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CONCERNS WITH ADDING JUVENILES TO SEX REGISTRY LISTS

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INTRODUCTION

A national practice since the late 1990s, sex offender registration and community notification for adult offenders has correlated with significant drops in the rates of sex offenses. Nevertheless, there remains significant debate over its actual social benefits. The same cannot be said, however, for juvenile sex offender registration, which is both economically disastrous and causes incredible hardships for children raised on the registry. This is because registration brings with it a number of disabilities both legal (e.g., exclusion from certain jobs, professional licenses or places of residence, and a requirement to carry certain identifications) and practical (e.g., the social stigma of being branded as a sex offender) that can affect the child well into adulthood. In fact, no crimes are averted through the juvenile registration process and the social costs far outweigh any potential benefits.

Such facts notwithstanding, in 40 American states, juveniles who commit sexually-related offenses can be required to register—sometimes for life. This is even more concerning when one considers that recidivism rates among registered juveniles are actually indistinguishable from similarly situated

youth who are not required to register. Among youth sex offenders, recidivism rates range only from three to 4 percent, with over 90 percent of arrests representing a singular event. In fact, arrests for sex offenses accounted for less than 1 percent of all arrests committed by youth aged 17 or younger. Given such an extremely low likelihood of occurrence both for first-time and repeated offenses, to commit juveniles to a potentially life-long registry list fails to rationally address the ultimate problem.

In addition to issues of efficacy, registration is simply unjust. As Nicole Pittman's report for Human Rights Watch has shown, many children are forced to register simply for engaging in consensual sexual behavior with other teenagers. While such behavior may be problematic for many reasons, it is hardly a criminal matter. For example, teenagers caught "sexting" private images of their own bodies may deserve to lose their mobile phones but do not deserve to go to prison for "distribution of child pornography." Likewise, 17-year-olds who have consensual sex with 15-year-olds may need some form of behavior correction, but it is hard to argue that they are guilty of "statutory rape." Indeed, even children that engage in behavior that does warrant criminal or mental health intervention—like forcible groping or touching—should not face lifelong sanctions if the issue is dealt with under the purview of the juvenile justice system.

UNDERMINING THE JUVENILE JUSTICE SYSTEM

In all states, even juveniles who commit far harsher crimes are often tried in the juvenile justice system where looser standards of evidence are balanced by milder, often temporary sanctions. Within these courts, any punishment is generally imposed in the "best interests of the accused" and their continued development toward adulthood, rather than for purely punitive motives. In fact, recent Supreme Court decisions have highlighted and distinguished the unique status of children in society as compared to adults. For example, in *Roper v. Simmons* (2005), Justice Kennedy explains: "From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed." Such a finding is justified, as continued study of the maturation process proves that the brain of an adolescent is not fully developed until well into his or her mid-20s. During this period, juveniles are more susceptible to peer pressure, and they are prone to impulsive acts, poor judgment, and reckless behavior without understanding the consequential realities of their actions. It is, therefore, understood that they are most often the result of transient, even signature qualities of youth, rather than potentially permanent behavioral flaws. It is, in part, for this reason that any sanctions imposed as part of juvenile adjudication rarely last beyond the offender's early 20s, and the associated records are often sealed so as not to be publicly searchable. However, in the case of juvenile

sex offenses, under current laws, many children are automatically subjected to the same system as adult offenders. Whatever harm involuntary groping or mild assault certainly causes, it makes little sense to adjudicate and punish such crimes outside the juvenile justice system, effectively treating them more harshly than, say, murder.

It is also important to note that in more egregious cases where the perpetrator is determined to be specifically incurable and thus would likely be unreceptive to the rehabilitative measures the juvenile system provides, the option still exists to adjudicate such an offender as an adult. For all these reasons, it is important that researched-based methods, as well as more thoughtful uses of the existing mechanisms within the justice system are allowed to dictate how juvenile offenders of all kinds should be handled. Accordingly, if a child is deemed suitable for adjudication and commitment to the juvenile system, all aspects of that determination—both strictly and in spirit—should be adhered to, including the opportunity to rehabilitate and re-enter society as a contributing member without the lifelong hurdles imposed by the sex registry. To do otherwise, hinders the system’s progress, while ultimately harming juveniles and the community at-large.

HARMS TO REGISTRY EFFICACY AND PUBLIC SAFETY

There is significant reason to believe that juvenile sex-offender registration, in fact, makes America *less* safe. In order to be effective, a registry should track only the most dangerous offenders. However, one that fails to distinguish between those with merely a troubled past and true predators can actually be harmful. Consider, for example, the case of Phillip Garrido, the man who held Jaycee Dugard in his backyard for 18 years, raping her repeatedly and fathering several children. Garrido was on a sex-offender registry for molestation and kidnapping. Officials knew he was dangerous, and parole officers and social workers visited his home on several occasions. Yet, because California had more than 83,000 registered sex offenders at the time, the system was too taxed to adequately focus on the most dangerous individuals. Had it not been, Jaycee might have been located and recovered sooner. In light of such failures, the California Sex Offender Management Board recently deemed the influx of sex-offender registrants as, “counterproductive to improving public safety.” The board further argued that “[w]hen everyone is viewed as posing a significant risk, the ability for law enforcement and the community to differentiate between who is truly high risk and more likely to reoffend becomes impossible.” This is particularly true when one considers, for example, that public urination is a registerable offense in 13 states.

Given such obvious and unnecessary stresses on the system, it would be helpful to be able to easily distinguish between the most dangerous offenders and those who pose less threat on a given registry. However, it is difficult to determine exactly how many offenders were added while they were under the age of 18 because registries very rarely note the age at conviction. One study suggests that approximately one-quarter of all sex offenders are juvenile ones. While the number of juveniles on the sex-registry database at any given time is very low, the number of adult registrants who were added as juveniles is higher. This number merely merges with the adult-convicted pool of offenders, which makes distinctions even more difficult to ascertain.

Further, and perhaps even more concerning is the fact that, as a practical matter, many of the burdens of registration apply only once someone has reached adulthood—making them largely irrelevant to juveniles anyway. After all, children are not eligible for professional licenses, they usually are prohibited from full-time employment and they generally lack the legal standing required to sign leases or buy real estate. For these reasons, lumping juveniles onto an adult sex-offender list not only overburdens the system, but largely does so unnecessarily.

Moreover, the collateral consequences from registry laws that juveniles face later, as adults, can significantly compromise their ability to function as productive members of society. This is, of course, because the registry list is a blanket form of punishment that fails to distinguish between different levels of severity. So, a violent offender can potentially face the same oppressive restrictions as a child guilty of sexting or streaking. Consequently, many nonviolent former inmates find themselves without a place to live because of laws that prohibit registered sex offenders from living near playgrounds, schools and most residential areas. Once homeless, these people resort to going “underground” or living “off the grid,” which merely makes it more difficult to keep track of their whereabouts. Such a result is clearly counterintuitive to a registry list that is designed to increase public safety.

VIOLATION OF CONSTITUTIONAL RIGHTS

Challenges regarding the constitutional rights of ex-offenders with respect to the registry’s negative effects have previously been addressed by the Supreme Court. In the most seminal of these cases, *Smith v. Doe* (2003), the question the court considered was whether the registry requirement (and the associated information it makes public) violated the ex post facto clause. At that time, the court ruled that it did not because the registration requirement was not intended to be punitive toward the offender, but rather to protect the public. However, it was subsequently proven that the underlying recidivism data used to inform the court’s determination of public good was flawed.

Accordingly, there is reason to believe that if the Supreme Court were to revisit the issue with newly-introduced, more accurate data, it is possible that registry lists throughout the nation could receive a major overhaul.

In fact, there have already been more recent precedents established in lower courts around the country that appear promising in this regard. For example, in September 2017, recognizing the potentially harmful unintended consequences of registry, a federal judge in Denver ruled that sex-offender registration amounted to cruel and unusual punishment after three plaintiffs filed a civil case that protested the severity of their treatment as a result of being forced onto such a list. The judge deemed the entire registry in Colorado unconstitutional, and specifically stated that public registry lists give fellow citizens the “power to inflict punishments beyond those imposed through the court.”

This suggests that the issue is significant enough to warrant a possible reevaluation by the nation’s highest court and if so, it should follow that children should be specifically protected from exposure to the kind of life-long consequences that are caused by such a flawed and potentially overreaching punishment.

ARGUMENTS AGAINST JUVENILE SEX-OFFENDER REGISTRY REFORM

In view of the foregoing, it is difficult to understand why sweeping reforms to the system are not already underway across the country. Although public officials, concerned citizens and even advocates for victims of sexual assault have begun working to eliminate juvenile sex-offender registration, proponents face a variety of arguments against the proposed reforms, the most common of which are misguided at best, and flat-out wrong, at worst. Accordingly, the remainder of the present study seeks to answer and in some cases, dispel the myths upon which the most commonly repeated objections are based.

“Some juveniles commit crimes that warrant life-long punishments.”

It is indisputable that some juveniles can do awful things. However, as we have previously established, in most cases, their culpability is diminished by inadequate brain development, which continues throughout puberty. That said, 49 states, the District of Columbia and Puerto Rico already have procedures in place to bring adult charges against children who commit the most egregious sexual offenses. If police and prosecutors believe that a child has committed a crime that poses the kind of ongoing danger that would warrant lifelong registration, then it stands to reason that the accused individual would and should be tried in the adult justice system. And, because of the potential gravity of the constitutional

issues described above, the adult court is arguably the more appropriate one in such cases, as it provides a higher standard of procedural protection for the accused.

Further, those that argue that it is never appropriate to try a child in adult criminal court, must also recognize the relatedly problematic nature of support for the kind of life-long punishment that registration presents, particularly for actions that can fall within the range of typical adolescent behavior. After all, if child murderers and violent carjackers should be excluded from the adult system, then certainly child sex offenders should be equally excluded from punishments that are specifically designed for adults.

“There aren’t that many juveniles on the registry in my state, so it is unnecessary to make changes.”

It is true that the number of people currently under 18 who are on sex-offender registries is relatively small. Indeed, many states have fewer than 10 registrants currently under the age of juvenile jurisdiction. However, as previously noted, the number of registrants who were added as juveniles but now are adults is far larger. This is because while there are some cases of younger children being added to registries, most juveniles who are accused of sexual misconduct are already in their mid-to-late teens. Since adjudication can take more than a year and children sent to secure facilities are not actually required to register until after their release, registration often does not occur until they have already reached the age of majority.

Moreover, because registries do not typically keep records as to the victim’s age or that of the offender at the time of the crime, there is no reliable way to ascertain the severity of their crime or the associated necessity for their continued presence on a registry. For example, a person convicted of “production of child pornography” might be a 40-year-old who forced children to perform sex acts. Or, it could be a 17-year-old who exchanged nude selfies with a 15-year-old girlfriend or boyfriend. The first offender deserves a long prison sentence and a spot on the registry, while the second two deserve to have their phone privileges revoked by their parents. Such an unfortunately common scenario merely demonstrates that the absolute number of people who are under 18 and on registries at any point in time is not a reliable indicator of the number of people unnecessarily and counterproductively impacted by registries merely for mistakes they made while they were children.

CONCLUSION

Since their origination within the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act of 1991, sex-offender registry lists have gradually expanded and have resulted in improved public safety. For example,

according to the FBI's Uniform Crime Reporting Program, rape rates have dropped by 30 percent since 1995, and child sex abuse cases fell from 88,000 in 1999 to fewer than 61,000 in 2013.

In light of such success, it would be misguided to suggest full removal of the registry system. However, juveniles who commit often-minor sexual offenses should have at least the same potential to rehabilitate and integrate back into society as their peers who have committed other, more serious offenses do. Further, given that many of the arguments advanced in defense of current registration policies are misguided or simply inaccurate, programs and policies that require children adjudicated as juveniles to register as sex offenders represent bad public policy. Accordingly, there is no reason to delay—the registration of children as sex offenders must end.

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ENDNOTES

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