

THE MOMENTUM BUILDS: CHALLENGING LIFETIME REGISTRATION OF JUVENILES CONVICTED OF SEXUAL OFFENSES IN THE POST-*ROPER* ERA

N.Y.U. REVIEW OF LAW & SOCIAL CHANGE: PANEL SERIES ON SEX OFFENDER REGISTRATION LAWS

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I. INTRODUCTION

In the ten years between 1995 and 2005, our understanding about children who commit crimes, even violent crimes, underwent a seismic shift. In 1995 and the years immediately following, jurisdictions across the country reacted to steeply rising violent crime among both juveniles and adults by adopting stricter crime policies.¹ These policies, among other things, sent increasing numbers of children to the adult criminal justice system for prosecution.² In keeping with this policy shift, states also enacted harsher penalties for adult sex offenders, including lifetime registration and community notification.³ Children accused of sexual offenses were caught in the vortex of these two sentencing trends,⁴ with many states extending their sex offender registration laws to include children. Legislation initially passed to protect children as victims was instead being used against juvenile offenders.⁵ States increasingly treated youth convicted of sexual offenses no differently than their adult counterparts.

Then in 2005, the pendulum began to swing back. In *Roper v. Simmons*,⁶ the United States Supreme Court struck down the juvenile death penalty under the Eighth Amendment as cruel and unusual punishment. *Roper* relied upon an emerging body of developmental and behavioral research establishing key differences between juvenile and adult offenders—research which provided the Court with a sound empirical basis for finding juveniles to be less blameworthy for their criminal conduct than adults and, therefore, less deserving of the harshest punishments, even in cases where they were convicted of homicide.⁷ Over the course of the next seven years, the Court struck down life without parole sentences for juveniles convicted of non-homicide crimes,⁸ eliminated mandatory life without parole sentences for juveniles convicted of homicide,⁹ and required that age be a consideration in determining when suspects must be given *Miranda*

1. Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & C. 137, 146–51 (1997).

2. *Id.*

3. See CENTER FOR SEX OFFENDER MANAGEMENT, SEX OFFENDER REGISTRATION: POLICY OVERVIEW AND COMPREHENSIVE PRACTICES (1999), <http://www.esom.org/pubs/sexreg.pdf>.

4. HUMAN RIGHTS WATCH, RAISED ON THE REGISTRY: THE IRREPARABLE HARM OF PLACING CHILDREN ON SEX OFFENDER REGISTRIES IN THE US 16 (2013).

5. *Id.* at 16–17.

6. 543 U.S. 551 (2005).

7. *Id.* at 569–70.

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

9. *Miller v. Jackson*, 132 S. Ct. 2455 (2012).

warnings.¹⁰ In addition to the psychological research, the Court also relied upon neuroscience to conclude that children were different from adults, at least with respect to sentencing and police interrogation, and thus entitled to certain protections under the Constitution that the Court was unwilling to extend to adults.¹¹ In just under a decade, the Court effectively shrank the number of youthful offenders back to size, rejecting the 90's crime policy mantra, "adult time for adult crime."

These landmark rulings inevitably sparked speculation about which policies or practices might be the next to fall with regard to the harsh treatment of juvenile offenders. This essay discusses recent challenges to juvenile sex offender registration statutes as one example of this trend. First, we provide a brief introduction to juvenile sex offender registration laws. Second, we discuss strategies for reforming juvenile registration laws. In considering strategies, we focus on the harm registration inflicts on registrants and the relationship, if any, between registration and community safety.¹² Then, we use this framework to discuss successful challenges to registration, including litigation victories in Pennsylvania and Ohio, as well as suggest further avenues for reform.

II. JUVENILE REGISTRATION LAWS

Although states had been registering children as sex offenders even prior to the enactment of the federal Adam Walsh Child Protection and Safety Act of 2006 (hereinafter "Adam Walsh Act"),¹³ the federal statute neither required nor prohibited inclusion of youth sex offenders upon passage. The previous version of the Act had expressly applied to adults convicted of sexual offenses and was silent

10. *J.D.B. v. North Carolina*, 131 S. Ct. 2394 (2011).

11. *Miller*, 132 S.Ct. at 2464–65; *J.D.B.*, 131 S. Ct. at 2403 n.5; *Graham*, 560 U.S. at 68; *Roper*, 543 U.S. at 570. Courts relied on neuroscience research that demonstrated that "[A]dolescent brains are not yet fully mature in regions and systems related to higher-order executive functions such as impulse control, planning ahead, and risk avoidance." *Miller*, 132 S.Ct. at 2464 n. 5 (quoting Brief for Petitioner at 4, *Miller*, 132 S.Ct. 2455 (Nos. 10-9646, 10-9647)). The frontal lobes of the brain, and especially the pre-frontal cortex, continue to develop through adolescence and into one's twenties. Brief for Petitioner at 15–16, *Miller*, 132 S.Ct. 2455 (Nos. 10-9646, 10-9647); see also Brief for Petitioner at 25, *Miller*, 132 S.Ct. 2455 (Nos. 10-9646, 10-9647) (citing Laurence Steinberg, *Should the Science of Adolescent Brain Development Inform Public Policy?*, 64 AM. PSYCHOLOGIST 739, 742 (2009)). Moreover, the "immaturity and plasticity" of the adolescent brain makes children open to change and reform. Brain malleability in a child "enhance[s] the prospect that, as the years go by and neurological development occurs, his 'deficiencies will be reformed.'" *Miller*, 132 S.Ct. at 2465 (quoting *Graham*, 130 S.Ct. at 2027 (quoting *Roper*, 543 U.S. at 570)). The Court in *Miller* further noted that "in *Graham*, we noted that 'developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds'—for example, in 'parts of the brain involved in behavior control.'" *Id.* at 2464 (internal citations omitted).

12. The Panel Series on Sex Offender Registration Laws, hosted by the *N.Y.U. Review of Law & Social Change*, focused specifically on these two issues and used them as a framework to examine effective strategies for reform.

13. 42 U.S.C. § 16911 (2006).

as to whether children who were adjudicated delinquent in the juvenile justice system fell within its provisions. Then in 2006, in response to lobbying by the parents of an eight-year-old girl sexually assaulted by a fourteen-year-old boy, Congress redefined the term “convicted” in the Adam Walsh Act to include juvenile adjudications of delinquency, expanding the breadth of registration and notification laws.¹⁴ Title I of the Act, also known as the Sex Offender Registration and Notification Act (“SORNA”), requires states to establish uniform sex offender registration mechanisms and definitions in order to facilitate a national registry and enforcement.¹⁵ To ensure state cooperation in creating the national registry, any state that did not substantially implement the provisions of the Adam Walsh Act would suffer a ten percent reduction of grants allocated pursuant to the Edward Byrne Memorial Justice Assistance Grant Programs (hereinafter “Byrne grants”).¹⁶

SORNA requires registration for juveniles who are at least fourteen years old at the time of the offense and have been adjudicated delinquent for committing (or attempting or conspiring to commit) offenses comparable to or more severe than aggravated sexual abuse or sexual abuse.¹⁷ “[J]urisdictions generally may premise the determination on the elements of the offense, and are not required to look to underlying conduct that is not reflected in the offense or conviction.”¹⁸ Qualified adjudications of delinquency result in a Tier III registration classification, reserved for the most serious sex offenses that are punishable by more than one year of imprisonment.¹⁹ Tier III registrants must register for life.²⁰ Individuals may petition for removal from the registry after twenty-five years, provided their record is clean.²¹ Tier III registrants must appear in person at the designated registration site every ninety days to verify their registration information.²² Importantly, the law does not require an individual risk assessment to determine whether juveniles are likely to reoffend. Therefore, a fourteen-year-old child adjudicated delinquent for an offense could potentially be required to register as a sex offender for his or her entire life without any determination of his likelihood to reoffend or the need for such registration.

14. *Id.* §16911(8).

15. *Id.* § 16913.

16. *Id.* §§ 3750–56.; *id.* § 16925(a).

17. Sexual abuse and aggravated sexual abuse are defined by 18 U.S.C. §§ 2241-42 (2007).

18. SMART OFFICE, JUVENILE OFFENDERS REQUIRED TO REGISTER UNDER SORNA: A FACT SHEET (2010), http://www.smart.gov/pdfs/factsheet_sorna_juvenile.pdf.

19. 42 U.S.C. § 16911(4) (2006).

20. *Id.* § 16915(a).

21. *Id.* § 16915(b); SMART OFFICE, THE NATIONAL GUIDELINES FOR SEX OFFENDER REGISTRATION AND NOTIFICATION (2008), http://www.smart.gov/pdfs/final_sornaguidelines.pdf.

22. 42 U.S.C. §§ 16916-17 (2006).

States' compliance with the dictates of SORNA have been uneven.²³ According to the most recent data available from the federal Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (hereinafter "SMART" office):

- Seventeen states and three U.S. territories have substantially implemented SORNA by including youth in their registration schemes.²⁴
- An additional twenty-two jurisdictions register youth in some capacity, though they are not deemed to have substantially implemented SORNA.²⁵
- Eleven states specifically exclude children from their state sex offender registries.²⁶

Some states have opted to accept deductions from their federal Byrne grants, concluding that registration was contrary to the individualized model of their juvenile justice systems,²⁷ that the high cost of creating and maintaining a juvenile registry would outweigh any federal monetary benefit, and that there was not enough evidence suggesting it increased public safety.²⁸

23. Compare DEL. CODE. ANN. tit. 11, § 4120 (West 2013) with OHIO REV. CODE ANN. § 2950.01 (West 2014).

24. SMART OFFICE, SORNA SUBSTANTIAL IMPLEMENTATION REVIEW (2009–2012), <http://www.smart.gov/sorna.htm> (including Alabama, Colorado, Delaware, Florida, Kansas, Louisiana, Maryland, Michigan, Mississippi, Missouri, Nevada, Ohio, Pennsylvania, South Carolina, South Dakota, Tennessee, Wyoming, the United States territory of Guam, the Commonwealth of Northern Mariana Islands and the U.S. Virgin Islands).

25. *Id.* (including Alabama, Arizona, Arkansas, California, Colorado, Delaware, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Texas, Tennessee, Utah, Virginia, Washington, Wisconsin, and Wyoming).

26. *Id.* (including Alaska, Connecticut, District of Columbia, Georgia, Hawaii, Maine, Nebraska, New York, Vermont, Pennsylvania, and West Virginia).

27. In a letter to the Department of Justice dated August 17, 2011, Jeffrey Boyd, General Counsel and Acting Chief of Staff to Texas Governor Rick Perry, wrote: "In dealing with juvenile sex offenders, Texas law more appropriately provides for judges to determine whether registration would be beneficial to the community and the juvenile offender in a particular case." Letter from Jeffrey Boyd, Tex. State Gen. Counsel & Acting Chief of Staff, to Linda Baldwin, Dir. of SMART Office (Aug. 17, 2011), http://www.ncleg.net/documentsites/committees/JLOCJPS/2011-12%20Interim%20October%2013,%202011%20Meeting/RD_SORNA_General_Information_2011-10-13.pdf.

28. "New York has a long standing public policy of treating juvenile offenders differently from adult offenders so that juveniles have the best opportunity of rehabilitation and reintegration. The federal requirement that juveniles be placed on the Sex Offender Registry under SORNA is in direct conflict with that public policy." The state also expressed concern over the "fiscal impact of implementation . . . with no improvement in public safety." Letter from Risa S. Sugarman, N.Y. Deputy Comm'r & Dir. of Office of Sex Offender Mgmt., to Linda Baldwin, Dir. of SMART Office (Aug. 23, 2011), http://www.ncleg.net/documentsites/committees/JLOCJPS/October%2013,%202011%20Meeting/RD_SORNA_General_Information_2011-10-13.pdf.

III.

STRATEGIES FOR REFORM OF JUVENILE SEX OFFENDER REGISTRATION LAWS

In evaluating the constitutionality of sex offender registration statutes as applied to children, one must weigh the harm to registrants against the harm to the community. Litigation challenges must look to empirical research on juvenile sexual offending and the settled rule that children should be treated differently under the law, as well as the common sense view that individuals must not be shackled to a label as damaging as “sex offender” for conduct they committed as children. The punitive effect of registration is significantly amplified when applied to children—children who are neither mature nor self-reliant, and whose lifetime reporting requirements will last years, if not decades, longer than the same penalty imposed upon adults. Moreover, the benefit to the community is actually diminished by placing youth on a registry because it has no impact on the already low rates of juvenile recidivism and could divert resources away from high-risk offenders.²⁹

A. Harm to Youth on the Registry

There is now ample evidence establishing the negative consequences of juvenile sex offender registration laws. Children who must register as sex offenders for life “will face innumerable barriers to successful prosocial development,”³⁰ including an increased likelihood that registered youth will come to view themselves as ‘delinquent’ even when they are law-abiding³¹ and find it more difficult to develop a positive self-identity.³² The label of “sex offender,” and the common view that sex offenders are dangerous, will follow the youth throughout his life. The Ohio Supreme Court articulated the harm that befalls youth on registries:

For a juvenile offender, the stigma of the label of sex offender attaches at the start of his adult life and cannot be shaken. With no other offense is the juvenile’s wrongdoing announced to the world. Before a juvenile can even begin his adult life, before he has a chance to live on his own, the world will know of his offense. He will never have a chance to establish a good character in the community. He will be hampered in his education, in his relationships, and in his work life. His potential will be squelched before it

29. HUMAN RIGHTS WATCH, *supra* note 4, at 7.

30. NICOLE PITTMAN & QUYEN NGYUEN, A SNAPSHOT OF JUVENILE SEX OFFENDER REGISTRATION AND NOTIFICATION LAWS: A SURVEY OF THE UNITED STATES (2011), http://www.njjn.org/uploads/digital-library/SNAPSHOT_web10-28.pdf; *see also In re J.B.*, 107 A.3d 1, 14 (Pa. 2014) (“[R]egistration also negatively affects juvenile offenders’ ability to obtain housing, schooling, and employment, which in turn hinders their ability to rehabilitate.”).

31. Elizabeth Letourneau & Michael Miner, *Juvenile Sex Offenders: A Case Against the Legal and Clinical Status Quo*, 17 SEXUAL ABUSE: J. RES. & TREATMENT 293, 313, 331 (2005).

32. *Id.* at 303–07.

has a chance to show itself. A juvenile—one who remains under the authority of the juvenile court and has thus been adjudged redeemable—who is subject to sex-offender notification will have his entire life evaluated through the prism of his juvenile adjudication. It will be a constant cloud, a once-every-three-month reminder to himself and the world that he cannot escape the mistakes of his youth. A youth released at 18 would have to wait until age 43 at the earliest to gain a fresh start. While not a harsh penalty to a career criminal used to serving 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.³³

The result of such stigma on adolescent development can diminish self-esteem, contribute to depression, and, in some cases, lead to suicide.³⁴

In addition to psychological harm, children required to register encounter numerous obstacles to participating in the most routine aspects of daily life. Many children adjudicated of sex offenses can be expelled from public school.³⁵ Research has also shown that registration and notification severely limit an individual's future employment, ability to keep a job, ability to find or retain housing, and can lead to hopelessness and fear for their own safety.³⁶ Most states have laws that expressly prohibit individuals on a registry from obtaining licenses for certain jobs, including jobs in the health care industry, education, and child development.³⁷ Indeed, some registrants have been subjected to vigilante property damage, harassment, and even physical assault.³⁸ Out of 296 youth registrants interviewed for *Raised on the Registry*, over forty-four percent said they had experienced at least one period of homelessness as a result of the restrictions attendant to registration.³⁹ Any household containing a “juvenile offender” is ineligible for public housing.⁴⁰ Registration can also divide families—one youth explained that because the registration restrictions prohibited him from living with any children, he and his mother moved away from his father and his siblings.⁴¹

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

34. HUMAN RIGHTS WATCH, *supra* note 4, at 51, 53. A former registrant took his own life after several years living on the registry. His mother reported that nearly ten years after his offense, he faced difficulty obtaining housing and employment in college. Within weeks of graduating from college, he committed suicide, seemingly because “he was going to look for professional work and knew his background would come up in every job interview.” *Id.* at 53.

35. *Id.* at 71.

36. *Id.* at 50–55.

37. *Id.* at 73.

38. Jill Levenson & Richard Tewksbury, *Collateral Damage: Family Members of Registered Sex Offenders*, 37 AM. J. CRIM. JUST. 54, 54–58 (2009) (collecting and referencing studies reaching these conclusions).

39. *Id.* at 65.

40. 42 U.S.C. § 13663(a) (1999); 24 C.F.R. § 960.204.

41. HUMAN RIGHTS WATCH, *supra* note 4, at 60.

B. Registration Does Little to Advance Community Safety

Requiring juveniles to register as sex offenders does not deter sexual offending nor promote public safety.⁴² Research shows the recidivism rates of youth for sex offenses are relatively low.⁴³ A meta-analysis examined over sixty-three studies involving 11,200 children and found an average sexual recidivism rate of 7.08% over an average five year follow-up.⁴⁴ Additionally, juvenile sexual reoffending is difficult to predict, and *type* of offense is much less predictive than specific details of the way in which the offense was carried out and the characteristics of the victim—partially due to the low recidivism rate.⁴⁵ In Pennsylvania, for example, only 1.4% of juveniles who had committed a sex offense committed another sex offense within two years of adjudication.⁴⁶ These rates are compared with a national thirteen percent recidivism rate for adults who commit sexual offenses.⁴⁷ Moreover, both sexually and non-sexually delinquent youth are far more likely to reoffend with *nonsexual crimes* than with sexual crimes.⁴⁸ Many demographic

42. See Elizabeth Letourneau, Dipankar Bandyopadhyay & Kevin S. Armstrong, *Do Sex Offender Registration and Notification Requirements Deter Juvenile Sex Crimes*, 37 CRIM. JUST. & BEHAV. 553, 556 (2010) (contemplating doubtful deterrent effects on would-be juvenile sex offenders through the use of sex offender registration and notification requirements on minors).

43. See Michael Caldwell, *Study Characteristics and Recidivism Base Rates in Juvenile Sex Offender Recidivism*, 54 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 197, 198 (2010) [hereinafter Caldwell, *Study Characteristics*] (citing to recidivism studies dating back to 1994). See also Michael Caldwell, *Sexual Offense Adjudication and Recidivism Among Juvenile Offenders*, 19 SEXUAL ABUSE: J. RES. & TREATMENT 107 (2007); Michael Caldwell, Mitchell H. Ziemke & Michael Vitacco, *An Examination of the Sex Offender Registration and Notification Act as Applied to Juveniles: Evaluating the Ability to Predict Sexual Recidivism*, 14 J. PSYCHOL., PUB. POL'Y & L. 89 (2008); E.M. Driessen, *Characteristics of Youth Referred for Sexual Offenses* (2002) (unpublished doctoral dissertation) (on file with Univ. of Wisconsin-Milwaukee); Franklin Zimring, Wesley Jennings, Alex Piquero & Stephanie Hays, *Investigating the Continuity of Sex Offending: Evidence from the Second Philadelphia Birth Cohort*, 26 JUST. Q. 59 (2009); Franklin Zimring, Alex Piquero & Wesley Jennings, *Sexual Delinquency in Racine: Does Early Sex Offending Predict Later Sex Offending in Youth and Young Adulthood?*, 6 CRIMINOLOGY & PUB. POL'Y 507 (2007). As a group, juvenile sex offenders pose a relatively low risk of reoffending sexually, particularly as they age into young adulthood. NAT'L INST. OF JUST., A MULTI-STATE RECIDIVISM STUDY USING STATIC-99R AND STATIC-2002 RISK SCORES AND TIER GUIDELINES FROM THE ADAM WALSH ACT 24 (2008).

44. Caldwell, *Study Characteristics*, *supra* note 43, at 201–02.

45. Ashley Batastini, Elizabeth Hunt, Julie Present-Koller & David DeMatteo, *Federal Standards for Community Registration of Juvenile Sex Offenders: An Evaluation of Risk Prediction and Future Implications*, 17 J. PSYCHOL. PUB. POL'Y & LAW 3, 451, 457–58 (2011) (describing the heterogeneous behaviors of child sex offenders).

46. PA. JUVENILE COURT JUDGES COMM'N, THE PENNSYLVANIA JUVENILE JUSTICE RECIDIVISM REPORT: JUVENILES WITH CASES CLOSED IN 2007, 2008, OR 2009, 85 (Nov. 2013).

47. HUMAN RIGHTS WATCH, *supra* note 4, at 30 (citing R. Karl Hanson & Monique T. Bussiere, *Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism Studies*, 66 J. OF CONSULTING & CLIN. PSYCH. 348 (1998)).

48. See Letourneau & Miner, *supra* note 31, at 297; FRANKLIN ZIMRING, AN AMERICAN TRAVESTY: LEGAL RESPONSES TO ADOLESCENT SEXUAL OFFENDING (2004).

studies find no differences in personality and psychosocial circumstances between juvenile sex offenders and non-sex offenders.

Multiple studies confirm that the lower rates of recidivism among youth who sexually offend derive largely from the fact that these youth offend for different reasons than adults. Their offenses may be driven by aspects of developmental immaturity related to their youth, including poor decision-making abilities, impulsivity, peer influence or isolation, and general psychosocial immaturity—factors less likely to play a role in adult sexual offending.⁴⁹ Only a small fraction of juvenile offenders will maintain sexually deviant behavior in adulthood.⁵⁰

While registration has no impact on recidivism or deterrence,⁵¹ requiring a child to register as a sex offender may actually reduce public safety by limiting a child's opportunities to engage socially and professionally in her community or to pursue a normal, productive life.⁵² Including youth on a registry may also diminish public safety by diverting resources away from high-risk offenders. "With thousands of new registrants added each year, law enforcement is stymied in its attempt to focus on the most dangerous offenders."⁵³

C. Successful Challenges in Pennsylvania and Ohio

Despite the limited effectiveness of registration, nearly forty states still require youth to register, many in accordance with the Adam Walsh Act. The Adam Walsh Act expressly provides that state courts have the authority to evaluate their individual registration schemes under their state constitutions, and if deemed unconstitutional by the state's highest court, the registration scheme may be stricken without jeopardizing the state's federal Byrne grant funds.⁵⁴ Two state supreme courts have now found juvenile registration penalties unconstitutional.

The Ohio Supreme Court was the first state supreme court to rule a state juvenile sex offender registration scheme unconstitutional in *In re C.P.*⁵⁵ C.P. was adjudicated delinquent for rape and kidnapping with sexual motivation, an offense requiring registration as a Tier III offender and which also designated C.P. a public-registry-qualified juvenile offender. The Ohio statute required mandatory

49. Michael F. Caldwell, *What We Do Not Know About Juvenile Sexual Reoffense Risk*, 7 CHILD MALTREATMENT 291, 298-99 (2002); Judith Becker & Scotia Hicks, *Juvenile Sexual Offenders: Characteristics, Interventions and Policy Issues*, 989 ANN. NY ACAD. SCI. 397, 399, 402 (2003); Caldwell, *Study Characteristics*, *supra* note 44, at 205.

50. Caldwell, *Study Characteristics*, *supra* note 44, at 205-06.

51. See generally Caldwell, *Study Characteristics*, *supra* note 44.

52. Research has also found that the recidivism rate is not measurably different for registered and unregistered children who committed sexual offenses. Elizabeth Letourneau & Kevin Armstrong, *Recidivism Rates for Registered and Nonregistered Juvenile Sexual Offenders*, 20 SEXUAL ABUSE: J. OF RES. & TREATMENT 393 (2008).

53. HUMAN RIGHTS WATCH, *supra* note 4, at 7.

54. 42 U.S.C. § 16925 (2006).

55. *In re C.P.*, 967 N.E.2d 729, 738 (Ohio 2012).

lifetime registration with the potential for review after twenty-five years, quarterly in-person reporting, and mandatory reporting of changes in personal data within three days. Ohio also mandated community notification and inclusion in the state's online registry.⁵⁶ C.P. challenged the registration requirement. The Ohio Supreme Court held that its juvenile SORNA statute violated both the Ohio and federal constitutional bans on cruel and unusual punishment.⁵⁷ Considering the vast registration and reporting requirements for juvenile offenders in light of U.S. Supreme Court precedent establishing children as less culpable than adults,⁵⁸ the court held that the registration requirement constituted cruel and unusual punishment. The court reasoned that:

[The law injects] registration and notification requirements into a juvenile system where rehabilitation is paramount, confidentiality is elemental, and individualized treatment from judges is essential. The public punishments required by [the law] are automatic, lifelong, and contrary to the rehabilitative goals of the juvenile system. We conclude that they “shock the sense of justice of the community” and thus violate Ohio’s prohibition against cruel and unusual punishments.⁵⁹

The court further noted that the automatic imposition of the penalty is fundamentally unfair in that it eliminates the judge’s discretion in disposition.⁶⁰

Ohio was the first state to implement juvenile sex offender registration in accordance with the Adam Walsh Act; Pennsylvania was one of the last. In 2011 Pennsylvania enacted a juvenile SORNA law⁶¹ requiring mandatory, lifetime registration⁶² for juveniles upon adjudication of one of the enumerated offenses.⁶³ As Tier III offenders, registered youth were required to provide vast amounts of personal information upon registration, verify their information in-person at an approved registration site every ninety days, and appear in-person to update any changes in their personal registration information within three days.⁶⁴ Any failure to provide accurate information or updated information resulted in a mandatory felony prosecution and mandatory incarceration for a term of three to ten years.⁶⁵

56. *Id.* at 736–37.

57. *Id.* at 744, 746.

58. *See* Miller v. Jackson, 132 S. Ct. 2455; J.D.B. v. North Carolina, 131 S. Ct. 2394 (2011); Graham v. Florida, 560 U.S. 48 (2010); Roper v. Simons, 543 U.S. 551 (2005); *see also* *In re Gault*, 387 U.S. 1 (1967).

59. *In re C.P.*, 967 N.E.2d at 746.

60. *Id.* at 750.

61. 42 PA. CONS. STAT. § 9799.10-9799.41.

62. *Id.* § 9799.15.

63. 18 PA. CONS. STAT. § 3121 (relating to rape); *id.* § 3123 (relating to involuntary deviate sexual intercourse); *id.* § 3125 (relating to aggravated indecent assault); *see also* 42 PA. CONS. STAT. § 9799.12 (criminalizing any attempt, solicitation or conspiracy to commit offense similar to an offense under §§ 3121, 3123, 3125).

64. 42 PA. CONS. STAT. § 9799.19.

65. *Id.* § 9799.22.

The risk of incarceration under the statute was grave; not even a natural disaster could excuse the statutory obligation to register.⁶⁶ Although children were not placed on the online public registry with adults, there were numerous ways in which their registration data could be shared or disseminated without penalty.⁶⁷

Shortly after the registration requirements went into effect, the statute was challenged on a variety of constitutional grounds. Petitioners claimed that the statute violated the state and federal due process clauses, the state and federal bans on cruel and unusual punishment, the federal protection against the enactment of *ex post facto* laws, and Pennsylvania's constitutional protection of the right to reputation.⁶⁸ Three separate challenges were filed in three separate juvenile courts across the state. All three challenges were sustained in the juvenile courts.⁶⁹ *In re J.B.*, filed in York County, Pennsylvania, was the first to reach the Pennsylvania Supreme Court.⁷⁰ *J.B.* was filed on behalf of seven youth who were retroactively required to register as sex offenders under the new statute.

The Pennsylvania Supreme Court ruled SORNA unconstitutional. The court relied upon the irrebuttable presumption doctrine to hold that SORNA violated juveniles' due process rights.⁷¹ Specifically, the court found that the statute created a faulty but irrebuttable presumption that all juvenile offenders "pose a high risk of committing additional sexual offenses."⁷² The court ruled that the juveniles' constitutionally-protected right to reputation is infringed by an irrebuttable presumption of future offending that is not universally true where a reasonable alternative means exists for determining the presumed fact.⁷³

66. 18 PA. CONS. STAT. § 4915.1.

67. 42 PA. CONS. STAT. §§ 9799.18, 9799.20, 9799.26, 9799.27, 9799.28.

68. Memorandum of Law in Support of Motions for *Nunc Pro Tunc* Relief, *In re J.B.*, No. CP-67-JV-726-2010 (Pa. Ct. Comm. Pl. York Nov. 1, 2013), <http://www.jlc.org/legal-docket/york-county-sorna-challenge> (click on "memorandum of law" hyperlink to download); Motion for *Nunc Pro Tunc* Relief and Memorandum of Law in Support of *Nunc Pro Tunc* Motions, *In re W.E.*, No. CP-36-JV-1085-2008 (Pa. Ct. Comm. Pl. Lancaster Feb. 11, 2014), <http://www.jlc.org/legal-docket/lancaster-county-sorna-challenge> (click on "memorandum of law" hyperlink to download); Memorandum of Law in Support of Motions for *Nunc Pro Tunc* Relief, *In re B.B.*, No. CP-45-JV-248-2012 (Pa. Ct. Comm. Pl. Monroe Jan. 16, 2014), <http://www.jlc.org/legal-docket/monroe-county-sorna-challenge> (click on "memorandum of law" hyperlink to download).

69. *In re B.B.*, No. CP-45-JV-248-2012 (Pa. Ct. Comm. Pl. Monroe Jan. 16, 2014); *In re J.B.*, No. CP-67-JV-726-2010 (Pa. Ct. Comm. Pl. York Nov. 1, 2013); *In re W.E.*, CP-36-JV-1085-2008 (Pa. Ct. Comm. Pl. Lancaster Feb 11, 2014).

70. *In re J.B.*, 107 A.3d 1 (Pa. 2014).

71. The Court noted that this doctrine has been used several times in Pennsylvania, *see Commonwealth v. Clayton*, 684 A.2d 1060 (Pa. 1996), and *D.C. v. School Dist. of Phila.*, 879 A.2d 408 (Pa. Commw. Ct. 2005), and was derived from a series of U.S. Supreme Court cases in the 1970s. *See In re J.B.*, 107 A.3d at 14 (citing *Vlandis v. Kline*, 412 U.S. 441 (1973); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Bell v. Burson*, 402 U.S. 535 (1971)).

72. 42 Pa.C.S. § 9799.11(a)(4).

73. *In re J.B.*, 107 A.3d at 16–17.

The court relied on a stipulated record, which detailed the statutory registration requirements and included several expert affidavits explaining the current research on juvenile sex offenders, the limited effectiveness of registration, harms flowing from registration, and the porousness of electronic databases even where the data is intended to be private.⁷⁴ With this record before it, the court wrote: “While adult sexual offenders have a high likelihood of reoffense, juvenile sexual offenders exhibit low levels of recidivism.”⁷⁵ “[M]any of those who commit sexual offenses as juveniles do so as a result of impulsivity and sexual curiosity.... [T]he vast majority of youth are unlikely to recidivate.”⁷⁶ Relying on both state and national data to support its holding, the court also noted that this research is corroborated by recent U.S. Supreme Court precedents and reasoned that in the area of sexual offenses “many acts of delinquency involve immaturity, impulsivity, and sexual curiosity rather than hardened criminality.”⁷⁷

With respect to the state-protected right to reputation, the court observed, “SORNA explicitly declares that sexual offenders, including juvenile offenders ‘pose a high risk of committing additional sexual offenses’... [T]he common view of registered sexual offenders is that they are particularly dangerous and more likely to reoffend than other criminals.”⁷⁸ However, such characterizations were refuted by the uncontroverted expert affidavits.⁷⁹ The court found that the label also negatively affects children’s “ability to obtain housing, schooling, and employment, which in turn hinders their ability to rehabilitate,” noting the onerous reporting requirements for youth on the registry.⁸⁰

Next, the court held that the presumption that sexual offenders pose a high risk of recidivating is not “universally true” when applied to juvenile offenders.⁸¹ The court held that this violated due process by establishing an irrebuttable presumption about future dangerousness.⁸² The Court also reasoned that SORNA contradicts the Juvenile Act’s⁸³ specified purpose, which is “to always be watchful of juveniles’ rehabilitation, while also providing accountability to the victim and society.”⁸⁴ Instead, “SORNA’s automatic registration removes the juvenile judges’

74. *Id.* at 10 & n.16; Brief of Appellees at 12–13, *In re J.B.*, 107 A.3d 1 (Pa. 2014) (No. CP-67-JV-0000726-2010).

75. *In re J.B.*, 107 A.3d at 17.

76. *Id.*

77. *Id.* at 19.

78. *Id.* at 16.

79. *Id.* at 16.

80. *Id.*

81. *Id.* at 17.

82. *Id.* at 19–20.

83. 42 Pa. Cons. Stat. § 6301.

84. *In re J.B.*, 107 A.3d at 18.

ability to consider the rehabilitative prospects of individual juvenile sexual offenders.”⁸⁵

D. Further Reform

Using the analysis set forth in the Pennsylvania and Ohio cases, states are beginning to address the constitutionality of their own juvenile registration schemes. The New Jersey Superior Court is currently reviewing a challenge to a lifetime registration scheme for juveniles.⁸⁶ The Missouri Supreme Court is currently reviewing the juvenile court’s ability to place a child on the adult sex offender registry in a case involving a developmentally delayed fourteen-year-old boy accused of sexually assaulting his adult sister.⁸⁷ In Louisiana, a particularly public notification scheme was poised for review, but the court did not reach the issue of its constitutionality.⁸⁸ And, in Michigan, a District Court judge struck down several reporting requirements of its registration law as unconstitutional.⁸⁹ The teachings of *Roper* and its progeny coupled with the research on juvenile sex offending were integral to the arguments set forth in these cases.

The next wave of litigation is also likely to challenge registration as applied to youth tried and convicted as adults. In many states, the registration scheme for adult sex offenders is more severe and onerous and more likely to require a listing of registered sex offenders on a public database or require community notification. However, the constitutional mandate that “children are different” for the purposes of sentencing and certain other constitutional considerations is equally relevant to an analysis of registration laws applied to children prosecuted as adults. In a recent case, *State v. Dull*, the Kansas Supreme Court found that the mandatory lifetime post-release supervision for a sex offense committed when the individual was seventeen years old was cruel and unusual punishment under the Kansas and U.S. Constitutions.⁹⁰ In *Dull*, the post-release lifetime supervision was comparable to the registration and reporting requirements set forth in SORNA for a seventeen-

85. *Id.* at 18.

86. *In re C.K.*, No. A-5469-13T4 (N.J. Super. Ct. App. Div. filed July 28, 2014).

87. *In re S.C.*, No. SC95049 (Mo. Nov. 10, 2015), <https://www.courts.mo.gov/file.jsp?id=94053>; see also Tony Rizzo, *Missouri’s Juvenile Sex Offender Registry is Challenged as Unconstitutional* (Sep. 30, 2015), <http://www.kansascity.com/news/local/crime/article37084293.html>.

88. The Louisiana Supreme Court recently reviewed the imposition of a notification scheme requiring registered juveniles to mark their driver’s licenses with “Sex Offender.” The Court ultimately held that the juvenile was not required to register as a sex offender because the statute was improperly applied to him. Therefore, the court did not reach the issue of whether the notification applies to juveniles required by law to register. *In re K.L.A.*, 172 So.3d 601 (La. 2015).

89. *Does v. Snyder*, No. 12-11194, 2015 WL 1497852 (E.D. Mich. May 7, 2015). The Court found, among other things, that the prohibition against living, working, or loitering within one thousand feet of school property was too vague because it did not clearly define loitering or school zones. Similarly, the court struck down the in-person reporting requirements for any change in vehicle phone number and email addresses.

90. *State v. Dull*, 351 P.3d 641 (Kan. 2015).

year-old charged and convicted as an adult for aggravated indecent liberties with a child. The court found that Dull's status as a juvenile was "a relevant characteristic to defining a class of offenders."⁹¹ The court reasoned that Dull had diminished culpability and that the mandatory lifetime post-release supervision was a part of his sentence and undeniably severe.⁹² Although there was no evidence of a national consensus disfavoring lifetime registration schemes for juveniles, the court ruled that the proportionality of the sentence as applied to youth does not serve any legitimate penological goals, especially in light of the documented low rates of recidivism for youth sexual offending.⁹³

IV. CONCLUSION

Although only the supreme courts of Pennsylvania and Ohio to date have found juvenile registration under SORNA unconstitutional, the reasoning of these cases, along with the analysis in *Dull*, provides a blueprint for challenges in other SORNA jurisdictions. The conclusions of the U.S. Supreme Court in *Roper*, *Graham, J.D.B.*, and *Miller* are clear: children's legal status and rights must be informed by age. Collapsing juvenile and adult sentencing into one framework fails for its inability to account for material, age-based differences between children and adults. These differences include the fact that children are developmentally immature, less culpable for their offenses, and far more likely to be rehabilitated. A one-size-fits-all punishment scheme imposes disproportionate penalties on children, violating a core principle of the American justice system. Furthermore, juvenile sex offender registration is especially vulnerable to challenge as it ignores settled research, fails to account for the individual facts and circumstances of each child, and imposes a lifetime stigma unjustified by the child's conduct. As the momentum for reform builds, the punitive mindset of 1995 will hopefully remain in the past.

91. *Id.* at 10.

92. *Id.* at 15.

93. *Id.* at 13–19.