjudge such person to be a ward of the court.

CAL. WELF. & INST. CODE § 602(a) (West Supp. 2007).
Paragraph (3) of section 290(d) lists the sex offenses for which a juvenile may be required to register if sent to CYA. These include: felony rape (section 261); sodomy (section 286); oral copulation (section 288a); sexual assault (sections 289 and 266c); aiding and abetting another in these acts (section 264.1); assault with intent to commit any of these acts (section 290(d)(3)(A)); abduction of a person under eighteen for the purpose of prostitution (section 267); lewd or lascivious acts on a child under fourteen (section 288); engaging in several acts of substantial sexual conduct with a child under fourteen while residing with the child or having recurring access to the child (section 288.5); and misdemeanor annoyance or molestation of a child under eighteen (section 647.6).16

Under the registration requirement of section 290, any designated law enforcement entity may provide information to the public about a person required to register as a sex offender by whatever means the entity deems appropriate and when necessary to ensure public safety.17 The information may include, but is not limited to, the offender's name, known aliases, gender, race, physical description, photograph, date of birth, address, description of license plate number, type of victim targeted, relevant parole or probation conditions, crimes resulting in classification under this section, and date of release from confinement, but cannot include any information identifying the victim.18 The designated law enforcement entity can authorize other persons or entities who receive the information under this section to disclose it to additional persons only if it will enhance public safety.19 The Department of Justice maintains a “900” telephone number20 and an Internet website of information concerning persons required to register for certain listed sex offenses.21 However, information about registered sex offenders may not be used for purposes related to health insurance, insurance, loans, credit, employment, education, scholarships, fellowships, housing or accommodations, or benefits, privileges or services provided by any business, unless a person is authorized under the law to use information disclosed to protect a person at risk.22

17. Id. § 290.45(a)(1) (West Supp. 2007).
18. Id. § 290.45(b).
19. Id. § 290.45(c)(1).
20. Id. § 290.4(a) (West 1999 & Supp. 2007).
21. Id. § 290.46(a)(1) (West Supp. 2007).
22. Id. § 290.4(d)(1)–(2) (West 1999 & Supp. 2007).
As a counterpart to section 290(d), Welfare and Institutions Code section 781(a)23 allows juveniles to have their records sealed in certain circumstances.24 Section 781(a) provides that juveniles who have been adjudged wards of the juvenile court may petition the court to seal their records any time after they have reached the age of eighteen.25 In relation to juvenile sex offenders in particular, section 781(a) provides that a court, in ordering the juvenile’s records sealed, shall relieve the juvenile from the registration requirement and destroy all registration information so that the proceedings in the case are deemed never to have occurred.26

The court shall not, however, order the person’s records sealed if the juvenile court finds that the person committed one of the especially serious, violent offenses listed in section 707(b) of the Welfare and Institutions Code27 when he or she was fourteen years of age or older.28 The sex offenses listed in section 707(b) include: rape with force or violence or threat of great bodily harm; sodomy by force, violence, duress, menace, or threat of great bodily harm; lewd or lascivious acts; oral copulation by force, violence, duress, menace, or threat of great bodily harm; and sexual assault against the victim’s will by means of force, violence, duress, menace, or fear of bodily injury.29 Taken together, Penal Code section 290(d) and Welfare and Institutions Code sections 781(a) and 707(b) only cover the worst sex offenses and ensure appropriate punishment. Therefore, CYA institutionalization is superfluous for designating the worst offenders for registration.

II. Registration of Juvenile Sex Offenders Can Serve Important Purposes: Public Safety, Retribution, and Rehabilitation

The purposes of registration in general include: protecting the public; preventing or deterring recidivism; providing for public scrutiny of the criminal and mental health systems that deal with juvenile sex offenders; holding juveniles responsible for their actions; and aid-

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24. Id.
25. Id.
26. Id.
27. Id. § 707(b).
28. Id. § 781(a).
29. Id. § 707(b)(4)–(8).
ing law enforcement in monitoring sex offenders. These purposes fall into three main categories: public safety, retribution, and rehabilitation. The juvenile justice system is no longer purely rehabilitative—it is now constructed to serve the additional goals of community safety and retribution. Yet, even though registration more obviously fulfills public safety and retributive purposes, it can still serve rehabilitative purposes. Both the evolution of the juvenile justice system and the legislative history of section 290(d) reveal the blending of these three main purposes.

A. The Evolution of the Juvenile Justice System Reflects the Blending of Public Safety, Retributive, and Rehabilitative Purposes

Progressive reformers initiated the implementation of the first juvenile courts in the nineteenth century. The reformers “maximized [judicial] discretion to provide flexibility in diagnosis and treatment and focused on the child and the child’s character and lifestyle rather than on the crime.” The juvenile court rejected the procedures of adult criminal prosecutions and focused on treatment instead, whereby “[c]ourt personnel presented a treatment plan to meet the child’s need based on a background investigation that identified the causes of the child’s misconduct.” Judges were given broad discretion in decision-making to provide individualized intervention.

In the 1950s, scholars, the United States Supreme Court, and state legislatures challenged the principles of the treatment model of juvenile justice and forced changes in the operation and organization of juvenile courts. In addition, society began to realize that the juvenile justice system was ill-equipped to deal with growing violent juvenile offending. Statistics show that in the early 1960s, juvenile felony arrest rates began a fifteen-year increase. Critics of the old offender-oriented treatment model called for a new offense-oriented justice

31. See Rossum, supra note 30, at 912–19.
32. BARRY C. FELD, JUSTICE FOR CHILDREN 7 (1993).
33. Id. at 15–16.
34. Id. at 16.
35. Id. at 15–16; see also Rossum, supra note 30, at 910, 912.
36. Rossum, supra note 30, at 912.
37. Id. at 918.
model to "achieve the twin goals of holding juveniles individually responsible for their criminal misdeeds and holding the juvenile justice system accountable for its treatment of these juveniles."\textsuperscript{39}

The Court in \textit{In re Gault}\textsuperscript{40} imposed due process requirements on juvenile court proceedings in order to "introduce a degree of order and regularity"\textsuperscript{41} that would implicitly hold juveniles responsible for their actions.\textsuperscript{42} The Court was concerned with the statistics indicating increased juvenile arrests for serious crimes.\textsuperscript{43} Courts and legislatures then responded to the United States Supreme Court's demand for more formal juvenile court procedures by revising the purposes, processes, and operations of their juvenile justice systems.\textsuperscript{44} Several states redrafted their purpose clauses to reflect public safety and juvenile accountability concerns.\textsuperscript{45} For example, the "purpose clause" for delinquency proceedings in California states that "[j]uvenile courts and other public agencies charged with enforcing, interpreting, and administering the juvenile court law shall consider the safety and protection of the public, the importance of redressing injuries to victims, and the best interests of the minor in all deliberations pursuant to this chapter."\textsuperscript{46} Thus, "\textit{Gault} began a 'due process revolution' that substantially transformed the juvenile court from a social welfare agency into a legal institution."\textsuperscript{47}

In California, the addition of subsection (d) to section 290 in 1985\textsuperscript{48} marked both the initial application of sex offender registration laws to juveniles and the California Legislature's movement away from the traditional rehabilitative nature of the juvenile justice system.\textsuperscript{49} Yet, the legislature has not gone so far as to disregard rehabilitation as

\textsuperscript{39.} Rossum, \textit{supra} note 30, at 918–19.
\textsuperscript{40.} 387 U.S. 1 (1967).
\textsuperscript{41.} \textit{Id.} at 27.
\textsuperscript{42.} Rossum, \textit{supra} note 30, at 916.
\textsuperscript{43.} \textit{In re Gault}, 387 U.S. at 20 n.26 (citing juvenile crime statistics, including that "[i]n 1965, persons under 18 accounted for about one-fifth of all arrests for serious crimes").
\textsuperscript{44.} \textit{Feld, supra} note 32, at 3.
\textsuperscript{47.} \textit{Feld, supra} note 32, at 17.
\textsuperscript{49.} \textit{See S.B. 888, 1985–86 Reg. Sess. (Cal. 1985) (Legislative Counsel's Digest) (stating that the addition of juveniles to the registration requirement would establish a "state-mandated local program by expanding the category of persons to which a criminal penalty is applicable").}
one purpose of the juvenile justice system. Rather, the application of registration to juvenile sex offenders reflects the commingling of public safety, retributive, and rehabilitative purposes.

B. The Evolution of Section 290 Indicates the Legislature's Intent that Registration for Juvenile Sex Offenders Serve Public Safety, Retributive, and Rehabilitative Purposes

Juveniles were not included in the registration requirement of section 290 until the 1985 amendments to that section (effective as of January 1, 1986).50 The legislature overwhelmingly supported the addition of juvenile sex offenders to the registration requirement.51 The legislative history of section 290 shows that the legislature intended registration to serve public safety, retributive, and rehabilitative purposes.52 The 1985 amendments: (1) added juveniles to the registration requirement; (2) provided that the registration requirement would terminate upon the person's attainment of the age of twenty-five or when he or she had his or her records sealed at age eighteen or older under Welfare and Institutions Code section 781(a),53 unless he or she committed a 707(b) offense, in which case at least three years after commission of the offense; and (3) provided for the destruction of the registration information.54

The explicit legislative purposes of registration are "to enhance public safety and reduce the risk of recidivism."55 That the legislature

50. § 290(d), 1985 Cal. Stat. at 5404-05. Though it may appear that the pre-1986 version of section 290 could have been interpreted to include juveniles, it was not. Thus, section 290 did not apply to juveniles until the 1985 amendment that adopted the new subdivision (d) expressly dealing with wards of the juvenile court. In re Bernardino S., 5 Cal. Rptr. 2d 746, 747-48 (Ct. App. 1992). The court in Bernardino S. concluded that "[g]iven this legislative interpretation of the pre-1986 statute and the complete absence of contrary authority, it seems clear that the sole statutory basis for requiring juvenile wards to register as sex offenders is the 1985 amendments themselves." Id. at 748.

51. Senate Bill No. 888 passed the Assembly with seventy-three ayes and two noes, and passed the Senate with thirty-eight ayes and zero noes. S.B. 888, 1985-86 Reg. Sess. (Cal. 1985) (Senate Final History).

52. See S.B. 888 (Legislative Counsel's Digest) (stating that the amendments would "expand[ ] the category of persons to which a criminal penalty is applicable"); see also S.B. 888 (Assembly Third Reading, as amended Sept. 12, 1985) (stating that "[a] registration system under which the duty of juveniles to register ends at age 25 will serve the goal of public protection while allowing rehabilitated minors to be free from the stigma of registration").


54. § 781(a), 1985 Cal. Stat. at 5411.

did not specifically indicate why it added juveniles to the registration requirement suggests that the legislature believed that all the reasons for applying registration to adult sex offenders apply equally to juvenile sex offenders. In fact, research shows that adult and juvenile sex offenders share many of the same characteristics and that juvenile and adult sex offenders "show all of the same variations of sexually abusive behavior." The legislature relied on the bill's sponsor, the Department of the Youth Authority, which was concerned with the recent dramatic increase in the percentage of juveniles committed to CYA for violent offenses and the fact that juvenile court wards did not have to register under the law at the time, no matter how violent their offense. This suggests that the only purpose for making the registration requirement contingent on commitment to CYA was that at the time, only commitment to CYA indicated that the offender was extremely violent and dangerous. Thus, requiring commitment to CYA as a requirement for registration was simply a historical quirk.

1. Public Safety is the Primary Purpose of Registration

The primary purpose of sex offender registration is to ensure that the public can obtain information necessary to protect themselves and their families from dangerous sex offenders in their communities. The legislature stated that "[i]n balancing the offenders' due process and other rights against the interests of public security . . . releasing information about sex offenders . . . will further the primary government interest of protecting vulnerable populations from potential harm." The legislature was concerned with protecting the public

56. Howard E. Barbaree et al., Sexual Assault in Society: The Role of the Juvenile Offender, in The Juvenile Sex Offender 1, 18 (Howard E. Barbaree et al. eds., 1993). Rapists and child molesters experience psychological difficulties, paraphilias (recurrent intense sexual urges and fantasies), antisocial personality disorder, psychopathology, substance abuse, and sexual and nonsexual abuse as children, among other things. Id. at 7–8. This study focused on more dangerous sex offenders—men who raped or sexually assaulted adult women and men who molested or sexually assaulted children. Id. at 3. The study also considered data on juvenile sex offenders. Id. at 11–12.

57. Id. at 12.


59. Richardson, supra note 9, at 254–55. In implementing registration requirements under section 290, the California Legislature included in section 290.45 that the law enforcement entity disclosing the information of registered sex offenders shall include "a statement that the purpose of the release of information is to allow members of the public to protect themselves and their children from sex offenders." CAL. PENAL CODE § 290.45(a)(2) (West Supp. 2007).

60. CAL. PENAL CODE § 290.03(a)(4).
from "more serious sex offenders" and "high risk sex offenders,"\textsuperscript{61} which, historically, were only those offenders committed to CYA. Registration allows law enforcement to closely monitor sex offenders and provides law enforcement with additional information in investigating sex offense cases.\textsuperscript{62} The legislature found that "the dangers to the public of nondisclosure far outweigh the risk of possible misuse of the information."\textsuperscript{63}

The California Legislature was concerned with sex offender recidivism because it threatens public safety.\textsuperscript{64} In implementing section 290, the legislature found that "[s]ex offenders pose a potentially high risk of committing further sex offenses . . . and the protection of the public from reoffending by these offenders is a paramount public interest."\textsuperscript{65} The legislature created the registration system "to identify, assess, monitor and contain known sex offenders for the purpose of reducing the risk of recidivism posed by these offenders, thereby protecting victims and potential victims from future harm."\textsuperscript{66}

Though the legislature did not include the statistics or information on which it relied in coming to their conclusion, scholarly literature and statistical research support the legislature's concern. In the years leading up to the implementation of section 290(d) in 1985, there was a surge of interest in and research on juvenile sex offenders.\textsuperscript{67} According to the Center for Sex Offender Management, "Sexual aggression perpetrated by young people has been a growing concern in the United States over the past decade," and it is estimated that juveniles commit up to one-fifth of all rapes and almost one-half of all cases of child molestation each year.\textsuperscript{68} The majority of juvenile sexual

\textsuperscript{61} Id. § 290.03(a)(6).
\textsuperscript{62} See id. § 290.45 (indicating that the additional information that registration provides includes the sex offender's name, known aliases, gender, race, physical description, photograph, date of birth, address, description and license plate number of the offender's car, type of victim targeted, relevant parole or probation conditions, crimes resulting in classification under section 290, and date of release from confinement); S.B. 888 (Assembly Third Reading, as amended Sept. 12, 1985) ("[R]egistration enables law enforcement to keep track of potentially dangerous sex offenders residing in their jurisdiction.").
\textsuperscript{63} Cal. Penal Code § 290.03(a)(7).
\textsuperscript{64} See id. § 290.03(a).
\textsuperscript{65} Id. § 290.03(a)(1).
\textsuperscript{66} Id. § 290.03(b).
\textsuperscript{67} Barbaree et al., supra note 56, at 10.
aggressors are male. The best available estimates suggest that adolescent males perpetrate 20% of all rapes and between 30% and 50% of all child molestations.

Research on juvenile sex offender recidivism is varied and particularly lacking, and recidivism measurements tend to be misleadingly low because sexual assault is a vastly underreported crime. Recidivism rates also vary depending on how they are calculated. Nevertheless, the few prospective studies on young sex offenders report recidivism rates between 2% and 14%. In one of the few recidivism studies on sexually assaultive juveniles with a relatively long follow-up period of about ten years, researchers found that 37% of the sexually assaultive juveniles studied had an adult criminal record of one or more sexual assaults after being discharged from juvenile corrections. In contrast, only 10% of the comparison group in the study, consisting of violent juveniles who had committed offenses other than sex offenses, had a record of adult sexual assaults. Not only was this difference statistically significant, but “only subjects who had been identified as sexually assaultive juveniles committed multiple sexual offenses in adulthood.” Furthermore, 89% of the sexually assaultive juveniles were arrested as adults for non-sexual violent offenses, whereas 69% of the violent comparison group were arrested as adults for non-sexual violent offenses. This study concluded that “as adults, sexually assaultive juveniles were significantly more dangerous than other violent juveniles” and that “these juveniles are an extraordinarily violent group who continue to commit sexually assaultive offenses, as well as other violent nonsexual offenses, into adulthood.”

69. Id.
70. Barbaree et al., supra note 56, at 11.
71. Recidivism of Sex Offenders, supra note 13, at 14.
72. Id. at 3.
73. Id. at 2-4 (stating that recidivism rates vary depending on whether they are based on subsequent arrest, subsequent conviction, and/or subsequent incarceration, whether any subsequent offenses or just subsequent sex offenses are included, and the length of follow up).
75. Id. at 262-63. Though the follow-up study commenced eight years after the original study, it took over four years to complete, so the entire study spanned twelve years. Id. at 263.
76. Id. at 263.
77. Id. at 262-63.
78. Id. at 263.
79. Id.
80. Id.
81. Id. at 265.
Though other follow-up studies of sexually assaultive adolescents have reported lower rates of recidivism, they had relatively brief follow-up periods. Additionally, when the researchers in the above study calculated recidivism rates based on a shorter seventeen-month follow-up period for their group of sexually assaultive juveniles, they found a 21% recidivism rate, which was lower than the 37% recidivism rate after about ten years. The discrepancy reveals the importance of length of follow-up and suggests that this study is more accurate than other studies because of its longer follow-up period. A meta-analysis study supports this conclusion as well in finding that recidivism rates for juveniles rose over time.

Despite studies like those above, since “little is really known about the long-term criminal outcome of adolescent sex offenders,” studies on adult sex offenders may shed light on juvenile sex offenders. Of 561 male sex offenders that researchers evaluated, researchers found that the majority (53.6%) of adult sex offenders reported the onset of at least one deviant sexual interest prior to age eighteen. Of that percentage, “each reported two different paraphilias and an average commission of 380.2 sex offenses by the time he reached adulthood.” Juvenile sex offenders reported 1.9 paraphilias and the commission of an average of 6.8 sex offenses.

One of the most widely-recognized meta-analysis studies of sexual offender recidivism examined the importance of various factors across studies and estimated how strongly certain offender and offense characteristics are related to recidivism. It showed that sex offenders

82. Id. at 263. For example, previous studies had follow-up periods of only about six years or seventeen months. Id. at 262.
83. Id. at 264.
84. Margaret A. Alexander, Sexual Offender Treatment Efficacy Revisited, 11 Sexual Abuse: J. Res. & Treatment 101, 110 (1999). This meta-analysis study analyzed seventy-nine studies on sexual offender treatment from 1943 through 1996 and compared treated and untreated sex offenders. Id. at 103-04. Recidivism was defined as “the number of subjects who were rearrested for a new sexual offense.” Id. at 104.
85. Rubinstein et al., supra note 74.
87. Id. at 13.
88. Id.
89. Recidivism of Sex Offenders, supra note 13, at 10–11.
were more likely to recidivate if they had prior sex offenses and started sexually offending at an early age. The researchers also found that sexual interest in children was the strongest predictor of recidivism across all studies. The study indicated that the average sex offense recidivism rate across all studies was 18.9% for rapists and 12.7% for child molesters over a four to five year period. The recidivism rate for any reoffense (both sexual and non-sexual offenses) was 46.2% for rapists and 36.9% for child molesters over a four to five year period. The Center for Sex Offender Management reviewed this meta-analysis study, along with many other studies on sex offender recidivism, and found that "because meta-analysis findings can be generalized across studies and samples, they offer the most reliable estimation of factors associated with the recidivism of sex offenders."

The studies on juvenile and adult sex offenders reveal a legitimate concern for protecting the community from recidivism. Though juvenile sex offender recidivism has yet to be comprehensively studied, current studies on juvenile sex offender recidivism as well as studies on adult sex offender recidivism suggest that juvenile sex offenders are particularly likely to commit additional sex offenses in adulthood. As with all juvenile crimes, the legislature must decide how to balance the protection of the community with the rehabilitation and treatment of the juvenile offender. In the case of juvenile sex offending, the legislature has determined that the balance weighs more heavily in favor of protecting the community, which is best achieved through registration.

Since the 1985 amendments to section 290, the legislature has added more offenses to the list of offenses for which juveniles must register, indicating a growing concern with juvenile behavior and the necessity of monitoring juveniles through registration for more and more types of conduct. In addition, the current statute no longer

90. Id. at 11.
91. Id.
92. Id. at 10.
93. Id.
94. Id. at 1.
95. Id. at 12.
96. Compare Act of Oct. 2, 1985, ch. 1474, § 290(d)(1), 1985 Cal. Stat. 5403, 5404–05, with Cal. Penal Code § 290(d)(3) (West 1999 & Supp. 2007). For example, whereas the 1985 amendments had a sunset clause for the offense of misdemeanor child molestation (section 647a), 1985 Cal. Stat. at 5406, 5408 (current version at Cal. Penal Code § 290(d)), the current statute once again contains that offense (section 647.6), indicating that it was added back to the statute after the 1985 amendments, possibly because of the seriousness and increased prevalence of that offense.
contains the language regarding automatic termination of the registration requirement at age twenty-five.97 The current statute provides that:

All records specifically relating to the registration in the custody of the Department of Justice, law enforcement agencies, and other agencies or public officials shall be destroyed when the person who is required to register has his or her records sealed under the procedures set forth in Section 781 of the Welfare and Institutions Code.98

Welfare and Institutions Code section 781 has also changed since the 1985 amendments with regard to juveniles who commit one of the serious, violent 707(b) offenses. The 1985 amendments to section 781 allowed for sealing of a juvenile’s records even if he or she committed a 707(b) offense as long as at least three years had elapsed since the commission of the crime.99 In contrast, under the current version of section 781, the court shall never order the person’s records sealed or registration requirement dropped if the person committed a 707(b) offense when he or she was fourteen years old or older.100 This change, along with the increased number of offenses for which juveniles must register under section 290(d), indicates the increased seriousness with which the legislature has come to view juvenile sexual offending and its intent to toughen registration requirements to address heightened public safety concerns.

2. Retribution is Also a Valid Purpose of Registration

Registration as retribution is another component of the overall treatment and punishment of a juvenile sex offender. In enacting the 1985 amendments to section 290, the legislature specifically noted that the intended effect of section 290(d) pertaining to juveniles was to “expand[ ] the category of persons to which a criminal penalty is applicable.”101 Since the commingling of juvenile and adult offenders within the sex offender registration statute departs from the traditional separation of juvenile and adult criminal justice systems,102 the

97. CAL. PENAL CODE § 290(d)(5).
98. Id.
100. CAL. WELF. & INST. CODE § 781(a).
102. Garfinkle, supra note 9, at 182.
legislature recognized the need to blend both rehabilitative and punitive purposes.\(^\text{103}\)

Retribution serves to balance the suffering of the victims and their families with the treatment and rehabilitation of the offender. Retribution is a necessary element of the juvenile justice system, lest we ignore the plight of the victims who suffer just as much when their assailant is a juvenile as when their assailant is an adult. While some argue that registration may stigmatize or ostracize juvenile offenders,\(^\text{104}\) when a juvenile has committed an offense that the legislature has deemed serious and dangerous, public safety outweighs these other concerns. Registration helps ensure that other potential young victims who are similarly developing physically and emotionally are aware of and less likely to be traumatized by sexual molestation or assault by the juvenile sex offender. The majority of victims of juvenile sex offenders are younger than nine years old, and about 25–40% are younger than six years old.\(^\text{105}\) Rather than focus on the possible stigmatization or hurt feelings of the juvenile offender, we should focus on the young victims who are also stigmatized and emotionally damaged by the mere fact of being victims of such an intimate crime in which they had no choice.

Retribution is warranted because the experience for victims of sexual abuse committed by juveniles is extremely intrusive—the assault is not only physical, but psychological as well.\(^\text{106}\) Victims of sex offenses suffer severe, numerous, and long-lasting effects.\(^\text{107}\) The short-term effects of sexual victimization include emotional disturbance, anxiety, fear, sleep and eating disturbances, anger, hostility, inappropriate sexual behavior, and behavioral and social problems.\(^\text{108}\) The long-term effects include depression, anxiety and tension, lowered self-esteem, disturbances of social interaction and affiliation, problems in relations with others, substance abuse problems, serious

\(^{103}\) See S.B. 888 (Legislative Counsel's Digest) (stating that the amendments would "expand[] the category of persons to which a criminal penalty is applicable"); see also S.B. 888 (Assembly Third Reading, as amended Sept. 12, 1985) (stating that "[a] registration system under which the duty of juveniles to register ends at age 25 will serve the goal of public protection while allowing rehabilitated minors to be free from the stigma of registration").

\(^{104}\) See Wind, supra note 9, at 116.


\(^{106}\) See Barbaree et al., supra note 56, at 2–3.

\(^{107}\) Id. at 2.

\(^{108}\) Id. at 2–3.
problems trusting others and in the development of intimate relationships, difficulties in sexual adjustment, and an increased rate of sexual behavior as adults.\textsuperscript{109} Victims of sexual abuse also seem to be more vulnerable to revictimization,\textsuperscript{110} which is why registration particularly serves the interests of victims by making them feel as though their assailant is adequately punished in addition to making them more aware of sex offenders in their communities. The most troubling consequence of sexual abuse is when victims become sexual offenders themselves.\textsuperscript{111}

Registration as punishment for sex offenders provides an outlet for victims who suffer these physical and psychological consequences. Registration can help victims feel safe and feel like they have assisted the community by playing a role in providing public information about dangerous sex offenders so others can take precautions to avoid being victimized. Registration as punishment also provides satisfaction for victims' families and society who must attempt to emotionally and psychologically heal these young victims and advocate for them. For example, school teachers, police, psychologists, and others have to deal with victims who suffer from depression, abuse others, or are otherwise antisocial and untrusting. Unlike other crimes, such as burglary or even simple assault, where the harm may be relatively short-term and reparable, the harm that sex offenders inflict is much more extensive and complex, with ripple effects throughout families and society. Accordingly, the legislature has determined that protecting the public at the expense of punishing juvenile sex offenders through registration, and in turn taking away some of sex offenders' privacy in their personal information, is a worthwhile tradeoff.

3. Registration Can Still Play a Rehabilitative Role

Registration is not contrary to rehabilitative goals. Rehabilitation is "[t]he process of seeking to improve a criminal's character and outlook so that he or she can function in society without committing other crimes."\textsuperscript{112} Rehabilitation can occur concurrently with a registration requirement so that registration plays a role in the rehabilitation of the juvenile offender. Registration is rehabilitative in that it can replace denial and minimization with motivation to change future

\begin{flushleft}
\textsuperscript{109} Id. at 3.
\textsuperscript{110} Id.
\textsuperscript{111} Richardson, supra note 9, at 251.
\textsuperscript{112} BLACK'S LAW DICTIONARY 1311 (8th ed. 2004).
\end{flushleft}
behavior. Registration also holds individuals responsible for their actions. It acts as a constant reminder to juveniles of their crime and may help encourage them to function in society without committing other crimes. The legislature itself views registration as rehabilitative to some extent in stating that registration "shall not be construed as punitive," and the release of information is not intended to "be used to inflict retribution or additional punishment on any person convicted of a sex offense."

Furthermore, unlike adult sex offender registration, registration for juveniles is not necessarily required for a lifetime. Juveniles may petition the court to have their file sealed and destroyed and their registration requirement relieved under Welfare and Institutions Code section 781, unless they have committed one of the serious, dangerous crimes listed under Welfare and Institutions Code section 707(b). Thus, juveniles who commit less serious sex offenses can work toward terminating their registration requirement as a means of motivating them to complete their treatment programs. Though the argument that registration is rehabilitative in this respect is weaker for juveniles who commit serious sex offenses and cannot have their registration requirement terminated, those are precisely the offenders whom the legislature has deemed most dangerous and in need of registering, so the community protection purpose of registration outweighs the rehabilitative purpose.

III. California Courts Have Formalistically Interpreted Current Law and Left Open the Possibility of Judicial Discretion to Impose Registration

California courts have formalistically interpreted section 290 without addressing the merits or purposes of registration, thereby leaving the door open for an amendment to the registration statute

113. See Earl F. Martin & Marsha Kline Pruett, The Juvenile Sex Offender and the Juvenile Justice System, 35 Am. Crim. L. Rev. 279, 310 (1998) (arguing that treatment programs for sex offenders must "assist the perpetrator in accepting responsibility for his actions by replacing denial and minimization with empathy for his victim and with motivation to change his future behavior").

114. See Rossum, supra note 30 (stating that the offense-oriented justice model "seeks to achieve the twin goals of holding juveniles individually responsible for their criminal misdeeds and holding the juvenile justice system accountable for its treatment of these juveniles").

116. Id. § 290.03(a)(7).
that allows for judicial discretion in imposing registration. The courts have not commented on whether registration is beneficial for juveniles; they have simply indicated that it is for the legislature to decide and that the court will interpret the laws as the legislature intended them without imposing judicial discretion unless mandated by the legislature. The legislature could and should decide to allow for judicial discretion.

Like the legislative history of section 290(d), the judicial interpretation of section 290(d) reinforces the notion that requiring commitment to CYA as a predicate for registration was likely a historical quirk—at the time the statute was enacted, CYA was believed to contain all of the worst offenders. The California Court of Appeal in In re Bernardino S. (decided in 1992, soon after the 1985 amendments to section 290) indicated this belief when it stated:

[T]he Legislature consciously sought to require registration only of those “violent or repeat offenders” whose dangerousness warranted the imposition of a penal measure otherwise reserved for convicted criminals. It chose to do so by predating registration on the juvenile’s having been subjected to the most restrictive of all juvenile court dispositions, Youth Authority commitment. Juveniles subjected to that disposition were more likely to be “violent or repeat” offenders than those receiving a less restrictive disposition.

Since CYA no longer contains all of the worst offenders, judicial interpretation of section 290(d) provides no basis for the legislature to resist amending the requirements for registration.

In Bernardino S., the court held that a minor adjudged a ward of the court for performing lewd and lascivious acts upon a child under the age of fourteen (in violation of Penal Code section 288), who was not committed to CYA, could not be ordered to register as a sex offender under section 290. Though lewd and lascivious acts upon a child under fourteen is a sex offense listed in section 290(d) (3), the

118. See, e.g., In re Bernardino S., 5 Cal. Rptr. 2d 746, 752 (Ct. App. 1992) (holding that the trial court lacked the power to impose a registration requirement on the minor because “the legislative determination of who should register and who should not is exclusive, and that the trial court cannot expand the legislative classification”).
119. See discussion supra Part II.B.
120. 5 Cal. Rptr. 2d 746 (Ct. App. 1992).
121. Id. at 749 (citing California Welfare and Institutions Code section 725.5, CAL. WELF. & INST. CODE § 725.5 (West 1998), which lists factors that the court must consider in determining proper disposition, such as age, circumstances and gravity of the offense, and previous delinquent history).
122. See infra Part IV.
124. In re Bernardino S., 5 Cal. Rptr. 2d at 747.
court found that "[b]y its plain words, section 290 requires registration of juvenile wards only when they are discharged or paroled from the Youth Authority after having been committed for one of the enumerated offenses."\textsuperscript{125} Instead of committing the minor to CYA, the court had placed him in his parents' home under a probation officer's supervision.\textsuperscript{126}

The court struck down the potential for judicial discretion in juvenile sex offender registration in the absence of legislative direction by concluding that "the legislative determination of who should register and who should not is exclusive."\textsuperscript{127} The court took a formalistic approach to interpreting section 290(d) and did not address the merits or purposes of registration, thereby not hindering or questioning legislative implementation of registration for juveniles.

The California Supreme Court also upheld section 290(d) as a result of a formal approach to statutory interpretation rather than an inquiry into the policy aims of registration.\textsuperscript{128} As the California Supreme Court indicated, such an inquiry must be left to the legislature,\textsuperscript{129} and the time is ripe for the legislature to make the much-needed change. In August 2006, the California Supreme Court in \textit{In re Derrick B.},\textsuperscript{130} analyzed the language of and legislative intent behind newly enacted section 290(a)(2)(E),\textsuperscript{131} which was added in 1994,\textsuperscript{132} after \textit{Bernardino S.} had been decided. The new section provides that:

\begin{quote}
Any person ordered by any court to register pursuant to this section for any offense not included specifically in this section if the court finds at the time of conviction or sentencing that the person committed the offense as a result of sexual compulsion or for purposes of sexual gratification. The court shall state on the record the reasons for its findings and the reasons for requiring registration.\textsuperscript{133}
\end{quote}

\textsuperscript{125} \textit{Id.} at 749.

\textsuperscript{126} \textit{Id.} at 747. The court did not commit the minor to CYA because the probation officer and a court-appointed psychiatrist found that the minor acted merely on impulse and immaturity rather than on pedophilic interests or a personality disorder. Thus, the probation officer found that the minor was not in any way a danger to the public or to children. \textit{Id.}

\textsuperscript{127} \textit{Id.} at 752.

\textsuperscript{128} \textit{See In re Derrick B.}, 139 P.3d 485, 487–88 (Cal. 2006).

\textsuperscript{129} \textit{Id.} at 492.

\textsuperscript{130} 139 P.3d 485 (Cal. 2006).


\textsuperscript{132} \textit{In re Derrick B.}, 139 P.3d at 488–89.

\textsuperscript{133} \textit{CAL. PENAL CODE} § 290(a)(2)(E).
The court held that section 290(a)(2)(E) does not apply to juveniles,\textsuperscript{134} thereby declining to impose judicial discretion in requiring juveniles to register in the absence of legislative mandate. The court found that since the terms “conviction” and “sentencing,” as used in section 290(a)(2)(E), are usually associated with adult proceedings, and adjudications in juvenile cases are not criminal convictions, this subdivision only applies in cases of adult convictions.\textsuperscript{135} Furthermore, “[t]he fact that \textit{Bernardino S.} was decided before the enactment of subdivision (a)(2)(E) makes it all the more significant that the Legislature chose to use terms that had been construed to apply to adult offenders only.”\textsuperscript{136}

The court found that the juvenile court erred in requiring Derrick to register as a sex offender under section 290 upon being released from CYA for sexual battery of a ten-year-old girl (in violation of Penal Code section 243.4)\textsuperscript{137} because “a juvenile offender may not be ordered to register as a sex offender under Penal Code section 290 if his offenses are not among those listed in subdivision (d)(3).”\textsuperscript{138} In contrast to \textit{Bernardino S.} where the minor had committed a listed offense but was not sent to CYA, in \textit{Derrick B.}, the minor was sent to CYA but had not committed a listed offense. In \textit{Derrick B.}, the court found that although section 290(a)(2)(A) requires registration by adults convicted of sexual battery, among other offenses, section 290(d)(3), which pertains to juveniles sent to CYA, does not include sexual battery.\textsuperscript{139}

Taken together, \textit{Bernardino S.} and \textit{Derrick B.} dictate that the juvenile court does not have discretion to require registration in connection with unlisted offenses or in the absence of a commitment to CYA. The court in \textit{Derrick B.} relied on \textit{Bernardino S.} and addressed the application of section 290(a)(2)(E) by concluding that “the Legislature carefully distinguished, in subdivisions (a)(2)(A) and (d)(3), between the offenses requiring registration by adults and those requiring registration by juveniles. In the absence of a clear expression of its intent, we are not persuaded that the Legislature meant to altogether abandon such differentiation in enacting subdivision (a)(2)(E).”\textsuperscript{140}

\begin{itemize}
  \item \textsuperscript{134} \textit{In re Derrick B.}, 139 P.3d at 488.
  \item \textsuperscript{135} Id.
  \item \textsuperscript{136} Id. at 489.
  \item \textsuperscript{137} \textsc{Cal. Penal Code} § 243.4.
  \item \textsuperscript{138} \textit{In re Derrick B.}, 139 P.3d at 486, 492.
  \item \textsuperscript{139} Id. at 487.
  \item \textsuperscript{140} Id. at 492.
\end{itemize}
The reasoning of the courts in *Bernardino S.* and *Derrick B.* had nothing to do with the goals of or requirements for registration. Instead, the courts relied on a formalistic analysis of the statutory language.\(^{141}\) Thus, the judicial interpretation of section 290 provides no basis to resist amending the requirements for registration. To the contrary, the cases reveal the need for amending section 290 by illustrating the glaring inconsistency between the traditional specialized treatment of juveniles and the lack thereof in the registration requirement. And yet, the court has deferred to the legislature in dealing with the problem, so it is time for the legislature to act.

**IV. The Reluctance of Judges to Send Juvenile Sex Offenders to CYA Has Created an Unintended Obstacle to Registration**

As previously discussed, judges can only require a juvenile sex offender to register if they send the juvenile to CYA. Yet, judges are reluctant to send juvenile sex offenders to CYA because of the terrible conditions at CYA and not because consequent registration would be inappropriate. In light of recent news of a videotape showing two correctional counselors kicking and striking two young inmates as they lay facedown on the floor, seven suicides and hundreds of attempted suicides in the juvenile system, and inmates in cages while being schooled,\(^{142}\) the abusive conditions and lack of resources at CYA have grown increasingly apparent.\(^{143}\) The abhorrent conditions have subsequently become a major point of contention among politicians, victims' families, and corrections officials.\(^{144}\)

In 2002, a coalition of law firms sued the Director of CYA in federal court as a class action challenging the conditions at CYA and alleging unconstitutional treatment of inmates.\(^{145}\) In January 2003, Margaret Farrell refiled the lawsuit in state court as a taxpayer action, alleging that CYA was improperly spending state funds on unlawful practices.\(^{146}\) Farrell's nephew was a mentally ill inmate who was locked in isolation in filthy conditions for twenty-three hours a day for seven months and fed "blender meals," a liquefied mix of foods, through a

\(^{141}\) See id.; *In re Bernardino S.*, 5 Cal. Rptr. 2d 746 (Ct. App. 1992).


\(^{143}\) See generally id.

\(^{144}\) See generally id.

\(^{145}\) Id.

\(^{146}\) Id.
straw pushed through his cell door. Farrell sought to compel the Director of CYA to remedy the illegal, inhumane, discriminatory, and punitive conditions that existed throughout CYA. Farrell’s complaint listed endless problems plaguing CYA. Most importantly, CYA does not provide an adequate number of treatment beds for sex offenders and does not, and cannot, comply with Welfare and Institutions Code section 727.6 which requires sex offender treatment for wards committed for sexually violent offenses. Furthermore, the sex offender treatment programs are inadequate, ineffective, and provided by untrained staff. As a result, the majority of sex offenders committed to CYA are housed in the general prison population with no treatment, so they are released to the community at a greater risk of reoffending.

In November 2004, the parties entered a consent decree and agreed to an expert review of the deficient conditions at CYA and the proposal of a Safety and Welfare Remedial Plan. However, even


148. Complaint, supra note 147, at 2.

149. Id. at 4–37 (listing excessive use of force against wards, the exposure of the most vulnerable wards to the most dangerous wards, rape, sexual assault, and sexual harassment within CYA, gang-related violence, subjection to extremely harsh punishment through segregation, denial of adequate medical treatment, denial of adequate mental health treatment, denial of adequate access to education, denial of adequate substance abuse treatment, denial of adequate access to physical facilities and the courts, and disability and sex discrimination).

150. CAL. WELF. & INST. CODE § 727.6 (West Supp. 2007) ("Where any minor has been adjudged a ward of the court for the commission of a 'sexually violent offense' . . . and committed to the Department of the Youth Authority, the ward shall be given sexual offender treatment consistent with protocols for that treatment developed or implemented by the Department of the Youth Authority.").

151. Complaint, supra note 147, at 29. The complaint cited the Budget Concept Paper for fiscal year 2002–03 and stated that as of March 2001, there were 1102 identified sex offenders in CYA institutions, but only 312 in treatment beds. Id.

152. Id.

153. Id.

now in 2007, three years after the consent decree, "little progress has been made to improve conditions in the institutions,"\textsuperscript{155} and "California's network of youth prisons . . . remains a bleak backwater, plagued by inadequate rehabilitation programs and extraordinary levels of violence."\textsuperscript{156} Many are skeptical that the state will make the necessary fundamental reforms in light of the fact that nothing has yet happened and violence is still rising.\textsuperscript{157} It is not surprising that due to the problems with CYA, "over the last decade or so, the Youth Authority has become the destination of last resort for the state's most violent young convicts."\textsuperscript{158} Since CYA has many problems, judges rarely send deserving juveniles to CYA, juvenile sex offenders do not have to register, and section 290(d) is unintentionally rendered ineffective by not encompassing all of the offenders that it should.\textsuperscript{159}

Statistics show that judges are no longer sending juvenile offenders to CYA. The Center on Juvenile and Criminal Justice reported that "[c]ommittments to California state youth correctional facilities are at their lowest levels in 47 years even though the state's youth population more than doubled during this period."\textsuperscript{160} In fact, over the last eleven years, the Department of Juvenile Justice's ("DJJ") new admissions and population dropped by 75%, which is the fastest decline in its six-decade history.\textsuperscript{161} Most recently, in 2006, only 0.3% of juvenile wards were committed to CYA compared to 0.7% in 2002.\textsuperscript{162} This represents

\begin{enumerate}
\item \textsuperscript{155} MALES ET AL., \textit{supra} note 38, at 2.
\item \textsuperscript{157} Id.
\item \textsuperscript{158} Warren, \textit{supra} note 142.
\item \textsuperscript{159} Even if appropriate changes are made, studies, such as those by the Center on Juvenile and Criminal Justice, indicate that "institutionalization is not in the best interests of juvenile offenders, and . . . incapacitation of these offenders may not serve the purpose of keeping crime rates down." MALES ET AL., \textit{supra} note 38, at 2. Therefore, judges may still refrain from sending juvenile offenders to CYA even if the institution improves.
\item \textsuperscript{160} Id. at 7. In 1959, the average daily population in DJJ facilities was 4279, whereas by June 2006, the average daily population was 2910. Id. On a per capita basis, the DJJ commitment rate in 1959 was 213.0 per 100,000 of the population aged ten to seventeen, whereas in 2006 the commitment rate was 64.6 per 100,000, id. at 8, tbl. 3, which "represents the lowest record commitment rate in California history," id. at 7. These statistics show that "[o]n a per capita basis, the 1959 population of incarcerated youth was more than three times greater than the same population in 2006." Id.
\item \textsuperscript{161} Id.
\item \textsuperscript{162} CRIMINAL JUSTICE STATISTICS CTR., OFFICE OF THE ATTORNEY GEN., CRIME IN CALIFORNIA, 2006, ADVANCE RELEASE 5, http://ag.ca.gov/cjsc/publications/advrelease/ad/ad06/ad06.pdf (last visited Nov. 8, 2007). Between 2002 and 2006, the percentage of juveniles committed to CYA were as follows: 0.7% in 2002; 0.7% in 2003; 0.4% in 2004; 0.3% in 2005; and 0.3% in 2006. Id. These percentages represent a decreasing trend. Juve-
a 57% decline in the percentage of juveniles committed to CYA. It is important to note that this decline occurred during the years of Margaret Farrell’s lawsuit against CYA and the heightened attention on the horrible conditions at CYA. Yet, during this same time period (2002 to 2006), the percentage of juveniles arrested only declined by 4.6%. Therefore, of the juveniles arrested, a significantly smaller percentage were committed to CYA recently than in previous years. Despite an overall trend of decreasing juvenile arrest rates in the past three decades, the recent dramatic reduction in CYA commitments does not reflect a similarly dramatic reduction in juvenile arrest rates in California. This is not surprising since “CYA commitment rates have shown no particular trend toward following juvenile arrest rates in California,” and “DJJ county commitment rates are unrelated to juvenile crime patterns,” as “[c]rime rates fell in all counties regardless of DJJ commitment rates.” While commitment rates are not related to arrest rates, they are related to conditions at CYA.

These statistics, when viewed in conjunction with the terrible conditions at CYA, suggest that the decreasing number of CYA commitments is due to a decreasing willingness of judges to send juvenile offenders to CYA and not a decrease in the arrest rate. Rather, “the sharp reduction in DJJ commitments illustrates a distinct movement toward new interventions to carry out appropriate treatment and retile wards are juveniles who are under the jurisdiction and protection of the court. See CAL. WELF. & INST. CODE § 602 (West 1998 & Supp. 2007).

I derived this statistic from the following calculations using the statistics in the text accompanying note 162: [(0.7-0.3)+0.7] x 100%=57%.

See CRIMINAL JUSTICE STATISTICS CTR., OFFICE OF THE ATTORNEY GEN., CRIME IN CALIFORNIA, 2006, ADVANCE RELEASE 3, http://ag.ca.gov/cjsc/publications/advrelease/ad/ad06/ad06.pdf (last visited Nov. 8, 2007). Between 2002 and 2006, the rate of juveniles arrested per 100,000 of the total population were as follows: 650.5 in 2002; 621.5 in 2003; 596.2 in 2004; 591.2 in 2005; and 621.9 in 2006. Id. Despite the increase in the juvenile arrest rate in 2006, these figures demonstrate a general decreasing trend. Even without the increased juvenile arrest rate in 2006, the percentage of juveniles arrested between 2002 and 2005 only declined by 9.2%, id., which is still far less than the 57% decline in juvenile commitments to CYA.

MALES ET AL., supra note 38, at 4. "Overall, youth felony arrests have dropped 60 percent over the last three decades and now stand at their lowest level since 1955." Id.


MALES ET AL., supra note 38, at 13.
habilitation of juvenile offenders," as "most major counties are now relying less on state correctional institutions." Instead, they are placing juvenile offenders in rehabilitation programs in their home counties with much better results. Some counties are even given subsidies to aid them in providing alternatives to CYA commitment. The San Francisco Board of Supervisors has urged local judges and prosecutors to avoid sending juvenile offenders to CYA. Alameda County officials recommended a similar moratorium on CYA commitments, and Santa Clara County officials prepared a report that included the possibility of phasing out the use of CYA. San Mateo and Santa Cruz counties have already announced they will no longer send convicted juveniles to CYA.

Furthermore, under Welfare and Institutions Code section 734, No ward of the juvenile court shall be committed to the Youth Authority unless the judge of the court is fully satisfied that the mental and physical condition and qualifications of the ward are such as to render it probable that he will be benefited by the reformatory educational discipline or other treatment provided by the Youth Authority.

Yet, as shown above, the problems that plague CYA likely prevent judges from believing that a juvenile sex offender will obtain the necessary treatment and programs at CYA. Judges are much more likely to consider alternative means of punishment and treatment that are more promising for rehabilitating a juvenile sex offender. Rather than send a juvenile to CYA, a judge may place him or her on probation and order placement of the minor in the approved home of a relative or nonrelative, a suitable licensed community care facility, or a foster home, or commit a minor to a county juvenile home, ranch, camp,
forestry camp, county juvenile hall, residential treatment center, or group home. Judges have wide discretion in how and where to handle juvenile offenders. Under Welfare and Institutions Code section 727, "the court may make any and all reasonable orders for the care, supervision, custody, conduct, maintenance, and support of the minor." Oddly, the one area in which judges do not have discretion is the registration requirement for juvenile sex offenders. Judges have no choice but to not require juvenile sex offenders to register if they do not send them to CYA—their hands are unreasonably tied.

The lack of adequate programs and treatment at CYA is especially significant in deterring judges from sending juvenile sex offenders to CYA because treatment is particularly important for sex offenders. Sex offenses are characterized by their chronic and compulsive nature. In addition, "[a]lthough sex offenders may commit other types of offenses, other types of offenders rarely commit sex offenses." The majority of juvenile sex offenders commit their first sexual offense before fifteen years of age and often even before twelve years of age. Furthermore, sex offenders progress from less serious offending to more serious offending.

Because sex offenders tend to repeat their behavior, it is important to treat juvenile sex offenders "before the behavior becomes more entrenched in adulthood." Treatment programs should be tailored to fit all the paraphilic interests of the particular sex offender. Just as treatment should be individualized to meet the specific needs of the juvenile, so should consideration for registration. Since the main purposes of treatment are to protect the community

178. *Id.* § 730(a) (West 1998).
179. NCJJ, *supra* note 5.
181. *Id.*
182. See Abel & Rouleau, *supra* note 86, at 14, 16-18 (indicating that sex offenders often have recurring paraphilic interests throughout their lifetimes, and "sex offenders have a general deficit that leads them to perpetrate these crimes"). In this study, rapists reported "having recurrent, repetitive, and compulsive urges and fantasies to commit rapes." *Id.* at 18.

184. Shaw et al., *supra* note 105, at 55S.
186. *Id.*
and assist the offender in accepting responsibility for his or her actions, "treatment of the juvenile could go a long way toward reducing the impact of sexual assault in our society." Because of "the severe consequences of sexual assaults upon the numerous victims throughout the offender's life span, a significant reduction in victim injury could be accomplished if effective treatment were provided early in the sex offender's career."

Not only is treatment important for sex offenders because of the nature of sex offenses and the characteristics of sex offenders, but juvenile sex offenders may respond better to treatment than adult offenders. Juvenile sex offenders have a less deeply ingrained deviant sexual pattern, they are still exploring alternative means of sexual gratification, and their sexual fantasies are still evolving so as not to be their permanent behavior. Studies suggest that "the majority of sexually abusive youth are amenable to, and can benefit from, treatment" because "the sexual arousal patterns of sexually abusive youth appear more changeable than those of adult sex offenders." In the meta-analysis study comparing treated and untreated juvenile sex offenders, researchers found that juvenile sex offenders responded well to cognitive-behavioral and relapse prevention treatment and had the lowest recidivism rate (7.1%) of all subjects. The effectiveness of treatment indicates that permanent institutionalization may not be necessary, and instead, "[o]nce treated, offenders may be monitored in the community for extended periods at a fraction of the cost of more restrictive or invasive measures."

Since treatment is so important for juvenile sex offenders, and CYA cannot provide sufficient or effective treatment, judges rightfully do not send juvenile sex offenders to CYA. Even if judges are not sending juveniles to CYA for reasons other than the terrible conditions at CYA, they are, nonetheless, not sending them there. The unintended consequence is that juvenile sex offenders circumvent the registration requirement, contrary to the intent and purposes of the law.

189. Barbaree et al., supra note 56, at 11.
190. Abel & Rouleau, supra note 86, at 18.
191. Wind, supra note 9, at 105-06.
192. Id. at 106.
193. UNDERSTANDING JUVENILE SEXUAL OFFENDING BEHAVIOR, supra note 68, at 3.
194. Id.
195. Alexander, supra note 84, at 105-06, 110.
196. Id. at 110.
V. Judicial Discretion in Juvenile Registration Can Better Promote the Purposes of Registration

A discretionary approach to juvenile sex offender registration through consideration of enumerated factors can better promote the public safety, retributive, and rehabilitative purposes of registration. Since the California Legislature has determined that registration is beneficial to society in serious, dangerous cases, the registration requirement should still exist for juveniles but must not depend on commitment to CYA. Instead, registration should depend on guided judicial discretion based on consideration of enumerated factors and a juvenile’s commission of one of the sex offenses currently listed in section 290(d)(3). This guided discretion preserves the traditional approach to juvenile justice, specifically, individualized consideration, while better effectuating the legislature’s purpose behind the juvenile sex offender registration statute.

Though there may be fear that, given discretion, judges will rely too heavily on emotional pleas in determining whether registration is appropriate for an offender, sex offense cases deserve judicial discretion. Rigid rules cannot easily account for “the unique nature of sexually abusive experiences,” juveniles’ varying levels of mental, emotional, psychological, and social development, their varying characteristics, and the spectrum of their sexual offenses. Sex offenses range widely from verbal sexual harassment to violent, aggressive rape. Yet, many juvenile sex offenders commit acts that fall somewhere in between these extremes, where rigid rules are not useful for achieving the desired result of rehabilitating the offenders, protecting the public, and effecting retribution.

Furthermore, while the United States Supreme Court in Gault, and subsequently the California Legislature in the 1985 amendments to section 290, may have attempted to impose more procedure and

197. Rubinstein et al., supra note 74, at 263.
198. See Shaw et al., supra note 105, at 59S–64S. “Sexual offending behavior is associated with a matrix of behavioral, emotional, and developmental problems.” Id. at 62S.
199. See Recidivism of Sex Offenders, supra note 13, at 2 (“Sex offenders are a highly heterogeneous mixture of individuals . . . .”).
200. See Shaw et al., supra note 105.
201. See Recidivism of Sex Offenders, supra note 13, at 2 (indicating that there are sex offenders “who have engaged in a wide range of other inappropriate and criminal sexual behaviors” in addition to the extremes like violent sexual assaults); see also John A. Hunter et al., Juvenile-Perpetrated Sexual Crimes: Patterns of Offending and Predictors of Violence, 15 J. Fam. Violence 81, 82 (2000) (“The sex crimes of juveniles who target children range from fondling to sodomy and intercourse and reflect varying degrees of violence.”).
principle on juvenile court proceedings, the rigid registration requirement contingent on commitment to CYA has, in effect, given judges unbridled discretion—the conditions at CYA have encouraged them to find alternative ways of dealing with sex offenders without any guidance. Yet, the Court in *Gault* indicated that "unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure." My proposal channels judicial discretion in decisions regarding sex offender registration to more effectively achieve the goals of public safety, retribution, and rehabilitation. This approach strikes a balance between rigid rules and unbridled judicial discretion.

Though the 1985 amendments to section 290 adding juveniles to the registration requirement did not provide for judicial discretion, this was likely because, at the time, CYA was not plagued by the problems it is plagued with now, and the legislature did not foresee such problems. However, as conditions worsen in CYA, it has become apparent that tying the registration requirement to CYA commitment has frustrated the legislative purposes of the registration requirement. Proposed amendments since 1985 sought to address this issue and provide for judicial discretion in registration requirements, yet such proposals were likely too extreme for their time and hence, rejected. Now that the conditions of CYA have become bad enough to finally grab the state's attention, the time is ripe for the legislature to amend section 290(d) and allow for judicial discretion.

A. The California Legislature's Rejection of Previous Proposed Amendments Occurred Before the CYA Crisis, and the Amendments Were Too Extreme

The California Legislature's rejection of previous proposed amendments to section 290(d) in the 1990s does not undermine an amendment now. In the 1990s, CYA was not as bad as it is now, and the previously proposed amendments were too extreme. In 1995, an amendment to section 290 was introduced in the California Assembly, but died. This proposal eliminated the requirement of commit-

203. *See In re Gault*, 387 U.S. 1, 18–31 (1967); *see also* discussion *supra* Part II.A–B (discussing the evolution of the juvenile justice system and the legislative history of section 290).

204. 387 U.S. at 18.


ment to CYA and imposed the registration requirement on all juveniles who committed sexual offenses listed in section 290(d)(3), with the possibility of an exemption by judicial discretion upon consideration of recommendations from various departments and programs with which the juvenile was involved.\textsuperscript{207} In addition to eliminating the CYA requirement, this proposal provided a presumption of registration for all juvenile sex offenders. Though there is no evidence of why this bill died, it is likely that it was too extreme at the time. The conditions of CYA in 1995 were neither as bad nor as publicized as they are now, and the bill provided too much room for judicial arbitrariness or inconsistency through its vague, broad language.\textsuperscript{208} It also did not delineate the worst sex offenders for registration—it just had a blanket rule.

After the 1995 bill died, another bill was introduced in the California Senate in 1997.\textsuperscript{209} Unlike the 1995 bill, this bill was approved, yet none of the drastic changes to section 290(d) that were originally proposed in the bill remained in the final version.\textsuperscript{210} As introduced, the bill required registration of all juveniles who are adjudicated for specified offenses without regard to their placement and made juveniles subject to registration for the same offenses that subject adult offenders to registration.\textsuperscript{211} Like the 1995 bill, the 1997 bill did not make registration contingent on commitment to CYA, but unlike the 1995 bill, the 1997 bill also greatly expanded the offenses for which juveniles would be subject to registration by subjecting them to registration for all the same offenses for which adults are subject to registration. The final version of this bill simply made juveniles subject to registration for some additional offenses that subject adult offenders to registration, but not all the same offenses as adults, and retained the requirement that juveniles be committed to CYA before being required to register.\textsuperscript{212} The offenses added by the final bill for which juveniles are required to register remain in the current version of the statute.

\textsuperscript{207} See \textit{id.} (as originally proposed in the Assembly Feb. 14, 1995, amending section 290(d)(1)); see also \textit{id.} (as amended in the Senate Aug. 19, 1996, the last version of the bill before it died).

\textsuperscript{208} \textit{Id.} (as originally proposed in the Assembly Feb. 14, 1995, amending section 290(d)(1)).

\textsuperscript{209} S.B. 314 (as originally proposed in the Senate Feb. 11, 1997, amending section 290).

\textsuperscript{210} \textit{Id.} (as approved by the Governor Oct. 8, 1997, amending section 290).

\textsuperscript{211} \textit{Id.} (as originally proposed in the Senate Feb. 11, 1997, amending section 290).

\textsuperscript{212} \textit{Id.} (as approved by the Governor Oct. 8, 1997, amending section 290).
Though there is no evidence as to why the radical changes were left out in the final version of the bill, it was likely because the conditions of CYA had still not reached their worst (since the 1997 bill was proposed only two years after the 1995 bill). Another likely reason was that the state still viewed juvenile offenders differently than adult offenders and strove to treat them differently by not expanding the list of sex offenses to match adults. Subjecting juveniles to registration for the same offenses as adults was too extreme to fit within the recognized separate goals of the juvenile and adult justice systems.

The attempts to amend section 290 reveal that many legislators acknowledge the pitfalls of section 290(d). With the recent focus on the terrible conditions of CYA, the issue is ripe for reconsideration. In light of the recent focus on the troubles of CYA, changes to section 290(d) that were considered drastic in 1995 and 1997 should now be considered necessary. Yet, no recent amendments since the 1995 and 1997 bills have meaningfully changed section 290(d). The addition of offenses for which juveniles must register in the 1997 bill indicates that the legislature was beginning to see the need to impose stricter registration requirements and make them more widespread and applicable. The unsuccessful attempts at amending section 290(d) reveal that: (1) there should be no blanket rule applying to all juvenile sex offenders; and (2) there should be no expansion of the list of offenses for which juveniles must register to mirror that of adults. There should still remain some separation between the treatment of adult and juvenile sex offenders.

B. Other States Successfully Allow for Judicial Discretion in Juvenile Sex Offender Registration

Of the many states that have extended their sex offender registration laws to juvenile sex offenders, several allow juvenile court judges to use discretion when determining whether a juvenile sex offender should be required to register. The Massachusetts juvenile sex of-


214. See ALA. CODE § 15-20-28(c)-(d), (f) (Supp. 2007) (exempting juvenile sex offenders from registration unless the sentencing court, in its discretion, holds otherwise after conducting a risk assessment hearing on the risk of the juvenile offender to the community); ARIZ. REV. STAT. ANN. § 13-3821(D) (2001 & Supp. 2007) (indicating that the court may require a person who has been adjudicated delinquent for a sex offense to register); ARK. CODE ANN. § 12-12-906(a)(1) (A)(i)-(ii) (2003 & Supp. 2007) (indicating that the court may find an offender is required to register as a sex offender after considering certain factors); COLO. REV. STAT. § 16-22-103(d)(4)-(5)(a) (2007) (stating that if “a court
Juvenile sex offender registration statute, for example, requires a judge to determine whether the offender poses a risk to the public by looking to the circumstances surrounding the offense and the offender's criminal history. Furthermore, Colorado uses a broad "totality of the circumstances" test in determining whether to waive the registration requirement for a juvenile. North Dakota allows the court to "deviate from requiring the juvenile to register if the court first finds the juvenile has not previously been convicted as a sexual offender or for a crime against a child, and the juvenile did not exhibit mental abnormality or predatory conduct in the commission of the offense." These state statutes indicate that judicial discretion in the registration system is practical, despite unwarranted concerns that judicial discretion invites too much subjectivity or arbitrariness. My proposed amendment provides even more specificity in guiding a judge's discretion through enumerated factors so as to lessen the risk of subjectivity or arbitrariness. Much more subjective and arbitrary is when a judge will happen to dislike an offender enough to violate Welfare and Institutions Code sections 734 and 727.6 and subject the offender to the horrendous conditions of CYA knowing there is no hope for effective treatment.

determines that the registration requirement specified in this section would be unfairly punitive and that exempting the person from the registration requirement would not pose a significant risk to the community, the court, upon consideration of the totality of the circumstances, may exempt the person from the registration requirements imposed" after considering certain factors); Conn. Gen. Stat. § 54-251(b) (2001 & Supp. 2007) (allowing the court to exempt sex offenders under the age of nineteen if it feels that registration is not required to ensure public safety); Mass. Ann. Laws ch. 6, § 178E(e) (LexisNexis 1999 & Supp. 2007) (allowing the court to exempt juvenile sex offenders from registration if the circumstances of the offense and the offender's criminal history do not indicate a risk of reoffense or danger to the public); Mont. Code Ann. § 41-5-1513(d) (2007) (allowing the court to exempt a juvenile sex offender from registration under certain circumstances); N.D. Cent. Code § 12.1-32-15(2)(c) (1997 & Supp. 2007) (stating that "[t]he court may deviate from requiring the juvenile to register if the court first finds the juvenile has not previously been convicted as a sexual offender or for a crime against a child, and the juvenile did not exhibit mental abnormality or predatory conduct in the commission of the offense").

218. See, e.g., Richardson, supra note 9, at 262.
220. Id. § 727.6 (West Supp. 2007) (mandating treatment for juvenile sex offenders).
C. The California Legislature Must Amend the Current Statute to Allow for Judicial Discretion in Requiring Registration

To better reflect the purposes of registration, the California Legislature must amend section 290(d) to allow for judicial discretion in requiring registration for the sex offenses listed in section 290(d)(3) by considering enumerated factors. Rather than make registration contingent on commitment to CYA, the amendment should enumerate factors for judges to take into consideration that best reflect the public safety, retributive, and rehabilitative purposes of registration. The amendment should include consideration of the following factors: (1) the ages of the minor and the victim; (2) the circumstances and gravity of the sex offense committed by the minor; (3) the minor's previous history of sex offenses and future danger to the community; and (4) the minor's living situation and environment.

Currently, in determining what judgment to make in any juvenile case under section 725.5 of the Welfare and Institutions Code,221 "the court shall consider . . . (1) the age of the minor, (2) the circumstances and gravity of the offense committed by the minor, and (3) the minor's previous delinquent history."222 Judges use these factors to determine whether a juvenile should be committed to CYA. These factors are not nearly narrowly tailored enough to act as a proxy for imposing a registration requirement on a sex offender, since they are intended to apply to all types of offenders. Nonetheless, that is the indirect effect they have under current law. Cutting out CYA as the intermediate requirement to registration and re-examining the factors that judges currently use in deciding whether to commit any juvenile offender to CYA provides a basis upon which to develop factors that best reflect the goals of sex offender registration. Incorporating the risk factors that professional literature has identified as being associated with juvenile sexual and criminal offending helps tailor the factors to juvenile sex offenders.

1. The Ages of the Minor and the Victim

The age of the minor is significant for determining whether and to what extent registration will help hold the minor responsible for his or her actions. The older a minor is, the more mature, aware, and responsible he or she likely is and the greater the likelihood he or she can understand and appreciate the purposes of registration. Retribu-

221. Id. § 725.5 (West 1998).
222. Id.
tion is also more appropriate in the case of an older minor. The age of the minor generally signifies the culpability of the minor in committing the sex offense—the level of awareness and understanding of the acts he or she committed. This factor will help judges address the concern of the "blurry line between normative and criminal sexual behavior." Though younger children may engage in innocent, normal sexual play, older juveniles engaging in similar conduct are less innocent. Considering a minor’s age when determining whether a juvenile sex offender should register allows the judge to place the appropriate amount of weight on the true deviant nature of the minor’s acts.

In the widely-recognized meta-analysis study of the relationship between certain offender and offense characteristics to recidivism, researchers found that adult sex offenders were more likely to reoffend if they had begun sexually offending at an early age. Thus, judges must weigh the potential risk of recidivism by younger offenders for public safety purposes with the argument that registration as retribution makes more sense for older offenders. It is manageable for a judge to negotiate these apparently conflicting considerations on a case-by-case basis, taking into consideration the other three factors of this proposed amendment as well. Judges are often required to weigh conflicting considerations in the criminal context, especially in juvenile cases which require individualized determinations under the traditional notions of the juvenile justice system. Since public safety is the primary purpose of registration, a judge may give greater weight to the potential risk of recidivism. A judge can, however, also look to factors other than the age of the minor to determine the risk of recidivism.

Not only should judges consider the age of the minor, they should also consider the age of the victim and the difference in age between the minor and the victim. The greater the age difference, the less likely the activity was innocent sexual play among children. Using age as a factor in this way, as opposed to using a certain age as a

223. Garfinkle, supra note 9, at 184–85.
224. Wind, supra note 9, at 113–14; see also Garfinkle, supra note 9, at 185–86.
225. See Wind, supra note 9, at 113.
226. See supra text accompanying notes 89–95.
227. Recidivism of Sex Offenders, supra note 13, at 11.
228. See Shaw et al., supra note 105, at 625 (indicating that “[a]ppropriate sexual exploratory behavior is usually carried out with children of the same age and size and with mutual consent,” whereas “[f]or children aged 9 years and older, the age difference between abuser and victim is usually greater than 2 years”).
threshold for imposing a blanket registration requirement, gives judges the opportunity to consider the level of maturity and social development of the minor for his or her age based on the type of act he or she committed.

In the context of factors to be considered in imposing the death penalty on adult murderers, the United States Supreme Court upheld consideration of the age of the defendant at the time of the crime and found that this factor was not too vague.\textsuperscript{229} The Court found that age may be a relevant factor in the sentencing decision.\textsuperscript{230} Though the death penalty and sex offender registration are obviously quite different forms of punishment, and juveniles cannot be sentenced to death in the United States,\textsuperscript{231} a parallel to death penalty jurisprudence is appropriate here. In the death penalty context, the Court has held that the Eighth Amendment "requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."\textsuperscript{232} Likewise, the traditional rehabilitative nature of the juvenile justice system emphasizes the individualized consideration of the offender.\textsuperscript{233}

2. The Circumstances and Gravity of the Sex Offense

The circumstances and gravity of the sex offense shed light on the future danger of the minor to the community as well as the likelihood of recidivism. The circumstances surrounding the offense may include consideration of whether the sexual activity was consensual or nonconsensual and the means used to engage in the sexual activity. Gravity would include whether violence, force, or trickery was used to commit the offense. The graver the offense, the more likely the juvenile is to be a threat to public safety and the more likely the offender knew what he or she was doing so as to serve the retributive purpose of registration.

In the context of death penalty sentencing, the Court has held that "[t]he circumstances of the crime are a traditional subject for consideration by the sentencer."\textsuperscript{234} The Court upheld this factor as clear, legitimate, and relevant. It is possible for the circumstances and

\textsuperscript{229} Tuilaepa v. California, 512 U.S. 967, 977 (1994).
\textsuperscript{231} Roper v. Simmons, 543 U.S. 551, 568 (2005).
\textsuperscript{233} See Rossum, supra note 30, at 912.
\textsuperscript{234} Tuilaepa, 512 U.S. at 976.
gravity of the offense to be bad, though not bad enough to commit
the juvenile to CYA, in which case this factor would relieve a judge of
necessarily committing the juvenile to CYA in order to impose regist-
tration and achieve the purpose of public safety.

One study comparing juveniles who sexually assault peers or
adults and those who target children found that those who assault
peers or adults were more likely to use injurious force, a surprise at-
tack, an intimidating presence, a weapon, or threats;\textsuperscript{235} those who tar-
get children were more likely to use trickery to engage the child in
sexual activity as part of a game, rather than using physical force.\textsuperscript{236}
Furthermore, juveniles who sexually assault peers or adults were less
likely to act alone, more likely to commit sexual assault in association
with other crimes, such as burglary, and more likely to be older than
juveniles who sexually assault children.\textsuperscript{237}

This factor allows judges to consider such circumstances sur-
rounding the offense. A judge must consider the level and extent of
force or deception the juvenile sex offender used in committing a sex
offense and to what extent registration can serve as retribution and
public protection. The study suggests that registration may be more
appropriate for juveniles who assault peers or adults since they often
use violence or force, conspire with others, commit other crimes in
conjunction with the sexual assault, and are older. Such circumstances
imply that the juvenile sex offender is more sophisticated, dangerous
to the community, and deserving of registration as retribution.

3. The Minor’s Previous History of Sex Offenses and Future
Danger to the Community

Previous history of sex offenses indicates possible future danger-
ousness because “sex offenders [are] more likely to recidivate if they
had prior sex offenses.”\textsuperscript{238} Even in death penalty cases, the Court has
stated that although “[i]t is, of course, not easy to predict future be-
havior[,] [t]he fact that such a determination is difficult . . . does not

\textsuperscript{235} Hunter et al., supra note 202, at 86, 90. Researchers conducting this study investi-
gated records on the sex offenses of 126 adolescent males. \textit{Id.} at 85. Juveniles were classi-
fied as child molesters if they were at least five years older than their victim, and peer/adult
offenders if they were less than five years older than their victim or younger than their
victim. \textit{Id.} at 86.

\textsuperscript{236} \textit{Id.} at 86, 89–90.

\textsuperscript{237} \textit{Id.} at 87, 89. The mean age of the offender at the time of his or her first offense
was 15.3 years for juvenile sex offenders who targeted peers or adults and 14.9 years for
juvenile sex offenders who targeted children. \textit{Id.} at 87.

\textsuperscript{238} \textit{Recidivism of Sex Offenders}, supra note 13, at 11.
mean that it cannot be made. Indeed, prediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system." The Court also upheld a death penalty sentencing factor considering the defendant's prior criminal activity by holding that "[b]oth a backward-looking and a forward-looking inquiry are a permissible part of the sentencing process," and prior criminal activity is not a vague factor. Supreme Court precedent thereby supports the judicial consideration of previous criminal history and determination of future dangerousness.

The minor's previous history of sex offenses is useful for indicating how ingrained the deviant behavior may already be in the minor and the minor's risk of recidivism, which then also influence his or her future dangerousness to society. Under Welfare and Institutions Code section 725.5, judges consider the minor's previous delinquent history in determining whether to commit a juvenile to CYA. However, for purposes of registration, this factor should be narrowly tailored so as to address the specific concern of sex offense recidivism and the need for law enforcement monitoring. By focusing on prior sex offenses only, and not all possible prior offenses, this factor will help ensure that only the worst juvenile sex offenders (such as repeat offenders) are required to register, as opposed to all first-time offenders. Examining the minor's previous history of sex offenses will also enhance public scrutiny of the criminal and mental health systems that deal with sex offenders since it can shed light on the need for reforms in treatment programs for juveniles who have committed prior sex offenses yet never received adequate treatment to prevent them from reoffending.

Since there is debate about the recidivism rates of sex offenders, this factor, in conjunction with the other factors, will ensure that judges give individualized consideration to each juvenile in determining whether the juvenile's environment, upbringing, and outside influences will make it likely that he or she will reoffend. This is preferable to basing decisions on statistics about the general population of sex offenders, which is what the rigid rule requiring commitment to CYA invites judges to attempt to do. Individualized consideration will lessen the risk of relying on the contentious, general predictors of future dangerousness.

242. See Garfinkle, supra note 9, at 171–72; Wind, supra note 9, at 103–06.
A judge may also consider whether the juvenile committed the sex offense against a stranger or a family member or friend to determine the future threat to public safety. In the meta-analysis study, researchers found that sex offenders were more likely to recidivate if they had victimized strangers or extra-familial victims.\textsuperscript{243} Not only are they more likely to recidivate, but the study of 561 male sexual assailters found that “nonincest paraphiliacs targeting young boys committed the greatest number of crimes.”\textsuperscript{244} In the study comparing juvenile sex offenders who assault peers or adults and those who assault children, researchers found that those who assault children frequently offend against siblings or relatives, whereas those who assault peers or adults principally target strangers or acquaintances.\textsuperscript{245} Since only 3\% of sexual offenses against children are committed by strangers,\textsuperscript{246} and friends or relatives pose the most likely source of danger to children,\textsuperscript{247} registration may only serve to address the future danger of the minor to the community if the minor’s victim was a stranger. These studies suggest that offenders targeting strangers pose the greatest threat to the community. This conclusion supports the conclusions under the other factors as to who should register: those who target strangers are also generally those who target peers or adults, use force, and are older than those who target children,\textsuperscript{248} so registration would likely best serve the goals of retribution and public safety in these circumstances.

In contrast, this factor may militate against imposing registration on minors who prey on friends and relatives since registration may not serve its public safety purpose in such a situation. Judges should have discretion not to impose registration or to impose registration without its community notification element when the victim is a relative or friend, unless they find registration beneficial for another purpose, such as law enforcement monitoring. Judicial discretion would give judges more flexibility and the ability to weigh these findings in each juvenile’s case.

\textsuperscript{243} Recidivism of Sex Offenders, supra note 13, at 11.
\textsuperscript{244} Abel & Rouleau, supra note 86, at 14.
\textsuperscript{245} Hunter et al., supra note 202, at 89.
\textsuperscript{247} Id.
\textsuperscript{248} Hunter et al., supra note 202, at 87, 89–90.
4. The Minor's Living Situation and Environment

Consideration of the minor's living situation and environment will help a judge determine the minor's likelihood of and opportunity for committing more sex offenses as well as what led him or her to commit sex offenses initially. This factor serves the rehabilitative and public safety purposes. If the minor is in an environment in which he or she has the opportunity to reoffend or is in an abusive situation that may reinforce the deviant sexual behavior, registration may serve as an extra deterrent and an extra means for law enforcement to monitor the juvenile where the juvenile is not otherwise surrounded by those who may monitor and help treat the juvenile. If the minor's living situation and environment are not conducive to rehabilitation, the minor may be more at risk of reoffending and will be more of a threat to the community. Therefore, the judge may find it in the minor's best interest for law enforcement to play an active role in monitoring the minor and ensuring that he or she has a chance to successfully complete treatment without resorting to committing more sex offenses.

In the meta-analysis study, researchers found that the characteristics of recidivists included history of abuse and neglect, long-term separations from parents, negative relationships with mothers, diagnosed antisocial personality disorder, and chaotic, antisocial lifestyles, among others.249 Other studies on juvenile sex offending have similarly found that environmental factors associated with sexual recidivism include: deviant sexual interests; problematic parent-child relationships; social isolation; poor social skills; low social self-esteem; antisocial values and behaviors, including emotional callousness and an absence of empathy for others; pro-offending attitudes or cognitive disorders; impulsivity; and treatment non-completion.250 Judges should consider whether these elements or characteristics are present in a juvenile sex offender's life, and, if so, registration may be appropriate as a means of necessary legal oversight where the minor is unlikely to receive familial oversight.

VI. Conclusion

My proposed amendment will cut out CYA as the intermediate requirement to registration and simply require judges to directly apply enumerated factors to determine whether a juvenile sex offender

249. Recidivism of Sex Offenders, supra note 13, at 12.
250. Understanding Treatment, supra note 188.
must register. This proposal will provide more stability to the registration requirement and will better effectuate the legislature's intent now and in the future in imposing registration requirements on juvenile sex offenders. Even if CYA improves within the next few years, it is likely to deteriorate again in the future, and my proposal will remain effective regardless of any changes. The factors discussed above will best reflect the purposes and benefits of sex offender registration and minimize the possible negative effects of registration on juveniles. When implemented correctly in the most appropriate cases, registration of juvenile sex offenders will not hinder the rehabilitation process or harm child-adolescent development. Only juveniles who are truly deserving of the registration requirement due to the unique nature of their particular sex offense will be required to register. This system is much fairer to the juvenile offender, the judge who must determine the appropriate treatment and punishment, and the community that wants protection from juvenile sex offenders.