

ONLY YOUNG ONCE, BUT A REGISTERED
SEX OFFENDER FOR LIFE:
A CASE FOR REFORMING CALIFORNIA'S JUVENILE
SEX OFFENDER REGISTRATION SYSTEM THROUGH
THE USE OF RISK ASSESSMENTS

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ARCHIE'S STORY

In 2002, when Archie was 15 years old, he met Lauren at a mutual friend's home.¹ When their friends left them alone, they began kissing, and Lauren initiated oral sex.² After she stopped, Archie finished by masturbating, eventually ejaculating on Lauren's chest.³ When they went back into the living room, one friend told the others what had happened and embarrassed Lauren.⁴ Archie then made the situation worse by calling Lauren a name.⁵ Understandably upset, Lauren called her mother and reported the incident.⁶

Because Lauren was only 13 years old, Archie was adjudicated a delinquent for having lewd and lascivious contact with a minor under the age of 14 and for non-forcible oral copulation.⁷ Archie received probation, along with placement in a group home setting.⁸ However, this was not Archie's first run-in with law enforcement, and not long

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¹ In re Archie J., No. A095503, 2002 WL 819595, at *1 (Cal. Ct. App. Apr. 30, 2002).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ In re Archie J., No. A099386, 2003 WL 21329286, at *1 (Cal. Ct. App. June 10, 2003).

after his adjudication, he was picked up again on charges that he had taken a car and been involved in a hit and run.⁹ In response to Archie's repeated delinquent behavior, the juvenile court committed him to the California Youth Authority (CYA).¹⁰

JESSE'S STORY

Jesse became a ward of the juvenile court at age 15 after he pulled the fire alarm at school.¹¹ A developmentally disabled special education student, he had an IQ of 76.¹² He was placed on probation and sent to live with his aunt and uncle.¹³ While there, he put his hand between the legs of his 13-year-old cousin.¹⁴ She reported the incident, and Jesse was charged with lewd and lascivious conduct.¹⁵ Despite the advice of his counsel, Jesse admitted the conduct immediately at the pretrial hearing.¹⁶ Jesse's counsel moved to withdraw the plea based on incompetency, but the court, without first suspending proceedings or conducting a psychological assessment, determined that Jesse had made the plea knowingly and voluntarily.¹⁷

Jesse was placed in a group home, but he quickly incurred several probation violations by running away. Although a psychologist testified that Jesse did not present a significant risk for

⁹ *Id.* at *2.

¹⁰ *Id.* at *1.

¹¹ *In re Jesse R.*, No. E035344, 2005 WL 1532247, at *1 (Cal. Ct. App. June 29, 2005).

¹² *Id.* at *2. Jesse's IQ of 76 signifies borderline intellectual functioning, which is connected with significant difficulties in abstract reasoning. Under the diagnostic guidelines of the DSM-IV, IQs between 71-84 are considered in the borderline range, while an IQ below 70 demonstrates mental retardation. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-IV (2000).

¹³ *In re Jesse R.*, 2005 WL 1532247, at *1.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at *2. The rights of incompetent youth in juvenile proceedings were established in *James H. v. Superior Court*, 143 Cal. Rptr. 398, 401 (Ct. App. 1978). However, there is no statutory guidance in California as to how incompetency proceedings should be conducted for juveniles. See Sue Burrell, Corene Kendrick & Brian Blalock, *Incompetent Youth in California Juvenile Justice*, 19 STAN. L. & POL'Y REV. 198, 213 (2008).

reoffending sexually, the juvenile court placed Jesse at CYA, saying that it was concerned about his habit of running away from placement and that he needed to be in a lock-down facility in order to benefit from treatment.¹⁸

INTRODUCTION

Both Archie and Jesse will have to register publicly as sex offenders for the rest of their lives. This is not because of any risk they currently pose to society, but rather because of an unforgiving, formulaic system that does not take into account the normal sexual experimentation of youth or the particular ability of youth to respond to treatment for inappropriate behaviors. In a juvenile system that is otherwise premised on the possibility of rehabilitation, the California sex offender registration scheme presumes that no youth is capable of change.

Today, sex offender registration requirements in California are based on the youth's adjudicated offense and placement with the Division of Juvenile Justice (DJJ).¹⁹ While this allows for some discretion at the Superior Court level, the registration system explicitly does not take into account the risk of sexual reoffending. This is particularly damaging for juveniles, who are in a state of flux and, the research shows, are particularly amenable to therapy.²⁰ Even among those who do not receive formal treatment, the very low rate of sexual recidivism among juvenile sex offenders suggests that many will simply "grow out" of inappropriate sexual experimentation as they mature.²¹

Instead of basing registration on the static factors of the adjudicated offense and a disposition of DJJ in isolation, the registration system for juveniles should consider whether or not the youth poses a significant risk after going through treatment at DJJ.

¹⁸ *In re Jesse R.*, 2005 WL 1532247, at *4.

¹⁹ The California Youth Authority (CYA) was California's youth prison system. After Archie received his disposition, CYA was renamed the Division of Juvenile Justice (DJJ). This was partly in response to the restructuring called for by the *Farrell v. Cate* litigation, discussed below in Part IV. This Comment uses both CYA and DJJ, based on which term was operative at the relevant time.

²⁰ Margaret A. Alexander, *Sexual Offender Treatment Efficacy Revisited*, 11 *SEXUAL ABUSE: A JOURNAL OF RESEARCH AND TREATMENT* 101, 101-117 (1999).

²¹ FRANKLIN ZIMRING, *AN AMERICAN TRAVESTY: LEGAL RESPONSES TO ADOLESCENT SEXUAL OFFENDING*, 27 (2004).

This change would recognize and respond to the unique developmental stage of juvenile offenders. Perhaps more importantly, this would improve community safety by creating incentives for juveniles to complete a comprehensive sexual behavior treatment program successfully.

Several recent developments make the use of risk assessments feasible and advisable for the juvenile population in California. First, two recent United States Supreme Court cases, *Graham v. Florida* and *Roper v. Simmons*, have called into question the use of lifelong consequences for juvenile offenders.²² Although the cases address lifelong incarceration and the imposition of the death penalty, they rely heavily on behavioral science about the unique developmental stage of juvenile offenders and their corresponding capacity for better impulse control and decision making as they mature. The cases strongly disapprove of lifelong consequences that fail to take this capacity for rehabilitation into account.²³ Subjecting juveniles to lifelong registration as sex offenders, without providing an opportunity for the youths to demonstrate their rehabilitation, would arguably generate similar disapproval.

The second major development is the improvement in the quality of therapeutic sexual behavior treatment that juveniles receive while they are placed in DJJ facilities. As a result of significant juvenile prison reform litigation,²⁴ California entered into a consent decree in 2004 that, among many other major changes, completely revamped the Sexual Behavior Treatment Program (SBTP) at DJJ. While there is still room for improvement, Californians can now be assured that juvenile sex offenders committed to DJJ will be given comprehensive treatment that is tailored to their needs.²⁵

²² *Graham v. Florida*, 130 S. Ct. 2011 (2010) (holding life without the possibility of parole to be unconstitutional under the Eighth Amendment when applied to juvenile non-homicide offenders); *Roper v. Simmons*, 543 U.S. 551 (2005) (holding the death penalty to be unconstitutional under the Eighth Amendment when applied to those who were under age 18 at the time of the homicide).

²³ *Graham*, 130 S. Ct. at 2029 (“To justify life without parole on the assumption that the juvenile offender forever will be a danger to society requires the sentencer to make a judgment that the juvenile is incorrigible. The characteristics of juveniles make that judgment questionable.”).

²⁴ *Farrell v. Cate*, the taxpayer lawsuit that resulted in a complete restructuring of CYA, including the Sexual Behavior Treatment Program, is discussed at more length in Part IV(a).

²⁵ DONNA BRORBY, TWELFTH REPORT OF THE SPECIAL MASTER: FARRELL V. CATE (2009), available at <http://www.prisonlaw.com/pdfs/OSM12rev.pdf> (reviewing

Finally, with the passage of Jessica's Law, California has chosen official tests to gauge the risk of reoffending among both juveniles and adults and mandated their use for all sex offenders soon to be released on parole.²⁶ Jessica's Law envisions the tests being used to identify and further restrict the liberty of parolees who are at a high risk to reoffend, but the assessments have also identified a sizable number of low-risk offenders,²⁷ for whom registration may not serve any purpose. Although there are problems with the assessments currently in use for juveniles, they generally err by overestimating, rather than underestimating, risk.²⁸ The new availability of these assessments and their already mandated application to juvenile offenders enables California to adopt a more tailored approach to identifying community risk, and thereby spare reformed juveniles from a lifelong stigma that is incompatible with the rehabilitative purpose of the juvenile justice system.

In this Comment, I argue that registration of juvenile sex offenders should be based on the risk, if any, that the ward poses to society at the time of his release. My argument does not extend to adult sex offenders. Further, I do not seek to argue that all juveniles who have committed sex offenses will rehabilitate successfully, or that no juvenile should be required to register. Rather, this paper will address why it is in the interests of community safety to have a juvenile sex offender registration system that recognizes the unique developmental needs of juvenile wards and their capacity for change.

In Part I, I will describe the current legal structure for the registration of wards who have committed sex offenses and the degree to which wards may be diverted from registration requirements under the current system. Part II describes the recent Supreme Court jurisprudence on the malleability of young offenders and connects those findings with the rehabilitative purpose of the juvenile justice system in California. Part III summarizes the current research on

DJJ's progress in implementing the Sexual Behavior Treatment Program Remedial Plan that was mandated as part of the stipulated injunction in *Farrell v. Cate*).

²⁶ The Sexual Predator Punishment and Control Act of 2006: Jessica's Law, CAL. PENAL CODE §§ 290.03(b), 290.04.

²⁷ Telephone Interview with Dr. Heather Bowlds, Director, DJJ Sexual Behavior Treatment Program (Oct. 19, 2010).

²⁸ *Id.*; Greg 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: A JOURNAL OF RESEARCH AND TREATMENT 319, 337 (2006).

juveniles who commit sexual offenses, including their very low rate of recidivism. Part IV introduces the comprehensive sex behavior treatment model now in place at DJJ as a result of the *Farrell* litigation.²⁹ Part V discusses how removing the lifelong registration requirement for low risk offenders could improve community safety. Finally, the Comment concludes with a restatement of the proposal, along with its limitations and benefits.

I. THE REGISTRATION SYSTEM FOR JUVENILE SEX OFFENDERS IN CALIFORNIA

A. Statutory Requirements

California Penal Code section 290.008 requires certain juvenile wards to register as sex offenders.³⁰ Not all juveniles who are adjudicated delinquent for sexual offenses must register. Rather, the statute lays out two requirements. First, the youth must have been adjudicated delinquent for one of the sex offenses enumerated in subsection (c) of Penal Code section 290.008. The enumerated juvenile offenses include: rape (section 261); sodomy (section 286); oral copulation (section 288a); lewd and lascivious acts on a child under the age of 14 (section 288); forcible sexual penetration (section 289); aiding and abetting any act of rape or forced penetration (section 264.1); an assault with the intent to commit any of the above listed offenses (section 290.008(c)(1)); or a kidnapping, either with the intent to commit the above listed offenses (sections 207, 209), or to force the victim into prostitution (section 267).³¹

This list of offenses is slightly more limited than the list of offenses that trigger registration for adult offenders. Notably, the list of offenses does not include sexual battery³² or several other misdemeanor offenses.³³ Also, consensual sexual activities with other youths below the age of consent, but over the age of 14, will not trigger the registration requirement.³⁴

²⁹ *Farrell v. Allen*, No. RG 03079344 (Cal. Super. Ct. filed 2004) (now known as *Farrell v. Cate*).

³⁰ CAL. PENAL CODE § 290.008.

³¹ CAL. PENAL CODE § 290.008(c)(1)-(3).

³² *In re Derrick B.*, 139 P.3d 485 (Cal. 2006).

³³ Compare offenses listed in *In re Derrick B.* with those enumerated in Penal Code section 290(c).

³⁴ The age of consent in California is 18. Unlawful sexual intercourse is not included under section 290.008. See also *In re J.P.*, 89 Cal. Rptr. 3d 17, 23 (Ct. App. 2009)

The second statutory requirement for sex offender registration is that the juvenile must have been committed to the California Department of Corrections and Rehabilitation, Division of Juvenile Justice (DJJ) for the enumerated offense.³⁵ Although the California Legislature has recently limited the types of offenses for which juveniles may be committed to DJJ, all offenses that would trigger registration under section 290.008 are still included.³⁶

Juvenile courts have no discretion to order a ward to register as a sex offender if either of these two requirements has not been met.³⁷ However, limitations on the court's discretion operate in both directions. The juvenile court also has no discretion to exempt a minor from the registration system if the two triggering requirements have been met.³⁸ These limitations on discretion have frustrated some commentators.³⁹

B. Opportunities for Diversion Under the Current Statute

Despite the lack of discretion for a juvenile court to reverse a registration that has been triggered, or to order registration for a ward who has not met the statutory requirements, actors within the juvenile justice system retain significant discretion in determining whether or not the two requirements will be triggered at all.

Prosecutors hold some discretion. Because not all sex crimes trigger registration for juveniles, it is not unusual for prosecutors to charge underlying sexual conduct differently depending on whether registration will be sought.⁴⁰ For instance, both Archie and Jesse could have been charged with the lesser offense of sexual battery,

(declining to extend registration to non-forcible oral copulation under an equal protection argument).

³⁵ CAL. PENAL CODE § 290.008(a).

³⁶ CAL. WELF. & INST. CODE § 733(c).

³⁷ See *In re Bernadino S.*, 5 Cal. Rptr. 2d 746 (Ct. App. 1992) (holding that judges may not impose registration absent commitment to the California Youth Authority); *In re Derrick B.*, 139 P.3d 485 (holding that judges may not impose registration for an offense that is not listed under Penal Code section 290 as it applies to juveniles).

³⁸ *In re G.C.*, 68 Cal. Rptr. 3d 523, 526-27 (Ct. App. 2007).

³⁹ Some commentators have argued that the requirement of a DJJ commitment unnecessarily restricts the juvenile judge's discretion, especially in light of the concerns many judges share about the abuses that have occurred in California's youth prison system over the last 15 years. See Christina D. Rule, *A Better Approach to Juvenile Sex Offender Registration in California*, 42 U.S.F. L. Rev. 497, 537 (2007).

⁴⁰ See *In re J.P.*, 89 Cal. Rptr. 3d 17, 23 (Ct. App. 2009).

which would not have triggered registration. Indeed, had their peer victims been a few months older, neither youth could have been charged with lewd and lascivious acts on a child.

Low-risk and first-time offenders are commonly diverted from a commitment to DJJ. Many juvenile court judges prefer to use a DJJ commitment only after other dispositions, such as probation or placement in a group home, have been unsuccessful. Indeed, commitments to DJJ have declined precipitously for all juvenile offenders over the last decade, at least partly in response to reports that DJJ was an inappropriate setting for rehabilitation.⁴¹

Unfortunately, placement in community programs is not necessarily effective for youth who have delinquency issues that are not limited to inappropriate sexual behaviors. The cases of both Archie and Jesse demonstrate this. Despite initial diversions from DJJ, Archie committed subsequent nonsexual offenses and Jesse incurred a series of probation violations for running away from his placement. Although these factors had nothing to do with the boys' risk of reoffending sexually, the juvenile courts felt bound to respond by ordering placement in DJJ, thereby triggering registration.

C. Limitations of Record Sealing

A very small number of youths who are required to register as sex offenders are eligible to have their records sealed. Once a record has been sealed, the requirement of registration is also lifted.⁴² However, record sealing is only available to youths who have not committed one of the offenses listed in Welfare and Institutions Code section 707(b) after the age of 14.⁴³ The only two offenses that could trigger registration, but are not also listed in Section 707(b), are abduction for the purposes of prostitution (Penal Code section 267) and aiding or abetting a sexual assault (Penal Code section 264.1).⁴⁴

Record sealing can be an important recourse for youth who committed a sex offense before the age of 14, but only if they have not

⁴¹ BARRY KRISBERG ET AL., *A NEW ERA IN CALIFORNIA JUVENILE JUSTICE: DOWNSIZING THE STATE YOUTH CORRECTIONS SYSTEM 12-14, 16* (Berkeley Center for Criminal Justice 2010), available at http://www.law.berkeley.edu/files/A_New_Era_10-22-2010.pdf.

⁴² CAL. PENAL CODE § 290.008(e).

⁴³ CAL. WELF. & INST. CODE § 781.

⁴⁴ Compare Penal Code section 290.008(c) with Welfare and Institutions Code section 707(b).

committed a section 707(b) offense since then. For instance, a youth who committed a sex offense when he was 10, and then committed a robbery at 15 for which he was committed to DJJ, will not be eligible to have his record sealed. In practice, the 707(b) exemption makes the likelihood of a juvenile sex offender being able to seal his records exceedingly small.

D. Lifetime Registration Requirement

The result of this registration structure is that wards know at their dispositional hearing whether or not they will be forced to register as sex offenders for the rest of their lives. Once the two requirements of offense and commitment have been met, there is almost no possibility of escaping registration.⁴⁵

II. THE UNIQUE STATUS OF JUVENILES AND THE APPROPRIATENESS OF LIFELONG CONSEQUENCES

The statutory mechanism described above, which makes a lifetime registration requirement dependent on the static factors of offense and disposition, without any consideration for the juvenile's later capacity to rehabilitate, ignores the Supreme Court's recent jurisprudence on the special nature of juvenile offenders.

A. The United States Supreme Court: "Incorrigibility is inconsistent with youth."⁴⁶

The Supreme Court has relied on substantial psychological and neurological evidence to show that juveniles are fundamentally different than adults because they are both less culpable for their crimes and more capable of reforming themselves. These two facts,

⁴⁵ Interestingly, when the California Legislature first expanded its sex offender registration laws to juvenile offenders in 1985, it did not impose lifetime registration. As the amendment sponsor explained, "[T]he premise for maintenance of a separate judicial system for juvenile offenders is that the prospects for rehabilitation are greater. A registration system under which the duty of juveniles to register ends at age 25 will serve the goal of public protection while allowing rehabilitated minors to be free from the stigma of registration." *In re Bernardino S.*, 5 Cal. Rptr. 2d 746, 749 (Ct. App. 1992). These concerns were apparently no longer at the forefront in 1995. At that time, the Legislature amended section 290 to abolish the age limit of 25 and impose a lifetime duty of registration on juvenile offenders. *See People v. Allen*, 90 Cal. Rptr. 2d 662, 663 (Ct. App. 1999).

⁴⁶ *Graham v. Florida*, 130 S. Ct. 2011, 2029 (2010) (quoting *Workman v. Commonwealth*, 429 S.W.2d 374, 378 (Ky.1968)).

taken together, have led the Court to conclude that youths should not be determined irredeemable at the time of sentencing.

In *Roper v. Simmons*, the Court abolished the death penalty for juvenile offenders, largely as a result of psychological differences that diminished juveniles' culpability.⁴⁷ Although the unique nature of youth had been recognized in previous Supreme Court cases, *Roper* represents the Court's first extended use of psychological data to support the lessened culpability of young criminal offenders.⁴⁸

Specifically, the Court found that "adolescents are overrepresented statistically in virtually every category of reckless behavior" and that juveniles "lack the freedom that adults have to extricate themselves from a criminogenic setting."⁴⁹ These factors, taken together with research on the "transitory, less fixed" personalities of juveniles, led the Court to believe that "any conclusion that a juvenile falls among the worst offenders" should be considered suspect.⁵⁰ Instead, the "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."⁵¹

Graham v. Florida was decided five years after *Roper*, and it abolished the use of life without parole sentences for minors who committed non-homicide offenses. In doing so, the case affirmed that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds."⁵² The Court drew from *Roper*, summarizing:

As compared to adults, juveniles have a lack of maturity and an underdeveloped sense of responsibility; they are more vulnerable or susceptible to negative

⁴⁷ *Roper v. Simmons*, 543 U.S. 551 (2005).

⁴⁸ An earlier case considering the use of the death penalty for juveniles, *Thompson v. Oklahoma*, did not need to rely on psychological studies in the main text of the opinion because the fact that juveniles were less culpable for their criminal acts was "too obvious to require extended explanation." 487 U.S. 815, 835 (1988).

⁴⁹ *Roper*, 543 U.S. at 569 (quoting Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 DEVELOPMENTAL REV. 339 (1992); and Laurence Steinberg & Elizabeth Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1014 (2003)).

⁵⁰ *Id.* at 570.

⁵¹ *Id.*

⁵² *Graham v. Florida*, 130 S. Ct. 2011, 2026 (2010).

influences and outside pressures, including peer pressure; and their characters are not as well formed. These salient characteristics mean that “[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.” Accordingly, “juvenile offenders cannot with reliability be classified among the worst offenders.”⁵³

The ability of juveniles to rehabilitate played a significant role in the Supreme Court’s understanding that juveniles could not reliably be found irredeemable at the time of sentencing. The Court found:

Juveniles are more capable of change than are adults, and their actions are less likely to be evidence of “irretrievably depraved character” than are the actions of adults. It remains true that “[f]rom 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.”⁵⁴

B. The Appropriateness of Lifelong Consequences for Youth

Given the lessened culpability of youth and their greater capacity for rehabilitation, the Supreme Court has called into question sentences that promise lifelong punishments without any opportunity for the youth to show that they have reformed.

1. Lifelong Determinations at Sentencing

The Supreme Court has found that youth, even those who have committed heinous crimes, are capable of change. In the context of *Graham*, the Court found that a sentence of life without the possibility of parole was cruel when applied to a juvenile because it “deprives the convict of the most basic liberties without giving hope of restoration.”⁵⁵ The California Supreme Court has also cited the sentence of life without parole as particularly harsh when applied to juveniles because it “stripped [the juvenile] of any opportunity or motive to redeem himself for an act attributable to the rash and

⁵³ *Id.* (citations and quotation marks omitted).

⁵⁴ *Id.* at 2026-27 (citations omitted).

⁵⁵ *Id.* at 2027 (emphasis added).

immature judgment of youth.”⁵⁶ As another court stated, a sentence of life without parole “means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days.”⁵⁷

Rebutting this denial of hope is at the heart of *Graham*, and providing youth with a way to prove themselves rehabilitated is the key to making a life sentence constitutional. The Court found that in order for a juvenile’s life sentence to be constitutional, the State must give defendants “some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.”⁵⁸ While the Court concedes that a juvenile “may turn out to be irredeemable,” the Eighth Amendment forbids States “from making [that] judgment *at the outset*.”⁵⁹

These concerns are equally relevant in the context of sex offender registration. Under the California scheme, a youth who has been adjudicated a sex offender and is sent to DJJ knows, at the time his disposition is announced, that he will be deemed a risk to society and a pariah in his community for the rest of his life. There is no opportunity, under the current scheme, for a youth to show that he has rehabilitated or matured past the point of inappropriate sexual behavior. A disposition that requires registration “alters the offender’s life by a forfeiture that is irrevocable.”⁶⁰

2. *Consequences versus Punishments*

Of course, it goes without saying that comparing a lifelong registration requirement with lifelong imprisonment has limitations. Both *Roper* and *Graham* found that the youth of the offender is important in the consideration of whether or not a punishment is cruel and unusual under the Eighth Amendment of the Constitution. *Roper* abolished the use of the death penalty as punishment for murderers under the age of 18, and *Graham* abolished the use of life without parole sentences for offenders under the age of 18 who did not commit homicide. The youth of the offender has been found dispositive in these contexts.

⁵⁶ *People v. Davis*, 633 P.2d 186, 198 (Cal. 1981).

⁵⁷ *Naovarath v. State*, 779 P.2d 944, 944 (Nev. 1989).

⁵⁸ *Graham*, 130 S. Ct. at 2030.

⁵⁹ *Id.* (emphasis added).

⁶⁰ *Id.* at 2027.

It is less clear whether the age of the offender should control in all situations. The Eighth Amendment, by its terms, is limited to cruel and unusual “punishments.”⁶¹ Sex offender registration, despite its ongoing punitive aspects, has been categorized as a civil consequence of a legitimate regulatory system, rather than as a criminal punishment.⁶² Indeed, sex offender registration has expressly been found constitutional.⁶³ The California Supreme Court found a registration system constitutional in the context of adult offenders, saying that “the Legislature may adopt a rule of general application for this class of offenders, and may guard against the demonstrated long-term risk of reoffense by imposing a permanent obligation on persons convicted of such crimes.”⁶⁴

Although requiring sex offenders to register may not prompt an Eighth Amendment analysis, it is clear that the psychological and neurological factors of youth that were dispositive in *Graham* and *Roper* are equally present for youth who have committed sex offenses. Differences in the ability of juveniles to rehabilitate and the resources available to them to do so also call into serious question whether juvenile offenders present the “demonstrated long-term risk” that the California Supreme Court thought was relevant to adult registration. The fundamental differences between juveniles and adults who commit sex offenses, as discussed in Part III, necessitates a different system.

These differences suggest that while it may not be unconstitutional to require juveniles to submit to lifetime registration, it remains poor policy to refuse to give youth opportunities to prove that they have succeeded in rehabilitating themselves. Despite a national concern that “sexual offenders are different,”⁶⁵ and therefore

⁶¹ U.S. CONST. Amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

⁶² *Smith v. Doe*, 538 U.S. 84, 99 (2003) (holding that any stigma related to a forced registration scheme was incidental and not “an integral part of the objective of the regulatory scheme”).

⁶³ *Id.*

⁶⁴ *In re Alva*, 92 P.3d 311, 325 (Cal. 2004).

⁶⁵ 142 CONG. REC. H4453 (daily ed. May 7, 1996) (statement of Rep. Schumer) (arguing in favor of greater restrictions on sex offenders). *See also* ZIMRING, *supra* note 22, at 27 (arguing that there are “four critical assumptions about sexual offenders that seem to underlie a wide range of recently enacted laws and policies. Together, these assumptions project the image of the sex offender in terms of (1) pathological sexual orientation, (2) sexual specialization, (3) fixed sexual proclivities, and (4) a high level of future sexual dangerousness”).

require community notification and lifelong supervision, there is very little empirical evidence to support that concern for a juvenile population, as discussed below. That lack of empirical evidence reduces the justification for a system that publicly classifies these youth “among the worst” offenders, just as *Graham* warned against.⁶⁶

III. THE EFFECTIVE REHABILITATION OF YOUNG SEXUAL OFFENDERS

In order to accept the validity of a lifelong juvenile sex offender registration scheme, like California’s, one must make several assumptions. First, it requires one to assume that “sexual offending is driven by stable traits that are relatively unaffected by the developmental maturation and changing life circumstances of adolescence.”⁶⁷ Second, it requires the assumption that an adjudication for a sexual offense can be used as a proxy to identify those youth who will pose an ongoing risk. Finally, it requires the belief that statutes mandating public registration of juveniles who have committed sex offenses will reduce the number of completed sex offenses in the future.⁶⁸

Given these required assumptions, it is vital to underline the ability of juvenile sex offenders to rehabilitate effectively. The public perception that all sexual offenders are persistent recidivists for whom treatment cannot succeed⁶⁹ is simply not accurate when applied to juveniles, as discussed below. However, when that belief is combined with a public registration scheme, rehabilitation can actually become

⁶⁶ *Graham v. Florida*, 130 S. Ct. 2011, 2026 (2010).

⁶⁷ Michael Caldwell, *Sexual Offense Adjudication and Sexual Recidivism among Juvenile Offenders*, 19 *SEXUAL ABUSE: A JOURNAL OF RESEARCH AND TREATMENT* 107, 108 (2007).

⁶⁸ *Id.*

⁶⁹ For a comprehensive review of the rhetoric and repeated misperceptions that were relied upon during legislative debates over sex offender registration laws, including the myth of the incurable pedophile, see Elizabeth Garfinkle, Comment, *Coming of Age in America: The Misapplication of Sex-Offender Registration and Community-Notification Laws to Juveniles*, 91 *CAL. L. REV.* 163, 168-77 (2003). The Comment also analyzes the surprising lack of discourse on how notification laws would be applied to juvenile offenders. Rather than discuss juvenile-specific factors for recidivism, most legislatures only regurgitated adult statistics and operated under the assumption that those concerns applied equally to juveniles. According to the author’s analysis, only one state, Alabama, noted the significant differences between juveniles and adults in both their rates of recidivism and their ability to respond to treatment. *Id.* at 182-83.

more difficult than it would otherwise be for young offenders and thereby decrease public safety.⁷⁰

A. Recidivism Among Juveniles with a History of Inappropriate Sexual Behavior

The reality of juvenile sexual recidivism is very different from the myth. Studies consistently show that the rate of sexual reoffending is very low, even among juveniles who have not received treatment.⁷¹ For instance, in the first large scale 10-year follow-up of juvenile male sex offenders, researchers found that the re-arrest rate for sexual offenses was only 4.7% for all offenders.⁷² This statistic held true regardless of the type of treatment the youths received while incarcerated.⁷³

Of particular importance, juvenile sex offenders do not appear more likely to commit sex crimes than their non-sexual offending peers.⁷⁴ One large scale study found that juvenile sex offenders had a re-arrest rate for sexual offenses of 6.6% over a five-year period.⁷⁵ Over the same period, 5.7% of juvenile delinquents with no prior history of sexually abusive behavior were arrested for new sexual offenses.⁷⁶ The difference between the two rates was not statistically significant.⁷⁷ The results suggest sexual offending youth do not present a significantly higher risk for committing new sex offenses in the future than their non-sexual offending delinquent counterparts. The finding that a history of sexual offenses is not predictive of future behavior among juveniles significantly undermines the rationale for

⁷⁰ For a discussion of the assumptions underlying juvenile sex offenders and their treatment, including the implications of those assumptions for long term rehabilitation, see Elizabeth J. Letourneau & Michael H. Miner, *Juvenile Sex Offenders: A Case Against the Legal and Clinical Status Quo*, 17 *SEXUAL ABUSE: A JOURNAL OF RESEARCH AND TREATMENT* 293-312 (2005).

⁷¹ For a comprehensive review of recent studies on juvenile sex offender recidivism and risk factors for recidivism, see Parks & Bard, *supra* note 29.

⁷² Dennis Waite et al., *Juvenile Sex Offender Re-Arrest Rates for Sexual, Violent Nonsexual and Property Crimes: A 10-Year Follow-Up*, 17 *SEXUAL ABUSE: A JOURNAL OF RESEARCH AND TREATMENT* 313, 328 (2005). Similar recidivism rates were found in a review of recent studies, see Parks & Bard, *supra* note 29.

⁷³ Waite et al., *supra* note 73.

⁷⁴ Caldwell, *supra* note 68.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

requiring lifelong community notification for youth who have committed sex offenses.⁷⁸

This trend of very low recidivism among sex offenders holds true for the population of youth who are treated in the Sexual Behavior Treatment Program at the Division of Juvenile Justice. Youth who were committed to DJJ for a sex offense are less likely than any other group of offenders to be recommitted to DJJ.⁷⁹ Youth with lewd and lascivious charges have readmission rates of 36%, compared to readmission rates of more than 56% for DJJ as a whole.⁸⁰ These rates of readmission do not necessarily signify new sexual offenses. Rather, they are a sign that the youth have either committed a new offense of any type, or that they violated the terms of their parole after release.⁸¹ The results are particularly striking given the large number of restrictions, including registration, that are placed on paroling juvenile sex offenders, which only increase the number of possible parole violations that a youth could incur.

B. Explaining the Low Recidivism Rates of Juveniles with Histories of Inappropriate Sexual Behavior

Although low rates of reporting for sexual offenses remains a concern, the low rates of recidivism cannot be explained as simply a result of juveniles learning how to avoid detection for their future offenses. Instead, some juveniles with previous sex offenses are rearrested, but for less serious offenses, like vandalism or theft.⁸² One study found juveniles with sex offense histories who reoffended were ten times more likely to commit a non-sexual offense than a sexual one.⁸³ This fact demonstrates both the lack of specialization of many youth who have committed a sex offense, and the fact that their low recidivism is not the result of any greater criminal sophistication.⁸⁴

⁷⁸ *Id.*

⁷⁹ CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, 2010 JUVENILE JUSTICE OUTCOME EVALUATION REPORT: YOUTH RELEASED FROM THE DIVISION OF JUVENILE JUSTICE IN FISCAL YEAR 2004-05, at 44 (2010), available at http://www.cdcr.ca.gov/Reports_Research/docs/RecidivismReport.FY0405.%20FINAL.DJJ.pdf.

⁸⁰ *Id.* at 46.

⁸¹ *Id.*

⁸² Caldwell, *supra* note 68, at 110.

⁸³ *Id.*

⁸⁴ ZIMRING, *supra* note 22, at 64-66.

Perhaps the best explanation for the low recidivism rates is age itself. Many sex offenses committed by juveniles, though by no means harmless, can be explained by the sexual development of young children, and the early sexual activity of youths below the age of 14.

1. Normal Sexual Play of Young Children

Lewd and lascivious charges have been brought against children as young as ten, but at least some of the behavior those charges target may have been better described as normal sexual play.⁸⁵ There is little contemporary comprehensive research on the prevalence of sexual play among preadolescents, in part due to public distaste for the attribution of sexual identities to children.⁸⁶ However, what little research there is suggests that sexual play is normal and not harmful. In an 18-year longitudinal study of children at UCLA, nearly half of mothers reported that their children had engaged in interactive sexual play before the age of six.⁸⁷ When those children reached adulthood, the researchers tested a wide range of factors to see if the experience of sexual play had had any effect. The sexual play did not appear to have any effect whatsoever on the young adult's development or maturation.⁸⁸ For the younger children adjudicated of sex offenses, the behaviors may represent a natural developmental stage.⁸⁹ For these children, very low recidivism would be expected as they grow out of this developmental stage. Although other states have addressed their

⁸⁵ For an example of juveniles being forced to register for acts that they are alleged to have committed at the age of 10, see *In re Registrant J.G.*, 777 A.2d 891 (N.J. 2001). J.G. was caught lying on top of a younger cousin with his penis exposed, for which he was later required to register as a sex offender. Charges against young children are relatively rare. National data over a period of 1985-2000 showed that only 6.5% of youth facing charges for offenses against persons were under the age of 12. Offenses against persons would include, but would not be limited to, sex offenses. HOWARD E. BARBAREE & WILLIAM L. MARSHALL, *THE JUVENILE SEX OFFENDER* 3 (2006).

⁸⁶ See Paul Okami et al., *Sexual Experiences in Early Childhood: 18-Year Longitudinal Data from the UCLA Family Lifestyles Project*, 34 J. SEX RES. 339 (1997).

⁸⁷ The numbers were significantly higher when masturbation activities were included. *Id.* at 344.

⁸⁸ *Id.* at 345.

⁸⁹ For a discussion of this developmental stage and appropriate ways for parents to address sexual play between children, see THE NATIONAL CHILD TRAUMATIC STRESS NETWORK, *CARING FOR KIDS: SEXUAL DEVELOPMENT AND BEHAVIOR IN CHILDREN—INFORMATION FOR PARENTS AND CAREGIVERS* (2009), available at http://www.nctsn.org/nctsn_assets/pdfs/caring/sexualdevelopmentandbehavior.pdf.

statutes' over-inclusivity of sexual play by restricting sex offender registration to youths over the age of fourteen, California has never established an age requirement.⁹⁰

2. *Youth Whose Behavior with Peers Triggers Age of Consent Violations*

Among slightly older children, the triggering charges can arise from consensual activities caught underneath the legal age limit for child molestation. The legal age at which a youth may consent to sexual activity in California is eighteen, which is significantly higher than the median ages of first sexual intercourse: 16.9 years for boys and 17.3 years for girls.⁹¹ Consensual sex under the age of eighteen, while unlawful, does not trigger any registration requirements under Penal Code section 290.008. However, sexual activity of any kind with a partner under the age of 14 is considered child molestation under Penal Code section 288, and can trigger registration requirements, regardless of whether the sexual activity occurred consensually between peers.

This fact puts youth with a low age of sexual debut at risk for triggering registration requirements. Nationally, the rates of youth who have sexual intercourse for the first time under the age of 14 are quite low; in 2002, only 6 percent of girls and 8 percent of boys had done so.⁹² The numbers are likely to be considerably higher, however, if other sexual activities that could trigger child molestation charges, such as oral sex or genital touching, were taken into account.⁹³ The vast majority of this activity will never be reported or prosecuted. However, certain populations of youth are disproportionately likely to be caught engaging in sexual activities with a partner who is under the

⁹⁰ *In re Registrant J.G.*, 777 A.2d 891, prompted the New Jersey Supreme Court to reform how registration is applied to youths who were under the age of 14 when they committed their triggering offense. California has no such age restrictions on registration.

⁹¹ HENRY J. KAISER FAMILY FOUNDATION, U.S. TEEN SEXUAL ACTIVITY (2005), available at <http://www.kff.org/youthhivstds/upload/U-S-Teen-Sexual-Activity-Fact-Sheet.pdf>.

⁹² *Id.*

⁹³ California Penal Code section 288 makes unlawful any "lewd or lascivious act . . . upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child." As such, it is considerably broader than a restriction on sexual intercourse. This is amply demonstrated by the cases of Archie and Jesse, described above.

legal age for child molestation. This includes youth in low income communities, for whom research has shown that an early sexual debut is more likely,⁹⁴ and youth who are already in the dependency or delinquency systems, due to their placements in group homes and other high-supervision environments with mandatory reporters.⁹⁵

While sexual debut before the age of 14 has been correlated with a variety of undesirable social outcomes, such as a higher risk of contracting sexually transmitted infections,⁹⁶ there does not appear to be any research indicating a correlation between an early sexual debut and a persistent sexual interest in children under the age of 14. Recidivism for youth in this category is likely to be very low as they, and their peer sexual partners, age out of the class of children protected under molestation statutes.⁹⁷

C. Research on the Amenability of Juveniles to Sex Offender Behavior Treatment

Not all of the reduction in offense rates can be explained away by juveniles who have outgrown sexual experimentation or have aged out of age of consent restrictions. Many of the youth caught up in the California registration scheme present with more serious histories of sexual abuse, including the abuse of multiple victims or abuse with the use of force. However, the research suggests that targeted treatment can be highly effective even for the offenders with more serious behavioral concerns. Thomas' story is illustrative.

⁹⁴ Tina Jordahl & Brenda J. Lohman, *A Bioecological Analysis of Risk and Protective Factors Associated with Early Sexual Intercourse of Young Adolescents*, 31 CHILD. & YOUTH SERVS. REV. 1272, 1276 (2009) (finding that among low-income youth in a three-city longitudinal study, approximately 26% had their first experience of sexual intercourse before turning 14 and that, among the sexually experienced sub-group, the average age of sexual debut was only 12.77 years).

⁹⁵ ZIMRING, *supra* note 22, at 54.

⁹⁶ Christine E. Kaestle et al., *Young Age at First Sexual Intercourse and Sexually Transmitted Infections in Adolescents and Young Adults*, 161 AM. J. EPIDEMIOL. 774-80 (2005).

⁹⁷ This highlights a significant difference between the criminal definition of child molestation and the psychiatric understanding of what constitutes pedophilia. While it is not unusual for a 15-year-old boy to be deemed a criminal "child molester" under California's criminal statutes, the DSM-IV-TR does not allow anyone to be diagnosed with pedophilia until they are at least 16 years of age and at least five years older than their victims. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-IV-TR, 302.2 Pedophilia (2000).

*I. Thomas' Story*⁹⁸

Thomas F. was just 14 years old when he confessed to his adoptive father that he had molested both his five-year-old foster brother and his ten-year-old foster sister.⁹⁹ He was adjudicated for one count of non-forcible lewd and lascivious conduct (section 288) and ordered to enter a group home that specialized in the treatment of juvenile sex offenders.¹⁰⁰ While in treatment, Thomas admitted to molesting more than 10 other victims, for which he received an additional adjudication for the continuous sexual abuse of a child (section 288.5).¹⁰¹ Thomas, with nearly 15 victims before he even turned 15, was classified as a high risk to reoffend.¹⁰²

Rather than prove those perceptions correct, Thomas excelled in his treatment program.¹⁰³ He moved steadily through the steps of the program and quickly became a role model for other youth.¹⁰⁴ In one of his six-month reviews, Thomas' probation officer reported to the court:

Thomas continues to fully engage his program He participates in both group and individual therapy on a weekly basis and it is reported that he is working diligently trying changes. Of utmost importance, Thomas over the last several months has internalized what he has learned at [his group home] and has been applying it to his everyday experiences. At this point in his recovery, Thomas has been classified as a low to moderate risk to re-offend sexually. This is a major accomplishment for Thomas considering his history and there is little doubt that he will be able to reduce his risk

⁹⁸ *In re Thomas F.*, No. A126167, 2010 WL 3687513 (Cal. Ct. App. Sept. 22, 2010).

⁹⁹ *Id.* at *1.

¹⁰⁰ Thomas will not have to register as a sex offender because the juvenile court judge sent him to a group home rather than to DJJ. This case is an example of how juveniles who are initially considered dangerous can succeed through diversion, and it serves as a counterpoint to arguments that judges should be able to order registration for juveniles based on their initial risk, regardless of their disposition. See Christina D. Rule, *A Better Approach to Juvenile Sex Offender Registration in California*, 42 U.S.F. L. Rev. 497, 537 (2007).

¹⁰¹ *In re Thomas F.*, 2010 WL 3687513, at *1.

¹⁰² *Id.* at *7.

¹⁰³ *Id.* at *6-7.

¹⁰⁴ *Id.*

to low, prior to being discharged from [his group home].¹⁰⁵

Thomas spent two-and-a-half years of his childhood addressing his sexual behavior in the group home-based treatment program. When he graduated from the program, he was classified as a low risk and was considered an unqualified success.

2. *Research on Amenability to Treatment*

Thomas' success, though laudable, is not particularly unusual. While the research does not single out offenders who were initially at a higher risk to reoffend from the low risk offenders, it does show that the vast majority of youth will not reoffend sexually.¹⁰⁶ Given low recidivism in general, researchers have had some difficulty in pinpointing how much of an effect specialized treatment has on reducing the already low base levels.

However, at least one of the studies that has compared the recidivism rates of juvenile sex offenders who have received treatment with an untreated group shows that treatment can bring significant declines in recidivism rates.¹⁰⁷ The study showed that treated adolescents had sexual recidivism rates of 5.3%, compared to rates of 17.8%¹⁰⁸ for untreated adolescents.¹⁰⁹ This represents a 72% reduction in sexual recidivism for adolescents who completed at least 12 months of treatment when compared to the untreated group of offenders.¹¹⁰

Particularly interesting was the decline in overall recidivism for treated youth. As discussed above, juvenile sex offenders tend to have ongoing delinquency issues, of which sexual misbehavior is only one part. However, participation in treatment was associated with a "41%

¹⁰⁵ *Id.* at *3.

¹⁰⁶ Caldwell, *supra* note 68.

¹⁰⁷ James R. Worling & Tracey Curwen, *Adolescent Sexual Offender Recidivism: Success of Specialized Treatment and Implications for Risk Prediction*, 24 CHILD ABUSE & NEGLECT 965 (2000).

¹⁰⁸ The experimental design of this study may explain the unusually high recidivism rate of untreated juveniles. Although the majority of studies find a recidivism rate around 5% for juvenile sex offenders, most studies are limited to those youth who have been identified by the juvenile justice system and have received treatment, *see* Parks & Bard, *supra* note 29. The group of untreated youth in this study were youth who either refused to participate in treatment, or who dropped out of treatment before completing the required 12 months. The fact that they self-selected out of treatment may indicate a higher than average initial recidivism risk.

¹⁰⁹ Worling & Curwen, *supra* note 108, at 971.

¹¹⁰ *Id.* at 976.

reduction in violent nonsexual recidivism and a 59% reduction in nonviolent reoffending.”¹¹¹ This significant decline in all types of recidivism with treatment echoes the findings of *Roper* and *Graham* that juveniles are particularly amenable to treatment.

IV. THE SEXUAL BEHAVIOR TREATMENT PROGRAMS FOR YOUTH AT CALIFORNIA’S DIVISION OF JUVENILE JUSTICE

Not only can juveniles with serious histories of abuse be rehabilitated, but California has developed and implemented a comprehensive program to ensure that they will.

A. Creating a Comprehensive Sexual Behavior Treatment Program: *Farrell v. Cate*

In 2003, the California Youth Authority was served with a taxpayer lawsuit that claimed CYA had so failed in its mandate, the rehabilitation of its wards, that continuing to fund CYA programs would be a gross misappropriation of taxpayer resources.¹¹² In the suit, *Farrell v. Cate*,¹¹³ the plaintiffs sought injunctive relief to force CYA to reform its facilities, management, and programming.¹¹⁴ In order to determine whether the grievances claimed by the plaintiffs were systemic, the California Attorney General funded extensive fact-finding by court-appointed experts in six areas, including one dedicated to reviewing sex offender treatment.¹¹⁵ The expert who reviewed sex offender treatment found that significant system-wide reform would be needed in order to bring California’s program for juvenile sex offenders in line with national best practices.¹¹⁶

¹¹¹ *Id.*

¹¹² The lawsuit was brought under California Code of Civil Procedure section 526a, which is a unique statute that grants taxpayers standing to challenge state practices where the state’s use of funds constitutes either an illegal expenditure or a waste of taxpayer money.

¹¹³ The defendant in *Farrell* is Matthew Cate, named in his professional capacity as the current director of the California Department of Corrections and Rehabilitation. Because the CDCR Directorship has turned over several times since *Farrell* was filed, the name of the suit has changed several times as well.

¹¹⁴ KRISBERG ET AL., *supra* note 42.

¹¹⁵ *Id.*

¹¹⁶ See JERRY THOMAS, EVALUATION OF SEX OFFENDER PROGRAMS: THE CALIFORNIA YOUTH AUTHORITY (2003), available at <http://www.prisonlaw.com/pdfs/CYA4.pdf>.

In light of the experts' damning reports in all six substantive areas,¹¹⁷ CYA entered into a stipulated injunction in 2004 that required the creation of remedial plans to fix the issues present in each area of concern.¹¹⁸ The Sexual Behavior Treatment Program Remedial Plan that resulted was comprehensive in its scope and impressive in its ambition,¹¹⁹ and has since been revised to allow for continued improvement in the program.¹²⁰ Although there is still work to be done, juveniles with sex offenses in their history are now offered comprehensive treatment that is tailored to their individual needs.¹²¹

B. Overview of the Services Now Available to Juveniles in DJJ with Sex Offense Histories

The Sexual Behavior Treatment Program (SBTP) at DJJ uses a “collaborative treatment approach between youth and staff to develop objective Individual Treatment Plans [ITPs] targeting dynamic risk factors” that research has shown may contribute to future sexual offending behavior.¹²² The individualized treatment plans are central to the success of the SBTP.¹²³ Youth are evaluated when they first enter DJJ, given an ITP, and then assigned to participate in any or all of the three standardized treatment levels that comprise the SBTP. The three treatment levels are the residential, outpatient, and healthy

¹¹⁷ The six areas addressed by the court-appointed experts, and later by remedial plans, were: General Corrections (Safety and Welfare), Mental Health and Substance Abuse Treatment, Health Care, Education, Sex Offender Treatment, and Disability Access.

¹¹⁸ *Farrell v. Allen*, No. RG 03079344 (Cal. Super. Ct. Nov. 19, 2004) (Consent Decree), available at <http://www.prisonlaw.com/pdfs/farrellcd2.pdf>.

¹¹⁹ Remedial Plan: Sexual Behavior Treatment Program, *Farrell v. Allen*, No. RG 03079344 (Cal. Super. Ct. filed May 16, 2005), available at <http://www.prisonlaw.com/pdfs/DJJSexPlan.pdf>.

¹²⁰ With the consent of both parties and the court-appointed expert, a revised version of the remedial plan was released in April 2010. CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, DIVISION OF JUVENILE JUSTICE, SEXUAL BEHAVIOR TREATMENT PROGRAM REMEDIAL PLAN (2010), available at http://www.cdcr.ca.gov/Juvenile_Justice/docs/SexOffenderPlan.pdf [hereinafter REVISED SBTP REMEDIAL PLAN].

¹²¹ See DONNA BROBRY, TWELFTH REPORT OF SPECIAL MASTER (2009), available at <http://www.prisonlaw.com/pdfs/OSM12rev.pdf>.

¹²² REVISED SBTP REMEDIAL PLAN, *supra* note 121, at 4.

¹²³ Interview with Dr. Heather Bowlds, *supra* note 28.

sexuality programs.¹²⁴ Although the three levels vary in terms of intensity and the needs of their targeted audience, each of the programs includes psychosexual education, individual therapy, group therapy, family integration, educational services, mental health services where appropriate, and recreational activities.¹²⁵

All of the program components are designed to address the dynamic factors that have been correlated with a higher risk of inappropriate sexual behavior in the future, including interpersonal functioning skills, contributory attitudes, sexual deviance, self-control, and avoiding peer pressure.¹²⁶ Although there is still comparatively little research on juvenile sex offender treatment, the comprehensive structure of SBTP's approach to addressing dynamic factors is in line with the national consensus on best practices in the field of juvenile sex offender treatment.¹²⁷ While there is room for improvement in standardizing the SBTP delivery system,¹²⁸ the revised remedial plan promises to provide youth with evidence-based treatment that effectively addresses their individual level of need within a continuum of care.¹²⁹

C. The Existing Use and Effectiveness of Risk Assessments at DJJ

Risk assessments play an important role in the Sexual Behavior Treatment Program. Each youth is assessed on entry into DJJ so that the youth can be placed in an appropriate level of treatment. Additionally, the J-SOAP-II, a risk assessment that has a dynamic scale, is used to assess the youths' progress in treatment periodically. DJJ is also required to perform a final assessment when the youth is

¹²⁴ *Id.*

¹²⁵ REVISED SBTP REMEDIAL PLAN, *supra* note 121, at 4.

¹²⁶ *Id.*

¹²⁷ Worling & Curwen, *supra* note 108, at 966 (describing a national consensus on treatment objectives, which include: "increasing offender accountability; assisting offender to understand and interrupt the thoughts, feelings and behaviors that maintain sexual offending; reducing deviant sexual arousal, if present; improving family relationships; enhancing victim empathy; improving social skills; developing healthy attitudes towards sex and relationships; and reducing the offenders' personal trauma, if present").

¹²⁸ BARBARA SCHWARTZ, SEX BEHAVIOR TREATMENT PROGRAM—AUDIT 4 (2009), available at <http://www.prisonlaw.com/pdfs/OSM12.AppA.pdf>.

¹²⁹ REVISED SBTP REMEDIAL PLAN, *supra* note 121.

about to parole, in order to determine the level of parole supervision that will be required for the youth under Jessica's Law.¹³⁰

Under a lesser known portion of Jessica's Law, California established a committee in 2007 to designate official risk assessment tools for both juveniles and adults.¹³¹ After consideration, the committee designated the STATIC-99 as the assessment tool for adults and the JSORRAT-II as the official assessment tool for juveniles.¹³² DJJ uses the STATIC-99 for wards over the age of 18 and JSORRAT-II for wards below age 18. Although unofficial, the J-SOAP-II assessment is also used because it allows for assessment of dynamic factors and progress in treatment, whereas the two official tests are static in nature.¹³³

All three of the assessments provide a prediction of actuarial risk, addressing whether the individual possesses characteristics that are associated with higher rates of recidivism, rather than a prediction that the individual actually will reoffend.¹³⁴ As such, they regularly overestimate the risk actually posed by an individual.¹³⁵ However, to the extent that the assessments are based on objective characteristics, they are often less exaggerated and can be more reliable than assessments based on clinical judgment alone.¹³⁶

¹³⁰ Interview with Dr. Heather Bowlds, *supra* note 28.

¹³¹ CAL. PENAL CODE § 290.04.

¹³² Division of Adult Parole Operations, *State Authorized Risk Assessment Tool for Sex Offenders (SARATSO) Committee*, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, http://www.cdcr.ca.gov/Parole/SARATSO_Committee/SARATSO.html#whatsnew (last visited Dec. 17, 2010).

¹³³ The Chelsea King Child Predator Prevention Act of 2010 (Chelsea's Law) calls for the designation of an official sexual offender risk assessment tool that recognizes dynamic factors in addition to static ones.

¹³⁴ For a review of the problems inherent in basing criminal justice decisions on actuarial risk, see BERNARD HARCOURT, *AGAINST PREDICTION: PROFILING, PUNISHING AND POLICING IN AN ACTUARIAL AGE* (2007); and CHRISTOPHER BAIRD, NATIONAL CENTER ON CRIME AND DELINQUENCY, *A QUESTION OF EVIDENCE: A CRITIQUE OF RISK ASSESSMENT MODELS USED IN THE JUSTICE SYSTEM* (2009).

¹³⁵ Parks & Bard, *supra* note 29, at 337-38.

¹³⁶ *Id.*

V. INFLEXIBLE REGISTRATION REQUIREMENTS DO NOT MEET THE NEEDS OF YOUTH OR OUR COMMUNITIES

California first expanded its sex offender registration scheme to juveniles in 1986 and amended the registration laws to create a lifelong requirement in 1995.¹³⁷ At that time, the public's focus was just beginning to shift towards juvenile offenders, but most people, even those working in the field of sex offender treatment, assumed that juveniles would mimic the common traits of adult offenders.¹³⁸

Today, many of those assumptions have been refuted. Many normal adolescent behaviors are criminalized by the registration scheme, subjecting some developmentally-appropriate juveniles to lifelong public scrutiny. Even among juveniles with more serious inappropriate behaviors, the research indicates that they are very unlikely to commit future offenses.

Additionally, all California youths who will be forced to register have completed sexual behavior therapy during their commitment to DJJ, further lowering the likelihood that they will pose any future risk. Even as the low risk posed by juvenile sex offenders has become an accepted fact among researchers and many clinical practitioners,¹³⁹ California continues to pass laws that further restrict the ability of juveniles with past sexual offenses to live productive lives.¹⁴⁰ Given the relative absence of empirical data to support a

¹³⁷ See *supra* note 46.

¹³⁸ Parks & Bard, *supra* note 29, at 338 (finding that “adolescent sex offenders are often categorized with adult sex offenders in spite of their unique developmental differences and low base rates of recidivism”).

¹³⁹ NATIONAL CENTER ON SEXUAL BEHAVIOR OF YOUTH, WHAT RESEARCH SHOWS ABOUT ADOLESCENT SEX OFFENDERS (2003), *available at* <http://ncsby.org/What%20Research%20Shows%20About%20Adolescent%20Sex%20Offenders%20060404.pdf> (cautioning that treatment staff tend to overestimate risk and advising that in “predicting risk to the community, it is usually appropriate to assume that an adolescent sex offender is relatively low risk unless there is significant evidence to suggest otherwise”).

¹⁴⁰ Although there has been a recent wave of legislation concerning sex offenders, none of the recent legislation has employed a differentiated response for juvenile offenders. See The Sexual Predator Punishment and Control Act of 2006: Jessica's Law (establishing residency requirements for sex offenders and lifetime GPS monitoring for high risk offenders); Chelsea's Law, *supra* note 134 (extending sentences for most sex offenses, establishing a “one strike” rule for certain sex offenses, forbidding sex offenders from entering school grounds for any purpose without written permission, and mandating the publication of risk assessment scores on the Megan's Law website); and Letourneau & Miner, *supra* note 71 (describing

significant ongoing risk posed by juvenile sex offenders, the registration requirements serve little preventative purpose and may actually put California communities at risk by decreasing the ability and motivation of juveniles to adjust appropriately.

Registration creates an impediment to the effective rehabilitation of juveniles who have committed sex offenses in two ways. First, the registration requirement carries social stigma that can prevent the juvenile from developing age-appropriate social skills. Second, the knowledge that nothing can be done to avoid registration reduces youths' incentives to participate actively and benefit from treatment.

Poor social skills are common among juvenile offenders. According to the Association for the Treatment of Sexual Abusers, "[P]oor social competency skills and deficits in self-esteem can best explain sexual deviance in juveniles, rather than the paraphilic interests and psychopathic characteristics that are more common in adult offenders."¹⁴¹ This suggests that the community would be served by programs that increase the social skills and self-esteem of young offenders; indeed, that is one of the dynamic factors targeted by the SBTP. However, the lifelong stigma associated with public registration is likely to counteract any gains in social skills or self-esteem made in treatment. Instead, requiring youth to register publicly may actually increase the likelihood of recidivism by ostracizing the youth from positive developmentally-appropriate experiences, such as the building of lasting relationships that are considered a protective factor against reoffending.¹⁴² As one researcher put it, "A punitive approach to juvenile sex offender treatment, [which is] often accompanied by public humiliation, may only serve to alienate such

how the legal reactions to juvenile sex offenders have not kept pace with an evolving clinical understanding of juvenile sex offenses).

¹⁴¹ Mark Chaffin & Barbara Bonner, "Don't Shoot, We're Your Children": Have We Gone Too Far in Our Response to Adolescent Sexual Abusers and Children with Sexual Behavior Problems?, 3 CHILD MALTREATMENT 314, 316 (1998) (quoting ASS'N FOR THE TREATMENT OF SEXUAL ABUSERS, POSITION ON THE EFFECTIVE LEGAL MANAGEMENT OF JUVENILE SEXUAL OFFENDERS (1997)).

¹⁴² Interview with Dr. Heather Bowlds, *supra* note 28. On the Static 99 Risk Assessment, men who have cohabited with an intimate partner are considered lower risk than those who have not. This is problematic for youth who have matured within DJJ, because they can be assigned a higher level of risk based on a social experience that was not available to them while detained.

adolescents further and hinder the normal social development that might otherwise contribute to the prevention of additional victims.”¹⁴³

Under the current system, youths are faced with many sticks, but no carrots. Once they receive a disposition of commitment to DJJ, they know that they must register as sex offenders for the rest of their lives. Once committed to DJJ, youth may be punished for not participating in the program by extended sentences.¹⁴⁴ In extreme cases, the state may petition for a recommitment based on the danger a youth still presents to the community.¹⁴⁵ While youths may be punished for a failure to participate in the treatment programs, there are no long-term rewards for participating actively in the sexual behavior treatment program. The incentive structure, therefore, creates a mediocre participant.

This incentive structure is problematic because many of SBTP’s components, such as trigger recognition, empathy building, and family therapy, require active participation from the youth in order to be successful. Providing youth with a carrot, the opportunity to prove to their community that they do not pose a significant risk and the chance to be relieved of the requirement of lifetime registration, is likely to prove a powerful motivating force for youth at DJJ. By providing a carrot to increase meaningful participation in the treatment programs, even among those youth who do not, in fact, end up being relieved of lifetime registration, communities can be made substantially safer.

VI. A NEW MODEL: REQUIRING REGISTRATION BASED ON RISK

A. What This Model Would *Not* Do

The model proposed by this Comment is fairly modest. Although the very low sexual recidivism rate of juveniles calls into serious question the efficacy of mass registration, this Comment does not call for an abolition of lifelong registration requirements for

¹⁴³ Parks & Bard, *supra* note 29, at 337.

¹⁴⁴ California already has the longest average length of incarceration in youth prisons in the country, 25.9 months, compared to a national average of 9.4 months.

CHRISTOPHER MURRAY ET AL., CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, SAFETY AND WELFARE PLAN: IMPLEMENTING REFORM IN CALIFORNIA (2006), available at <http://www.prisonlaw.com/pdfs/DJJSafetyPlan.pdf>.

¹⁴⁵ CAL. WELF. & INST. CODE § 1800.

juveniles, although others have suggested it.¹⁴⁶ There are a small minority of offenders whose inappropriate sexual behavior may continue into adulthood, and for whom registration is not only rational, but also desirable.

A proposal for the abolition of juvenile registration is also doomed politically, at least in the short term. It is highly unlikely that there is political will in California to reduce the restrictions on sex offenders, even when those offenders are juveniles. Political will can only exist if public opinion towards juvenile sex offenders changes significantly. The group that may have the greatest effect on public opinion is the psychological community. As mentioned above, there has been wider recognition among researchers and clinicians of the roles that they may play in ensuring that juveniles are treated appropriately. One psychologist has issued a call to arms of sorts:

The ethical obligation of psychologists to avoid harm to clients requires an objective evaluation of risk and an approach to treatment that is independent of public opinion, political environment, or personal bias. Such an obligation includes advocacy for fair and humane treatment of adolescents in the juvenile justice system and the promotion of accurate information regarding the long-term prognosis of adolescents who have sexually offended. Such advocacy contributes to the potential for change in public perception, whereby the human dignity of adolescents who sexually offend is valued and the social expectation that they will mature into productive adults can be cultivated without compromising accountability for their actions or quality rehabilitative treatment.¹⁴⁷

The growing consensus among clinicians that juveniles with sex offense histories present a low risk to the community, taken together with the clinicians' public discussion of that consensus, suggests that the public's perceptions of juvenile sex offenders may

¹⁴⁶ For a legal perspective, see ZIMRING, *supra* note 22, at 152-55. For a clinical perspective, see Letourneau & Miner, *supra* note 71, at 307 (“[N]or should the presence of a sexual offense cause a youth to be pulled out from his or her natural ecology, sometimes for years at a time, and permanently labeled as a sex offender.”); Parks & Bard, *supra* note 29, at 337 (“[A]dolescents should not be subjected to lifelong registration without the opportunity for registry expiration in the absence of reoffense.”).

¹⁴⁷ Parks & Bard, *supra* note 29, at 339 (citation omitted).

change in the future. However, until there is greater public understanding of the limitations of sex offender registration when applied to juveniles, this proposal is aimed at limiting the stigmatic damage of registration for those select youth who have demonstrated, through accepted risk assessments, the fact that they no longer pose a risk to their community.

B. The Proposed Model

This Comment proposes a registration model that recognizes juveniles' greater capacity for rehabilitation and provides them with an opportunity to demonstrate that they have, in fact, rehabilitated and no longer pose a significant risk to our community. This proposal would both reduce harm to low risk offenders and recognize the salient characteristics of youth as identified by the Supreme Court in *Graham*: their lower culpability and their proven capacity for rehabilitation. Recognition of these salient characteristics, both of which have significant empirical support in the context of juvenile sex offenders, does not require an abolition of registration. But it does require offering youth opportunities to prove that they have rehabilitated.

The proposed model would retain the two determinative factors of our current system. In order to trigger registration, youth would have to be adjudicated for one of the offenses listed under Penal Code section 290.008, and they would have to receive a disposition to the Division of Juvenile Justice for that offense. However, this Comment proposes an escape mechanism from registration for youth who have benefitted from treatment and are classified, at the time that they are about to parole from DJJ, as a low risk to reoffend.

The risk classification would be made using California's approved assessments for juvenile and adult sex offenders. As discussed above, the existing assessments test static factors, but the new assessments under Chelsea's Law will include dynamic risk assessment and, presumably, offer both increased validity and a greater opportunity for the youth to prove that he has changed.

The timing of the proposed testing for risk, just before the youth paroles into the community, is important. This would give the youth ample time to benefit from treatment and would be a more accurate gauge of the long term risk, if any, that the youth poses. This would be in line with the considerations laid out in *Graham* for lifetime consequences. The youth would be given a "meaningful opportunity" to prove that he should not require lifetime registration "based on demonstrated maturity and rehabilitation," rather than

having his fate determined “at the outset,” just as *Graham* advised against.¹⁴⁸ This delayed and objective measure of risk is particularly important for juveniles with sex offense histories, because the public perception of their danger so greatly outstrips their actual risk of recidivism.

Conclusion

This proposal offers a partial solution to the larger problem of how society can properly balance punishment and safety with the rehabilitative mission of the juvenile justice system. This Comment suggests that a *Graham*-based model, which understands youth’s capacity for reform and encourages them to demonstrate it, should be included in a rehabilitative system. Subjecting youth to lifelong registration as sex offenders, without first offering them an opportunity to prove that they do not pose a risk, goes against the mission of the California juvenile justice system to provide rehabilitation. Worse, it is a consequence based on public fear and unfounded misconceptions rather than the actual danger, if any, posed by the youth. As California reforms its juvenile justice system in response to *Farrell*, it should take this opportunity to question the wisdom of a registration scheme that imposes lifelong consequences on youth without the opportunities for reform that *Graham* suggests are necessary.

¹⁴⁸ *Graham v. Florida*, 130 S. Ct. 2011, 2030 (2010).

