



# CRUEL AND UNUSUAL

*The Case against Registering Kids as Sex Offenders*

BY NICOLE I. PITTMAN AND RIYA SAHA SHAH

*a*dolescents are unfinished products, works-in-progress toward the adult character they have not yet formed. . . . Predicting what they will become is chancy, speculative, unreliable.

—Brief for the Petitioner,  
*Miller v. Alabama*

America's kids have racked up some big wins in the nation's most august court. The victory lap began in 2005 when the Supreme Court banned the death penalty for juveniles. (*Roper v. Simons*, 543 U.S. 551 (2005).) In 2010, the Court barred mandatory life without parole for juveniles, except those convicted of murder. (*Graham v.*

*Florida*, 560 U.S. 48 (2010).) Two years later, the Court eliminated this exclusion, reasoning that a mandatory sentence of life in prison without the possibility of release violates juveniles' constitutional protections against "cruel and unusual punishment." (*Miller v. Alabama*, 132 S. Ct. 2455 (2012).)

The justices' decisions in these and other cases were based in large part on a body of research that has established important cognitive and other differences between children and adults, especially in the areas of reasoning and impulse control. (*See, e.g., Kayla Pope et al., Developmental Neuroscience and the Courts: How Science Is Influencing the Disposition of Juvenile Offenders*, 51 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 341 (2012).) These studies

provide a sound empirical basis for concluding that juveniles are less blameworthy for their criminal conduct than adults, and thus less deserving of the harshest punishments.

The decisions reflect the commonsense understanding, supported by science, that children are works in progress. In the decision regarding the application of the death penalty, the majority of justices reasoned that "[t]he reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character." (*Roper*, 543 U.S. at 570.) Collectively, these rulings confirm that laws must be calibrated to the reality that children are fundamentally different from adults, not miniature versions of

them.

Although the country has moved forward in understanding children's culpability when it comes to sentencing juvenile offenders, it has moved in the opposite direction in responding to children who have engaged in sexual misconduct. The federal government along with 39 states register these children as sex offenders. Lists perceived as necessary to track dangerous people who preyed on children now include more than 200,000 people whose only offense was committed when they were children, some as young as eight years old. Many of their actions constitute normative or experiential behaviors, such as "playing doctor," streaking, sexting, and teenage romances in which one or both parties are under the legal age of consent. Serious offenses are much less common and not predictive of future behavior.

### LONG-TERM IMPACT ON JUVENILES AND THEIR FAMILIES

Jason was 14 years old and living in a foster home in Richmond, California, when he met his first girlfriend, a 13-year-old neighbor named Tianna. A few months into their relationship, Tianna's mother discovered them engaging in oral sex. It was consensual, but the law in California treats any sexual activity with someone under age 14 as child molestation. Jason was prosecuted in juvenile court, and before he was even old enough to drive, his name and address were added to the California Sex Offender Registry.

Brandon was only 11 years old when he was registered as a sex offender—all because of a silly game among kids home alone. In a twist on musical chairs, Brandon's 13-year-old sister turned off the lights and told everyone to undress and then try to quickly redress before she turned the lights back on. Brandon, always the clown, thought it would be funny if he left his clothes off. When the lights came on, he was standing there naked. Everyone laughed, then he got dressed and they all ate pizza. But when a seven-year-old girl who had taken part in the game told her mother she had seen Brandon's penis, the police got involved and charged Brandon with indecent exposure. He was adjudicated delinquent in a Texas juvenile court, and from then on known as a sex offender.

In states like California and Texas where children like Jason and Brandon are required to register for life—and in states where people's names are published and proliferate online, never to be erased—sex offender registration is a life sentence, served not in prison but on the fringes of society. Even kids who eventually are removed from registries suffer incredibly in the intervening years. A *Human Rights Watch* report based on more than 500 interviews with youth listed on sex offender registries found almost all of them reported severe mental health problems. (*Raised on the Registry: The Irreparable Harm of Placing Children on Sex Offender Registries in the US*, HUM. RTS. WATCH (May 1, 2013), <http://tinyurl.com/qc66yzk>.)

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As a sex offender in the state of Texas, Brandon wasn't then and isn't now allowed to live in a "child safety zone," areas marked by invisible fences that extend thousands of feet around schools, parks, movie theaters, and any place children might gather. Brandon also cannot live with anyone under the age of 14, which meant his own home was off-limits once he was adjudicated delinquent for a sex offense. Too young to incarcerate, the judge placed Brandon with a foster family where he was abused and later ran away. Eventually, he ended up in a juvenile facility where he stayed until he was 17 years old.

Jason is now 34 years old. Despite earning a college degree, he cannot find steady employment, is often homeless, and suffers from acute depression. As a young adult, Brandon also was frequently homeless. Unable to provide a permanent address for the sex offender registry, he was convicted three times for failure to register, and each time sentenced to prison. After his third term in prison, he became increasingly depressed. Unable to find work, he was arrested within a year for theft. Calling Brandon a "career criminal," the judge sentenced him to 15 years to life. Now 31 years old, Brandon has spent the majority of his life behind bars.

It is remarkable that this fate befalls children whose cases are handled by juvenile courts, within a system founded on the ideal of rehabilitation. In theory, juvenile justice is all about second chances—holding children accountable and supporting them in ways that help them grow into responsible, law-abiding adults. Registering kids as sex offenders does just the opposite. Many of these children are themselves victims of abuse or neglect, or have experienced other types of trauma. Instead of addressing their underlying issues and helping them to heal, registration triggers endless shaming and social alienation—the worst possible response to a troubled child.

Laws intended to protect kids essentially robbed Jason and Brandon of their childhood and cast an endless shadow over their future. And their stories are not unusual. The harms, social alienation, and life obstacles they experienced are typical. One in five kids raised on registries attempt suicide at some point in their lives; many succeed.

In situations where the survivor and the person who caused harm are siblings, which they often are, everyone suffers. Entire families have been targets of vigilante violence. A woman who was inappropriately touched by her brother when they were both children later said, "What people don't realize is that a child on the registry is a family on the registry and a victim on the registry."

### FAULTY ASSUMPTIONS ABOUT REGISTRATION'S IMPACT ON RECIDIVISM

While sexual misconduct can cause harm, registries do not remedy the harm done or prevent future harm. Dr. Elizabeth Letourneau, the country's leading expert on the prevention of child sexual abuse, believes firmly that "holding children appropriately accountable for harmful behavior and providing them with evidence-based treatment can reduce their likelihood for future offending. Subjecting them to registration cannot." (Elizabeth J. Letourneau et al., *The Influence of Sex Offender Registration on Juvenile Sexual Recidivism*, 20 CRIM. JUST. POL'Y REV. 136 (2009); see Michael F. Caldwell, *Quantifying*



*the Decline in Juvenile Sexual Recidivism Rates*, 22 PSYCHOL. PUB. POL'Y & L. 414 (2016).)

Her view is even more persuasive in the context of research showing vanishingly low recidivism. A recent meta-analysis of studies found that, regardless of the severity of the sex offense, 97 percent of all youth never reoffend sexually. (Sharon E. Denniston & Michael F. Caldwell, Answering the Call to Study the Effects of Juvenile SORN: Lessons from Two Studies, Paper Presented at the ATSA 34th Annual Research and Treatment Conference (Oct. 15, 2015).)

Yet America spends a fortune tracking low-to-no risk children. An economic analysis by R Street Institute, a conservative think tank in Washington, D.C., shows youth registration costs governments as much as \$3 billion a year, has virtually no economic or societal benefit, and takes a staggering toll on kids and their families and communities. (RICHARD B. BELZER, R STREET INSTITUTE POLICY STUDY NO. 41: THE COSTS AND BENEFITS OF SUBJECTING JUVENILES TO SEX-OFFENDER REGISTRATION AND NOTIFICATION (2015).) This money would be better spent on upstream solutions that actually work—intervening early and effectively when abuse occurs and preventing it in the first place.

## STATES SLOWLY SCALE BACK JUVENILE SEX OFFENDER REGISTRIES

While the Supreme Court has not yet addressed the constitutionality of registering juveniles as sex offenders, laws in several states have been struck down or curtailed by state courts. The Ohio Supreme Court was the first to rule. (*In re C.P.*, 967 N.E.2d 729, 738 (Ohio 2012).) In this 2012 case, the court held that state law regarding juvenile registration violated both Ohio and federal constitutional bans on cruel and unusual punishment. The court reasoned that the law was fundamentally at odds with a juvenile justice system in which “rehabilitation is paramount, confidentiality is elemental, and individualized treatment from judges is essential.” (*Id.* at 746.) It reasoned that the punishments of registration are “automatic, lifelong, and contrary to the rehabilitative goals of the juvenile system,” and therefore the laws “‘shock the sense of justice of the community’ and thus violate Ohio’s prohibition against cruel and unusual punishments.” (*Id.*)

Other states have used a due process analysis to require an individualized hearing prior to imposing sex offender registration on children. (*See N.V. v. State*, No. CA07-972, 2008 WL 588627 (Ark. Ct. App. Mar. 5, 2008); *Doe v. Attorney Gen.*, 715 N.E.2d 37 (Mass. 1999).)

Applying a different line of reasoning, the West Virginia Supreme Court recently held that juvenile adjudications are not equivalent to adult criminal convictions. Therefore, the requirement to register individuals convicted of specific offenses does not apply to youth whose cases are handled in a juvenile court. (*State v. J.E.*, Nos. 16-0667 & 16-0723 (W. Va. Feb. 14, 2017).)

The Pennsylvania Supreme Court has provided the most comprehensive ruling to date, making a range of legal arguments against juvenile registration. (*In re J.B.*, 107 A.3d 1 (Pa. 2014).) Most fundamentally, the court held that juvenile registration violates a child’s right to due process by creating

a faulty but “irrebuttable” presumption that all juvenile sex offenders are dangerous. “[Registration] explicitly declares that sexual offenders, including juvenile offenders ‘pose a high risk of committing additional sexual offenses’ . . . . Moreover, . . . the common view of registered sexual offenders is that they are particularly dangerous and more likely to reoffend than other criminals.” (*Id.* at 16–17.) Citing a body of incontrovertible research demonstrating low recidivism rates, the justices concluded, “many acts of delinquency involve immaturity, impulsivity, and sexual curiosity rather than hardened criminality.” (*Id.* at 19.)

The court also held that registration infringes on children’s constitutionally protected right to reputation and the benefits that flow from it, pointing to evidence that the sex offender label negatively affects their “ability to obtain housing, schooling, and employment, which in turn hinders their ability to rehabilitate.” (*Id.* at 16–17.) And in a nod to the decision by Ohio’s highest court, the Pennsylvania justices emphasized that registration happens automatically, without an individualized hearing or any other opportunity for the judge to exercise discretion in the matter.

As of February 2015, Pennsylvania became the first in the country to prohibit juvenile registration both prospectively and retrospectively. All previously registered youth in Pennsylvania received notice that their names had been removed from the registry.

These state supreme court rulings issued over the past five years, building on prior Supreme Court rulings about appropriate punishment for young people, are evidence of a legal trend in the right direction. The rulings both advance and reflect what can be described as a slow change of heart nationally on the practice of registering children alongside adult sex offenders.

## A CALL FOR CHANGE

People across the political spectrum, including survivors of child sexual abuse and surviving family members, are calling for change. Many of them have joined together to form Just Kids, which is dedicated to ending the practice of registering children as sex offenders. (The Center on Youth Registration Reform, run by author Nicole Pittman, is a founding member of Just Kids.)

Today there are attempts underway in several states to exclude children from sex offender registries, and a parallel effort in Congress to amend the Sex Offender Registration and Notification Act (SORNA). Originally passed in 2006 and better known as the Adam Walsh Act, it created a strong incentive for states to include juveniles on sex offender registries—something that advocates who pushed for this legislation and many of its framers now view as a mistake.

Branding more than 200,000 children as sex offenders has not resulted in safer communities. Quite the opposite: by cluttering registries, it is even harder to monitor truly dangerous adults. Equally important, and as more and more courts are pointing out, the harm to children named on these lists is far more pervasive and severe than anyone imagined.■