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Juvenile Pariahs

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Articles

Juvenile Pariahs

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Under federal and some state laws, juveniles who have been adjudicated delinquent for sex offenses can be required to register on sex offender registries for extended periods or life. In some jurisdictions, lifetime sex offender registration, community notification, and other sex offender restrictions are mandatory.

This Article explores whether mandatory lifetime sex offender registration, community notification and other sex offender restrictions violate the Eighth Amendment's guarantee against cruel and unusual punishment as applied to juveniles. Citing Roper v. Simmons *and* Graham v. Florida*, the United States Supreme Court recently held in* Miller v. Alabama *that assigning mandatory life-without-parole prison sentences to juveniles violates the Eighth Amendment because a judge must be allowed to consider mitigating circumstances—including a juvenile's lack of maturity, vulnerability to negative influences, and capacity for change—before imposing a lifetime penalty. With* Miller*, and before that* Graham*, the Court extended the definition of the "most severe" punishments to include permanent non-capital punishments applied to juveniles. This reasoning should be applied to mandatory lifetime sex offender registration and related restrictions as applied to juveniles because they are similarly punitive and permanent penalties.*

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INTRODUCTION

> Children's diminished culpability and greater prospects for reform mean that they are less deserving of the most severe punishments. —Miller v. Alabama, 132 S. Ct. 2455, 2464 (2012).

> [O]nly a person protected by legal training from the ordinary way people think could say, with a straight face, that this terrible consequence of a sex offender's conviction is not punishment. —Sigler v. Ohio, No. 08-CA-79, 2009 WL 1145232, at *1 (Ohio Ct. App. Aug. 27, 2009).

Our juvenile justice system—now more than one hundred years old[1]— differs from the adult criminal justice system in fundamental ways.[2] The most important distinction is that the juvenile justice system's purported primary goal is rehabilitation rather than deterrence, incapacitation, or retribution.[3] Some scholarship has traced a disturbing trend in juvenile justice toward treating some juvenile offenders as adults.[4] In most circumstances, this treatment occurs when both a prosecutor and a juvenile court judge determine that the child's crime is so serious that it warrants an adult penalty.[5]

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1. Our policy of treating juveniles differently from adults goes back to the inception of a separate court for juveniles in Chicago in 1899. *See* David S. Tanenhaus, *The Evolution of Juvenile Courts in the Early Twentieth Century: Beyond the Myth of Immaculate Construction*, *in* A CENTURY OF JUVENILE JUSTICE 42, 42 (Margaret K. Rosenheim et al. eds., 2002).

2. The Supreme Court has long recognized the importance of treating and rehabilitating juveniles rather than "institutionalizing" or "punishing" them as adults. *See, e.g.*, *In re* Gault, 387 U.S. 1, 15–16 (1967).

3. *See, e.g.*, McKeiver v. Pennsylvania, 403 U.S. 528, 544–45 n.5 (1971).

4. *See, e.g.*, Thomas A. Loughran et al., *Differential Effects of Adult Court Transfer on Juvenile Offender Recidivism*, 34 LAW & HUM. BEHAV. 476, 476–77 (2010) (describing policy reforms that led more juveniles to be transferred to adult criminal court).

5. *See, e.g.*, Ohio's Juvenile Bindover Procedure Law, OHIO REV. CODE ANN. § 2152.12 (West 2005 & Supp. 2012).

When it comes to a broad range of offenses—some serious and others comparatively not—that are classified as "sex crimes,"[6] certain federal and state laws brand young people as societal pariahs, for most or the rest of their lives, without regard for their potential for rehabilitation.[7] These reactionary laws, unsupported by science, destroy life outcomes for young people who have committed crimes that most of us would not believe deserve ostracism without the possibility of review. Society is not safer as a result; in fact, it is less safe because these young registrants are effectively prohibited from any chance at successfully progressing from youth to young adult to productive member of adult society.[8]

The Supreme Court recently held in *Miller v. Alabama* and *Jackson v. Hobbs* (hereinafter jointly referred to as *Miller*) that mandatory life sentences without the possibility of parole constitute cruel and unusual punishment as applied to juveniles because a judge must be allowed to consider mitigating circumstances (including a juvenile's lack of maturity, vulnerability to negative influences, and capacity for change) before imposing a lifetime penalty.[9] *Miller* is the third case in seven years in which the Supreme Court acknowledged that juveniles are categorically different from adults and should not be subject to the "most severe" punishments. These cases changed the standard for the juvenile death penalty (*Roper v. Simmons*),[10] juvenile life without parole for non-homicide crimes (*Graham v. Florida*),[11] and mandatory juvenile life without parole (*Miller*).[12]

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6. "Sex offense" is defined generally by Title I of the Adam Walsh Child Protection and Safety Act of 2006 (the "Adam Walsh Act")—also known as the Sex Offender Registration and Notification Act ("SORNA")—as "a criminal offense that has an element involving a sexual act or sexual contact with another." SORNA § 111(5)(A)(i) (42 U.S.C. § 16911(5)(A)(i) (2006)). "Criminal offense" in the relevant sense refers to offenses under any body of criminal law, including state, local, tribal, foreign, and military. *Id.* § 111(6) (42 U.S.C. § 16911(6)). The offenses covered by this clause should be understood to include all sexual offenses whose elements involve: (I) any type or degree of genital or anal penetration or (II) any sexual touching of or contact with a person's body, either directly or through the clothing. *Cf.* 18 U.S.C. §§ 2246(2)–(3) (2013) (defining sexual act and sexual contact for federal laws).

7. *See, e.g.*, CAL. PENAL CODE § 290.008 (West 2013); FLA. STAT. §§ 943.0435, 944.607 (2013); National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38030, 38041–42 (July 2, 2008) (codified in scattered sections of 42 U.S.C.) [hereinafter SORNA Guidelines].

8. Experts report that registries and residency restrictions do not reduce crime. For further discussion of this issue, see *infra* Part I.D. *See generally* FRANKLIN E. ZIMRING, AN AMERICAN TRAVESTY: LEGAL RESPONSES TO ADOLESCENT SEXUAL OFFENDING (2004) [hereinafter ZIMRING, TRAVESTY].

9. Miller v. Alabama, 132 S. Ct. 2455, 2467–69, 2475 (2012) (holding that mandatory life imprisonment without the possibility of parole constitutes cruel and unusual punishment).

10. Roper v. Simmons, 543 U.S. 551, 578 (2005) (holding that the juvenile death penalty constitutes cruel and unusual punishment).

11. Graham v. Florida, 130 S. Ct. 2011, 2034 (2010) (holding that juvenile life without parole for non-homicide crimes constitutes cruel and unusual punishment).

12. *Miller*, 132 S. Ct. at 2467–69.

With *Miller* and *Graham*, the Court extended the definition of the "most severe" punishments to include permanent non-capital punishments as applied to juveniles. Following this evolution, mandatory lifetime sex offender registration, community notification, and other sex offender restrictions should also be held to be cruel and unusual punishment as applied to juveniles because they are similarly punitive and permanent penalties.

Over the past twenty years, legislatures have imposed increasingly severe restraints on young people who have been labeled sex offenders,[13] criminalizing behaviors that were once dealt with in communities.[14] In spite of the traditional rehabilitative goals of juvenile courts, legislatures have increasingly saddled juvenile sex offenders with longer registration terms, community notification of registry status, and increased restrictions on their movement and activities.[15] These penalties apply to young people who have committed a variety of juvenile offenses, which in some jurisdictions include masturbation, sending sexually explicit texts, consensual sex acts between teens ("Romeo and Juliet" cases), sexual acts within the family, and even some non-sexual offenses.[16]

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13. *See* Maggie Jones, *How Can You Distinguish a Budding Pedophile from a Kid with Real Boundary Problems?*, N.Y. TIMES., July 22, 2007, (Magazine), at 633; *see also* ASS'N FOR THE TREATMENT OF SEXUAL ABUSERS, A REASONED APPROACH: RESHAPING SEX OFFENDER POLICY TO PREVENT CHILD SEXUAL ABUSE 21 (2011) [hereinafter ATSA REPORT 2011] (citing A. Vandervort-Clark, Legislating Sex Offender Management: Trends in State Litigation in 2007 and 2008, Presentation to the 28th Annual Research and Treatment Conference of the Association for the Treatment of Sexual Abusers (Oct. 2009) ("Between 2007 and 2008, no fewer than 1500 sex offender-related bills were introduced in state legislatures, and over 275 new laws were passed and enacted.")).

14. *See, e.g.*, Fletcher v. State, No. 0404010688, 2008 WL 2912048, at *5 (Del. Fam. Ct. June 16, 2008) ("[In the 1970s] most mothers were stay-at-home mothers, the children were watched after school by their mothers, or by other neighborhood mothers. Neighbors knew and socialized with each other. The neighborhood mothers were willing to scold any of the neighborhood children when they were bad without fearing repercussions from the child's parents. Those same neighbors were also willing to help any of the neighborhood children if they were hurt or in danger. . . . Many of today's children, however, do not have a parent or another neighborhood parent watching over them . . . . The solution, unfortunately, and perhaps a necessity to protect the public, has been to greater criminalize our children. And the more we have criminalized our children, the easier it has become to simply equate them to adults. From 1915 to 2001, Delaware's juvenile sex offender laws had gone from leaving offenses completely to the regulation of family, church, and community, to treating juvenile sex offenders just as harshly as adult sex offenders.").

15. As of 2010, thirty-four states required juveniles adjudicated delinquent for sex offenses to register. NICOLE I. PITTMAN & QUYEN NGUYEN, A SNAPSHOT OF JUVENILE SEX OFFENDER REGISTRATION AND NOTIFICATION LAWS: A SURVEY OF THE UNITED STATES 32 (2011) [hereinafter PITTMAN REPORT]. Of those states requiring registration for juvenile offenses, sixteen did not disclose juvenile offenders' private information to the public. *Id.* Juveniles were subject to lifetime registration in at least seven states. *Id*.

16. SORNA, discussed in Part III.B, *infra*, requires that kidnapping be included as a registerable offense. *See* SORNA § 111(4)(B) (2006) (defining a Tier III sex offender as one whose "offense is punishable for more than 1 year" and "involves kidnapping of a minor").

In some jurisdictions, lifetime juvenile sex offender registration is mandatory for certain offenses.[17] Although this was not always the case, some jurisdictions have adopted, or are attempting to adopt, such requirements to substantially comply with the federal Adam Walsh Act.[18] This move toward compliance, which is by all means not universal, has occurred in spite of inconsistent public support for juveniles being placed on registries and questions about the effectiveness of registries in promoting public safety.[19]

Since jurisdictions began requiring registration, there have been challenges to registration requirements for both juveniles and adults.[20] Some courts have held that sex offender registration, community notification, and related restrictions are not punitive because they are collateral consequences of conviction or adjudication rather than punishment.[21] However, in recent years, other jurisdictions have held that

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17. *See, e.g.*, 730 ILL. COMP. STAT. 150/2(E)(1); 150/7 (2007) (Illinois' mandatory lifetime registration offenses include, among other things, luring a minor, keeping a place of juvenile prostitution, exploitation of a child, criminal sexual assault, and aggravated criminal sexual abuse); *see also* 42 U.S.C. § 16911(5)(C).

18. *See* SMART: OFFICE OF SEX OFFENDER SENTENCING, MONITORING, APPREHENDING, REGISTERING, & TRACKING, OFFICE OF JUSTICE PROGRAMS, *SORNA*, http://www.ojp.usdoj.gov/smart/sorna.htm (last visited Oct. 31, 2013) (listing the states in compliance as Alabama, Delaware, Florida, Kansas, Louisiana, Maryland, Michigan, Mississippi, Missouri, Nevada, Ohio, Pennsylvania, South Carolina, South Dakota, Tennessee, and Wyoming); *see also infra* Part III.B. As of November 2012, there were sixteen states, more than thirty Native American tribes, and three territories in substantial compliance with SORNA. *See* SMART, *supra*; *see also* Nicole I. Pittman, Address at Nat'l Jewish Democratic Council Leadership Summit: Litigation Approaches to Challenging SORNA (Oct. 26, 2012) [hereinafter Pittman Presentation].

19. Recent studies have looked at public support for juvenile registry. *See, e.g.*, Poco D. Kernsmith et al., *Public Attitudes Toward Sexual Offenders and Sex Offender Registration*, 18 J. CHILD SEXUAL ABUSE 290, 294 (2009) (reporting that eighty-six percent of participants in the study believed that a juvenile who committed a forcible sex offense should be required to register, but the juvenile was less worthy of having registration imposed than adults who sexually abused children); Jessica M. Salerno et al., *Psychological Mechanisms Underlying Support for Juvenile Sex Offender Registry Laws: Prototypes, Moral Outrage, and Perceived Threat*, 28 BEHAV. SCI. & L. 58, 79 (2010) ("In the abstract, the public is as likely to support registry laws for juvenile as for adult sex offenders, but when faced with a particularly young juvenile, or a juvenile whose offenses are less severe than the prototypically severe sex offense that people naturally envision, people are less likely to support registry laws for juveniles."); Margaret C. Stevenson et al., *Effects of Defendant and Victim Race on Perceptions of Juvenile Sex Offenders*, 27 BEHAV. SCI. & L. 957, 962, 967 (2009) (studying support for requiring a fifteen-year-old boy to register in a case involving statutory rape; study participants supported registration so long as the boy's identifying information was not disseminated on the internet).

20. *See infra* notes 21, 22, 25.

21. *See, e.g.*, United States v. Juvenile Male ("*Juvenile Male III*"), 670 F.3d 999, 1010 (9th Cir. 2012) (holding that the requirement that juvenile sex offenders register in a database is not cruel and unusual punishment); *In re* J.W., 787 N.E.2d 747, 760 (Ill. 2003) (holding that lifetime juvenile sex offender registration did not constitute cruel and unusual punishment post-*Roper*, partially because juveniles' registration information is not publicly disseminated); *see also* ACLU of Nev. v. Masto, 670 F.3d 1046, 1060 (9th Cir. 2012) (holding that due process is not violated because registration and notification requirements are imposed as the result of being convicted).

juvenile sex offender registration, especially when coupled with a community notification requirement, is unconstitutionally punitive.[22] Some jurisdictions have refused to implement registration schemes for juveniles because they conflict with juvenile justice policy, in particular the policy of keeping juvenile adjudications confidential.[23] This trend takes into account current thinking about juveniles' reduced culpability and capacity for change.[24]

The Supreme Court has not specifically addressed the issue of whether juvenile sex offender registration constitutes punishment. It has, however, held that adult offender registration does not constitute punishment, partially because an adult's public registry information is already a matter of public record due to the adult's criminal conviction.[25] That reasoning should not be applicable to juveniles, because juvenile court files are traditionally confidential.[26] In addition, applying mandatory lifetime sex offender restrictions to juveniles without the possibility for meaningful review fails to recognize that youth are categorically different, that they should not be subject to the "most severe" punishments, or that registration and community notification undermine the primary goal of the juvenile justice system: rehabilitation.[27]

This Article explores whether laws requiring mandatory lifetime registration, community notification, and other restrictions based on

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22. *See, e.g.*, People v. Dipiazza, 778 N.W.2d 264, 274 (Mich. Ct. App. 2009) (holding ten year juvenile sex offender registration requirement cruel and unusual punishment as applied to a Romeo and Juliet case); *In re* C.P., 967 N.E.2d 729, 750 (Ohio 2012) (holding that mandatory lifetime sex offender registration constitutes cruel and unusual punishment and recognizing a national consensus on the issue).

23. States refusing to comply include Arizona, Arkansas, California, Nebraska, and Texas. *The Adam Walsh Act: States in "Substantial Compliance" Very Low?*, CONGRESS, COURTS AND DECISIONS (July 27, 2011, 1:51 PM), http://congress-courts-legislation.blogspot.com/2011/07/adam-walsh-act-states-in-substantial.html.

24. *Dealing with Child-on-Child Sex Abuse Not One Size Fits All*, USATODAY.COM (Jan. 7, 2012), http://usatoday30.usatoday.com/news/nation/story/2012-01-07/child-sex-abuse/52431616/1.

25. *See* Smith v. Doe, 538 U.S. 84, 99 (2003) (noting that any stigma related to sex offender registration was not punishment, as it was not an "integral part of the objective of the regulatory scheme"). This Article argues, however, that the reasoning applied in *Smith* is inapplicable because it applied to adults, not juveniles who are categorically different.

26. *See, e.g.*, 705 ILL. COMP. STAT. 405/1–8 (2007); MICH. COMP. LAWS § 712A.17 (2013); OHIO. REV. CODE ANN. § 2151.14 (West 2005 & Supp. 2012); United States v. Juvenile Male ("*Juvenile Male I*"), 590 F.3d 924, 932 (9th Cir. 2010), *vacated*, 131 S. Ct. 2860 (2011) ("Juveniles are denied certain procedural rights afforded to adult criminal defendants . . . but they are, in turn, beneficiaries of an adjudicatory system designed, though not always successfully, to rehabilitate rather than punish—a system ill-suited to public exposure.").

27. *See* Miller v. Alabama, 132 S. Ct. 2455, 2467–69, 2475 (2012); *see, e.g.*, Illinois Juvenile Court Act, 705 ILL. COMP. STAT. 405/5–101 (one purpose of the Juvenile Court Act is "[t]o provide an individualized assessment of each alleged and adjudicated delinquent juvenile, in order to rehabilitate and to prevent further delinquent behavior though the development of competency in the juvenile offender").

juvenile sex offender status violate the Eighth Amendment's guarantee against cruel and unusual punishment. Part I describes current social science and developmental research related to juvenile sex offenders, including re-offense rates and effectiveness of treatment. Part II discusses the effects of registration, community notification, and other related restrictions and why they constitute punishment as applied to juveniles. Part III describes the history and current status of sex offender registration, community notification, and other restrictions on juveniles. Part IV discusses relevant case law related to the punitive nature of sex offender registration and the cruel and unusual nature of mandatory lifetime penalties for juveniles. Part V applies an Eighth Amendment analysis to mandatory lifetime registration, community notification, and restrictions on juveniles convicted of sex offenses and argues that such requirements constitute cruel and unusual punishment. Part VI recommends how to proceed toward building a national consensus that imposing mandatory lifetime sex offender registration constitutes cruel and unusual punishment as applied to juveniles, and ultimately toward abolishing the practice.

I. What Research Tells Us About Juvenile Sex Offenders and Registration

A. Adolescent Brain Development Generally

Our understanding of juvenile sex offenders must be rooted in an understanding of adolescent development generally. A wealth of new information about adolescent brain development has emerged since states began imposing sex offender registration requirements.[28] This new information helps us to put juvenile sex offending in context.

Adolescents are not as mentally or emotionally developed as adults.[29] Brain development research shows that juveniles' prefrontal cortexes (the

28. The federal guidelines for implementation of the Jacob Wetterling Act (enacted in 1994, requiring all states to implement sex offender registries) did not require states to register juveniles for sex offenses, but did not prohibit them from doing so. *See* Megan's Law: Final Guidelines for the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, 64 Fed. Reg. 572, 578 (Jan. 5, 1999) (codified as amended at 42 U.S.C. § 14071). Many states began imposing registration requirements on juveniles thereafter. For a snapshot of states requiring juvenile registration, see Pittman Report, *supra* note 15, at 33.

29. *See generally* Mario Beauregard et al., *Neural Correlates of Conscious Self-Regulation of Emotion*, 21 J. Neuroscience RC165 (2001); Elizabeth Cauffman & Laurence Steinberg, *(Im)maturity of Judgment in Adolescence: Why Adolescents May be Less Culpable than Adults*, 18 Behav. Sci. & L. 741 (2000); Robert F. McGivern et al., *Cognitive Efficiency on a Match to Sample Task Decreases at the Onset of Puberty in Children*, 50 Brain & Cognition 73 (2002); Elizabeth R. Sowell et al., *Mapping Cortical Change Across the Human Life Span*, 6 Nature Neuroscience 309 (2003); Elizabeth R. Sowell et al., In Vivo *Evidence for Post-Adolescent Brain Maturation in Frontal and Striatal Regions*, 2 Nature Neuroscience 859 (1999); L.P. Spear, *The Adolescent Brain and Age-Related Behavioral*

part of the brain primarily responsible for judgment and impulse control) are less effective than those of adults.[30] The prefrontal cortex does not normally develop until an individual reaches her twenties.[31] Adolescent brains have high levels of dopamine in the prefrontal cortex, which increases the likelihood of engaging in risky or "novelty-seeking" behavior.[32] In addition to the prefrontal cortex, juveniles' limbic systems—responsible for emotional and reward-seeking behaviors—are more active than those of adults.[33] Adolescents place less weight on risk than adults[34] and are "vulnerab[le] to risky behavior, because sensation-seeking is high and self-regulation is still immature."[35] As a result, adolescents are more likely than adults to take risks and make poor decisions.[36]

In addition to issues related to prefrontal cortexes and limbic systems, the white matter in the brain of a juvenile is not fully developed.[37] This impedes that part of the brain that handles judgment and decision-making—the prefrontal cortex—from effectively communicating with the part that controls emotions and thrill seeking.[38] As an adolescent matures, the white matter increases in the brain through the process of myelination, and information processing improves.[39] At the same time, gray matter in the brain, which causes information processing inefficiencies, is pruned away.[40] Simply put, the part of the teen brain that is responsible for judgment and impulse control and the part of the brain that controls

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Manifestations, 24 NEUROSCIENCE & BIOBEHAV. REVS. 417 (2000); Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009 (2003).

30. *See* Alison S. Burke, *Under Construction*, 34 INT'L J.L. & PSYCHIATRY 381, 383 (2011) (noting that sections of the brain mature into the early twenties); Laurence Steinberg, *A Behavioral Scientist Looks at the Science of Adolescent Brain Development*, 72 BRAIN & COGNITION 160, 161–62 (2010) (noting that the prefrontal cortex is the last part of the brain to mature).

31. *See* Burke, *supra* note 30, at 383.

32. Dustin Wahlstrom et al., *Developmental Changes in Dopamine Neurotransmission in Adolescence*, 72 BRAIN & COGNITION 146, 152 (2010).

33. Todd A. Hare et al., *Biological Substrates of Emotional Reactivity and Regulation in Adolescence During an Emotional Go-Nogo Task*, 63 BIOLOGICAL PSYCHIATRY 927, 932 (2008) (noting that when compared to adults, adolescents place less weight on risk than reward).

34. Steinberg & Scott, *supra* note 29, at 1012.

35. Steinberg, *supra* note 30, at 162 ("[M]any risky behaviors follow this pattern, including unprotected sex.").

36. Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 DEVELOPMENTAL REV. 339, 344 (1992) ("[R]eckless behavior [is] virtually a normative characteristic of adolescent development."); *see Adolescent Brains Show Lower Activity in Areas that Control Risky Choices*, NAT'L INST. OF MENTAL HEALTH (Mar. 15, 2007), http://www.nimh.nih.gov/news/science-news/2007/adolescent-brains-show-lower-activity-in-areas-that-control-risky-choices.shtml.

37. Steinberg, *supra* note 30, at 161.

38. Antoinette Kavanaugh, Enhancing Juvenile Representation: A Developmentally Sound Approach, slide 10 (Jan. 5, 2012) (available from the author).

39. *Id.* at slide 11.

40. *Id.*

emotions and reward seeking become better able to communicate as a teen matures; as this communication improves, youths become better decisionmakers.[41]

In addition to the neurological, adolescents are not fully developed in the psychosocial realm.[42] The most extreme increase in psychosocial development occurs between ages sixteen and nineteen.[43] As they develop psychosocial competencies, juveniles increase their "capacity to resist the pull of social and emotional influences and remain focused on long-term goals."[44] Until early adulthood, young people lack the ability to efficiently process social and emotional cues, leading to increased susceptibility to outside negative influences.[45] Juveniles are especially susceptible to peer influences[46] and are more likely to engage in "antisocial behavior" to conform to peer expectations or build status in a group.[47]

This relatively new information has influenced how courts, including the Supreme Court, understand juveniles generally:

> [T]his Court has . . . observed that children generally are less mature and responsible than adults; that they often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them; that they are more vulnerable or susceptible to . . . outside pressures than adults. . . . The law has historically reflected the same assumption that children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them.[48]

It is important to remember this perspective on normal adolescent development and culpability with regard to juveniles who commit sex offenses. Like other offenses, a juvenile's sex offenses often reflect immature decisionmaking, sensation seeking, and responses to peer pressure.[49]

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41. Elizabeth R. Sowell et al., *Mapping Continued Brain Growth and Gray Matter Density Reduction in Dorsal Frontal Cortex: Inverse Relationships During Postadolescent Brain Maturation*, 21 J. NEUROSCIENCE 8819, 8826–28 (2001) (noting that as gray matter is pruned, adult judgment and decisionmaking emerge).

42. *See* Dustin Albert & Laurence Steinberg, *Judgment and Decision Making in Adolescence*, 21 J. RES. ON ADOLESCENCE 211, 216–20 (2011).

43. Cauffman & Steinberg, *supra* note 29, at 756.

44. *See* Albert & Steinberg, *supra* note 42, at 220.

45. Laurence Steinberg, *Should the Science of Adolescent Brain Development Inform Public Policy?*, 64 AM. PSYCHOLOGIST 739, 743 (2009).

46. *See* Margo Gardner & Laurence Steinberg, *Peer Influence on Risk Taking, Risk Preference, and Risky Decision Making in Adolescence and Adulthood: An Experimental Study*, 41 DEVELOPMENTAL PSYCHOL. 625, 625 (2005).

47. Gardner & Steinberg, *supra* note 46, at 626, 633.

48. J.D.B. v. North Carolina, 131 S. Ct. 2394, 2403 (2011) (citations omitted) (internal quotation marks omitted).

49. *See, e.g.*, 730 ILL. COMP. STAT. 150/2 (2007 & Supp. 2012) (including grabbing, masturbation, or public urination as registerable criminal sexual abuse offenses).

B. Who Are Juvenile Sex Offenders?

Our collective image of sex offenders frequently does not comport with what research tells us about juveniles who commit sex crimes.[50] Much of our collective fear of juvenile sex offenders is rooted in misconception.[51] Although we deeply fear predatory sexual crime and associate it with the words "sex offender," research shows that juveniles tend to commit non-predatory offenses and offenses of curiosity, against the people they know—other young people.[52] Juveniles generally engage in less serious sexual offenses than adults[53] and have fewer victims than adult sex offenders.[54] Juveniles who commit offenses against other juveniles are not considered pedophiles.[55] As a group, juveniles who are adjudicated delinquent have low rates of sexual re-offense and an even lower likelihood of sexually offending as adults, especially if they receive appropriate treatment.[56] They are far more likely than adult offenders to

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50. I had the opportunity to talk to many people—students, professors, and the public—about youth on registries when I worked as a clinic fellow in the Children and Family Justice Center at Northwestern University School of Law in 2010 and 2011. As part of that work, I sometimes conducted an activity where I asked my audience to complete the following sentence: "A juvenile sex offender is . . . ." When asked to complete the sentence "A juvenile sex offender is . . ." respondents replied, among other things, "nasty," "sick," "needs help," "abused as children," "dysfunctional relationship with parents," "someone who follows you and wants to harm you," "child predators," "rapists," and "dangerous." (on file with Author).

51. False assumptions include: that there is an epidemic of juvenile sex offending, that juvenile sex offenders have more in common with adult sex offenders than with other juvenile delinquents, and that juvenile sex offenders pose a high risk of reoffending. Elizabeth J. Letourneau et al., *Do Sex Offender Registration and Notification Requirements Deter Juvenile Sex Crimes?*, 37 Crim. Just. & Behav. 553, 565–66 (2010).

52. *See id.*

53. *See, e.g.*, Sue Righthand & Carlann Welch, Office of Juvenile Justice & Delinquency Prevention, Juveniles Who Have Sexually Offended: A Review of the Professional Literature 57 (2001) (concluding that youth engage in fewer inappropriate behaviors over a shorter duration and that their behaviors are less aggressive); Phoebe Greer, *Justice Served? The High Cost of Juvenile Sex Offender Registration*, 27 Dev. Mental Health L. 33, 44–46 (2008) (documenting juvenile sex offenses that are generally not abusive or aggressive in nature); Alexis O. Miranda & Colette L. Corcoran, *Comparison of Perpetration Characteristics Between Male Juvenile and Adult Sexual Offenders*, 12 Sexual Abuse: J. Res. & Treatment 179, 179, 184, 186 (2000) (studying characteristics of sixteen juvenile and nineteen adult males who had committed sexual abuse and found that adult offenders committed a higher number of perpetrator incidents and had longer relationships with their victims).

54. Miranda & Corcoran, *supra* note 53, at 186.

55. *See* John A. Hunter Jr. et al., *The Relationship Between Phallometrically Measured Deviant Sexual Arousal and Clinical Characteristics in Juvenile Sexual Offenders*, 32 Behav. Res. & Therapy 533, 537–38 (1994).

56. *See* Terance D. Meithe et al., *Specialization and Persistence in the Arrest Histories of Sex Offenders: A Comparative Analysis of Alternative Measures and Offense Types*, 43 J. Res. Crime & Delinq. 204, 222 (2006); Michelle L. Meloy, *The Sex Offender Next Door: An Analysis of Recidivism, Risk Factors, and Deterrence of Sex Offenders on Probation*, 16 Crim. Just. Pol'y Rev. 211, 225–26 (2005); Donna M. Vandiver, *A Prospective Analysis of Juvenile Male Sex Offenders: Characteristics and Recidivism Rates as Adults*, 21 J. Interpersonal Violence 673, 685 (2006); Dennis Waite et al., *Juvenile Sex Offender Re-arrest Rates for Sexual, Violent Nonsexual and Property Crimes: A Ten-Year*

stop inappropriate sexual behaviors with intervention.[57] In sum, research shows that juveniles who commit sex offenses are clinically different from adults who commit sex offenses.[58]

C. Juvenile Sex Offenders and Treatment

Many juveniles end up on sex offender registries for behaviors that would be considered within the spectrum of normal sexual development.[59] However, some others end up on registries for activities that fall outside the spectrum of average sexual development.[60]

Research indicates that most juveniles who commit sex offenses will outgrow the behavior, especially if they receive appropriate treatment.[61] Effective juvenile sex offender treatment addresses a young person's risk factors for, and protective factors against, reoffending.[62] Risk factors may include poor coping skills, low self-esteem, sexual attraction or sexual preoccupation, difficulty maintaining intimate relationships, chaotic home environment, and lack of peer network or community presence.[63] Risk must be balanced against protective factors against offending, which may include emotional expressiveness, a strong desire not to harm others, a strong sense of self, the ability to self-soothe, regular school attendance, social and emotional adjustment, and caregiver stability and support.[64]

Follow Up, 17 Sexual Abuse: J. Res. & Treatment 313, 313 (2005); Franklin E. Zimring et al., *Sexual Delinquency in Racine: Does Early Sex Offending Predict Later Sex Offending in Youth and Young Adulthood?*, 6 Criminology & Pub. Pol'y 507, 529 (2007) [hereinafter Zimring et al., *Racine*].

57. *See* ATSA Report 2011, *supra* note 13, at 15 (citing David Finkelhor et al., Office of Juvenile Justice & Delinquency, *Juveniles Who Commit Sex Offenses Against Minors*, Juvenile Justice Bulletin (2009)).

58. *Id*.

59. Recent statistics indicate that forty-eight percent of high school students have had sexual intercourse; of sexually active high school students, fifteen percent have had four or more sexual partners. Ctrs. for Disease Control & Prevention, *2007 Results: Youth Risk Behavior Surveillance System: Sexual Behaviors*, http://apps.nccd.cdc.gov/youthonline/App/QuestionsOrLocations.aspx (follow "Ever had sexual intercourse" hyperlink; follow "Had sexual intercourse with four or more persons" hyperlink). Similar results were reported for 2011. *See* Ctrs. for Disease Control & Prevention, *supra* (reporting 47.4% of students have had sexual intercourse and 15.3% with four or more partners).

60. *Id.*

61. Ass'n for the Treatment of Sexual Abusers, The Effective Legal Management of Juvenile Sex Offenders 2 (Mar. 11, 2000) (arguing that because their brains are developing, juveniles are more amenable to appropriate and effective treatment than adults).

62. *Id.* at 4–5.

63. *See generally id.*; Gregory A. Parks & David E. Bard, *Risk Factors for Adolescent Sex Offender Recidivism: Evaluation of Predictive Factors and Comparison of Three Groups Based Upon Victim Type*, 18 Sexual Abuse: J. Res. & Treatment 319 (2006) (reporting that results of retrospective risk assessments showed certain factors as predictors of sexual and non-sexual recidivism, and support previous research that most juveniles do not continue offending into adulthood).

64. ATSA Report 2011, *supra* note 13, at 17 (citing Jane Gilgun, *Children and Adolescents With Problematic Sexual Behaviors*, *in* Current Perspectives: Working With Sexually Aggressive

Helping youth develop protective factors is a critical piece in the effectiveness of treatment.[65]

Juvenile sex offenders are generally responsive to treatment[66]—more so than adults—because of their youth and developmental status.[67] With effective treatment, they are more likely than not to "stop their abusive behaviors and live safely in the community,"[68] and are less likely to commit either sexual re-offenses or non-sexual offenses.[69]

D. Re-Offense and Recidivism

While the public is concerned that juvenile sex offenders are likely to become habitual sexual predators or commit violent offenses as adults, that fear is not generally realized—and should have been dispelled—by recent research on sexual re-offense and general recidivism rates among youth adjudicated delinquent for sex offenses.

This research shows that juveniles adjudicated delinquent for sex offenses have extremely low rates of recidivism generally and even lower rates of sexual re-offense.[70] Several recent longitudinal studies, examining data on more than 33,000 juvenile sex offenders, reinforce the clinical consensus that juvenile sex offenders present low recidivism risks.[71]

Youth and Youth With Sexual Behavior Problems 383 (Robert E. Longo & David S. Prescott eds., 2006); Janis Bremer, *Protective Factors Scale*, *in* Risk Assessment of Youth Who Have Sexually Abused 195 (David Prescott ed., 2006)).

65. *Id.*

66. Nat'l Ctr. on Sexual Behavior of Youth, NCSBY Fact Sheet: What Research Shows About Adolescent Sex Offenders 1 (2003), http://www.dshs.wa.gov/pdf/ca/NCSBYfactsheet.pdf; *see* Timothy E. Wind, *The Quandry of Megan's Law: When the Child Sex Offender is a Child*, 37 J. Marshall L. Rev. 73, 105 (2003) (noting that when treated in programs designed for juvenile sex offenders, youth who receive treatment recidivate at lower rates than treated adults and untreated juveniles).

67. ATSA Report 2011, *supra* note 13, at 13.

68. *Id.* at 15 (citing David Finkelhor & Lisa M. Jones, Office of Juvenile Justice & Delinquency, *Explanations for the Decline in Child Sexual Abuse Cases*, Juvenile Justice Bull. 8–10 (2004)); *see* Parks & Bard, *supra* note 63, at 337 (finding that juvenile sex offenders who completed treatment had recidivism of 5.3%, compared to 17.8% for those who did not).

69. Marc Winokur et al., Juvenile Sexual Offender Research: A Systematic Review of Evidence-Based Research 19–21 (2006).

70. *See, e.g.*, Michael F. Caldwell et al., *An Examination of the Sex Offender Registration and Notification Act as Applied to Juveniles: Evaluating the Ability to Predict Sexual Recidivism*, 14 Psychol. Pub. Pol'y & L. 89, 101 (2008); Michael F. Caldwell, *Sexual Offense Adjudication and Sexual Recidivism Among Juvenile Offenders*, 19 Sex Abuse 107, 107 (2007) [hereinafter Caldwell, *Sexual Offense Adjudication*]; Elizabeth J. Letourneau & Kevin S. Armstrong, *Recidivism Rates for Registered and Nonregistered Juvenile Sex Offenders*, 20 Sexual Abuse: J. Res. & Treatment 393, 403 (2008); Zimring et al., *Racine*, *supra* note 56, at 522; Franklin E. Zimring et al., *Investigating the Continuity of Sex Offending: Evidence from the Second Philadelphia Birth Cohort Study*, 26 Just. Q. 58, 58 (2009) [hereinafter Zimring et al., *Philadelphia*].

71. *See id.*

1. Zimring Studies

In 2006 and 2007, Franklin Zimring and his associates studied two large community-based samples of male and female birth cohorts to examine the risk of recidivism among people adjudicated delinquent for sex offenses.[72] Both studies show that juvenile sex offenders pose little risk of recidivism, especially in adulthood.[73]

In the first study, Zimring and his colleagues examined patterns of juvenile-to-adult sex offending. The study examined data from three birth cohorts in Racine, Wisconsin, of youth born in 1942, 1949, and 1955.[74] The population consisted of more than 6000 boys and girls.[75] Based on the data collected, the researchers found minimal correlation between committing a sex offense as a juvenile and committing a sex offense as an adult.[76] Only 8.5% of males with juvenile sex offense police contact had such police contact as adults.[77] In comparison, 6.2% of males with juvenile non-sex offense police contact had adult sex offense police contact.[78] As juvenile sex offenders were not statistically more likely than juvenile non-sex offenders to commit an adult sex offense, the researchers found that juvenile sex offending did not predict adult sex offending.[79]

In the next study, Zimring and his colleagues examined data from the 1958 Second Philadelphia Birth Cohort to again examine juvenile-to-adult sex offending.[80] The data included information about 13,160 males and 14,000 females from birth to age twenty-six.[81] A total of 204 males and seventeen females had police contacts for sex offenses as juveniles;[82] of these 221 individuals, one in ten males and zero females had a sex-related offense during the first eight years of adulthood.[83] The researchers concluded that neither having committed a sex offense as a juvenile nor the frequency of juvenile sex offending significantly increased the likelihood that a person would commit a sex offense as an adult.[84] Further, the results indicated that a history of juvenile sex

72. *See* Zimring et al., *Racine*, *supra* note 56, at 507; Zimring et al., *Philadelphia*, *supra* note 70, at 59.
73. *Id.*
74. Zimring et al., *Racine*, *supra* note 56, at 511.
75. *Id.* at 512.
76. *Id.* at 526.
77. *Id.* at 508.
78. *Id.*
79. *Id.* at 529.
80. Zimring et al., *Philadelphia*, *supra* note 70, at 59.
81. *Id.* at 62.
82. *Id.*
83. *Id.* at 65.
84. *Id.* at 69.

offending contributed virtually nothing to predicting membership in any adult offender group, particularly in an adult sex offender group.[85]

2. Caldwell Study

At about the same time, Michael Caldwell studied the recidivism patterns of a cohort of more than 2,000 juveniles who were released from secure custody.[86] A total of 249 had committed sex offenses and 1780 had committed non-sex offenses.[87] During a five-year period, the prevalence of new sex offenses for those previously adjudicated for sex offenses was 6.8%, compared to 5.7% for those previously adjudicated for non-sex offenses.[88] In the five-year follow-up period, eighty-five percent of the new sexual offenses were committed by previously non-sex offending juveniles.[89]

3. Letourneau Studies

In both 2008 and 2009, Elizabeth Letourneau and her colleagues studied juvenile sex offenders in South Carolina and found that sex offender registration had no effect on juvenile sexual or non-sexual re-offending.[90] In the 2008 study, nonregistered youth were matched with registered youth (111 matched pairs) on the basis of year of index offense, age at index offense, race, prior person offenses, prior nonperson offenses, and type of index sexual offense.[91] Recidivism was assessed across a four-year follow-up.[92] The results showed that the sexual offense reconviction rate was less than one percent—too low to support a comparison between the groups.[93] Non-sexual violent offense reconviction rates did not significantly differ between registered and nonregistered juveniles.[94]

In the 2009 study, Letourneau and her colleagues studied recidivism rates of males with sex crime adjudications for an average nine-year follow-up period.[95] The results showed that the sexual offense reconviction rate was less than three percent, and registration had no influence on non-

85. *Id.*
86. Caldwell, *Sexual Offense Adjudication*, *supra* note 70, at 107.
87. *Id.* at 107.
88. *Id.* at 110.
89. *Id.*
90. Letourneau & Armstrong, *supra* note 70, at 393–408.
91. *Id.* at 398.
92. *Id.* at 393.
93. *Id.* at 399–400.
94. *Id.* at 393.
95. Elizabeth J. Letourneau et al., *The Influence of Sex Offender Registration on Juvenile Sexual Recidivism*, 20 CRIM. JUST. POL'Y REV. 136, 136 (2009).

sexual violent recidivism.[96] Several other studies on the same subject confirm these results.[97]

4. Registries and Public Safety

Registration laws and other restrictions on juvenile sex offenders do not achieve their intended purpose of improving public safety.

Registries have not been shown to deter sex offending[98] or to reduce crime.[99] Many researchers and criminal justice reformers have argued that registries make communities less safe because they generate a false sense of security.[100] Registries instill the belief that parents can protect their children from sexual offenders by checking an online database.[101] However, the majority of juvenile sex offenses involve people that they know intimately—members of their families and their juvenile peers.[102] Placing juveniles on registries does not affect their ability to offend against those populations.

In addition, registries may actually increase crime by alienating juvenile registrants from social supports and institutions (including education, housing, employment, and family) that reduce the risk of delinquent behaviors.[103] Registration can make it difficult for a youth to progress through school and participate in extracurricular activities or participate in other social institutions.[104] Public registration and community notification can impede brain development,[105] increase the risk of suicide, alienate a youth from school and community, and raise barriers to

96. *Id.* at 142.

97. *See, e.g.*, Meloy, *supra* note 56, at 211 (2005); James R. Worling & Tracey Curwen, *Adolescent Sexual Offender Recidivism: Success of Specialized Treatment and Implications for Risk Prediction*, 24 CHILD ABUSE & NEGLECT 965, 965 (2000) (describing a ten-year follow-up study of adolescents who had sexually offended); James R. Worling et al., *20-Year Prospective Follow-Up Study of Specialized Treatment for Adolescents Who Offend Sexually*, 28 BEHAV. SCI. & L. 46, 47 (2010) (showing that adolescents who participated in specialized treatment were significantly less likely to face charges for sexual, non-sexual violent, and nonviolent crimes).

98. Letourneau et al., *supra* note 51, at 553.

99. *See* ZIMRING, TRAVESTY, *supra* note 8, at 149.

100. SARAH TOFTE, HUMAN RIGHTS WATCH, NO EASY ANSWERS 4 (2007), *available at* http://www.hrw.org/reports/2007/us0907/us0907web.pdf.

101. Seventy percent of mental health professionals surveyed felt that "a listing of sex offenders on the web would create a false sense of security for parents who might feel that they can protect their children simply by checking a web site." Alvin Malesky & Jeanmarie Keim, *Mental Health Professionals' Perspectives on Sex Offender Registry Web Sites*, 13 SEXUAL ABUSE: J. RES. & TREATMENT 53, 53 (2001).

102. JUSTICE POLICY INST., REGISTERING HARM: HOW SEX OFFENSE REGISTRIES FAIL YOUTH AND COMMUNITIES 13 (2008).

103. *Cf.* Zimring et al., *Racine*, *supra* note 56, at 530.

104. *Id.* (stating that youth labeled as sex offenders often experience social rejection, making them more likely to associate with delinquent peers, less likely to be attached to social institutions such as schools and churches, and ultimately more likely to engage in illegal behaviors).

105. *Id.*

successful participation in society.[106] Moreover, registries are often out of date. inaccurate, or both, which causes misdirected fear and ostracism of people who live at an address listed on the internet, but who have never committed a sex crime.[107]

Reformers have argued that establishing and maintaining registries unnecessarily costs law enforcement money and resources because officers are forced to spend time tracking down people who fail to register, many of whom pose no threat to the public.[108] In addition, they have argued that blanket registration and notification requirements make it difficult for the public to accurately assess safety threats.[109] Moreover, they have argued that suspicion caused by registries and notification may undermine a community's sense of trust which, in turn, inhibits communities from facilitating public controls—like community watches—that increase public safety.[110]

II. Social Science Related to the Punitive Nature of Registration, Notification, and Restrictions on Juveniles

Juveniles on sex offender registries face severe and often permanent penalties.[111] For the juvenile, registration may affect participation in school, college, and an orderly, social, daily life.[112] Humiliation and shame associated with registry status, and the risk of being exposed, often serve to isolate young people on registries.[113] Housing and job instability are also key problems that can undermine a juvenile's ability to develop appropriately.[114] Many young people on registries are restricted from

106. Tofte, *supra* note 100, at 80–97.

107. Richard Tewksbury & Matthew B. Lees, *Perceptions of Punishment: How Registered Sex Offenders View Registries*, 53 Crime & Delinq. 380, 384 (2007).

108. *See* Zimring, Travesty, *supra* note 8, at 146.

109. *See* Jill S. Levenson & David A. D'Amora, *Social Policies Designed to Prevent Sexual Violence: The Emperor's New Clothes?*, 18 Crim. Just. Pol'y Rev. 168, 182 (2007).

110. *See* Zimring, Travesty, *supra* note 8, at 146. (citing Jeffrey Michael Cancino, *The Utility of Social Capital and Collective Efficacy: Social Control Policy in Nonmetropolitan Settings*, 16 Crim. Just. Pol'y Rev. 287 (2005)).

111. Michael F. Caldwell, *What We Do Not Know About Juvenile Sexual Reoffense Risk*, 7 Child Maltreatment 291, 301 (2002) (outlining negative consequences of registration on juveniles). For example, Louisiana requires sex offender status to be printed on driver's license. *See, e.g.*, La. Rev. Stat. Ann. § 15:542 (2012).

112. Caldwell, *supra* note 111, at 301.

113. *See generally* Elizabeth Garfinkle, *Coming of Age in America: The Misapplication of Sex-Offender Registration and Community-Notification Laws to Juveniles*, 91 Calif. L. Rev. 163 (2003).

114. *See, e.g.*, Ava Page et al., Justice Policy Inst., Education and Public Safety 9 (2007); Tofte, *supra* note 100, at 80–97 (stating that juvenile registration increases suicide risk, alienation from school and community, and increases barriers to successful community participation); Robert G. Zevitz & Mary Ann Farkas, *Sex Offender Community Notification: Managing High Risk Criminals or Exacting Further Vengeance?*, 18 Behav. Sci. & L. 375, 376 (2000); Zimring et al., *Racine*, *supra* note

participating in age-appropriate activities or living near children, which can lead to social isolation that may increase risky delinquent or criminal behavior.[115] Research also shows that some of these outcomes affect a former offender's ability to rehabilitate and reintegrate into society.[116] This is especially troubling given that a recent study of three-hundred young people on sex offender registries showed that 85.6% had waived trial for an offense that required registration and 53.1% reported they were not told that sex offender registration would be part of their sentence.[117] In addition, 87% of these young people reported that the public was notified of their registry status, despite the fact that only 67.9% were subject to public registration.[118]

In states with community notification requirements, community members sometimes use registry information to harass, victimize, or discriminate against sex offenders.[119] People on registries often want to hide their registry status to avoid discrimination and harassment[120] and tend to isolate themselves after being exposed or victimized.[121]

This is not only the youth's problem. A juvenile's registration status often affects the whole family because children live within family units.[122] The majority of people on registries feel that their stigma attaches to

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56, at 530 (stating that youth labeled as sex offenders are less likely to be attached to positive institutions like schools or churches.).

115. *See* Richard Tewksbury, *Experiences and Attitudes of Registered Female Sex Offenders*, 68 FED. PROBATION 30, 31 (2004); *see also* Jill S. Levenson et al., *Public Perceptions About Sex Offenders and Community Protection Policies*, 7 ANALYSES SOC. ISSUES & PUB. POL'Y 1, 3 (2007) (explaining that when communities are aware a person is on the sex offender registry, the offender may be subject to harassment, vigilantism, stress, depression, employment instability, housing instability, all of which increase the likelihood of criminal behavior).

116. *See* Elizabeth E. Mustaine et al., *Residential Location and Mobility of Registered Sex Offenders*, 30 AM. J. CRIM. JUST. 177, 190 (2006); Richard Tewksbury, *Collateral Consequences of Sex Offender Registration*, 21 J. CONTEMP. CRIM. JUST. 67, 68 (2005) [hereinafter Tewksbury, *Collateral Consequences*]; Tewksbury, *supra* note 115, at 31; Richard Tewksbury & Matthew Lees, *Perceptions of Sex Offender Registration: Collateral Consequences and Community Experiences*, 26 SOC. SPECTRUM 309, 331–32 (2006).

117. Pittman Presentation, *supra* note 18.

118. Examples of public notification included personal information and photograph on the internet (84.6%), school notification (22%), employer notification (26.4%), highway billboard sign (1.3%), and flyers (18.7%). *Id.*

119. Tewksbury, *Collateral Consequences*, *supra* note 116, at 68.

120. *Id.* at 75.

121. *Id.* at 78–79.

122. William Edwards & Christopher Hensley, *Contextualizing Sex Offender Management Legislation Policy: Evaluating the Problem of Latent Consequences in Community Notification Laws*, 45 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 83, 91 (2001) (stating that sex offender management places a strain on the entire family, not just the registrant); Nastassia Walsh & Tracy Velazquez, *Registering Harm: The Adam Walsh Act and Juvenile Sex Offender Registration*, CHAMPION, Dec. 2009, at 20, 22–23 (highlighting the challenges juvenile sex offender registrants face).

their entire families.[123] Families of registrants face isolation, threats, harassment, stress, and housing displacement.[124]

Perhaps the most compelling descriptions of the problem come from youth registrants themselves. Young registrants interviewed for a Human Rights Watch Report on the impact of sex offender registration laws on children reported that registration affected them in the following ways: denial of access to or severely interrupted primary or secondary education (52.4%); homelessness (44.6%); serious repercussions for families including economic hardship and strained family relationships (76.7%); exposure to violence or threats of violence against self or family member (52%); attempted suicide (19.6%); negative psychological impacts on self or family member (84.5%).[125]

Reflecting current social science, many courts have recognized that registries and community notification shame and isolate registrants.[126] Branding, shaming, and banishment are historical punishments that have been held to constitute excessive punishment.[127] There is no consensus as to whether registries and community notification of juvenile sex offender status brand, shame, and banish to the extent that they constitute punishment excessive or otherwise, but some courts have so held.[128]

III. Juvenile Sex Offender Registration: The Legal Landscape

A. Juvenile Sex Offender Registration, Notification, and Restrictions Before 2006

Sex offender registration statutes require people convicted of sex offenses to provide personal information to law enforcement agencies.[129] Generally, the articulated purpose of registries is to monitor offenders, to

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123. Jill S. Levenson & Leo P. Cotter, *The Effect of Megan's Law on Sex Offender Reintegration*, 21 J. Contemp. Crim. Just. 49, 52 (2005).

124. *See* Tewksbury, *Collateral Consequences*, *supra* note 116, at 79.

125. *See* Nicole Pittman & Alison Parker, Human Rights Watch, Raised on the Registry: The Irreparable Harm of Placing Children on Sex Offender Registries in the U.S. 50–72 (2013).

126. *See, e.g.*, Doe v. Pataki, 3 F. Supp. 2d 456, 467–68 (S.D.N.Y. 1998) (reasoning that registration as a sex offender carries with it "shame, humiliation, ostracism, loss of employment . . . and a multitude of other adverse consequences" that result in a "tangible impairment of a right in addition to the harm to reputation," thereby implicating a liberty interest); Doe v. Poritz, 662 A.2d 367, 420 (N.J. 1995) (construing New Jersey's sex offender registration statute and holding that harm to reputation coupled with harm to the Constitutional right to privacy implicates a federally protected Constitutional interest); *cf.* Valmonte v. Bane, 18 F.3d 992, 1002 (2d Cir. 1994) (holding that inclusion on child abuse registry implicates liberty right to future employment).

127. *See, e.g.*, Smith v. Doe, 538 U.S. 84, 98 (2003); Femedeer v. Haun, 227 F.3d 1244, 1250–51 (10th Cir. 2000); Cutshall v. Sundquist, 193 F.3d 466, 475 (6th Cir. 1999); E.B. v. Verniero, 119 F.3d 1077, 1099 (3d Cir. 1997).

128. *See, e.g.*, *In re* C.P., 967 N.E.2d 729, 732 (Ohio 2012).

129. *See* Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109–248, 120 Stat. 587 (codified as amended in scattered sections of 10, 18, 21, 28, & 42 U.S.C.).

locate suspects when new sex crimes take place, and to restrict sex offenders' residency and employment options in order to protect the public safety.[130] Community notification statutes allow for publication or dissemination of a registrant's personal identifying information to law enforcement agencies, interested parties, or the public.[131]

In the 1990s, Congress enacted several statutes that provided financial incentives for states that implemented sex offender registries.[132] In 1994, the Jacob Wetterling Crimes Against Children and Sexually Violent Offenders Registration Act (the "Jacob Wetterling Act") required registration for many sexual offenses against children and some non-sexual offenses, including kidnapping and false imprisonment of a minor.[133] The Jacob Wetterling Act required states "to track sex offenders by confirming their place of residence annually for ten years after their release into the community or quarterly for the rest of their lives if the sex offender was convicted of a violent sex crime."[134] The Jacob Wetterling Act allowed for, but did not require, community notification.[135] Megan's Law, enacted in 1996, amended the Jacob Wetterling Act to require law enforcement to notify the community when "necessary to protect the public."[136] In the same year, the Pam Lyncher Sexual Offender Tracking and Identification Act of 1996 created a federal database of all the registration information and made it available to federal and local law enforcement.[137] In 2000, Congress passed the Campus Sex Crimes Prevention Act, which required sex offenders to report enrollment in or employment at an institution of higher education.[138]

By the mid-1990s, almost every state had enacted some form of sex offender registry and community notification in order to obtain its share of federal crime protection funds.[139] The federal laws did not specify whether

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130. *Id.*

131. The federal Adam Walsh Act allows the public to seek information about specific registrants "in order to protect the public from sex offenders and offenders against children." *Id.*

132. *See, e.g.*, 42 U.S.C. § 14071 (1995) (encouraging states to come into compliance with the Act; refusal meant losing ten percent of federal law enforcement funds under the Byrne Grant Program of the Department of Justice).

133. *Id.* § 14071(a)(3)(A).

134. Jacob Wetterling Crimes Against Children and Sexually Violence Offender Registration Act of 1994, H.R. 3355, 103d Cong. § 170101(b)(6) (2d Sess. 1994) (repealed 2006) ("Jacob Wetterling Act"); *see* JANE L. IRELAND ET AL., VIOLENT AND SEXUAL OFFENDERS: ASSESSMENT, TREATMENT, AND MANAGEMENT 273 (2009).

135. *Id.* at 49.

136. 42 U.S.C. § 14071(e)(2) (1996); *see* IRELAND ET AL.; *supra* note 134, at 273.

137. Pam Lychner Sexual Offender Tracking and Identification Act of 1996, 42 U.S.C. §§ 14072–14073.

138. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (codified as amended in scattered sections of 18, 22, 27, & 42 U.S.C.).

139. The first community notification provision was in Washington State as a provision of the state's Community Protection Act of 1990. SCOTT MATSON, WASHINGTON STATE INST. FOR PUB. POLICY, SEX OFFENDER COMMUNITY NOTIFICATION UPDATE 1 (1996); *see, e.g.*, WASH. REV. CODE § 71A 09 (1993).

registration requirements should be applied to juveniles; each jurisdiction decided individually whether and how to register juveniles that were adjudicated delinquent for sex offenses.[140] Before 2006, approximately thirty states required juveniles to register in some way.[141] The schemes that the states adopted varied widely in terms of judicial discretion, registration terms, community notification, and residency, work, and housing restrictions.[142] Some states went further and applied additional restrictions,[143] like school and foster care restrictions,[144] and other states attempted to apply such controls.[145]

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140. Juveniles convicted as adults were required to register under the Jacob Wetterling Act. 42 U.S.C. §§ 14071–14073 (repealed 2006).

141. PITTMAN REPORT, *supra* note 15, at 14.

142. Some states did not require juveniles to register. *See, e.g.*, HAW. REV. STAT. § 846E–2 (2013). Other states gave judges the discretion to determine whether or not to order juveniles to register. *See, e.g.*, OHIO REV. CODE § 2152.83(D) (West 2005 & Supp. 2012) (listing factors Ohio judges consider when determining whether to assign registration for offenses that do not mandate registration). Some states gave judges discretion to determine registration terms, while others removed judicial discretion and required mandatory lifetime registration terms. *See* PITTMAN REPORT, *supra* note 15, at 32. Some states required community notification for juveniles, but the majority of states did not. *Id.* Some states imposed residency, work and other restrictions on juvenile registrants, while other states explicitly refused to do so. *Id.* at 66, 69 (comparing Georgia and Illinois).

143. Georgia applies the same restrictions on adults and juveniles. *See* GA. CODE ANN. §§ 42-1-12 to 42-1-19 (2013) (listing the registration requirements and subsequent restrictions for sex offenders in Georgia); *see also* PITTMAN REPORT, *supra* note 15, at 66. Michigan has explicitly refused to apply residency restrictions to juveniles. *See* MICH. COMP. LAWS § 28.735 (2013) (outlining residency requirements for registered sex offenders; MICH. COMP. LAWS § 28.736 (exempting juveniles from the residency requirements); *see also* PITTMAN REPORT, *supra* note 15, at 78. Illinois does not impose residency restrictions on juveniles. *See* 730 ILL. COMP. STAT. 150/8(a) (2013) (implementing residency requirements for certain sex offenders); *see also* PITTMAN REPORT, *supra* note 15, at 69.

144. For example, Illinois recently passed a law requiring juvenile sex offenders to stay off and away from school property. Patrick Yeagle, *Opponents: New Sex Offender Laws Won't Help*, ILL. TIMES (May 13, 2010), http://www.illinoistimes.com/Springfield/article-7293-opponents-new-sex-offender-laws-wont-help.html.

145. *See* State v. C.M., 746 So. 2d 410, 421 (Ala. Crim. App. 1999) (holding Alabama's registration and community notification scheme unconstitutional as applied to juveniles because the Act goes beyond what is necessary to protect public safety).

B. New Juvenile Sex Offender Registration, Notification, and Restrictions in 2006 and Beyond: Responses to the Adam Walsh Act (SORNA)[146]

On July 20, 2006, Congress repealed the Jacob Wetterling Act and replaced it with the Adam Walsh Child Protection and Safety Act (the "Adam Walsh Act").[147] Title I of the Adam Walsh Act, the Sex Offender Registration and Notification Act ("SORNA"), attempts to set a national baseline for sex offender registration.[148] SORNA requires that states receiving federal crime prevention funds ("Byrne Funds") substantially comply with the registration guidelines that it outlines.[149]

In states that comply with SORNA, judges do not have discretion to excuse a juvenile who has committed certain registerable offenses from registration requirements based on risk assessment or other factors.[150] SORNA requires a three-tier registration system.[151] Tier I is a catch-all for all lesser offenses that do not qualify for higher-level tier status;[152]

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146. In 2006, the Adam Walsh Act was passed. *See* Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (codified as amended in scattered sections of 10, 18, 21, 28, & 42 U.S.C.). Ohio was the first state to come into substantial compliance. S. 10, 127th Gen. Assemb. (Ohio 2003) (enacted). Few other jurisdictions complied. *See* SMART, *supra* note 18 (listing states in compliance). On January 11, 2011, the U.S. Attorney General issued Supplemental Guidelines for Sex Offender Registration and Notification. 76 Fed. Reg. 1630 (Jan. 11, 2011) [hereinafter Supplemental Guidelines]. They changed the original guidelines significantly. *See* SORNA Guidelines, *supra* note 7, at 38030. The Attorney General noted that one of the largest barriers to implementation was that SORNA required registration for juveniles at least fourteen years old who were "adjudicated delinquent for particularly serious sex offenses." Supplemental Guidelines, *supra*, at 1636. Because of resistance from states, the Attorney General removed the public notification requirement and allowed that jurisdictions that did not put juveniles on the website also did not have to provide registry information to school, public housing, social service, and volunteer entities, and other organizations, companies, or individuals who request information: "There is no remaining requirement under SORNA that jurisdictions engage in any form of public disclosure or notification regarding juvenile delinquent sex offenders. Jurisdictions are free to do so, but need not do so to any greater extent than they may wish." *Id.*

147. *See generally* SORNA § 101 (2006).

148. President George W. Bush stated that the Adam Walsh Act would help law enforcement protect children by "expand[ing] the National Sex Offender Registry by integrating the information in State sex offender registry systems and ensuring that law enforcement has access to the same information across the United States." Remarks on Signing the Adam Walsh Child Protection and Safety Act of 2006, 42 Weekly Comp. of Pres. Doc. 1395, 1396 (July 27, 2006).

149. States lose ten percent of federal Byrne funds for non-compliance. *See* Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, & Tracking, Dep't of Justice, Requests for Reallocation of Byrne JAG Funding Penalty 2 (2012).

150. For example, in 2013, legislators proposed House Bill 182, which provides the Delaware Family Court discretion to designate—or not designate—juveniles under fourteen as sex offenders, thus subjecting them to registration and reporting requirements. The bill also provides for judicial review of registration requirements for juveniles over fourteen who committed certain offenses. H.R. 182, 147th Gen. Assemb. (Del. 2013) (codified as amended at Del. Code Ann. tit. 10, § 1009(c) (2013)).

151. SORNA Guidelines, *supra* note 7, at 38041–42.

152. 42 U.S.C. § 16911(2) (2006).

these offenses require fifteen years of registration.[153] Tier II offenses are punishable by more than one year in prison but are not classified as the most severe sex offenses.[154] They require twenty-five years of registration.[155] Tier III sex offenses are considered the most serious offenses punishable by more than one year in prison.[156] Tier III offenders must register for life,[157] but they are eligible to petition a court for registry termination after twenty-five years of good behavior.[158]

The United States Attorney General issued guidelines and regulations that inform jurisdictions how to implement SORNA.[159] State compliance is overseen by the federal Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking ("SMART").[160]

Before 2006, whether and how to register juveniles had been determined by each state. However, states seeking to become substantially compliant with SORNA were required to implement standard registration[161] and community notification[162] requirements for both juveniles and adults. Under SORNA and the proposed implementation guidelines published in 2006, all of the same registration and notification standards would apply to juveniles and adults.[163]

SORNA also required mandatory sentences for certain offenses, whether committed by juveniles or adults.[164] In order to be substantially compliant with SORNA, states were required to impose mandatory registration upon any juvenile convicted as an adult and any juvenile over fourteen adjudicated delinquent for a sex offense equivalent to aggravated sexual abuse.[165] These crimes were automatically classified as

153. SORNA §§ 115–16 (2006).

154. 42 U.S.C. § 16911(3).

155. SORNA § 115.

156. 42 U.S.C. § 16911(4)(A).

157. SORNA § 115.

158. 42 U.S.C. § 16915(b)(3)(B).

159. Office of Sex Offender Monitoring, Apprehending, Registering, & Tracking, Office of Justice Programs, *SORNA*, http://www.ojp.usdoj.gov/smart/sorna.htm (last visited Oct. 31, 2013) [hereinafter SMART Website].

160. *Id.*

161. Under SORNA, juveniles tried as adults and juveniles over fourteen adjudicated for an offense "comparable to or more severe than aggravated sexual abuse" are required to register for twenty-five years or life. SORNA § 111. Aggravated sexual abuse includes, among other things, engaging in a sexual act with a child under the age of twelve. *See* 18 U.S.C. § 2241(a) (2007).

162. Initially, SORNA required internet notification. SORNA Guidelines, *supra* note 7, at 38030.

163. SORNA § 202.

164. *See* SORNA Guidelines, *supra* note 7, at 38030.

165. Under federal law, aggravated sexual abuse includes: (1) sexual abuse by force or threat; (2) sexual abuse by rendering another person unconscious and engaging in a sexual act with that person; or (3) knowingly engaging in a sexual act with a minor under the age of twelve. 18 U.S.C. § 2241.

Tier III, the most severe offenses.[166] SORNA and the 2006 guidelines did not allow judicial discretion to decide whether registration was appropriate for juveniles convicted as adults—or who committed Tier III offenses—and required juvenile registrants to wait twenty-five years before petitioning the court for registry termination.[167] These offenses also required community notification of sex offender status, placing juveniles on internet-searchable public databases.[168]

The Attorney General issued interim guidelines in March 2007.[169] There was significant debate at that time about whether SORNA's requirements should apply to juveniles.[170] Many jurisdictions had resisted the provisions of SORNA as applied to juveniles, finding them extreme, overbroad, and in conflict with the rehabilitative purpose of juvenile court.[171] One main concern was the lifetime registration requirement for a youth who knowingly engaged in a sex act with a minor under twelve; this requirement was removed from the SORNA Guidelines in 2008 in response to juvenile advocates' arguments that the provision was developmentally inappropriate.[172] In 2010, the mandatory community notification requirements were also removed from the SORNA Guidelines in response to juvenile advocates' arguments that community notification violates the confidentiality provisions and protections of the juvenile court.[173] The final guidelines, published in 2011, allow states to withhold information about juveniles from the public registry and still be considered to be in substantial compliance.[174] States now have the

166. A Tier III sex offender under SORNA is a sex offender whose offense is punishable by more than a year, and the offense "(1) is comparable to or more severe than aggravated sexual abuse; (2) is abusive sexual contact against a minor twelve years or younger; or (3) involves kidnapping of a minor." *See* 42 U.S.C. § 16911(4)(A)–(B) (2006).

167. *See* SORNA Guidelines, *supra* note 7, at 38068.

168. *Id.* at 38060.

169. *Id.*

170. *See, e.g.*, 152 CONG. REC. S8012, S8027 (daily ed. July 20, 2006) (statement of Sen. Leahy).

171. The Council of State Governments surveyed states on which factors were impeding SORNA implementation and noted that the most common cited barrier were the juvenile registration and reporting requirements. COUNCIL OF STATE GOV'TS, SORNA AND SEX OFFENDER POLICY IN THE STATES 5 (2010). Twenty-three of forty-seven states responding reported that they found the juvenile provisions problematic. *Id.* at 4. Of the states reporting, forty-two indicated that implementation would require new or additional legislation to achieve compliance. *Id.* Of states responding, seventy-three percent reported that the SORNA requirements were somewhat inconsistent or highly inconsistent with state systems; the areas of inconsistency included excluding juveniles from the registry, purging juvenile records at twenty-one, and community notification. *Id*. Some states resisted adopting an offense-based system when most had already adopted a risk-based system that accounted for individual assessment. *Id*.

172. SORNA Guidelines, *supra* note 7, at 38041.

173. Supplemental Guidelines for Sex Offender Registration and Notification, 75 Fed. Reg. 27362, 27363 (May 14, 2010) (codified in scattered sections of 42 U.S.C.).

174. Supplemental Guidelines, *supra* note 146, at 1630 (permitting states to withhold information including email addresses and other Internet identifiers); *see* 42 U.S.C. § 16915a (2008).

discretion to disseminate juveniles' information publicly, but are not required to do so.[175]

C. State Action Since SORNA

The original deadline for jurisdictions to substantially comply with SORNA was July 27, 2009.[176] As that date approached, at most one state was in substantial compliance.[177] The U.S. Attorney General granted a one-year extension.[178] As of July 2012, only fifteen states substantially complied with SORNA.[179] Some states rejected the SORNA requirements outright because they were inconsistent with current state sex offender policies.[180] Other states decided not to come into compliance because the expense of implementation would exceed the amount of money equal to ten percent of their Byrne funds.[181] Still other states have attempted to come into compliance but have not been able to pass legislation to do so.[182] SORNA challenges have ensued on various bases, some successful, some not.[183]

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175. SORNA Guidelines, *supra* note 7, at 38032. SORNA standards "set a floor, not a ceiling" for sex offender registration programs. *Id.* SORNA places almost no limits on states' discretion to adopt broader registration and notification provisions. *Id*. at 38032–35. A 2007 study indicated that at least twenty-five states disseminated juvenile registrants' information via the Internet. *See* Brenda V. Smith & Jaime M. Yarussi, Nat'l Inst. of Corrs., Breaking the Code of Silence (2007), *available at* http://www.wcl.american.edu/endsilence/documents/BreakingtheCodeofSilence_CorrectionalOfficersHandbook.pdf.

176. *See* Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, & Tracking, *SORNA Implementation Guidance*, Smart Watch Newsl. (Winter 2010), http://www.ojp.usdoj.gov/smart/smartwatch/10_winter/pfv.html.

177. *Id.*

178. *Id.*

179. As of spring 2012, the states in compliance were Alabama, Delaware, Florida, Kansas, Louisiana, Maryland, Michigan, Mississippi, Missouri, Nevada, Ohio, South Carolina, South Dakota, Tennessee, and Wyoming. *See* Pittman Presentation, *supra* note 18. Pennsylvania is now also in compliance with SORNA. *See* SMART, *supra* note 18.

180. *See, e.g.*, *Texas Latest State Refusing to Join Sex-Offender Registry*, FOXNews.com, Oct. 7, 2012, http://www.foxnews.com/us/2012/10/07/texas-latest-state-refusing-to-join-sex-offender-registry/ (citing one reason for resistance as losing the individualized risk assessment process), *see also* Levenson & Cotter, *supra* note 123.

181. *See, e.g.*, Senate Criminal Justice Comm., Interim Report, 81st Sess. Interim, at 14 (Tex. 2010), *available at* http://www.senate.state.tx.us/75r/senate/commit/c590/c590.InterimReport81.pdf; Justice Policy Inst., What Will it Cost States to Come into Compliance with the Sex Offender Notification and Registration Act? (2008). For an overview of state compliance, see Nat'l Consortium for Justice Info. & Statistics, Survey on State Compliance With the Sex Offender Registration and Notification Act (SORNA) (2009).

182. *See, e.g.*, S.B. 1040, 97th Gen. Assemb., 2d Reg. Sess. (Ill. 2011); H.B. 893, 195th Gen. Assemb. (Pa. 2011).

183. *See, e.g.*, Abigail Goldman, *Juvenile Sex Offender Laws Struck Down—For Now*, Las Vegas Sun, Apr. 6, 2008, at 8; *cf.* ACLU of Nevada v. Masto, 670 F.3d 1046, 1056–58 (9th Cir. 2012) (holding that a Nevada law that expanded the definition of a sex offender was not punitive and respects due process rights).

IV. WHAT THE COURTS SAY

When looking at the constitutionality of sex offender registration, community notification, and other restrictions imposed on sex offenders, courts examine the nature and extent of the burden imposed on the registrant, and whether it is excessive in relation to its purpose.[184]

In recent years, courts have acknowledged that registration imposes intrusive burdens on the registrant, including lengthy registration terms, GPS monitoring, frequent in-person reporting, and increased dissemination of previously private information.[185]

Community notification schemes have evolved as technology and laws have changed. When first introduced, community notification schemes were used by law enforcement to disseminate information to people who might be in immediate risk of harm,[186] but as sex offender registration and community notification schemes have evolved, the general public can access a wealth of identifying information about sex offender registrants via the internet.[187] Making this information public is more problematic for juveniles than the public becoming aware of a conviction or adjudication because Internet-accessible registry information is easily accessible in a way that juvenile court files are not. The exposure, and the risks associated with it, imposes a heavy burden on registrants that some courts have recognized as punishment—cruel and unusual or otherwise.

A. SUPREME COURT CASES

1. Sex Offender Registration and the Issue of Punishment

Before grappling with the issue of whether lifetime mandatory sex offender registration for juveniles constitutes cruel and unusual

184. *See, e.g.*, Smith v. Doe, 538 U.S. 84, 89 (2003).

185. Adam Walsh Child Protection and Safety Act, 42 U.S.C. § 16981 (2006) (authorizing the U.S. Attorney General to award grants to states and governments to develop programs that fit sex offenders with electronic monitoring); LA. REV. STAT. ANN. § 15:542 (2012) (requiring registrants to provide lengthy information including: palm prints, a DNA sample, all landline and telephone numbers, and requiring that "Sex Offender" be printed on the registrant's driver's license); State v. Robinson, 873 So. 2d 1205, 1213 (Fla. 2004) (imposing lifelong registration requirements on sexual predators "imposes more than a stigma").

186. Catherine L. Carpenter & Amy E. Beverlin, *The Evolution of Unconstitutionality in Sex Offender Registration Laws*, 63 HASTINGS L.J. 1071, 1088–89 (2012) (noting that in 2001, Louisiana's registration statute required that registrants provide name, address, place of employment, crime of conviction, place and date of conviction, aliases, and social security number; in 2012, Louisiana's registration statute required name, aliases, physical description, addresses of housing and school, current photograph, fingerprints, palm prints, DNA sample, description of every vehicle driven, copy of driver's license, and every email address, online screen name, and other online identifiers).

187. *Id.*

punishment, courts must establish that such a requirement is punitive—in intent or effect—and not simply regulatory.

The Supreme Court addressed the issue in *Smith v. Doe*.[188] Justice Souter recognized that sex offender registration schemes share characteristics that are both regulatory and punitive.[189] Courts must determine whether there are factors that "tip[] the scale," thereby making a scheme punitive.[190]

When determining whether a scheme is regulatory or punitive, courts first look to whether the legislature intended for the scheme to be civil or criminal.[191] Even if the legislature intends for the scheme to serve a civil purpose, it may still impose a criminal penalty if the scheme is "so punitive in either purpose or effect as to . . . . transform . . . a civil remedy into a criminal penalty."[192] Courts must determine whether legislation that was intended to regulate is excessive in relation to its non-punitive purpose.[193]

When determining whether a piece of legislation is excessive, courts apply the seven-factor test articulated in *Kennedy v. Martinez-Mendoza*:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as punishment[,] whether it comes into play only on a finding of *scienter*, whether its operation will promote traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.[194]

The Court applied this analysis in *Smith*, which concerned an adult registration scheme, and found that it was not punitive.[195]

The Court had the opportunity to review a juvenile scheme in *United States v. Juvenile Male* ("*Juvenile Male II*") but did not reach the merits.[196] The strong differences between the majority and the dissents in *Smith* suggest that the Court might find the restrictions punitive as

188. *Smith*, 538 U.S. at 84.

189. *Id.* at 110 (Souter, J., concurring).

190. *Id.* at 92.

191. *Id.*

192. *Id.* (citations omitted).

193. *Id.*

194. 372 U.S. 144, 168–69 (1963) (emphasis in original).

195. 538 U.S. at 97–99. In 2005, the Eighth Circuit Court of Appeals applied *Smith* but held that Ohio's juvenile registration statute did not constitute "retroactive criminal punishment." Doe v. Miller, 405 F.3d 700, 723 (8th Cir. 2005). In 2013, the Fourth Circuit held that SORNA's registration requirement did not constitute cruel and unusual punishment. United States v. Under Seal, 709 F.3d 257, 266 (4th Cir. 2013).

196. 131 S. Ct. 2860, 2862 (2011).

applied to juveniles, especially if the Court were to take into account what it has recently acknowledged about adolescent development.

a. Smith v. Doe

In *Smith*, the Supreme Court addressed whether a sex offender registration scheme violated the Ex Post Facto Clause[197] of the Constitution by requiring retroactive application to adult sex offenders who were convicted prior to the enactment of the scheme; the Court found that it did not because the registration scheme was civil in nature.[198]

197. U.S. CONST. art. 1, § 9, cl. 3.

198. *Smith*, 538 U.S. at 96. It should be noted that, while the majority of cases that address registration schemes as applied to adults and found them regulatory in nature, courts have found sex offender registration and community notification schemes punitive where they exceeded non-punitive purposes. *See, e.g.*, United States v. Leach, 639 F.3d 769, 773 (7th Cir. 2011); United States v. George, 625 F.3d 1124, 1131 (9th Cir. 2010), *vacated*, 672 F.3d 1126 (2012); United States v. DiTomasso, 621 F.3d 17, 25 (1st Cir. 2010), *vacated*, 132 S. Ct. 1533 (2012); United States v. Shenandoah, 595 F.3d 151, 158–59 (3d Cir. 2010), *abrogated by* Reynolds v. United States, 132 S. Ct. 975 (2012); United States v. Guzman, 591 F.3d 83, 94 (2d Cir. 2010); United States v. Young, 585 F.3d 199, 203–06 (5th Cir. 2009); United States v. Gould, 568 F.3d 459, 466 (4th Cir. 2009); United States v. Ambert, 561 F.3d 1202, 1207 (11th Cir. 2009); United States v. Hinckley, 550 F.3d 926, 936 (10th Cir. 2008), *abrogated by* Reynolds v. United States, 132 S. Ct. 975 (2012); United States v. May, 535 F.3d 912, 919–20 (8th Cir. 2008), *abrogated by* Reynolds v. United States, 132 S. Ct. 975 (2012); *cf.* ACLU of Nev. v. Masto, 719 F. Supp. 2d 1258, 1260 (D. Nev. 2008), *rev'd*, 670 F.3d 1046 (9th Cir. 2012) (holding retroactive application of revised statutes governing classification, monitoring, and residency violated the Ex Post Facto Clause because the statutes automatically classified based on crime committed, and numerous people whose crimes had been committed in the distant past and who were unlikely to reoffend were subjected to the state's requirements); State v. Williams, 952 N.E.2d 1108, 1113 (Ohio 2011) (reasoning that after statutory scheme was "changed dramatically" when Ohio came into substantial compliance with the Adam Walsh Act, the new burdens, duties, obligations, or liabilities imposed were punitive in nature); Hevner v. State, 919 N.E.2d 109, 112–13 (Ind. 2010) (regulatory scheme was punitive where most factors of intent-effect test advanced a punitive interest); State v. Pollard, 908 N.E.2d 1145, 1153 (Ind. 2009) (" [By r]estricting the residence of offenders . . . without considering whether a particular offender is a danger to the general public, the statute exceeds its non-punitive purposes."); Wallace v. State, 905 N.E.2d 371, 384 (Ind. 2009) ("[T]he non-punitive purpose of the Act . . . does not serve to render as non-punitive a statute that is so broad and sweeping."); Doe v. Dist. Attorney, 932 A.2d 552, 563 (Me. 2007) ("The fact that a sex offender never has the ability to escape the registration requirements . . . regardless of behavior, consequences, or contributions following the conviction, strikes us as having the capability to be excessive and as diverging from the purpose of protecting the public."); State v. C.M., 746 So. 2d 410, 419–20 (Ala. Crim. App. 1999) (finding amendments to Alabama's registration and community notification scheme which prohibited a juvenile sex offender from returning to the family home violated Ex Post Facto clause where the provision applied the broadest application of registration and community notification regardless of whether they were applied to juveniles or adults). *But cf.* United States v. Shannon, 511 F. App'x 487, 490–92 (6th Cir. 2013) (finding no violation of the Ex Post Facto Clause when juvenile did not provide the "clearest proof" that SORNA was so punitive in effect as applied to juveniles); United States v. Elkins, 683 F.3d 1039, 1045 (9th Cir. 2012) (applying SORNA based on a state conviction as a juvenile sex offender not punitive).

In *Smith*, respondents Doe I and Doe II had been convicted of aggravated sex offenses in Alaska.[199] Both had served prison time and had completed sex offender treatment.[200] Doe I pled guilty nine years before the Alaska Sex Offender Registration Act was enacted.[201] He obtained early supervised release as a result of treatment compliance and because he posed a low risk of sexually reoffending.[202] He married, started a business, reunited with his family, and was granted custody of his minor daughter after the court determined that he had been rehabilitated.[203]

After the Alaska Sex Offender Registration Act was enacted, however, Doe I was required to register four times a year and was subject to community notification because Alaska's Act was applied retroactively.[204] Doe I appealed, and the case went to the Supreme Court based on Doe's argument that retroactive application of the Act violated the Ex Post Facto Clause.[205]

The Court's majority opinion described the process for determining whether a piece of legislation that was intended to regulate is excessive in relation to its non-punitive purpose.[206] The Court noted that the first factor is whether the sanction involves an affirmative disability or restraint.[207] When determining whether registrants suffer from an affirmative disability or restraint, the Court considers: (1) whether the law imposes physical restraint; if no physical restraint, (2) whether the law involves a restriction on activities that could otherwise be considered restraint; and (3) if no restraint, either physically or effectively, whether the sanctions imposed involve the type of shame and humiliation traditionally associated with shaming punishments.[208] The Court identified historical shaming punishments to include banishment, loss of freedom of movement, public shame and humiliation, occupational or residency challenges, and conditions analogous to probation or supervised release.[209]

Despite the fact that many courts had previously held that sex offender registration schemes are non-punitive, the Court recognized

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199. *Smith*, 538 U.S. at 84.
200. *Id.*
201. *Id.* at 91, 117.
202. *Id.*
203. *Id.*
204. *Id.* at 90–91.
205. *Id.* at 84.
206. *Id.* at 97.
207. *Id.* at 99–100.
208. *Id.* at 98–101.
209. *Id. See id.* at 109 n.* (Souter, J., concurring) ("There is significant evidence of onerous practical effects of being listed on a sex offender registry.").

that sex offender registration and community notification laws serve to shame and isolate the registrant.[210] However, the majority noted that, under the Alaska scheme, sex offender registrants were not banished from their communities because they were able to move around and work as other citizens.[211] The majority further stated that "[o]ur system does not treat dissemination of truthful information in furtherance of a legitimate governmental objective as punishment," and ultimately held the Alaska scheme to be non-punitive.[212]

In his dissent, Justice Stevens argued that the majority failed to decide whether the Act deprived registrants of liberty.[213] He argued that sex offender registration statutes "impose significant affirmative obligations and a severe stigma on every person to whom they apply."[214] Finally, he argued that the Act was punitive because it severely deprived registrants of their liberty, imposed restraints on everyone in the class of registrants, and did not restrain anyone else.[215]

Justice Ginsberg argued in her dissent that the registration scheme constituted punishment because: (1) registration and notification were comparable to parole; (2) the Act's requirements were reminiscent of public shaming; (3) the registration requirements were based on past crimes, not present risk; (4) registration did not prevent future crimes; (5) the registration term was not based on the risk of re-offense; (6) notification was required four times a year even if the information had not changed; and (7) the Act provided no possible way to shorten the term, through rehabilitation or proof of incapacitation.[216] Therefore, she argued that the Act was punitive in both its intent and result.[217]

These dissents could be important predictors of how the Court might rule on whether sex offender registration laws are punitive post-SORNA. It should be noted that when the *Smith* decision was entered in 2003, sex offender laws were less restrictive than they are post-SORNA, giving rise to the possibility that the Court would now consider current sex offender registration requirements unconstitutional even as applied to adults.[218] In addition to a larger number of registerable offenses,[219]

210. *Id.* at 99 ("It must be acknowledged that notice of criminal conviction subjects the offender to public shame, the humiliation increasing in proportion to the extent of the publicity. And the geographic reach of the Internet is greater than anything that could have been designed in colonial times.").

211. *Id.* at 101.

212. *Id.* at 98, 105–06.

213. *Id.* at 111 (Stevens, J., dissenting).

214. *Id.* (Stevens, J., dissenting).

215. *Id.* at 111–12 (Stevens, J., dissenting).

216. *Id.* at 115–17 (Ginsburg, J., dissenting).

217. *Id.* at 118 (Ginsburg, J., dissenting).

218. Although the Court split 6-3 in *Smith*, three members of the majority—and one in the dissent—have since retired. As a result, the addition of Justices Roberts, Alito, Sotomayor, and Kagen

increased penalties now include extended registration terms,[220] dissemination of additional personal information,[221] expanded community notification requirements,[222] oppressive residency restrictions,[223] and GPS monitoring.[224]

Even if sex offender registration were deemed regulatory as applied to adults, the issue before us is whether, as applied to juveniles, registrants face public shame and humiliation that reaches the level of historic notions of punishment. Being placed on a public registry is not the same for juveniles as it would be for adults, because juvenile cases are traditionally kept confidential.[225] Once their names and identifying information is disseminated on the Internet, juvenile sex offender registrants face permanent stigma[226] that remains even after the

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to the Court could change the balance for sex offender registration requirements. For a discussion of the evolution of adult sex offender registration schemes, see Carpenter & Beverlin, *supra* note 186.

219. *Id*. at 1082 (noting that Utah's registration scheme contained nineteen triggering offenses in 2000 and twenty-nine triggering offenses in 2011).

220. *Id.* at 1083 (noting that reclassification of crimes post-SORNA have increased penalties and registration/notification requirements). *See, e.g*., OHIO REV. CODE ANN. § 2950.031(A)(1)–(2) (West 2007) (specifying new classifications post-SORNA and their retroactivity), *held unconstitutional by* State v. Bodyke, 933 N.E.2d 753 (Ohio 2010).

221. Carpenter & Beverlin, *supra* note 186, at 1088–89 (noting that, for example, in 2001, Louisiana's registration statute required that registrants provide name, address, place of employment, crime for which he was convicted, place and date of conviction, aliases and social security number; in 2012, Louisiana's registration statute required name, aliases, physical description, addresses of housing and school, current photograph, fingerprints, palm prints, DNA sample, description of every vehicle driven, copy of driver's license, every email address, online screen name, and other online identifiers).

222. *Id.* at 1090–93 (noting that, when community notification was first introduced, information was narrowly disseminated; current online registry information contains extensive information about registrants, including detailed physical descriptions, home and work addresses, and maps to their locations).

223. *Id.* at 1096–98 (noting that, when first introduced, restrictions prohibited sex offenders from living within 1,000 feet of places where minors congregate—including schools, daycare centers, and parks; current legislation often require the buffer zone to be 2,500 feet and places where minors congregate have been expanded to include bus stops, arcades, and libraries); *see* Formaro v. Polk Cnty., 773 N.W.2d 834, 837 (Iowa 2009) (holding the 2000-foot restriction constitutional).

224. Carpenter & Beverlin, *supra* note 186, at 1098 (noting that as many as thirty-nine states permit some form of electronic monitoring of sex offenders).

225. While federal SORNA guidelines no longer require public disclosure of registrants who were adjudicated delinquent, see Supplemental Guidelines, *supra* note 146, at 1632, it leaves states and Indian Tribes the authority to do so. United States v. Juvenile Male ("*Juvenile Male I*"), 590 F.3d 924, 937 (9th Cir. 2010), *vacated*, 131 S. Ct. 2860 (2011) ("Historically, information from juvenile adjudications has been made public only when a juvenile's case is transferred to adult criminal court for *punitive purposes*.").

226. Justice Stevens' dissent in *Smith v. Doe* focused on the severe stigmatizing effect of registration on the registrant and stated that "these statutes unquestionable affect a constitutionally protected interest in liberty." 538 U.S. 84, 112 (2003) (Stevens, J., dissenting). Justice Ginsburg's dissent, in which Justice Breyer joined, focused on "profound humiliation and community-wide ostracism," "onerous and intrusive obligations on convicted sex offenders," and concerns about lifetime labeling of an individual who showed strong evidence of rehabilitation. *Id*. at 115–17 (Ginsburg, J., dissenting).

information is removed from the registry.[227] By subjecting juvenile sex offenders to community notification while keeping other juvenile offenses confidential, community notification implies that juvenile sex offenders are more dangerous than other young people in the juvenile justice system. This may exacerbate existing problems with housing and employment because young registrants are not able to easily change residences[228] and employment options are already scarce.[229]

The critical factor to consider in this discussion is whether current registration schemes applied to juveniles are excessive in relation to their regulatory purpose. Although courts have consistently found that registration and community notification schemes are reasonably related to a non-punitive goal—promoting public safety—laws that require lifetime registration based on offense rather than risk, without the possibility of review, do not allow for the individualized assessment to which juveniles are entitled.[230] This is of special concern because "[t]here is no evidence . . . that the 'high rate of recidivism' at issue in *Doe* is shared by juvenile offenders."[231] In her *Smith* dissent, Justice Ginsburg expressed specific concern about the constitutionality of sex offender registration schemes that do not allow for individualized risk assessment or the opportunity to prove rehabilitation.[232] It is possible that, as applied to juveniles post-SORNA, additional Justices would take the same position.

Although the Court in *Smith* asserted that the Alaska Sex Offender Registration Act was not punitive because it was not excessive in relation to its non-punitive purpose, this reasoning should not be applied to juveniles. By failing to recognize juvenile status and provide the traditional confidentiality protections afforded to juveniles,[233] mandatory lifetime juvenile sex offender registration tips the scale from regulatory

227. *See* PITTMAN & PARKER, *supra* note 125, at 50–75.

228. *Juvenile Male I*, 590 F.3d at 935 (Registration and community notification "seriously jeopardizes the ability of such individuals to obtain employment, housing, and education.").

229. *Id.*

230. Juveniles are entitled to individualized sentencing. *See* Miller v. Alabama, 132 S. Ct. 2455, 2468 (2012).

231. *Juvenile Male I*, 590 F.3d at 940.

232. Smith v. Doe, 538 U.S. 84, 117 (2003) (Ginsburg, J., dissenting) (taking the position that the Alaska sex offender registration scheme was punitive, Justice Ginsburg wrote that "the Act makes no provision whatever for the possibility of rehabilitation: Offenders cannot shorten their registration or notification period, even on the clearest demonstration of rehabilitation."). It should be noted that Justice Ginsburg joined the majority in *Connecticut Dep't of Pub. Safety v. Doe*, decided the same year as *Smith*, which determined that procedural due process did not require individualized risk assessment for community notification. 538 U.S. 1, 4 (2003).

233. *See, e.g.*, United States v. Three Juveniles, 61 F.3d 86, 87–88 n.1 (1st Cir. 1995) (finding confidentiality provisions of the Federal Juvenile Delinquency Act include, among other things, the requirement that "neither the name nor picture of any juvenile shall be made public in connection with a juvenile delinquency proceeding." (quoting 18 U.S.C. § 5038 (1996))).

to punitive.[234] Doing so fails to take into account juvenile status, the fact that community notification violates the traditional confidentiality protections afforded to juveniles, and that registry and community notification risks are often greater for juveniles than they are for adults. Moreover, *Smith* did not discuss whether imposing lifetime registration on a juvenile would conflict with the Court's jurisprudence on juvenile offenders and culpability, that juveniles should not be subject to the most serious punishments, or with the idea that juveniles are typically not treated the same as adult offenders even when they have committed the same crimes. If the Court had considered the registration scheme as applied to juveniles, and taken into consideration each of these things, it might have come to a different opinion.[235]

b. United States v. Juvenile Male

United States v. Juvenile Male ("*Juvenile Male I*") involved a juvenile offender convicted of a sex offense. Subsequent to his conviction, Congress enacted SORNA, which required juveniles to register in any jurisdiction where they resided, were employed, or attended school.[236] The juvenile was required to register.[237] The Ninth Circuit vacated the district court's registration requirement, holding that retroactive application of the federal statute was punitive and violated the Ex Post Facto Clause.[238] The Ninth Circuit distinguished *Juvenile Male I* from *Smith*, focusing on the fact that SORNA's registration requirements would impose conditions that would not typically follow a juvenile adjudication, which is normally confidential.[239] Applying SORNA would expose information previously held to be confidential, impose more in-person reporting requirements, and increase the minimum registration term to twenty-five years.[240]

234. *See id.* at 90.

235. To do so, the Court would have to take into account the cases discussed in Part IV, *infra*.

236. *Juvenile Male I*, 590 F.3d at 928.

237. *Id.*

238. *Id.* at 941–42.

239. *Id.* at 926 ("As a society, we generally refuse to punish our nation's youth as harshly as we do our fellow adults, or hold them to the same level of culpability as people who are older, wiser, and more mature. The avowed priority of our juvenile justice system (in theory if not always in practice) has, historically, been rehabilitation rather than retribution. Juvenile proceedings by and large take place away from the public eye, and do not become part of a young person's permanent criminal record. . . . [h]istorically, an essential aspect of the juvenile justice system has been to maintain the privacy of the young offender and, contrary to our criminal law system, to shield him from the 'dissemination of truthful information' and 'transparency' that characterizes the punitive system in which we try adults.").

240. *Id*. at 927.

The case was appealed to the United States Supreme Court.[241] The Court recognized that the juvenile's court supervision had ended when he turned twenty-one—prior to the Ninth Circuit decision.[242] When a juvenile challenges an expired sentence, he must show that there is an ongoing collateral consequence that is traceable to the underlying sentence in order to proceed.[243] Although the juvenile had an ongoing duty to register based on state law, the requirement was not due to the special condition of supervision.[244] As a result, the Court vacated the Ninth Circuit's Ex Post Facto holding as moot, finding a lack of Article III jurisdiction.[245]

Due to the jurisdiction issue, the Supreme Court never reached the merits in *United States v. Juvenile Male* ("*Juvenile Male II*"), so we do not know how the Court might rule on a case involving juvenile registration. The fact that the Court was not unanimous in *Smith*, and that there were strong dissents related specifically to confidentiality issues, indicate the possibility that the Court would come out differently on the issue of registration as applied to juveniles, particularly if the Court took into account its positions on adolescent development emphasized in *Roper v. Simmons*, *Graham v. Florida*, and *Miller v. Alabama*.[246] The developmental and neurological factors present in those cases, and the Court's acknowledgement of their importance when determining the appropriateness of a punishment, should be relevant to a determination of whether lifetime mandatory sex offender registration is an appropriate punishment.

After the Supreme Court vacated the Ninth Circuit's decision, the case returned to the Ninth Circuit for review in *United States v. Juvenile Male* ("*Juvenile Male III*").[247] The court addressed whether the SORNA registration requirement, as applied to certain juvenile delinquents in cases of aggravated sexual assault, superseded confidentiality provisions of the Federal Juvenile Delinquency Act and whether SORNA registration violated juveniles' constitutional rights.[248] The Ninth Circuit looked at the conflict between the confidentiality provisions of the Federal Juvenile Delinquency Act and the disclosure requirements of SORNA.[249] Based on that review, the court held that "both the statutory text and legislative history of SORNA suggest its reporting and

241. United States v. Juvenile Male ("*Juvenile Male II*"), 131 S. Ct. 2860 (2011).
242. *Id.* at 2865.
243. *Id.* at 2864.
244. *Id.* at 2865.
245. *Id.*
246. *See infra* Part IV.
247. United States v. Juvenile Male ("*Juvenile Male III*"), 670 F.3d 999 (9th Cir. 2012).
248. *Id*. at 1014.
249. *Id*. at 1008.

registration requirements were intended to reach a limited class of juveniles adjudicated delinquent in cases of aggravated sexual abuse, including appellants."[250]

The court then went on to address certain constitutional claims brought by appellants, including allegations that SORNA's juvenile registration requirements are unconstitutional under the Equal Protection Clause, the prohibition against cruel and unusual punishment, the right against self-incrimination, substantive due process, procedural due process, and the right to effective assistance of counsel.[251] Speaking to the issue of cruel and unusual punishment, the court held that "[a]lthough defendants understandably note that SORNA may have the effect of exposing juvenile defendants and their families to potential shame and humiliation for acts committed while still an adolescent, the statute does not meet the high standard of cruel and unusual punishment."[252]

While *Juvenile Male III* held that sex offender registration did not constitute cruel and unusual punishment as applied to juveniles, it did not address the fact that federal and state SORNA laws create a federal crime for failure to register—with punishments including incarceration—and impose increased registration and notification requirements for offenders based on offense rather than risk.[253] More recently, other jurisdictions have held the same or similar restrictions to constitute punishment, particularly when juvenile status is considered.[254]

2. Juvenile Sentencing Cases

Assuming that mandatory lifetime sex offender registration and community notification constitutes punishment when applied to juveniles, the next step in the analysis is whether that punishment is cruel and unusual.

Over the last seven years, the Supreme Court has incrementally addressed appropriate punishment for juvenile offenders.[255] From *Roper* and *Graham* to *Miller*, the Court relied on the Eighth Amendment's

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250. *Id.*

251. *Id.* at 1008–09.

252. *Id.* at 1010 ("The requirement that juveniles register in a sex offender database for at least 25 years because they committed the equivalent of aggravated sexual abuse is not a disproportionate punishment. These juveniles do not face any risk of incarceration or threat of physical harm.").

253. *In re* C.P., 967 N.E.2d 729, 753–54 (Ohio 2011).

254. *Id.*

255. The Supreme Court has addressed the fundamental differences between youth and adults many times. *See generally* J.D.B. v. North Carolina, 131 S. Ct. 2394 (2011); Thompson v. Oklahoma, 487 U.S. 815 (1988); California v. Brown, 479 U.S. 538 (1987); *In re* Gault, 387 U.S. 1 (1967).

requirement of proportionality to determine that death and mandatory lifetime sentences for juveniles are unconstitutional.[256]

The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."[257] The Supreme Court has repeatedly acknowledged that juveniles are a distinct group of offenders due to developmental immaturity, and that consideration of age is important to an assessment of whether a punishment is just. The Court held, for example, that youth is "more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. . . . [p]articularly 'during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment' expected of adults."[258]

The Court has also noted that throughout its history, it has "observed that children generally are less mature and responsible than adults, that they often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them, that they are more vulnerable or susceptible to outside pressures than adults."[259] Further, the Court has found that "none of what is said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime specific."[260]

The purpose of the Eighth Amendment is to preserve the "dignity of man," and to ensure that the state's power to enforce the amendment is "exercised within the limits of civilized standards."[261] Aside from "[f]ines, imprisonment and even execution," other forms of punishment are "constitutionally suspect."[262] Further, the Eighth Amendment is not static, but is defined by the "evolving standards of decency that mark the progress of a maturing society."[263]

The prohibition against cruel and unusual punishment requires "that punishment for crime should be graduated and proportioned to [the] offense."[264] A proportionality review can involve "cases in which the

256. Miller v. Alabama, 132 S. Ct. 2455, 2475 (2012) (tracing the history of the Eighth Amendment's requirement of proportionality).

257. U.S. CONST. amend. VIII. The provision is applicable to the states through the Fourteenth Amendment. Furman v. Georgia, 408 U.S. 238, 240 (1972) (per curium).

258. Eddings v. Oklahoma, 455 U.S. 104, 115–16 (1982) (quoting Belloti v. Baird, 443 U.S. 622, 635 (1979)).

259. *J.D.B.*, 131 S. Ct. at 2403 (citations omitted) (internal quotations marks omitted).

260. *Miller*, 132 S. Ct. at 2465.

261. *Id.* at 100.

262. *Id.*

263. *Id.* at 101.

264. Graham v. Florida, 130 S. Ct. 2011, 2021 (2010) (quoting Weems v. United States, 217 U.S. 349, 367 (1910)).

Court implements the proportionality standard by certain categorical restrictions."[265] When that happens, a court may consider "the nature of the offense" or "the characteristics of the offender."[266] Some offenders, including juveniles, are categorically different; proportionate penalties must recognize and account for juveniles as a special class of offenders with a reduced level of culpability.[267]

a. Roper v. Simmons

In 2005, the Supreme Court in *Roper* looked at the issue of whether it was permissible under the Eighth and Fourteenth Amendments to impose the death penalty on a youth aged seventeen or under.[268] When he was seventeen, Christopher Simmons committed capital murder.[269] He was sentenced to death after he turned eighteen.[270] He filed a petition for post-conviction relief, arguing that the Constitution prohibited the execution of juveniles based on the reasoning articulated in *Atkins v. Virginia*.[271] The Court considered "evolving standards of decency" as part of its proportionality analysis.[272] It determined that there was a national consensus against the death penalty for juveniles[273] because (1) the death penalty had been rejected in a majority of states,[274] (2) it was infrequently used even when allowed,[275] and (3) there was scientific evidence that our society now considers juveniles "categorically less culpable than the average criminal."[276] The Court highlighted three differences that show that juveniles should not be classified among the "worst offenders": juveniles are less morally reprehensible than adults due to their immaturity; juveniles are vulnerable and lack control over their own environment; and juveniles' struggle with identity development indicates that it is not correct to conclude that a crime committed by a juvenile is evidence of depraved character.[277] Finally, the Court noted that the United States is the only country in the world that gives the "official sanction to the juvenile death penalty."[278] After balancing the relevant

265. *Id.*
266. *Id.* at 2022.
267. *See* Roper v. Simmons, 543 U.S. 551, 569 (2005); *see also Graham*, 130 S. Ct. at 2026.
268. *Roper*, 543 U.S. at 555–56.
269. *Id.* at 556.
270. *Id*. at 558.
271. *Id.* at 559.
272. *Id.* at 561 (quoting Trop v. Dulles, 356 U.S. 86, 100–01 (1958)).
273. *Id*. at 567.
274. *Id*.
275. *Id*.
276. *Id.* at 567 (quoting Atkins v. Virginia, 536 U.S. 304, 316 (2002)).
277. *Id.* at 569–70.
278. *Id.* at 575.

factors, the Court held that the death penalty constituted a disproportionate punishment for offenders under eighteen.[279]

b. Graham v. Florida

In 2010, the Supreme Court in *Graham* looked at the issue of whether a sentence of life without the possibility of parole for a non-homicide crime is categorically cruel and unusual in violation of the Eighth Amendment.[280] Terrance Graham was charged with armed burglary and attempted robbery for offenses that occurred when he was seventeen.[281] At the time of his offense, he was on probation for a different burglary committed when he was sixteen.[282] He was convicted and sentenced to life in prison on the armed burglary charge and fifteen years on the attempted robbery.[283] Because Florida had abolished its parole system, the only way that he could obtain release would be to obtain executive clemency.[284]

Relying on *Roper*, the Court found that the Eighth Amendment did not permit the state to deny a juvenile's right to "demonstrate that he is fit to rejoin society" after committing a non-homicide crime as a child.[285] The Court then applied a proportionality analysis to determine whether a punishment is cruel and unusual.[286] The Court considered (1) whether there is a balance between the culpability of the offender and the severity of the punishment; and (2) whether the sentence serves legitimate penological goals.[287] The Court noted that the culpability of offenders should be assessed "in light of their crimes and characteristics."[288] Thus, in evaluating the punishment, the Court evaluates whether the punishment serves "legitimate penological goals."[289]

Addressing the issue of culpability, the Court reiterated that juveniles are less culpable than adult offenders and are, therefore, less deserving of the "most severe punishments."[290] In evaluating the severity of a punishment, the Court noted that it considers the severity of the punishment generally, and again as applied to a juvenile.[291] Even when

279. *Id.*
280. Graham v. Florida, 130 S. Ct. 2011, 2017 (2010).
281. *Id.* at 2018.
282. *Id.*
283. *Id.* at 2020.
284. *Id.*
285. *Id.* at 2033.
286. *Id.* at 2021.
287. *Id.* at 2026.
288. *Id.*
289. *Id.* (citations omitted).
290. *Id.*
291. *Id.*

juveniles and adults receive the same sentence, the effect of the sentence is more severe for juveniles due to their age.[292]

Finally, the Court evaluated whether a sentence of life without parole for non-homicide crimes served legitimate penological goals.[293] For each possibility, the immaturity and mutable characteristics of youth undermined the goal.[294] The Court categorically forbade life-without-the-possibility-of-parole sentences for nonhomicide juvenile offenders, recognizing that recent scientific and social science evidence showed that youths' brains are fundamentally different from adults' brains and that youth are therefore categorically less culpable.[295]

Importantly, the Court in *Graham* noted that in order for a life penalty to be constitutional, states must give a juvenile defendant "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."[296] While a juvenile may turn out to be "irredeemable," the Eighth Amendment prohibits states from "making [that] judgment at the outset."[297]

Since *Graham*, courts follow a two-part analysis to decide whether to adopt a categorical rule regarding punishments: (1) whether there is a national consensus against the practice, and (2) whether, in the court's independent judgment, the punishment in question violates the Constitution.[298] The Eighth Amendment is "interpreted according to its text, by considering history, tradition, and precedent."[299] *Roper* and *Graham* both hold that a juvenile's reduced culpability makes them "less deserving of the most severe punishments."[300] Courts imposing categorical rules apply *Roper* and *Graham* to ensure that juveniles' decency, culpability, and ability to demonstrate maturity and reform are factored into the sentencing scheme.[301]

c. Miller v. Alabama

In June 2012, the Court in *Miller v. Alabama* held that a judge or jury must have the opportunity to consider mitigating circumstances before imposing life without parole, the harshest penalty possible for juveniles.[302] Therefore, a state law mandating juvenile life without parole,

292. *Id.*
293. *Id.* at 2031–34.
294. *Id.* at 2031–33.
295. *Id.* at 2026, 2034.
296. *Id.* at 2030.
297. *Id.*
298. *Id.* at 2033; *see* Roper v. Simmons, 543 U.S. 551, 572 (2005).
299. *Roper*, 543 U.S. at 560.
300. *Graham*, 130 S. Ct. at 2026; *Roper*, 543 U.S. at 572.
301. *Id.*
302. Miller v. Alabama, 132 S. Ct. 2455, 2466 (2012).

absent consideration of a juvenile's "lessened culpability" and greater "capacity for change," is unconstitutional.[303]

Miller involved two cases from Alabama and Arkansas concerning two fourteen year-old boys who were "convicted of murder and sentenced to life imprisonment without the possibility of parole."[304] The first case involved Kuntrell Jackson, who stood outside a store as his friend shot and killed a store clerk.[305] He was charged with and convicted of capital felony murder and aggravated robbery.[306] The Arkansas Supreme Court rejected Jackson's Eighth Amendment arguments based on *Roper* and *Graham*, finding that those cases were narrowly tailored to their specific contexts.[307]

The second case involved Evan Miller, who struck a person with a baseball bat, and then, with a friend, lit two fires in the person's trailer.[308] The victim died from injuries and smoke inhalation.[309] The case was transferred to adult court, and Miller was convicted for murder in the course of arson and sentenced to life without parole, which was a mandatory sentence.[310] The Alabama Court of Criminal Appeals affirmed, holding that "life without parole was 'not overly harsh when compared to the crime' and that the mandatory nature of the sentencing scheme was permissible under the Eighth Amendment."[311]

The Supreme Court examined the Eighth Amendment issue through the lens of "evolving standards of decency that mark the progress of a maturing society."[312] In addition, the Court relied on two strands of precedent related to the need for proportionate punishment.[313]

First, the Court specifically considered the developmental findings in *Roper* and *Graham*. Highlighting children's lack of maturity, vulnerability to outside influences, and more retrievable character, the Court declared that "*Roper* and *Graham* establish that children are constitutionally different from adults for purposes of sentencing. Because juveniles have diminished culpability and greater prospects for reform . . . 'they are less deserving of the most severe punishments.'"[314] Examining the mandatory

303. *Id.* at 2460.
304. *Id.*
305. *Id.* at 2461.
306. *Id.*
307. *Id.*
308. *Id.* at 2462.
309. *Id.*
310. *Id.* at 2462–63.
311. *Id.* (quoting Miller v State, 63 So. 3d 676, 690 (Ala. Crim. App. 2010)).
312. Estelle v. Gamble, 429 U.S. 97, 102 (1976).
313. Miller v. Alabama, 132 S. Ct. 2455, 2455 (2012); *see* Kennedy v. Louisiana, 554 U.S. 407, 421 (2008).
314. *Miller*, 132 S. Ct. at 2464 (quoting Graham v. Florida, 130 S. Ct. 2011, 2026 (2010)).

penalty schemes at issue in *Miller*, the Court found that they "prevent the sentencer from taking account of these central considerations."[315] The Court noted that failing to consider adolescent development when applying a penalty prohibits the trial court from properly assessing the proportionality of punishment for the juvenile offender.[316]

Second, the Court considered a line of cases involving mandatory sentences for youth.[317] These rulings required that a sentencer factor in the "mitigating qualities of youth."[318] The Court highlighted that mandatory sentencing schemes without consideration of mitigating circumstances are harmful to juveniles because each juvenile would receive the same sentence as another juvenile, without acknowledgment of the differences between "the shooter and the accomplice, the child from a stable household and the child from a chaotic and abusive one."[319]

Upon analysis, the Court held that *Roper*, *Graham*, and individualized sentencing in capital cases[320] show that imposing permanent mandatory sentences on juveniles, absent an assessment of "age . . . immaturity, impetuosity, and failure to appreciate risks and consequences" ignores the circumstances of the offense, "including the extent of [the juvenile's] participation in the conduct and the way familial and peer pressures may have affected [the juvenile]."[321] In addition, mandatory sentencing disregards any possibility of rehabilitation.[322] The Court stated that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders" because there is too great a risk of disproportionate punishment by subjecting youth to the harshest prison sentence.[323]

Further, the Court declared that because of decisions about children's "diminished culpability and heightened capacity for change," sentencing juveniles to the harshest possible penalty "will be uncommon."[324] Lastly, the Court required that a sentencer take into account "how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison."[325] With this, the Court extended

315. *Id.* at 2466.

316. *Id.* at 2467. (discussing prior decisions that showed "the flaws of imposing mandatory life-without-parole sentences on juvenile homicide offenders"); *see Kennedy*, 554 U.S. at 407; Atkins v. Virginia, 536 U.S. 304, 312–13 (2002).

317. *Miller*, 132 S. Ct. at 2458.

318. *Id.*

319. *Id.* at 2467–68.

320. *See* Woodson v. North Carolina, 428 U.S. 280, 289 (1976).

321. *Miller*, 132 S. Ct. at 2468.

322. *Id.*

323. *Id.* at 2469.

324. *Id.*

325. *Id.*

the rationale from *Roper* and *Graham* to mandatory lifetime sentences—highlighting that the same characteristics that would make youth less culpable require that their sentences be subject to review.[326]

B. Examples from States: Promising Eighth Amendment Juvenile Cases Since SORNA Implementation

When the Supreme Court considers whether juvenile sex offender registration requirements constitute cruel and unusual punishment under the Eighth Amendment, the Court will analyze "evolving standards of decency" as part of its proportionality discussion.[327] When the Court considers evolving standards of decency, it considers whether there is a national consensus against the penalty in question.[328] As stated above, the criteria used to evaluate whether national consensus supports a challenged sentence are (1) legislative enactments enabling the sentencing practice, and (2) actual use of the practice.[329] Considerations include whether the punishment has been rejected in most jurisdictions, and whether it is used frequently when allowed, as well as specific characteristics of the offender.[330]

Currently, while every jurisdiction in America requires some juvenile sex offenders to register, only six require mandatory lifetime registration (additional states allow lifetime registration for certain offenses) and only twenty-five require community notification.[331] Moreover, legislative action and judicial decisionmaking in various jurisdictions—discussed in Parts IV.B and VI, infra—illustrate a move toward a consensus that mandatory registration is cruel and unusual for juveniles.

326. *Id.*

327. Trop v. Dulles, 356 U.S. 86, 101 (1958).

328. *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 552 (2005).

329. Graham v. Florida, 130 S. Ct. 2011, 2023 (2010).

330. *Id.*

331. Pittman Report, *supra* note 15, at 8, 32. Litigators have already begun challenging sex offender registration statutes as applied to juveniles post-*Miller*. In Pennsylvania, for example, six juveniles challenged the constitutionality of the Pennsylvania Sex Offender Registration and Notification Act. *See York County SORNA Challenge*, Juvenile Law Center, http://www.jlc.org/legal-docket/york-county-sorna-challenge. On November 4, 2013, the Court of Common Pleas of York County, Pennsylvania held that mandatory lifetime sex offender registration for juveniles violated the Pennsylvania and U.S. constitutional ban on cruel and unusual punishment. *In re* J.B. et al., No. CP-67-JV-0726-2010 (Pa. Ct. Common Pleas Nov. 4, 2013), *available at* http://www.jlc.org/blog/juvenile-court-judge-finds-pennsylvania-juvenile-sex-offender-registration-law-unconstitutional.

1. Ohio:[332] Mandatory Lifetime Registration for Juveniles Constitutes Cruel and Unusual Punishment

Ohio's sex offender registry was originally implemented in 1963.[333] A 1996 amendment created a three-category classification system: sexually oriented offenders; habitual sexual offenders; and sexual predators.[334] In Ohio, juveniles adjudicated delinquent or convicted as adults for sex offenses are subject to registration requirements.[335]

Ohio was the first state to come into substantial compliance with SORNA.[336] Before this compliance, Ohio's registration scheme allowed for judicial discretion in placing juveniles on the registry and, acknowledging *In re C.P.* and *Miller*, assigning classification.[337] It also provided a means for juveniles to be removed from the registry.[338]

Ohio had initial compliance difficulties because of its different approach to applying registration and community notification requirements to juveniles.[339] Initially, the SMART Board determined that Ohio's proposed scheme was too lenient on juveniles because it excluded certain low-level offenses from mandatory registration.[340] The issue of community notification was resolved when the guidelines were amended to allow states discretion to decide whether to make juveniles' identifying information available to the public.[341] The Ohio scheme was eventually deemed substantially compliant in September 2009.[342]

SORNA compliance changed how juveniles were assigned to tiers.[343] Under the prior statutory scheme, the determination of tier assignment in Ohio was based on various factors and the courts maintained discretion. After Ohio complied with SORNA, tier assignment was now

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332. *See* Sex Offender Registration and Notification, OHIO REV. CODE ANN. § 2950 (West 2013); Juvenile Sex Offender Registration and Notification, OHIO REV. CODE ANN. § 2152.82–99 (West 2013); Children Subject to Sex Offender Registration and Notification Law, OHIO REV. CODE ANN. § 2152.191.

333. State v. Cook, 700 N.E.2d 570, 574 (Ohio 1998); *see* H.R. 180, 124th Gen. Assemb. (Ohio 2002) (codified as amended at OHIO REV. CODE ANN. §§ 2151.28, 2151.31).

334. OHIO REV. CODE ANN. § 2950.01; *see* H.R. 180, 124th Gen. Assemb. (Ohio 2002).

335. OHIO REV. CODE ANN. § 2152.82.

336. Ohio Senate Bill 10 amended Ohio Revised Code section 2950 by reclassifying sex offenders into tiers based on offense, increasing frequency and duration of registration requirements, increasing community notification requirements, expanding residency restrictions, and increasing penalties for non-compliance with registry requirements. S. 10, 127th Gen. Assemb., Reg. Sess., (Ohio 2003) (codified as amended in scattered sections of OHIO REV. CODE ANN.) (listing Jan. 1, 2008, as the projected date of substantial compliance).

337. *Id.* § 2950.09(B)(3)(a)–(j).

338. *Id.* § 2152.83.

339. SMART Website, *supra* note 159.

340. *Id.*

341. Supplemental Guidelines, *supra* note 146, at 1631–32.

342. SMART Website, *supra* note 159.

343. OHIO REV. CODE ANN. § 2152.80.

based on the crime committed.[344] The new registration scheme provided that a juvenile would only be subjected to a registration requirement if he or she was at least fourteen years of age at the time of the offense, and the offense was committed on or after January 1, 2002.[345] Certain juveniles were automatically classified as Public Registry Qualified Juvenile Offender Registrants ("PRQJORs") based on the offense committed and are assigned lifelong mandatory public registration.[346]

Under the new Ohio registration scheme, the juvenile court maintained discretion to order registration requirements for certain juveniles who were adjudicated delinquent, but not for PRQJORs. The new scheme imposed a number of requirements in order for the juvenile court judge to exercise any discretion: (1) the juvenile had to be fourteen or fifteen years of age at the time of the offense, (2) the juvenile could not have been previously adjudicated delinquent for a sexually oriented or child-victim oriented offense, and (3) the court was not required to classify an individual as a Juvenile Offender Registrant ("JOR") or a JOR and a PRQJOR.[347] In cases where the court was allowed to use its discretion, it was to consider the nature of the offense, whether the child has shown any remorse for the offense, public interest and safety, the results of any treatment, and any professional assessments submitted to the court.[348] If the court decided to classify the juvenile as a JOR, it was required to conduct a hearing to determine tier classification. After the hearings, a fourteen or fifteen year old may be classified as a JOR or both a JOR and PRQJOR.[349]

Juveniles aged sixteen or seventeen were subjected to stricter requirements. A juvenile was assigned to a tier if (1) the juvenile was sixteen or seventeen at the time of the offense; (2) the offense was committed on or after January 1, 2002; and (3) the court was not required to automatically classify the juvenile as a PRQJOR.[350] A sixteen or seventeen year old was classified as a registrant if the juvenile was previously adjudicated delinquent for committing any sexual offense or

344. This change was significant for many registrants who were reclassified based on the new scheme. *See, e.g.*, State v. Roey, No. 97484, 2012 WL 1758700, at *1 (Ohio Ct. App. May 17, 2012) (finding the juvenile delinquent and requiring registration for ten years as a juvenile sexually oriented offender was reclassified as a Tier III offender, requiring lifetime registration).

345. OHIO REV. CODE ANN. § 2152.82(a)(1).

346. State v. Williams, 952 N.E.2d 1008, 1110 (Ohio 2011); OHIO REV. CODE ANN. § 2152.83.

347. PRQJOR classification applies to juveniles fourteen or older adjudicated delinquent for: rape, sexual battery, gross sexual imposition, aggravated murder with sexual motivation, murder with sexual motivation, and kidnapping with sexual motivation. *See* OHIO ATT'Y GEN. OFFICE, JSORN AFTER 1-1-08 (2007).

348. OHIO REV. CODE ANN. § 2152.83(D)(1)–(6).

349. *Id.* § 2152.83(A)–(B).

350. *Id.* § 2152.831.

any offense involving a child victim, regardless of when the prior offense was committed and regardless of the child's age at the time of committing the offense.[351] The minimum age for registration was fourteen, and registry information was on a public website.[352] Juveniles with PRQJOR status were prohibited from occupying a residence within 1000 feet of a school, preschool, or childcare center.[353]

For these older juveniles, tier classification was based on the offense for which the juvenile was adjudicated.[354] A juvenile was required to register for ten years under Tier 1, twenty years under Tier II, and for life under Tier III.[355] While non-PRQJORs had the ability to be reclassified or declassified as soon as the initial classification hearing, a PRQJOR was eligible to petition the court for reclassification or registry termination only after twenty-five years of a clean record.[356]

In April 2012, the Ohio Supreme Court struck down the requirement that PRQJORs be subject to mandatory registration, community notification, and online searchable database (including photo, name, address, and criminal histories), opining that it was cruel and unusual punishment in violation of the Ohio and U.S. Constitutions and also a violation of due process.[357] Performing a proportionality analysis and citing a growing national consensus against imposing automatic lifetime registration requirements on juvenile sex offenders,[358] the court noted that Ohio's law created a new class of juvenile sex offenders who were automatically required to register for the rest of their lives, with an opportunity to be reclassified twenty-five years after their registration requirements began.[359] The automatic classification differed from the traditional process of holding a juvenile court hearing to determine the sex offender's classification.[360] Focusing on the

351. *Id.* § 2152.83(A)(1)(b).

352. *Id.* § 2152.86.

353. *Id.* § 2950.034(A).

354. *Id.* § 2152.83(2).

355. *See In re* C.P., 967 N.E.2d 729, 750 (Ohio 2012) (holding automatic lifetime registration for juveniles is unconstitutional under the Ohio Constitution).

356. *Id.*

357. *Id*. Ohio courts had previously held that Ohio Senate Bill 10 (reclassifying sex offenders into tiers) did not constitute excessive punishment or cruel and unusual punishment as applied to adults. *See*, *e.g.*, State v. Byers, No. 07 CO 39, 2008 WL 4416519, at *15 ¶ 77 (Ohio Ct. App. Sept. 30, 2008) ("As long as R.C. Chapter 2950 is viewed as civil, and not criminal—remedial and not punitive—then the period of registration cannot be viewed as punishment. Accordingly, it logically follows that it does not constitute cruel and unusual punishment since the punishment element is lacking.").

358. *In re* C.P., 967 N.E.2d at 739.

359. *Id.* at 734.

360. *Id.* at 736.

elimination of a juvenile court judge's discretion, the majority found the scheme to be unconstitutional.[361]

Citing *Graham*, the court noted that Ohio has a juvenile court system that assumes children are less culpable than adults.[362] Because "[j]uveniles are more capable of change than adults,"[363] and are amenable to rehabilitation, they "cannot with reliability be classified among the worst offenders" deserving the most severe penalties.[364] In addition, juveniles who do not kill are "categorically less deserving of the most serious forms of punishment" with "twice diminished moral culpability" related to age and the nature of the offense.[365]

The court reviewed the severity of the offense compared to the punishment[366] and noted that "[r]egistration and notification requirements for life, with the possibility of having them lifted only after 25 years, are especially harsh punishments for a juvenile."[367] In addition, the court recognized that a registration period is longer for a juvenile than an adult because juveniles are younger at the time they have to begin registering.[368] The court noted that for juveniles, "the length of the punishment is extraordinary, and it is imposed at an age when the character of the offender is not yet fixed."[369] The court found the imposition extreme and developmentally detrimental.[370] The court noted that:

> Registration and notification necessarily involve stigmatization. For a juvenile offender, the stigma of the label attaches at the start of his adult life and cannot be shaken. With no other offense is the juvenile's wrongdoing announced to the world. Before a juvenile can even begin his adult life, before he has a chance to live on his own, the world will know of his offense. He will never have a chance to establish a good character in the community. He will be hampered in his education, in his relationships, and in his work life. His potential will be squelched before it has a chance to show itself. A juvenile—one who remains under the authority of the juvenile court and has thus been ajudged redeemable—who is subject to sex-offender notification will have his entire life evaluated through the prism of his juvenile adjudication. It will be a constant cloud, a once-every-three-month reminder to himself and the world that he cannot escape the mistakes of his youth. A youth released at 18 would have to wait until age 43 at the earliest to gain a

361. *Id.* at 748.
362. *Id.* at 750.
363. *Id.* at 740 (citing Graham v. Florida, 130 S. Ct. 2011, 2026–27 (2010)).
364. *Id.* (citing Roper v. Simmons, 543 U.S. 551, 553 (2005)).
365. *Id.* at 741 (citing *Graham*, 130 S. Ct. at 2027).
366. *Id.*
367. *Id.*
368. *Id.*
369. *Id.*
370. *Id.* at 742

> fresh start. While not a harsh penalty to a career criminal used to spending time in a penitentiary, a lifetime or even 25-year requirement of community notification means everything to a juvenile. It will define his adult life before it has a chance to truly begin.[371]

Next, the court considered whether there were penological justifications for imposing mandatory lifetime registration. It noted that the juvenile court's goals are rehabilitative, while lifetime registration and community notification undermine rehabilitation by anchoring the juvenile to his crime.[372] In addition, the system of assigning mandatory sentences based on violation, rather than risk, removes judicial discretion so that there is no way of knowing whether the public safety is protected.[373]

Finally, the court considered the goals of penal sanctions: retribution, deterrence, incapacitation, and rehabilitation.[374] It found that retribution was inappropriate because the "sentence must be directly related to the personal culpability" of the offender and juveniles are categorically less culpable due to developmental issues.[375] Deterrence was inappropriate because juveniles are less able to anticipate consequences due to their "lack of maturity and underdeveloped sense of responsibility."[376] Additionally, it noted that rehabilitation was actually hampered by registration and notification due to social and economic considerations.[377] When taken together, the court found that penological theory was "not adequate to justify" imposition of lifetime registration and notification.[378]

In sum, the court found that the requirement that PRQJORs be subject to mandatory registration and community notification constituted cruel and unusual punishment because the penalty was not proportionate to the crime.[379] The court noted that the lack of proportionality was evidenced by the lifetime and public nature of the penalty. Juvenile court proceedings are supposed to be confidential to allow a young person to avoid stigma, but registration and notification undermined these goals.[380]

As many courts had done before, the dissent argued that the registration requirements were not subject to an Eighth Amendment

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371. *Id*. at 741–42.
372. *Id*. at 742.
373. *Id*.
374. *Id*.
375. *Id*. at 742–743.
376. *Id*. at 743 (quoting Graham v. Florida, 130 S. Ct. 2011, 2028–29 (2010)).
377. *Id*. (noting that the registration status creates economic impact because registrants are not able to get jobs that require background checks and that disclosure of registry status inspires vigilantism, shaming, ostracism, housing instability, and employment instability).
378. *Id*. at 744 (quoting *Graham*, 130 S. Ct. at 2030).
379. *Id*. at 745.
380. *Id*.

challenge because registries are civil in nature and not punishment.[381] It noted that Eighth Amendment challenges are extremely rare and argued that in this case, the disproportionality between the punishment and the severity of the crime was not significant enough to be grossly disproportionate.[382] The dissent reasoned that a juvenile's age and immaturity should be considered but should not be used as an excuse.[383]

More recently, Ohio Senator Bill Seitz introduced legislation seeking to bring Ohio's SORNA into compliance with the Ohio Supreme Court's decision in *In re C.P.* and other cases.[384] Subsequent cases dealing with juvenile sex offender registration have followed.[385]

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381. The Ohio Supreme Court has dealt with the issue of whether the registration scheme constitutes punishment in other contexts. For example, in *State v. Williams*, 952 N.E.2d 1108, 1113 (Ohio 2011), the court held that the new registration scheme's retroactivity provisions crossed the line between remedial and punitive action in violation of the Ohio Constitution's ex post facto laws. The court reasoned that (1) the sexual predator label was permanent for adult offenders, (2) registration requirements were much more demanding and could no longer be likened to renewing a driver's license, (3) community notification had expanded to the extent that virtually all information about the offender was public record and much of it available on the internet, (4) new restrictions under the law prevented all sex offenders, not just those convicted of crimes against children, from living within 1000 feet of a school, and finally, (5) under the new law a sheriff could request that a landlord verify a sex offender currently lived at the registered address. *Id.* at 1111–12. Under the new law offenders had to personally register with the sheriff in the county they reside, work, and go to school. *Id.* at 1111. This was potentially interaction with three different sheriffs every ninety days. In addition, the Ohio Supreme Court previously held that it was significant that the information provided to the sheriff under the old law could be disseminated to only a restricted group of people. State v. Cook, 700 N.E.2d 570, 582 (Ohio 1998). The requests of verification from a landlord by the sheriff could be made an unlimited number of times. *Williams*, 952 N.E.2d at 1112. For these reasons, the Court determined that it could no longer find the provisions of the law civil in nature, stating that "[t]hese restraints on liberty are the consequences of specific criminal convictions and should be recognized as part of the punishment that is imposed as a result of the offenders' actions." *Id.* (quoting State v. Wilson, 865 N.E.2d 1264, 1274 (Ohio 2007) (Lanzinger, J., concurring in part and dissenting in part)). The court unequivocally held that "[f]ollowing the enactment of S.B. 10, all doubt has been removed: R.C. Chapter 2950 is punitive." *Id.*

382. *In re* C.P. 967 N.E.2d at 757 (Cupp, J., dissenting).

383. *Id.* (Cupp, J., dissenting).

384. Ohio Senate Bill 144 seeks to adjust the law to reflect the court's decisions in *Hyle v. Porter*, 882 N.E.2d 899 (Ohio 2008), *State v. Bodyke*, 933 N.E.2d 753 (Ohio 2010), *Williams*, 952 N.E.2d at 1108, *In re C.P.*, 967 N.E.2d at 745, *State ex rel. Jean-Baptiste v. Kirsch*, 983 N.E.2d 302 (Ohio 2012), and *State v. Howard*, 983 N.E.2d 341 (Ohio 2012). *See* S. 144, 130th Gen. Assemb. (Ohio 2013).

385. *See, e.g.*, *In re* Raheem L., No. C-100608, 2013 WL 2647683, *3–*4 (Ohio Ct. App. June 12, 2013) (upholding provision requiring registration beyond a juvenile defendant's twenty-first birthday). The dissent argued that the provision violated juveniles' due process rights because it compelled juvenile court judges to automatically impose adult sentences and eliminated the opportunity for judges to review the youth's response to treatment and rehabilitation before determining that an adult penalty was appropriate. *Id.* at *5–*6 (Cunningham, P.J., dissenting).

2. *Michigan:*[386] *Lifetime Registration with Notification Constitutes Cruel and Unusual Punishment as Applied to Romeo and Juliet Cases*

As of 2011, more than 3500 people appeared on the Michigan sex offender registry for offenses committed as juveniles.[387] In Michigan, both juveniles adjudicated delinquent and juveniles convicted as adults for sex offenses are required to register.[388] Some exceptions apply for juveniles assigned "Youth Trainee Status" for young people who successfully complete a probation program.[389] Juveniles assigned to particular tiers are required to register for ten or twenty-five years after release.[390]

In *People v. Dipiazza*, two high school students had a consensual relationship which, incidentally, led to marriage and a child.[391] When the boy was eighteen and the girl was fifteen, a teacher found a photograph of them in bed together with the boy's hand on the girl's breast.[392] The teens' parents were aware of the nature of their relationship.[393] The teacher notified the prosecuting attorney.[394] The boy was adjudicated delinquent for "attempted third-degree criminal sexual conduct" and was sentenced to probation and sex offender registration.[395] After the boy successfully completed his probation, his case was dismissed and erased, but he remained required to publicly register.[396]

On appeal, the boy's attorney argued that financial and emotional consequences of registration constituted cruel and unusual punishment.[397] The court examined an earlier Michigan case, *In re Ayres*, that held that requiring a juvenile offender to register was not punishment.[398] The *Ayres* court had noted

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386. The Michigan Sex Offender Registration statute can be found at Sex Offenders Registration Act, MICH. COMP. LAWS §§ 28.721–28.736 (2013).

387. PITTMAN REPORT, *supra* note 15, at 25.

388. MICH COMP. LAWS §§ 28.721a–722, 28.722(b)(ii)(A)–(B), (b)(iii), 28.723.

389. *See* MICH. COMP. LAWS §§ 28.721–736. The Holmes Youthful trainee Act ("HYTA") allows individuals aged seventeen to twenty one to participate in a probation program. *Id.* § 762.11. If they comply with the program, their conviction does not appear on a public registry. *Id.* § 762.13. A person assigned to HYTA before October 1, 2004 must comply with sex offender registration requirements and continue to register. They may petition the court for registry termination after ten years. *Id.* § 762.13(c)(6).

390. *Id.* §§ 78.725(11), (12).

391. People v. Dipiazza, 778 N.W.2d 264, 266 (Mich. 2009).

392. *Id.*

393. *Id.* at 273.

394. *Id.* at 266.

395. *Id.*

396. *Id.*

397. *Id.*

398. *In re* Ayres, 608 N.W.2d 132 (Mich. Ct. App. 1999).

> In light of the existence of strict statutory safeguards that protect the confidentiality of registration data concerning juvenile sex offenders, we conclude that the registration required imposed by the act, as it pertains to juveniles, neither "punishes" respondent nor offends a basic premise of the juvenile justice system—that a reformed adult should not have to carry the burden of a continuing stigma for youthful offenses. The confidential collection and maintenance of juvenile offender registration data by law enforcement authorities serves an important remedial function and is not so punitive in form and effect as to render it unconstitutional "punishment" under [the Michigan Constitution].[399]

The *Dipiazza* court questioned the applicability of *Ayres* because *Ayres* was decided before juveniles' registry information was publicly available.[400] The court noted that the essential underpinning of *Ayres* was that the registration requirement did not punish because strict statutory guidelines protected juvenile registrants' confidentiality, and acknowledged that this premise was no longer valid.[401]

The court first considered whether requiring juveniles to register constituted punishment.[402] The court considered "the totality of circumstances, and particularly (1) legislative intent, (2) design of the legislation, (3) historical treatment of analogous measures, and (4) effects of the legislation."[403] The court held that the implied purpose of the sex offender registration statute—public safety—was not served by requiring an otherwise law abiding adult to be forever branded a sex offender.[404] The court concluded, "given the totality of the circumstances . . . the registration requirement under SORNA, as applied to defendant, constitutes punishment."[405]

The court then determined whether the punishment was cruel and unusual. The court noted that the offense was not grave, but the punishment was harsh—that requiring the defendant to register was keeping him from being employed.[406] "[A]fter considering the gravity of the offense, the harshness of the penalty, a comparison of the penalty to penalties imposed for the same offense in other states, and the goal of rehabilitation,"[407] the court concluded that requiring the defendant to

399. *Id.* at 139.

400. *Dipiazza*, 778 N.W.2d at 269.

401. *Id.* (citing *In re* Wentworth, 651 N.W.2d 773, 779 (Mich. Ct. App. 2002)).

402. *Id.* at 270.

403. *Id.* at 270–73; *see In re* Ayres, 608 N.W.2d at 136 (quoting Doe v. Kelley, 961 F. Supp. 1105, 1108 (W.D. Mich. 1997)).

404. *Id.* at 271.

405. *Id.* at 273.

406. *Id.*

407. *Id.* at 274.

register as a sex offender for ten years constituted cruel and unusual punishment.[408]

Subsequent to this case, Michigan signed into law a provision that addresses Romeo and Juliet situations and will allow some offenders to be removed from, or be able to avoid, registration.[409]

V. Applying an Eighth Amendment Analysis to Mandatory Lifetime Registration, Community Notification, and Restrictions, Post-*Miller*

Assuming it can be proven that mandatory lifetime registration for juveniles constitutes punishment for the purposes of the Ex Post Facto clause, the Court must then determine whether the punishment is cruel and unusual. *In re C.P.* provides a promising analytical model that could be applied in other jurisdictions. The Supreme Court's analysis in *Miller*—decided after *In re C.P.*—can only bolster an Eighth Amendment argument.

The prohibition against cruel and unusual punishment provides that "punishment for crime should be graduated and proportioned to . . . the offense."[410] Mandatory lifetime registration is a disproportionate punishment and an impermissibly permanent punishment.

The Court "implements the proportionality standard by certain categorical restrictions . . . considering the nature of the offense . . . [and] the characteristics of the offender."[411] When adopting categorical rules related to punishment, the Court considers whether there is national consensus against a sentencing practice and then considers whether, in its independent judgment, the practice violates the Constitution.[412] The Court's exercise of independent judgment requires "consideration of the culpability of the offenders at issue in light of their crimes and characteristics," the severity of the punishment, and whether the practice serves legitimate penological goals.[413]

There is no national consensus related to whether and how juvenile registration is imposed.[414] Practices vary widely from jurisdiction to jurisdiction. While national consideration of a sentencing practice is not determinative, and not based on the need for particular numbers or

408. *Id. But cf. In re* T.D., 823 N.W.2d 101, 110 (Mich. Ct. App. 2011), *vacated as moot*, 821 N.W.2d 569, 570 (Mich. 2011).

409. *In re* T.D., 821 N.W.2d at 570.

410. Miller v. Alabama, 132 S. Ct. 2455, 2455 (2012) (internal references omitted).

411. Graham v. Florida, 130 S. Ct. 2011, 2021–22 (2010).

412. *Id.* at 2022.

413. *Id.* at 2026.

414. *See supra* Part III.C.

ratios,[415] it is significant that mandatory lifetime sex offender registration and related restrictions are imposed on juveniles in a limited number of jurisdictions.[416]

When considering the nature of the characteristics of the offender, the Court in *Miller* noted that a youth's age is relevant for Eighth Amendment purposes and must be taken into consideration.[417] While some registration schemes may provide certain protections for juveniles—such as registry termination provisions—juveniles are generally not treated differently than adults for purposes of registration.

In *Graham*, the Court stated that while a serious offense like rape is "a serious crime deserving serious punishment," it is not the same as a homicide crime in a moral sense.[418] Registerable sex offenses—whether minor or comparatively serious—are not as serious as crimes that have been deemed the most egregious and deserving of the most severe punishments.[419]

The requirement of lifetime registration is actually worse for juveniles than adults because youth are on the registry longer due to their age.[420] As discussed in Part IV.B.1, supra, the Ohio Supreme Court in *In re C.P.* described seriousness of the penalty: "A juvenile—one who remains under the authority of the juvenile court and has thus been deemed redeemable—who is subject to sex offender notification will have his entire life evaluated through the prism of his juvenile adjudication."[421]

The purpose and effects of punishments are relevant to whether a punishment violates the Eighth Amendment; any sentence "lacking any penological justification is by its nature disproportionate."[422] Applying mandatory lifetime registration to juveniles does not serve any penological goal. Juvenile status undermines the justifications behind each goal because of a youth's developmental limitations.[423] Because of a youth's diminished culpability, any argument for retribution is less compelling for a youth than it would be for an adult.[424] Lack of maturity undermines the goal of deterrence; juveniles act recklessly and are less likely than adults to consider potential punishments before committing

415. *See Miller*, 132 S. Ct. at 2471–72 (noting that the Court prohibited sentences of life without the possibility of parole even though thirty-nine jurisdictions allowed the practice).

416. *See generally* Pittman Report, *supra* note 15.

417. *Miller*, 132 S. Ct. at 2466.

418. *Graham*, 130 S. Ct. at 2027.

419. *Id.*

420. *Id.* at 2028.

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

422. *Graham*, 130 S. Ct. at 2028.

423. *Id.* at 2026.

424. *See* Roper v. Simmons, 543 U.S. 551, 553 (2005).

crimes.[425] In addition, by imposing restrictions and community notification, sex offender schemes undermine rehabilitation and create barriers for youth to participate fully in society. The punishment is excessively punitive because of the emotional and social toll; the shaming; the isolation it creates by restricting housing, employment, and family life; and the fact that the requirement remains in place despite the fact that juveniles are amenable to treatment and may, at some point, no longer pose any risk to the community.[426]

In *Miller*, the Court stated that it must consider the "mitigating qualities of youth" when applying a sentence and must account for youths' developmental status.[427] Sentences must be individualized.[428] Imposing a permanent penalty without considering "immaturity, impetuosity, and failure to appreciate risks and consequences"[429] is impermissible. The same characteristics that make juveniles less culpable than adults require their sentences to be subject to review.[430]

The practice of imposing mandatory lifetime sex offender registration runs contrary to the Supreme Court's jurisprudence in *Miller* (and *Roper* and *Graham* before it). *Miller* extended the definition of "most severe" punishments to include permanent non-capital punishments.[431] Mandatory lifetime registration is such a punishment—the juvenile court judge is not permitted to consider the individual characteristics when assigning registration requirements and is not permitted to give the registrant an opportunity to prove that he or she has been rehabilitated. This failure to take developmental status into account is impermissible.

When taken together, these factors support the argument that mandatory lifetime registration, community notification, and restrictions as applied to juveniles violate the Eighth Amendment.

VI. Going Forward

Juvenile advocates play an important role in shaping the legal and public discourse around juvenile sex offender registration, as they did with the juvenile death penalty and life without parole. The question now is what can be done to improve the likelihood that the practice be banned in the interest of youth and society?

425. *Id.* at 571.
426. *See* Smith v. Doe, 538 U.S. 84, 117 (2003) (Ginsburg, J., dissenting).
427. Miller v. Alabama, 132 S. Ct. 2455, 2459 (2012).
428. *Graham*, 130 S. Ct. at 2034.
429. *Miller*, 132 S. Ct. at 2468.
430. *Id.* at 2469.
431. *See id.* at 2475.

The road ahead seems clear: states that have adopted strict schemes must pull back their registry requirements for juveniles (possibly including judicial discretion, individualized risk assessment, and a registry termination process), or there is likely to be another Eighth Amendment battle in the Supreme Court related to juveniles. To the extent possible, juvenile advocates should work toward building a national consensus that juvenile sex offender registration constitutes punishment before the Supreme Court reviews the issue. The strategy for building consensus should include at least three parts: policy development, litigation strategy, and social science research.

A. Policy Development

Illinois is a good example of a jurisdiction where juvenile advocates have effectively helped shape juvenile sex offender policy. Following a constitutional challenge to juvenile registration as a violation of substantive due process and the Eighth Amendment's ban on cruel and unusual punishment post-*Roper*, the Illinois Supreme Court held in 2003 that lifetime juvenile sex offender registration did not constitute cruel and unusual punishment.[432] The court ruled that no rights were affected, nor was registration cruel and unusual punishment, partially because strict limits are placed on access to juveniles' confidential information in Illinois.[433] In a special concurrence, Justice McMorrow recognized the tension between the rehabilitative goals of the juvenile court and the practice of imposing lifetime registration on juveniles, and invited the Illinois legislature to "reconsider the wisdom of imposing such a burden on juveniles, particularly juveniles under the age of 13."[434]

In response, the Illinois legislature considered empirical research related to juvenile sex offenders and ultimately designed a process whereby people on the registry for juvenile sex offenses may petition the court for registry termination after a designated period of time.[435]

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432. *In re* J.W., 787 N.E.2d 747, 759–60 (Ill. 2003). The Illinois Supreme Court held that (1) requiring a juvenile to register for the rest of his life did not violate substantive due process, *id.* at 757–60, (2) the registration requirement was not punishment and, thus, did not violate the Eighth Amendment or the Double Jeopardy Clause, *id.* at 761–62, (3) probation condition that prohibited the juvenile from residing in his home for any purpose was unconstitutionally overbroad, *id.* at 765, and (4) juvenile sex offenders are included within the larger category of sex offenders required to register, i*d.* at 756.

433. *Id*. at 759–60.

434. *Id.* at 767 (McMorrow, C.J., specially concurring) ("The public safety concerns which animate the registration and notification laws should be harmonized with our traditional understanding of the need to protect and rehabilitate the young citizens of this state.").

435. The Illinois legislature brought forth House Bill 2067 in 2006. H.B. 2067, 94th Gen. Assemb. (Ill. 2006). It proposed that a judge should determine if a juvenile should register and if so, for what duration. *Id*. § 3–5(c). The State's Attorney would have to petition the court to continue a juvenile's registration term. The State's Attorney would have to prove by a preponderance of the evidence that

Still, tensions continued. Despite approving a termination provision in 1999, the Illinois legislature continued to attempt to revise registration and community notification requirements for juveniles. For example, in an attempt to come into compliance with SORNA in 2011,[436] Senate Bill 1040 proposed to increase the registration term for some offenses from ten to twenty-five years, added additional registerable offenses, increased the number of times per year that many juveniles had to register in person from one to four, and penalized a conviction for violating the Sex Offender Registry Act by extending the registry term to natural life.[437] In addition, the legislature proposed that some non-sexual offenses that required registration on the Child Murderer and Violent Offender Registry be moved to the sex offender registry.[438]

Visible and concerned juvenile advocates—attorneys, social workers, and mental health professionals—spoke out against the revisions to the bill,[439] slowed down the legislative process, and put it to committee to discuss the developmental and financial implications of the bill and whether the registration revisions were appropriate, particularly as applied to juveniles. Ultimately, the Bill did not pass and Illinois is still not compliant with SORNA.[440]

As state legislatures continue to introduce bills to come into substantial compliance with SORNA, juvenile advocates should take similar action in their respective states: frame the conversation in terms of adolescent development; use the available social science; educate

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the juvenile posed a serious risk to the community. *Id.* § 3–5(d). It did not pass. In 2008, the legislature brought forth another bill, Senate Bill 121. S. 121, 95th Gen. Assemb. (Ill. 2008). The bill placed the burden on the juvenile to petition the court to terminate his or her registration. *Id*. § 3–5(c). The Judge can terminate registry requirements after a specified period of time if the juvenile proves that he or she poses no risk to the community by a preponderance of the evidence. *Id.* § 3–5(d). The bill succeeded, in part because the legislature knew that SORNA would go into effect in 2009 and would be harsher. Pub. Act. 95-0658 (codified at 730 ILL. COMP. STAT. 150/2, 150/3, 150/3–5). It would comfort those who feared the legislators weren't being tough on crime. In addition, it harmonized the safety concerns with the need to rehabilitate youth. Currently, the Illinois Sex Offender Registration Act allows people to petition the court for registry termination two years after a juvenile adjudication for a misdemeanor offense and five years after a juvenile adjudication for a felony offense. 730 ILL. COMP. STAT. 150/3–5(c) (2013). The court considers several factors, including the results of a sex offender risk assessment; the petitioner's sex offender history; evidence of rehabilitation; information related to the petitioner's mental, physical, educational and social history, and effect on the victim. *See* 730 ILL. COMP. STAT. 150/3–5(e).

436. Illinois filed for an extension until July 2011 to come into substantial compliance, and thus receive its full Byrne funds. OFFICE OF SEX OFFENDER SENTENCING, MONITORING, APPREHENDING, REGISTERING, & TRACKING, U.S. DEP'T OF JUSTICE, SORNA EXTENSIONS GRANTED (2010).

437. S. 1040, 97th Gen. Assemb., Reg. Sess. (Ill. 2011).

438. *Id*. § 7. These included kidnapping and are required under SORNA. *See* SORNA § 111(4)(B).

439. *Illinois Legislators Debate Costly Expansion of Sex Offender Registry*, RANDOLPH COUNTY HERALD TRIB. 1 (Mar. 19, 2012, 6:15 PM), http://www.randolphcountyheraldtribune.com/article/20120319/NEWS/303199899.

440. SMART Website, *supra* note 159.

legislators; and inform the media. The fewer states that come into compliance with SORNA, and the longer it takes the ones that do to do so, the more likely that advocates can establish a national consensus against the practice of placing juveniles on registries.

In jurisdictions where the registration schemes are already overly broad, advocates should work to influence legislators to enact more youth-appropriate schemes. When asked by legislators what would work instead of the SORNA model, juvenile advocates should inform them about social and brain science-driven best practices applied to juveniles.

When arguing for revised sex offender registration schemes, juvenile advocates should argue, based on *Miller*, that juveniles should not be subject to mandatory lifetime sex offender registration. Second, if registration requirements apply to juveniles at all, judges should have discretion to decide whether each juvenile must register and for how long. Third, courts should conduct individualized empirically-validated risk assessments before assigning registration requirements; if juveniles pose no risk, or if registration would not improve public safety, juveniles should not be required to register. Fourth, if juveniles are required to register, every jurisdiction should adopt a registry termination provision that enables the juvenile to petition the court within a reasonable period of time, and juveniles should be appointed counsel for such petitions. Fifth, juvenile registrants should not be subject to housing or movement restrictions because this practice isolates them from their families, which in turn undermines rehabilitation. Finally, community notification requirements for juveniles should be eliminated. Publicly identifying youth registrants undermines rehabilitation, puts them at risk, and violates confidentiality under state juvenile justice policies.

B. Litigation Strategy

When thinking about litigation strategy, juvenile advocates should consider bringing Eighth Amendment challenges in jurisdictions that impose significantly more onerous restrictions on juveniles than the federal law requires (for example, those with GPS tracking or public notification by billboard) and those with state constitutions that are less demanding than the federal Constitution when it comes to cruel and unusual punishment (cruel *or* unusual[441] instead of cruel *and* unusual). Any victory in these states aids in the development of a national consensus that juvenile registration unconstitutional.

In re C.P. offers a promising model for challenging juvenile sex offender registration on Eighth Amendment and other constitutional

441. *See, e.g.*, Cal. Const. art. 1, § 17; Mich. Const. art. 1, § 16. For a more comprehensive list of state constitutions, see Barry Latzer, State Constitutions and Criminal Justice 205 App. F (1991).

grounds. The Ohio court in *In re C.P.* relied heavily on *Graham* and noted a growing national consensus that juvenile sex offender registration is inappropriate.[442] Eighth Amendment arguments made in state cases would be additionally bolstered by the Supreme Court's decision in *Miller*, which focuses on the requirement of individualized review for juveniles.

When bringing challenges to state juvenile sex offender registration schemes, litigants should focus on the reasons why registration and community notification constitute punishment as applied to juveniles, likely using Ex Post Facto cases, and why that punishment is cruel and unusual. In states with mandatory lifetime registration without the possibility of review (or with the possibility of review after twenty-five years of good behavior), litigants should focus on the requirement of individualized assessment emphasized in *Miller*.

C. Social Science Research

What constitutes a proper juvenile disposition should not be determined lightly. The most important social science research will continue to look into the effects of registration on the registrant, the registrant's whole family, and the community at large in order to show that the effect—if not the intent—of juvenile sex offender registration schemes is punitive.

As advocates frame discussions with legislators, judges, and the public, they should let each advocacy area inform the others: the most current social science research, case law, and national trends should be presented to legislators; social science research, legislation, and national trends should be presented to courts; social scientists should track court-based trends. As with other areas of juvenile law, this area is changing rapidly as we become more aware of how children and teens grow and change. Knowledgeable advocates can help shape the conversation and try to ensure that we are moving toward policies and practices that are cognizant and respectful of youth development.

Conclusion

The same analysis that the Supreme Court applied to juvenile death penalty and life-without-parole cases should be applied when assessing whether a juvenile should be required to register as a sex offender for life without the possibility for meaningful review. Because mandatory lifetime registration, community notification, and other sex offender

442. 967 N.E.2d 729, 738–39 (Ohio 2012).

restrictions impose ongoing and excessive punishment, the practice of imposing these requirements on juveniles should be abolished.