

STUDENT WORKS

CLASSIFYING JUVENILES “AMONG THE WORST OFFENDERS”:* UTILIZING *ROPER v. SIMMONS* TO CHALLENGE REGISTRATION AND NOTIFICATION REQUIREMENTS FOR ADOLESCENT SEX OFFENDERS

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Johnnie is a registered sex offender. When he was eleven he touched his four-year-old half-sister’s vagina (over her underwear). A few months later, she performed oral sex on him at his request. Johnnie’s mother found out. She called the police and Johnnie spent sixteen months in a residential juvenile sex offender program, where he successfully completed treatment. When he was released, Johnnie’s mother wanted nothing to do with him, so he ended up living with his grandmother. Two months after he started at a new middle school, someone found Johnnie on the state’s Internet sex offender registry. Two days later, Johnnie walked into oncoming traffic and told a police officer he wanted to die. He transferred to an alternative school for juvenile delinquents. Even there, the harassment continued. Some of the other boys confronted Johnnie on the school bus, calling him a sex offender and yelling: “You tried to rape your sister!” As a result of anger and depression, Johnnie has twice been admitted to psychiatric hospitals. Not only is Johnnie suicidal, but

* Used throughout, this phrase is attributed to Justice Kennedy who delivered the majority opinion in *Roper v. Simmons*, in which the United States Supreme Court held that juveniles “cannot with reliability be classified among the worst offenders” for whom capital punishment is reserved. *Roper v. Simmons*, 543 U.S. 551, 569, 578 (2005).

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when he transferred to yet another school and the harassment continued, he told a counselor that he wanted to kill another student for taunting him. Johnnie knows what he did to his sister was wrong and continues to feel guilty about it. Johnnie has never committed another sex offense. Nevertheless, his name, photo, address, and school information continue to appear on the Internet registry, where they will likely remain for the rest of his life.¹

I. INTRODUCTION

For more than one hundred years, juvenile offenders have filtered through a special justice system designed to account for their youth and recognize their potential and need for rehabilitation.² By allowing for delinquency adjudications instead of criminal records, this system focuses on rehabilitation not punishment.³ Furthermore, this system has traditionally recognized the importance of confidentiality in juvenile proceedings.⁴ Court proceedings were historically closed to the public and juvenile records remained sealed.⁵ Recently enacted federal sex offender legislation, the Adam Walsh Child Protection and Safety Act of 2006 (Adam Walsh Act)⁶ and its Sex Offender Registration and Notifi-

1. Maggie Jones, *How Can You Distinguish a Budding Pedophile from a Kid With Real Boundary Problems?*, N.Y. Times Mag. (July 22, 2007) (available at http://www.nytimes.com/2007/07/22/magazine/22juvenile-t.html?_r=1). "Johnnie" is a pseudonym for the Delaware teenager interviewed by Jones. *Id.* Because of his anonymity, it is impossible to determine his actual status on the sex offender registry; his story is nevertheless presented as an example of the circumstances surrounding juvenile sex offense adjudications.

2. Laurence Steinberg & Robert G. Schwartz, *Developmental Psychology Goes to Court*, in *Youth on Trial: A Developmental Perspective on Juvenile Justice* 9, 9 (Thomas Grisso & Robert G. Schwartz eds., U. Chi. Press 2000).

3. *Id.*

4. *Id.* at 14.

5. *Id.*

6. 42 U.S.C. §§ 16901–16991 (2006). On July 27, 1981, six-year-old Adam Walsh was abducted from a shopping center in Hollywood, Florida. America's Most Wanted, *The Story of Adam Walsh*, <http://www.amw.com/fugitives/case.cfm?id=39789> (accessed May 18, 2010). Adam's severed head was found two weeks later, but the search for Adam's killer continued until December 2008 when the Hollywood police department officially closed his case and announced that longtime suspect Ottis Toole was responsible for Adam's abduction and murder. *Id.* The Adam Walsh Act was signed into law by President George W. Bush on the twenty-fifth anniversary of Adam's disappearance, July 27, 2006. 42 U.S.C. § 16901.

cation Act (SORNA),⁷ steer juvenile courts away from rehabilitation and confidentiality toward more punitive and public proceedings. These laws ignore the distinct differences between juvenile and adult sex offenders and create a juvenile justice system that fails to rehabilitate, disregards confidentiality, and greatly enhances the risk that adolescent offenders will become adult criminals. Juvenile-justice advocates need a solid basis upon which to challenge these laws, to promote a juvenile court system that once again seeks to rehabilitate—not incriminate—adolescent offenders. The United States Supreme Court recently provided such a basis with its landmark decision in *Roper v. Simmons*.⁸

SORNA creates wide-ranging minimum standards that seek to strengthen the nation’s sex offender registration and notification programs.⁹ Essentially, it broadens registration requirements to include an expanded group of sex offenses and sex offenders, lengthens the duration of registration, and increases the amount of information available on public sex offender registries.¹⁰ Sex offenders must now register in every jurisdiction where they live, work, or attend school, and they must periodically appear in-person to verify and update their registration information.¹¹ Most significantly, SORNA applies to juvenile adjudications.¹² Adolescents age fourteen and older who engage in specified sex offenses must now be listed on community-notification Web sites alongside adult sex offenders and convicted pedophiles.¹³

Despite the well-established rehabilitative goals of juvenile courts, SORNA categorizes adolescent sex offenders among the

7. SORNA is Subchapter I of the Adam Walsh Act, 42 U.S.C. §§ 16901–16991.

8. 543 U.S. 551 (2005) (invalidating the juvenile death penalty as applied to any crime committed under the age of eighteen).

9. U.S. Dept. Just., Off. Just. Programs, *Frequently Asked Questions: The Sex Offender Registration and Notification Act (SORNA) Final Guidelines* 4, http://www.ojp.gov/smart/pdfs/faq_sorna_guidelines.pdf (July 2008) [hereinafter *SORNA FAQ*].

10. *Id.* SORNA applies registration requirements to federally recognized Indian tribes, in addition to all fifty states, the District of Columbia, and United States territories. *Id.*

11. *Id.*

12. 42 U.S.C. § 16911(8).

13. Specifically, SORNA applies to juvenile adjudications for sex offenses involving any degree of penetration, genital, anal, oral-genital, or oral-anal contact, which are “comparable to or more severe than aggravated sexual abuse.” *See id.* (explaining that juvenile adjudications are covered by SORNA if the offender is fourteen or older and the offense is “comparable to or more severe than aggravated sexual abuse” as defined by federal law); 18 U.S.C. § 2241 (2006) (defining aggravated sexual abuse); *see also infra* pt. II(B) (providing a full explanation of how SORNA applies to juvenile adjudications).

worst sex offenders and subjects them to the strictest registration requirements.¹⁴ Perhaps most shocking, juveniles are required to remain on publicly accessible sex offender Web sites for the rest of their lives.¹⁵ By classifying adolescents among the worst offenders, SORNA undermines the goals of the juvenile justice system. While its deleterious effects on the lives of juvenile offenders may not become apparent for several years, the Adam Walsh Act is ripe for challenge. The United States Supreme Court recognizes that juveniles cannot be classified among the worst offenders; this jurisprudence can and should be utilized to invalidate SORNA as it applies to juveniles.

In the landmark case *Roper v. Simmons*, the United States Supreme Court recognized distinct differences between juvenile and adult offenders and used these differences to support its conclusion that juveniles of any age cannot be subject to capital punishment.¹⁶ Furthermore, the Court found the traditional justifications behind capital punishment—retribution and deterrence—inapplicable to juvenile executions.¹⁷ The *Roper* Court's reasoning can and should be applied to other areas of criminal law—namely sex offender registry laws—that, like death penalty statutes, fail to differentiate between adult and juvenile offenders. Clear judicial recognition of inherent differences between adults and juveniles can lead to legislative reform and result in a more workable juvenile justice system that will continue to support rehabilitation of the nation's youngest offenders. This Article will demonstrate how the *Roper* Court's reasoning can be used to challenge sex offender registration and community-notification laws as they apply to juvenile offenders.

Part II of this Article provides a brief history of federal sex offender registration and notification laws, explains the key provisions of the Adam Walsh Act and SORNA, and identifies the problems of applying these laws to juveniles. Part III examines the *Roper* decision in depth and outlines the precedent supporting the

14. See *infra* pt. II(B) (explaining SORNA's implications for juvenile offenders).

15. 42 U.S.C. §§ 16911(4), 16911(8), 16915(a)(3). Sex offender status can impede employment, education, and personal relationships. Jones, *supra* n. 1. Psychologists suggest that being ostracized and labeled a sex offender so early in life will lead to adult criminal behavior. *Id.*

16. 543 U.S. at 569–571.

17. *Id.* at 572.

Court's determination that juveniles are less culpable because of their immaturity and therefore exempt from the death penalty. Part IV demonstrates how the *Roper* Court's distinctly recognized differences between juveniles and adults can be applied to exempt minors from sex offender registration and community-notification requirements. Finally, Part V explains that utilizing current criminal court transfer procedures adequately serves the interests of registration and notification statutes. By relying on a system already in place, courts will avoid the mandatory, far-reaching, and inflexible requirements of the Adam Walsh Act while protecting all children and maintaining the rehabilitative goals of the juvenile justice system.

II. THE ADAM WALSH ACT, SORNA, AND THE PROBLEMS FOR JUVENILES

Federal and state legislators have long recognized the importance of protecting children from sexual predators by implementing mandatory registration requirements and enhancing penalties for sex offenders. This section outlines the federal sex offender registration and notification laws leading to enactment of the Adam Walsh Act and SORNA. It then explains the key provisions of these laws and illustrates the problems that arise when their requirements are applied to juvenile sex offenders.

A. Federal Sex Offender Legislation: A Brief History

In 1944, California enacted the first sex offender registration statute, which required law enforcement agencies to create and share a list of the names of felony sex offenders.¹⁸ In 1990, Washington became the first state to enact legislation that required convicted sex offenders to register.¹⁹ During the next four years, thirty-eight additional states passed similar statutes.²⁰ Congress responded by enacting the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act of 1994

18. Steven J. Costigliacci, Student Author, *Protecting Our Children from Sex Offenders: Have We Gone Too Far?* 46 Fam. Ct. Rev. 180, 182 (2008).

19. *Id.*

20. *Id.*

(Jacob Wetterling Act),²¹ which required all states to create a sex offender registry.²² During the next twelve years, the Jacob Wetterling Act received several distinct amendments, but remained the leading federal child-protective and sex offender legislation.²³

Under the Jacob Wetterling Act, states were permitted, but not required, to publicly disclose information about registered sex offenders.²⁴ However, during the mid-1990s every state and the District of Columbia provided for community notification by enacting Megan's Laws,²⁵ and Congress followed suit in 1996 with the federal Megan's Law.²⁶ Megan's Law permitted disclosure of sex offender registry information and required law enforcement agencies to publicly disseminate relevant information necessary to safeguard the public.²⁷ That same year, creation of the National Sex Offender Registry (NSOR)²⁸ allowed the FBI to track sex offenders living in states with insufficient sex offender registration systems.²⁹ In 1997, Congress amended several provisions

21. 42 U.S.C. §§ 14071–14073 (repealed 2006). When 11-year-old Jacob Wetterling was abducted by a masked gunman in Minnesota in 1989, the state had no way to track sex offenders because it did not require them to register on a central list. Costigliacci, *supra* n. 18, at 182–183; Brittany Enniss, Student Author, *Quickly Assuaging Public Fear: How the Well-Intended Adam Walsh Act Led to Unintended Consequences*, 2008 Utah L. Rev. 697, 699 (2008). Jacob has never been found and no suspect has been charged. *Id.* His story inspired the creation of state and federal child-protective statutes bearing his name. Jacob Wetterling Resource Ctr., *How We Began and the Need for Transition*, <http://www.jwrc.org/WhoWeAre/History/tabid/128/Default.aspx> (accessed May 18, 2010).

22. U.S. Dept. Just., Off. Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking, *Legislation: Federal Sex Offender Legislation*, <http://www.ojp.gov/smart/legislation.htm> (accessed May 18, 2010) [hereinafter *SMART Legislation*]. Specifically, the Jacob Wetterling Act required states to confirm the residence of convicted sex offenders every year for ten years after release, or every three months for life if the offender was convicted of a violent sex crime. *Id.* States that failed to create a sex offender registry faced drastic cuts to federal funding. Costigliacci, *supra* n. 18, at 183.

23. Costigliacci, *supra* n. 18, at 182.

24. 42 U.S.C. § 14071(e)(1) (repealed 2006).

25. *SMART Legislation*, *supra* n. 22.

26. Pub. L. No. 104-145, §§ 1–2, 110 Stat. 1345, 1345 (1996) (named “Megan’s Law,” amending the Jacob Wetterling Act). Megan’s Law was named for Megan Kanka, a seven-year-old New Jersey girl who was raped and killed by a convicted sex offender living in her neighborhood. Enniss, *supra* n. 21, at 700.

27. *SMART Legislation*, *supra* n. 22.

28. NSOR was created by the Pam Lychner Sex Offender Tracking and Identification Act of 1996, Pub. L. No. 104-236, §§ 1–2, 110 Stat. 3093, 3093 (1996). See *SMART Legislation*, *supra* n. 22 (explaining that the Pam Lychner Act established a national sex offender database, NSOR, and permitted dissemination of information on registered offenders to the extent necessary for public safety or to facilitate background checks).

29. *Id.* These offenders were required to register with the FBI to ensure they could be

of the Jacob Wetterling Act and the Pam Lychner Act to require states to participate in the NSOR and establish procedures to register out-of-state offenders who move to, work, or attend school in the state.³⁰ Congress again expanded sex offender registration requirements with the Campus Sex Crimes Prevention Act of 2000,³¹ which requires registered offenders who are employees or students at colleges and universities to notify the institution of their sex offender status.³²

Finally in 2006, Congress repealed the Jacob Wetterling Act and replaced it with the Adam Walsh Act,³³ which contains the same provisions and requirements as the Jacob Wetterling Act but implements some major changes with drastic effects on juvenile offenders.³⁴ When President George W. Bush signed the Adam Walsh Act on July 27, 2006, states were given three years to implement its provisions.³⁵ States that fail to timely comply face an annual ten-percent reduction in federal crime prevention funding.³⁶ The Adam Walsh Act permitted the U.S. Attorney General to grant up to two one-year extensions,³⁷ and by April 2009—

tracked through the national NSOR database. *Id.* The Pam Lychner Act also required the FBI to periodically confirm the residence of registered offenders, and allowed the agency to disclose collected information to federal, state, and local law enforcement agencies. *Id.*

30. Jacob Wetterling Improvements Act of 1997, Pub. L. No. 105-119, § 115, 111 Stat. 2440, 2461–2471 (1997). The Improvements Act required registered offenders to also register with states where they work or attend school if those states are not their state of residence, and to register with the new state upon moving out-of-state. *SMART Legislation, supra* n. 22.

31. Pub. L. No. 106-386, §§ 1601–1603, 114 Stat. 1464, 1537–1539 (2000). It should be noted that Congress' wave of sex offender legislation also included the Protection of Children from Sexual Predators Act of 1998, Pub. L. No. 105-314, § 1, 112 Stat. 2974, 2974 (1998), which provided assistance to eligible states seeking to comply with federal registration requirements through the Sex Offender Management Assistance program and denied federal funding to any program that allowed federal prisoners unsupervised Internet access. *SMART Legislation, supra* n. 22.

32. 114 Stat. at 1537. This Act also requires institutions of higher education to report sex offender information to local law enforcement agencies. *SMART Legislation, supra* n. 22. Campuses already required to disseminate crime statistics had to provide community notification with regard to registered sex offenders on campus as employees or students. *Id.*

33. 42 U.S.C. §§ 16901–16991.

34. *Infra* pt. II(B) (explaining in detail how the Adam Walsh Act and SORNA affect juvenile offenders).

35. 42 U.S.C. § 16924(a).

36. *Id.* at § 16925(a). The referenced funds are allocated to states “under . . . the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. §§ 3750 et seq.)” *Id.*

37. *Id.* at § 16924(b).

three months before the deadline—at least thirty-one states had requested an extension.³⁸ Consequently, on May 26, 2009, U.S. Attorney General Eric Holder authorized a one-year nationwide extension.³⁹ As of September 2009, only two jurisdictions had substantially implemented SORNA's provisions.⁴⁰ For many other jurisdictions, the extension provides relief as they struggle to comply in the face of severely diminished state budgets.⁴¹ Thus, states have until July 26, 2010, to determine whether the reduced federal funding justifies the costs of compliance—in actual monetary value and in terms of the detrimental effects the federal law imposes upon the nation's youngest offenders.

B. SORNA Classifies Juveniles among the Worst Sex Offenders

Title I of the Adam Walsh Act establishes SORNA, a national sex offender registration and notification program⁴² that broadens

38. Michael Drost, *Registries for Sex Offenders Vex States: Maryland Asks for Extension*, Wash. Times (D.C.) A1 (Apr. 26, 2009) (explaining that Maryland was the thirty-first state to seek a one-year extension to comply with the Adam Walsh Act).

39. Atty. Gen. Or. 3081-2009, *U.S. Dept. Just., Off. Just. Programs*, http://www.ojp.usdoj.gov/smart/smartwatch/09_august/blanketextension.html (May 18, 2010).

40. U.S. Dept. Just. News Release, *Justice Department Announces First Two Jurisdictions to Implement Sex Offender Registration and Notification Act* (Sept. 23, 2009) (available at 2009 WL 3044169) (announcing that Ohio and the Confederated Tribes of the Umatilla Indian Reservation were the first two jurisdictions to substantially comply with SORNA).

41. As of July 2009, West Virginia officials were still debating whether the practical problems of complying with the Act are worth the \$200,000 in lost federal funding for non-compliance. Michelle Saxton, *Sex Offenders: Federal Act Poses Issues for State*, Charleston Daily Mail (W. Va.) 1A (July 20, 2009) (explaining that one of the major hurdles in compliance is determining how to deal with sealed juvenile records). California's Sex Offender Management Board calculated the cost of compliance at \$38 million, while non-compliance would result in only a \$210,000 reduction in federal funding. Abigail Goldman, *Sex Offender Act Might Not Be Worth Its Cost to Nevada*, Las Vegas Sun 1 (Feb. 15, 2009) (explaining that many states have determined it would cost more to implement procedures and legislation that comply with the Adam Walsh Act than it would to ignore compliance deadlines and face reduced federal funding). Similarly, Virginia officials estimated the cost of compliance to be \$12.4 million, while the State stands to lose only \$400,000 for non-compliance. *Id.* Florida, on the other hand, estimated compliance costs at \$3.2 million, while the State could lose up to \$2.8 million for non-compliance. *Id.*

42. 42 U.S.C. §§ 16902, 16911(8). Congress established the national registration program for the stated purpose of protecting "the public from sex offenders and offenders against children, and in response to the vicious attacks by violent predators against the victims listed below." 42 U.S.C. § 16901. The statute then describes the crimes committed against seventeen victims, sixteen of whom were abducted, attacked, sexually assaulted, or murdered by *adult* offenders: Jacob Wetterling (eleven years old, abducted in Minnesota in 1989, remains missing); Megan Nicole Kanka (seven years old, abducted, sexually as-

the definition of “sex offense,”⁴³ increases the duration of registration requirements and penalties for failure to register,⁴⁴ adds to the information offenders must provide,⁴⁵ and creates a national sex offender database available through a publicly accessible Web

saulted, and murdered in New Jersey in 1994); Pam Lychner (thirty-one years old, attacked by a repeat offender in Texas); Jetseta Gage (ten years old, abducted, sexually assaulted, and murdered in Iowa in 2005); Dru Sjodin (twenty-two years old, sexually assaulted and murdered in North Dakota in 2003); Jessica Lunsford (nine years old, abducted, sexually assaulted, buried alive, and murdered in Florida in 2005); Sarah Lunde (thirteen years old, strangled and murdered in Florida in 2005); Christy Ann Fornoff (thirteen years old, abducted, sexually assaulted, and murdered in Arizona in 1984); Alexandra Nicole Zapp (thirty years old, brutally attacked and murdered by a repeat sex offender in Massachusetts in 2002); Polly Klaas (twelve years old, abducted, sexually assaulted, and murdered by a repeat sex offender in California in 1993); Jimmy Ryce (nine years old, abducted and murdered in Florida in 1995); Carlie Brucia (eleven years old, abducted and murdered in Florida in 2004); Amanda Brown (seven years old, abducted and murdered in Florida in 1998); Elizabeth Smart (fourteen years old, abducted in Utah in 2002); Molly Bish (sixteen years old, abducted in Massachusetts in 2000, her remains were found three years later); Samantha Runnion (five years old, abducted, sexually assaulted, and murdered in California in 2002); and Amie Zyla (eight years old, sexually assaulted by a juvenile offender in Wisconsin in 1996, “has become an advocate for child victims and protection of children from juvenile sex offenders”). *Id.* at § 16901(1)–(17). Amie Zyla was molested by a 14-year-old family friend, Joshua Wade, who was adjudicated delinquent for a misdemeanor and sent to a residential juvenile facility. Jones, *supra* n. 1. In 2005, Zyla learned that Wade, then twenty-three, was charged with numerous counts of sexual assault against children. *Id.* Wade was sentenced to twenty-five years in prison. *Id.* Zyla, now nineteen, has become an advocate for registration and notification programs, insisting that juvenile sex offenders should be subject to registration requirements because they “turn into adult predators.” *Id.* Wade apparently made little progress during his treatment after molesting Zyla and admitted to assaulting other children. *Id.*

43. 42 U.S.C. § 16911(5). SORNA requires registration for all sexual offenses that involve “any type or degree of genital, oral, or anal penetration, or . . . any sexual touching of or contact with a person’s body, either directly or through the clothing.” U.S. Dept. Just., Off. Atty. Gen., *The National Guidelines for Sex Offender Registration and Notification* 17, http://www.ojp.gov/smart/pdfs/final_sornaguidelines.pdf (May 20, 2010) [hereinafter *SORNA Guidelines*]. SORNA extends to attempts or conspiracies to commit any covered offense. *Id.* at 18. The Act also covers certain offenses involving minors, such as kidnapping, solicitation, and possession, production, or distribution of child pornography. *Id.* at 18–20. Registration is required for most federal sexual offenses, as well as offenses under any state, local, tribal, foreign, and military law. *Id.* at 17–18.

44. 42 U.S.C. §§ 16913(e), 16915, 16916. Depending on the severity of the charged offense, sex offenders are required to register for fifteen years to life. *Id.* at § 16915(a). Sex offenders must appear for an in-person check-in at least once a year. *Id.* at § 16916. Failure to comply with registration requirements will be punished by a minimum of one-year imprisonment. *Id.* at § 16913(e).

45. *Id.* at § 16914. Registered sex offenders must provide their name and any alias; social security number; addresses for every place where they reside, work, or attend school; and the license plate number and a description of any vehicle they own or operate. *Id.* at § 16914(a)(1)–(6). For details on additional information provided by the jurisdiction for inclusion on the Internet registries, see *infra* Part II(B)(4).

site.⁴⁶ Most significant to this Article, SORNA expands the offenses that require registration to include certain juvenile adjudications.⁴⁷ Based on the level of severity of the offense, SORNA categorizes sex offenders into a three-tiered system and attaches minimum registration requirements to each tier.⁴⁸ When an adolescent is adjudicated delinquent for an offense that brings him within SORNA's province, he has categorically committed a "Tier III" offense (the most severe). With respect to juvenile adjudications, SORNA applies only to those adjudicated delinquent for offenses that are "comparable to or more severe than aggravated sexual abuse"; such offenses are specifically classified within Tier III.⁴⁹ Once adjudicated delinquent, juveniles are required to register as sex offenders. Because they are Tier III offenders, their personal information will appear on publicly accessible Web sites for the rest of their lives.⁵⁰

1. SORNA's Registration Requirements Apply to Juvenile Adjudications

At the outset, it is important to understand that juvenile sex offenders were required to register in certain situations before the

46. 42 U.S.C. §§ 16919(a), 16920. The Act transforms the NSOR into a national database maintained by the Attorney General and FBI, and compiles information on every person required to register as a sex offender in any jurisdiction. *Id.* at § 16919(a). This database is accessible through the Dru Sjodin National Sex Offender Public Website, also created by the Act. *Id.* at § 16920(a). The NSOR provides information contained in the sex offender registries of all fifty states, the District of Columbia, participating Indian tribes, Puerto Rico, and Guam. U.S. Dept. Just., *Dru Sjodin National Sex Offender Public Website*, <http://www.nsopw.gov/Core/OffenderSearchCriteria.aspx> (accessed May 20, 2010). Site visitors may run queries by name, state, county, locality, or zip code. *Id.*

47. 42 U.S.C. § 16911(8). SORNA's federal registration requirements apply to juvenile adjudications for offenses committed by an adolescent age fourteen or older that are "comparable to or more severe than aggravated sexual abuse" as defined by federal law. *Id.* For details on SORNA's juvenile sex offender registration requirements, see *infra* Part II(B)(1).

48. See generally 42 U.S.C. §§ 16911(2)–(4), 16915(a), 16916 (defining which offenders are covered by each tier and explaining that the amount of time an offender must register and the frequency with which he must personally appear to update registry information depend upon the tier-level classification of his offense). For a complete explanation of SORNA's tier system, see *infra* Part II(B)(2).

49. 42 U.S.C. § 16911(8) (explaining which juvenile adjudications are covered by SORNA); *Id.* at § 16911(4) (defining Tier III offenses as including aggravated sexual abuse). SORNA's application to juvenile adjudications is discussed in detail at *infra* Part II(B)(1). For details on Tier III offenses, see *infra* Part II(B)(2).

50. *Id.* at § 16915(a)(3). For details on SORNA's registration requirements, see *infra* Part II(B)(3).

Adam Walsh Act. Juveniles prosecuted and convicted as adults were required to register as sex offenders under the federal Jacob Wetterling Act.⁵¹ In addition, thirty-two states already require registration for juvenile adjudications but with limitations, while only six states have separate registration laws to specifically address juvenile sex offenders.⁵² Prior to the Adam Walsh Act, state laws varied significantly with regard to minimum age requirements for registration, duration of the registration requirement, and procedures for removal from the state registry.⁵³ Currently, only six states specify the youngest age at which registration requirements apply, ranging from eleven to fifteen years of age.⁵⁴ Twenty states have procedures that allow juveniles to be removed from the sex offender registry at certain points after their adjudication, ranging from eighteen to twenty-one years of age.⁵⁵ Other states permit juveniles to petition the courts for termination of their registration requirement once they live “crime-free” for a specified period of time.⁵⁶ Before taking a closer look at SORNA, it is important to note that the Act does not override all state laws and procedures pertaining to juvenile sex offenders. SORNA aims to create a functional nationwide system for sex offender registra-

51. Jacob Wetterling Act, 42 U.S.C. §§ 14071–14073 (repealed 2006); U.S. Dept. Just., *Ctr. for Sex Offender Mgt., Training Curriculum, Section 7: The Legal and Legislative Response*, http://www.csom.org/train/juvenile/7/7_4.htm (accessed May 20, 2010) [hereinafter *CSOM Curriculum*].

52. *CSOM Curriculum*, *supra* n. 51. Some states restrict the accessibility of information about registered juvenile offenders by disseminating information only to juvenile courts and limiting the amount of personal information available on the publicly accessible registry. *Id.* The six states with separate registration laws are Arkansas, Missouri, Montana, North Carolina, Oklahoma, and Wisconsin. *Id.*

53. *Id.*

54. *Id.* For example, North Carolina law requires juveniles to register if they were at least eleven years old at the time of the offense and if the court finds them “a danger to the community.” *Id.* (citing N.C. Gen. Stat. § 14-208.26(a) (Lexis 2010)). Indiana’s law applies to juveniles fourteen and older if the court finds by clear and convincing evidence that they are likely to commit future offenses. *Id.* (citing Ind. Code Ann. §§ 11-8-8-7, 4.5(b) (Lexis 2010)). South Dakota’s law applies to juveniles fifteen and older, while laws in Ohio, Idaho, and Oklahoma set fourteen as the minimum age for registration regardless of a finding of dangerousness. *Id.* (citing S.D. Codified Laws § 22-24B-2 (2009), Ohio Rev. Code Ann. § 2950.01(m) (Lexis 2010), Idaho Code Ann. § 18-8403 (Lexis 2010), Okla. Stat. Ann. tit. 10A, § 2-8-102 (West 2010)).

55. *Id.*

56. *Id.*

tion and notification; it outlines *minimum* standards and “sets a floor, not a ceiling, for jurisdictions’ programs.”⁵⁷

As it pertains to sex offenders required to register, SORNA expands the term “convicted” to include juveniles adjudicated delinquent for a class of sex offenses.⁵⁸ Covered offenses must meet two requirements: (1) the juvenile was fourteen or older at the time of the offense; and (2) the offense was “comparable to or more severe than aggravated sexual abuse.”⁵⁹ As defined by federal law, aggravated sexual abuse encompasses a range of serious sexual assault offenses.⁶⁰ Specifically, the prohibited conduct includes engaging in a sexual act with another person by means of force or threat of death or serious violence, by involuntarily drugging the victim, or by rendering the victim unconscious.⁶¹ SORNA also covers sexual acts with a minor younger than twelve, regardless of whether the act involved any sort of violence or coercive behavior.⁶² Sexual acts proscribed by federal law include various forms of contact—genital, anal-genital, oral-genital, or oral-anal—as well as any degree of penetration by the penis, hand, finger, or an object.⁶³ Direct genital touching is also a covered offense if the victim is younger than sixteen.⁶⁴

In sum, SORNA orders states to apply sex offender registration and notification laws to juveniles adjudicated delinquent for an offense committed when they were fourteen or older that fits within the definition of aggravated sexual abuse. This is the minimum nationwide standard, and states are free to lower the age requirement or expand the covered offenses as they see fit.

57. *SORNA Guidelines*, *supra* n. 43, at 6. SORNA contains one exception to this unbridled jurisdictional discretion relating to information that must not be disclosed on public registries, including the offender’s social security number and the identity of any victim. *Id.* at 7. In all other areas, SORNA places no limits on the discretion of jurisdictions to adopt more far-reaching registration and notification standards. *Id.*

58. 42 U.S.C. § 16911(8).

59. *Id.*

60. 18 U.S.C. § 2241(a)–(c).

61. *Id.* at § 2241(a)–(b).

62. *Id.* at § 2241(c).

63. *Id.* at § 2246(2)(A)–(C).

64. *Id.* at § 2246(2)(D).

2. SORNA Classifies Juvenile Adjudications among the Most Severe Offenses

SORNA classifies sex offenders into three tiers and attaches a set of registration requirements to each level.⁶⁵ Tier I sex offenders are those convicted of offenses that do not qualify for more severe Tier II or Tier III classification.⁶⁶ Examples of Tier I offenses include offenses not punishable by more than one year imprisonment, possession of child pornography, and assault against an adult victim that involves sexual touching without an attempted or completed sexual act.⁶⁷ Offenses that qualify for Tier II or Tier III classification are punishable by imprisonment of more than one year, and the level of severity is determined by the nature of the offense and the age of the victim.⁶⁸ Essentially, Tier II offenses encompass the following conduct: prostitution involving a minor (or attempt or conspiracy), sexual contact with a minor (any sexual touching directly or through clothing, including attempt, conspiracy, or solicitation), using a minor in a sexual performance, and producing or distributing child pornography.⁶⁹ Tier III offenses are those “comparable to or more severe than . . . aggravated sexual abuse⁷⁰ or sexual abuse,” or “abusive sexual contact” against a minor younger than thirteen,⁷¹ as defined by federal law.⁷² This language should sound familiar. By definition, all juvenile adjudications covered by SORNA are Tier III offenses because the federal registration requirements apply to offenses committed by a juvenile fourteen or older that are “comparable to

65. See generally 42 U.S.C. §§ 16911(2)–(4), 16915, 16916 (defining the offenses covered by each tier and explaining the registration requirements attached to each category).

66. *Id.* at § 16911(2).

67. *SORNA Guidelines*, *supra* n. 43, at 22.

68. 42 U.S.C. § 16911(3)–(4); *SORNA Guidelines*, *supra* n. 43, at 22–23.

69. 42 U.S.C. § 16911(3)(A)–(B); *SORNA Guidelines*, *supra* n. 43, at 23–24.

70. For a complete description of what constitutes aggravated sexual abuse under federal law, see *supra* Part II(B)(1).

71. For SORNA purposes, abusive sexual contact involves sexual touching, directly or through clothing, if the victim is younger than thirteen. *SORNA Guidelines*, *supra* n. 43, at 24 (citing 18 U.S.C. §§ 2244, 2246(3)).

72. 42 U.S.C. § 16911(4)(A). Tier III offenses also include attempt or conspiracy to commit these offenses, kidnapping a minor (unless the offender is a parent or guardian), and offenses that occur after the offender has already committed a Tier II offense. *Id.* at § 16911(4)(A)–(C).

or more severe than aggravated sexual abuse.”⁷³ Covered offenses involve engaging in a sexual act with another person by force or threat, or by drugging or rendering the other person unconscious.⁷⁴ For the purposes of this provision, sexual acts include genital or anal penetration, and oral-genital or oral-anal contact.⁷⁵ While states have discretion to enact more far-reaching laws to address juvenile sex offenders,⁷⁶ SORNA’s minimum national standards mandate that at least this class of juvenile offenders will be categorized among the worst offenders and thereby subject to the most stringent registration requirements.

3. SORNA Subjects Juvenile Offenders to Lifetime Registration Requirements

SORNA’s tier levels affect the duration of an offender’s registration requirement and the frequency with which an offender must make in-person appearances to verify registry information.⁷⁷ All offenders are required to register in their state of residence, as well as in any other state where they live, work, or attend school.⁷⁸ Tier I offenders must continue to register as sex offend-

73. *Id.* at §§ 16911(4)(A)(i), 16911(8). For details on SORNA’s juvenile sex offender registration requirements, see *supra* Part II(B)(1).

74. *SORNA Guidelines, supra* n. 43, at 16.

75. *Id.* (referencing 18 U.S.C. § 2246(2)) (defining “sexual act” for the purpose of the offense of “aggravated sexual abuse” found in 18 U.S.C. § 2241). Thus, for the purposes of juvenile adjudications, SORNA covers sexual acts that involve even the slightest degree of genital or anal penetration, as well as oral sex. *Id.* SORNA does not require registration for sex offense convictions based on consensual sexual acts if both participants are at least thirteen years old and the age difference between the two is not more than four years. *SORNA FAQ, supra* n. 9, at 8. However, the Department of Justice expressly stated, “[J]urisdictions have discretion to exceed the minimum standards of SORNA and require registration upon convictions based on consensual sexual conduct.” *Id.*

76. *SORNA Guidelines, supra* n. 43, at 16 (stating that jurisdictions are free to broaden the class of covered juvenile sex offenses as they see fit).

77. *See generally* 42 U.S.C. §§ 16915(a), 16916(1)–(3) (explaining that sex offenders are required to register for fifteen years to life and appear in person as frequently as every three months).

78. *Id.* at § 16913(a). Offenders must keep their registry information current in each applicable jurisdiction. *Id.* at § 16913(c). For initial registration, the offender must also register with the jurisdiction where he was convicted (if different from where he resides). *Id.* at § 16913(a). Offenders must initially register before the end of a prison sentence for the sex offense or within three business days of the conviction if no prison sentence is imposed. *Id.* at § 16913(b). Any change of name, residence, employment, or student status requires the offender to personally appear in at least one concerned jurisdiction. *Id.* at § 16913(c).

ers for fifteen years,⁷⁹ and Tier II offenders must register for twenty-five years.⁸⁰ Juveniles subject to SORNA, and all other Tier III offenders, must register as sex offenders for the rest of their lives.⁸¹ All registered sex offenders are required to appear in-person periodically so the jurisdiction may take a current photograph and verify information in its registry.⁸² Tier I offenders must perform this in-person check-in annually;⁸³ Tier II offenders must appear at least every six months;⁸⁴ and Tier III offenders must appear in-person at least every three months.⁸⁵ If an offender fails to register or comply with registry update requirements (for example, by missing an in-person check-in), SORNA requires him to be punished by at least one year of imprisonment.⁸⁶

It should be noted that SORNA allows for a reduced registration period for offenders who maintain a “clean record” for a specified period of time.⁸⁷ This allows juveniles adjudicated as Tier III offenders to reduce their registration requirements from life to a minimum of twenty-five years.⁸⁸ A “clean record” under SORNA means that the offender is not subsequently convicted of any felony or sex offense and successfully completes any imposed probation, parole, or supervised release, as well as a certified sex offender treatment program.⁸⁹ Tier I offenders, generally subject to registration requirements for fifteen years,⁹⁰ may reduce their registration by five years if they maintain a clean record for ten years.⁹¹ The twenty-five-year registration requirement for Tier II offenders is mandatory, and SORNA provides no authorization to reduce the duration for maintaining a clean record.⁹²

79. *Id.* at § 16915(a)(1).

80. *Id.* at § 16915(a)(2).

81. *Id.* at § 16915(a)(3).

82. *Id.* at § 16916.

83. *Id.* at § 16916(1).

84. *Id.* at § 16916(2).

85. *Id.* at § 16916(3). Having to appear in-person every three months can be particularly difficult for juveniles without transportation or involved parents.

86. *Id.* at § 16913(e).

87. *Id.* at § 16915(b)(1).

88. *Id.* at § 16915(b)(2)(B).

89. *Id.* at § 16915(b)(1).

90. *Id.* at § 16915(a)(1).

91. *Id.* at §§ 16915(b)(2)(A), 16915(b)(3)(A).

92. *Id.* at §§ 16915(a)(2), 16915(b)(2), 16915(b)(3); *SORNA Guidelines*, *supra* n. 43, at

SORNA expressly states that for “a [T]ier III sex offender adjudicated delinquent, the reduction is from life to that period for which the clean record . . . is maintained.”⁹³ An associated provision states that a Tier III offender adjudicated delinquent must maintain a clean record for twenty-five years.⁹⁴ However, juveniles convicted as adults may not reduce the lifetime duration of their registration requirements.⁹⁵ In sum, a teenager required under SORNA to register as a sex offender based on a juvenile adjudication may reduce his registration requirement from life to the number of years during which he maintains a clean record, but this can amount to no less than twenty-five years of required registration. For example, a fifteen-year-old who commits an offense that subjects him to SORNA may be removed from the registry no sooner than age forty, assuming he avoids any other felony or sex-offense charges during that time.

4. *SORNA Requires Public Disclosure of Juveniles’ Personal Information*

When sex offenders register they must provide an array of information; the information disclosed to the public varies by state, but SORNA provides minimum requirements in this area as well.⁹⁶ Offenders must provide their name (and any alias), social security number, all residential addresses, the license plate number and a description of any vehicle they own or operate, and the name and address of any place where they work or attend school.⁹⁷ In addition, the jurisdiction must supplement this registry information with a physical description and current photograph of the offender, his fingerprints and palm prints, a DNA sample, a copy of his driver’s license or identification card, the statutory text of the offense requiring the offender to register, and the offender’s full criminal history.⁹⁸ Each jurisdiction must pub-

57.

93. 42 U.S.C. § 16915(b)(3)(B).

94. *Id.* at § 16915(b)(2)(B).

95. *SORNA Guidelines*, *supra* n. 43, at 57.

96. *See generally* 42 U.S.C. §§ 16914, 16918 (listing the information that must be provided by the offender, as well as supplemental information the jurisdiction must include on its registry).

97. *Id.* at § 16914(a)(1)–(6).

98. *Id.* at § 16914(b)(1)–(7). An offender’s criminal history must include his registra-

lish this information on its publicly accessible sex offender registry Web site, which is linked into the national registry created by SORNA.⁹⁹

SORNA provides several mandatory and optional exceptions to the disclosure rule.¹⁰⁰ Jurisdictions must not disclose the offender's social security number, the identity of any victim, or arrests not resulting in conviction.¹⁰¹ Jurisdictions have the option to withhold the name (but not address) of the offender's employer or school.¹⁰² In addition, jurisdictions may choose not to disclose any information about a Tier I offender so long as the conviction that requires registration was not committed against a minor.¹⁰³ There are no exceptions (other than those listed above) to the information that must be disclosed about Tier II and Tier III offenders, regardless of the nature of the offense or age of the offender.¹⁰⁴

Because the Adam Walsh Act has not been fully implemented in every state,¹⁰⁵ juvenile-justice advocates are presented with a prime opportunity to challenge the Act for SORNA's deleterious effects on adolescent offenders. The Adam Walsh Act has been the subject of constitutional litigation across the country, but it has not yet been challenged for its effects on juvenile sex offenders.¹⁰⁶

tion status; the date of all arrests and convictions; the status of probation, parole, or supervised release; and any outstanding arrest warrants. *Id.* at § 16914(b)(3).

99. *Id.* at §§ 16918(a). Under SORNA, each Web site must allow the public to search by zip code or other geographic radius. *Id.* Jurisdictional registry Web sites are also searchable through the Dru Sjodin National Sex Offender Public Website. *Id.* at § 16920(a)–(b). For more information on the national registry, see *supra* note 46 and accompanying text.

100. See generally 42 U.S.C. § 16918(b)–(c) (listing the mandatory and optional exemptions).

101. *Id.* at § 16918(b)(1)–(3).

102. *Id.* at § 16918(c)(2)–(3).

103. *Id.* at § 16918(c)(1).

104. *Id.* at § 16918(b)–(c). While a number of states required juvenile sex offenders to register prior to SORNA, many placed limits on the type of information made available to the public. *CSOM Curriculum*, *supra* n. 51. Some states maintain separate registries for juvenile offenders accessible to the public only upon request. *Id.* Michigan includes juveniles on the registry available to law enforcement personnel, but they will not appear on the public registry until they turn eighteen. *Id.* Other states maintain a juvenile registry within the juvenile court system, which provides far less accessibility than the public adult registries. *Id.*

105. See *supra* nn. 35–41 and accompanying text (explaining that states have until July 26, 2010, to comply with the Adam Walsh Act).

106. The Adam Walsh Act has faced constitutional challenges over whether it is a

Although the Supreme Court has indicated its general acceptance of sex offender registries, it did so in a pre-SORNA ruling.¹⁰⁷

By extending registration and notification laws to encompass juvenile adjudications, SORNA imposes inflexible and unrealistic requirements on juvenile offenders. It undermines the traditional goals of the juvenile justice system by imposing lifetime registration requirements and mandating public access to juveniles' personal information. In the proclaimed interest of public safety, SORNA justifies these harsh penalties by classifying juveniles among the worst offenders. It does so despite the fact that the Supreme Court has clearly recognized the diminished culpability of adolescents.¹⁰⁸ In its landmark *Roper* decision, the Court identified distinct characteristics that lessen the culpability of juveniles—characteristics that set them apart from their adult counterparts and prevent them from being classified among the worst offenders.¹⁰⁹ Thus, juvenile-justice advocates must turn to *Roper* and utilize its reasoning to support constitutional challenges to

proper exercise of congressional authority. See Scott Lauck, *Sex-Offender Split to Go to U.S. High Court*, Mo. Laws. Wkly. (June 22, 2009) (available at 2009 WLNR 12034464) (stating that the Eighth Circuit upheld the Act, while the Fourth Circuit held the Act unconstitutional). Indeed, federal circuit courts split over the constitutionality of the Act's provision allowing for indefinite civil commitment of a "sexually dangerous person." *Id.* The United States Court of Appeals for the Eighth Circuit upheld the Act's constitutionality, while the Fourth Circuit declared the Act beyond the scope of Congress' power under both the Commerce Clause and Necessary and Proper Clause. *Id.*; Angela Riley, *8th Circuit Says Adam Walsh Act Constitutional*, Mo. Laws. Wkly. 1, 1 (May 15, 2009) (available at 2009 WLNR 9495448). A Florida federal district court also found the Act unconstitutional as a violation of Congress' power under the Commerce Clause, based on the Act's provision that criminalizes sex offenders who, while registered in one state, move to another state and fail to update their registration with the new state. See *U.S. v. Powers*, 544 F. Supp. 2d 1331 (M.D. Fla. 2008). During its 2009–2010 term, the United States Supreme Court heard the Fourth Circuit case, *United States v. Comstock*, and ruled the Act's civil commitment provision constitutionally permissible under the Necessary and Proper Clause. See *U.S. v. Comstock*, 2010 WL 1946729 (U.S. May 17, 2010). Finding proper congressional authority and reasons supporting enactment of the provision, the Court found the provision sufficiently narrow in scope and within the federal government's role of administering mental health care to federal prisoners. *Id.* at **1–2.

107. *Smith v. Doe*, 538 U.S. 84, 105–106 (2003) (finding that the Alaska Sex Offender Registration Act did not violate the ex post facto clause because it was nonpunitive in nature). When the Department of Justice issued guidelines to help states interpret and implement SORNA, it expressly stated SORNA presents no ex post facto issues because its registration and notification requirements are nonpunitive. *SORNA Guidelines*, supra n. 43, at 7. However, sex offenders who fail to register or timely update their registration information are subject to imprisonment for no less than one year. 42 U.S.C. § 16913(e).

108. *Roper*, 543 U.S. at 571.

109. *Id.* at 569–570.

SORNA’s juvenile sex offender registration and notification requirements.

III. *ROPER v. SIMMONS: A SEPARATE CLASS FOR JUVENILE OFFENDERS*

Before studying the reasoning and analysis of the *Roper* majority it is first necessary to review the Court’s applicable death penalty precedent. By the time it heard *Roper*, the Supreme Court had already invalidated the death penalty for mentally retarded individuals¹¹⁰ and for those who were younger than sixteen at the time of the crime,¹¹¹ yet it had expressly upheld capital punishment for sixteen- and seventeen-year-olds.¹¹² Writing for the *Roper* majority, Justice Kennedy first addressed the Court’s 1989 decision, *Stanford v. Kentucky*,¹¹³ which held that imposing the death penalty on individuals who were sixteen or seventeen at the time of the crime did not constitute cruel and unusual punishment prohibited by the Eighth Amendment.¹¹⁴ Addressing this issue for the second time, the *Roper* majority declared *Stanford* no longer controlling¹¹⁵ and instead relied on its reasoning in *Thompson v. Oklahoma*¹¹⁶ and *Atkins v. Virginia*.¹¹⁷

110. *Atkins v. Va.*, 536 U.S. 304, 321 (2002).

111. *Thompson v. Okla.*, 487 U.S. 815, 838 (1988).

112. *Stanford v. Ky.*, 492 U.S. 361, 380 (1989).

113. 492 U.S. 361 (1989).

114. *Roper*, 543 U.S. at 555–556 (citing *Stanford*, 492 U.S. at 380).

115. *Id.* at 555, 574–575 (stating that the *Stanford* decision is no longer controlling on the issue of the constitutionality of the juvenile death penalty). Seventeen-year-old Kevin Stanford was sentenced to death after being tried and convicted as an adult for first-degree murder, sodomy, and robbery. *Stanford*, 492 U.S. at 365–366. Stanford’s case was reviewed with that of Heath Wilkins, also sentenced to death for first-degree murder. *Id.* at 366–367. The Court concluded that neither death sentence violated the Eighth Amendment’s prohibition against cruel and unusual punishment. *Id.* at 380. In December 2003, Kevin Stanford was pardoned by the governor of Kentucky, who commuted the sentence to life imprisonment, declaring: “We ought not be executing people who, legally, were children.” *Roper*, 543 U.S. at 565.

116. 487 U.S. 815 (1988) (invalidating the death penalty for offenders whose crimes were committed when they were under the age of sixteen).

117. 536 U.S. 304 (2002) (invalidating the death penalty as punishment for offenders with mental retardation). The *Roper* Court noted that the *Stanford* decision was inconsistent with prior Eighth Amendment decisions, including *Thompson* and *Adkins*. *Roper*, 543 U.S. at 574–575.

A. *Thompson v. Oklahoma*: Diminished Culpability
of Juveniles Younger than Sixteen Prohibits
Imposition of the Death Penalty

In 1988, the *Thompson* Court held that the Eighth and Fourteenth Amendments prohibit execution of juveniles who were younger than sixteen when they committed the charged crime.¹¹⁸ Because juveniles of this age possess a lessened culpability, they cannot justifiably be subjected to the “ultimate penalty.”¹¹⁹ The Court looked to trends in state legislation¹²⁰ and jury decisions to determine whether the juvenile death penalty comports with “evolving standards of decency” reflected by the Eighth Amendment’s ban against cruel and unusual punishment.¹²¹ When *Thompson* was decided, all states had enacted legislation setting the maximum age for juvenile court jurisdiction at no less than sixteen.¹²² Furthermore, the Court found a national trend away from executing juveniles under the age of sixteen.¹²³ While only eighteen states had expressly set a minimum age for capital punishment in 1988, all eighteen set the age requirement at sixteen.¹²⁴ The Court used this legislative history to identify a trend in modern standards of decency—a trend moving away from sub-

118. 487 U.S. at 838. William Wayne Thompson, the defendant, was convicted of first-degree murder for his participation (along with three older individuals) in a murder when he was fifteen years old. *Id.* at 818–819. Although Thompson was legally a child under Oklahoma law, the trial court certified him to be tried as an adult, finding that his potential for rehabilitation within the juvenile justice system was virtually nonexistent. *Id.* at 819–820. He was sentenced to death and the appellate court affirmed the conviction and the sentence, finding that “once a minor is certified to stand trial as an adult, he may also, without violating the Constitution, be punished as an adult.” *Id.* at 820 (quoting *Thompson v. Okla.*, 724 P.2d 780, 784 (Okla. Crim. App. 1986)).

119. *Id.* at 823.

120. The Court noted that state laws generally treat juveniles under age sixteen as minors who are ineligible to vote or serve on a jury, and who may not drive or marry without parental consent. *Id.* at 824. For a compilation of state laws in effect at the time of the *Thompson* decision, see *id.* at 839–848, apps. A–F (listing state laws imposing minimum age requirements for the right to vote, serve on a jury, drive, marry, purchase pornographic materials, and gamble).

121. *Id.* at 821–824 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) for the proposition that the Court’s decisions regarding what constitutes “cruel and unusual punishments” banned by the Eighth Amendment have guided the “evolving standards of decency that mark the progress of a maturing society”).

122. *Id.* at 824.

123. *Id.* at 826–829.

124. *Id.* at 829.

jecting teenagers under sixteen to the death penalty and toward recognizing that they are unprepared to assume the responsibilities of adults.¹²⁵ By the time the Court decided *Roper*, eighteen states had prohibited the juvenile death penalty for any crime committed under the age of eighteen, while twelve states had abolished the death penalty altogether.¹²⁶

The *Roper* Court relied heavily on *Thompson’s* proposition that teenagers’ “irresponsible conduct is not as morally reprehensible as that of an adult.”¹²⁷ Indeed, it was the *Thompson* Court that first declared juveniles are less able to evaluate and understand the consequences of their conduct due to their lack of experience and education and their propensity to be motivated by emotion and peer pressure.¹²⁸ Under this reasoning, the *Thompson* Court found no support for the social purposes of retribution and deterrence, which serve as the traditional justifications for capital punishment.¹²⁹ Retribution is not served by executing juveniles because they are less culpable than adult criminals and possess distinct potential for growth and rehabilitation.¹³⁰ Furthermore, juveniles are unlikely to be deterred by capital punishment because, in the unlikely event teenagers engage in any sort of cost-benefit analysis before they act, they are not likely to be deterred by the very small number of individuals executed for a crime they committed under age sixteen.¹³¹ Because executing

125. *Id.* at 830–831.

126. *Roper*, 543 U.S. at 580–581, app. A(II)–(III) (listing the states that set the minimum age at eighteen and those without the death penalty). The *Roper* majority discussed national and international trends, noting that only seven countries other than the United States have executed juveniles since 1990: Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and China. *Id.* at 577. Dissenting in *Roper*, Justice O’Connor criticized the majority’s conclusion, claiming there was insufficient evidence of a national consensus. *Id.* at 588 (O’Connor, J., dissenting). Furthermore, two states (Virginia and Missouri) directly responded to the Court’s *Stanford* ruling by enacting statutes that expressly set the minimum age for capital punishment at sixteen. *Id.* at 596 (O’Connor, J., dissenting).

127. *Id.* at 561, 570 (quoting *Thompson*, 487 U.S. at 835).

128. *Thompson*, 487 U.S. at 835; see *Roper*, 543 U.S. at 569–571 (explaining that the *Thompson* plurality used these characteristics to support its conclusion that the death penalty was unconstitutional when imposed on juveniles younger than sixteen).

129. *Thompson*, 487 U.S. at 836–837.

130. *Id.* at 836–837.

131. *Id.* at 837–838. Relying on a then-recent study, the Court noted that the last recorded execution of a juvenile younger than sixteen occurred in 1948, and throughout the twentieth century, only eighteen to twenty individuals were executed for crimes they committed before the age of sixteen. *Id.* at 832 (citing Victor L. Streib, *Death Penalty for*

juveniles under sixteen fails to serve the social purposes behind the death penalty, it is “nothing more than the purposeless and needless imposition of pain and suffering.”¹³² Although defense counsel argued for a complete prohibition of the death penalty for any crime committed under the age of eighteen, the *Thompson* Court chose to draw the line at age sixteen by declaring such executions in violation of the Eighth and Fourteenth Amendments.¹³³ This reasoning again inspired the Court in 2002 to invalidate executions of mentally retarded criminals as cruel and unusual punishment prohibited by the Eighth Amendment.¹³⁴

B. *Atkins v. Virginia*: Diminished Culpability of
Mentally Retarded Individuals Prohibits
Imposition of the Death Penalty

Along the lines of *Thompson*, the *Atkins* Court found that cognitive and behavioral impairments cause mentally retarded individuals to possess a diminished capacity.¹³⁵ While this diminished capacity does not exempt them from criminal liability, it certainly diminishes their culpability.¹³⁶ Upon recognizing this diminished culpability, the Court questioned whether the social purposes of retribution and deterrence can justify executing those

Juveniles, 190–208 (Ind. U. Press 1987) (providing a compilation of American juvenile death penalty statistics from 1620–1986)). By comparison, from 1930 to 1988 (the year *Thompson* was decided), 3,963 total executions occurred. U.S. Dept. Just., Bureau of Just. Statistics, *Key Facts at a Glance: Executions*, <http://www.ojp.gov/bjs/glance/tables/exetab.htm> (last updated Dec. 2009). One could argue that capital punishment’s deterrent effect is also lost on adult criminals because they similarly fail to engage in cost-benefit analysis before committing capital crimes. However, the *Thompson* Court seemed to distinguish the deterrent value of death sentences imposed on adults by relying on the very small number of individuals actually executed for crimes they committed under the age of sixteen. See 487 U.S. at 837–838 (stating that even if a fifteen-year-old engaged in a cost-benefit analysis he would not likely be deterred since only a small number of persons his age have been executed during the Twentieth Century).

132. *Thompson*, 487 U.S. at 838 (quoting *Coker v. Ga.*, 433 U.S. 584, 592 (1977) (finding that capital punishment for raping an adult woman violates the Eighth Amendment)).

133. 487 U.S. at 838.

134. *Atkins*, 536 U.S. at 321.

135. *Id.* at 318 (noting that mentally retarded individuals face a variety of impairments including “diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others”).

136. *Id.*

affected by mental retardation.¹³⁷ As in *Thompson*, the Court answered this question in the negative. Executing those with a lessened culpability fails to serve the idea behind retribution that only those “most deserving of execution” should be subjected to the death penalty.¹³⁸ Additionally, mentally retarded persons are not deterred by the possibility of execution because their impairments prevent them from understanding that their conduct could lead to execution.¹³⁹

Both *Thompson* and *Atkins* stand for the proposition that the death penalty is reserved for the worst criminals and it cannot be upheld as a punishment for individuals with diminished culpability.¹⁴⁰ Where the offender’s culpability is lessened, whether due to the incapacities of youth or mental impairment, execution cannot be justified by the traditional notions of retribution and deterrence.¹⁴¹ With this precedent in mind, the *Roper* Court continued its analysis to determine whether all juveniles (not just those under sixteen) were sufficiently less culpable to be exempted from capital punishment.¹⁴²

C. *Roper* Court: Immaturity and Lessened Culpability of All Juveniles Calls for a Categorical Ban against the Juvenile Death Penalty

In 2005, the Court revisited the constitutionality of the juvenile death penalty, this time drawing a clear line and imposing a categorical prohibition against capital punishment for crimes committed under the age of eighteen.¹⁴³ By recognizing that adolescents’ youth and inexperience causes them to be prone to im-

137. *Id.* at 318–319.

138. *Id.* at 319.

139. *Id.* at 319–320.

140. *See id.* (holding the execution of a mentally retarded offender unconstitutional because of his or her diminished capacity); *Thompson*, 487 U.S. at 836–838 (holding the execution of a person under age sixteen unconstitutional because of the juvenile’s lessened culpability).

141. *See Atkins*, 536 U.S. at 318–320 (finding the justifications for capital punishment—retribution and deterrence—do not apply to mentally retarded offenders because of their diminished capacity); *Thompson*, 487 U.S. at 836–838 (finding the deterrent and retributive values of the death penalty are insignificant due to the lessened culpability of a person younger than sixteen).

142. *Roper*, 543 U.S. at 564.

143. *Id.* at 572–574.

mature and irresponsible conduct, the Court identified distinct characteristics of juvenile offenders that cause them to be less culpable than adult criminals.¹⁴⁴ In light of this diminished culpability, the social purposes of retribution and deterrence (typically used to justify the death penalty) are not served by executing juveniles.¹⁴⁵ Thus, the Court concluded that juveniles (of all ages) cannot be subject to the death penalty, a punishment reserved for society's worst offenders.¹⁴⁶

1. Three Distinct Characteristics Decreasing the Culpability of Juvenile Offenders

Perhaps the most striking aspect of the *Roper* opinion is the majority's emphasis on the differences between juveniles and adults in the areas of psychosocial and brain development. The Court invoked social science research¹⁴⁷ to support its finding that juveniles are not as culpable as adults and thus cannot be classified "among the worst offenders" deserving of capital punishment.¹⁴⁸ To reach this conclusion, the *Roper* majority identified three distinct characteristics that make juveniles less culpable than adult offenders.¹⁴⁹ First, juveniles are prone to "impetuous and ill-considered actions and decisions" due to their lack of maturity and responsibility.¹⁵⁰ In support of this conclusion, the majority cited empirical studies finding that "adolescents are over-

144. *Id.* at 569–570.

145. *Id.* at 571–572.

146. *Id.* at 569, 574.

147. *Id.* at 569–570 (citing Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 *Am. Psychol.* 1009, 1014 (2003) (stating that juveniles, as minors by law, "lack the freedom that adults have to extricate themselves from a criminogenic setting"); Erik H. Erikson, *Identity: Youth and Crisis* (W.W. Norton & Co. 1968) (generally stating that, due to undeveloped character, the "personality traits of juveniles are more transitory, less fixed")).

148. *Roper*, 543 U.S. at 570.

149. *Id.* at 569–570.

150. *Id.* at 569. In his dissent, Justice Scalia outright rejected this characterization and criticized the majority for "picking and choosing" scientific methodologies that support its findings. *Id.* at 616–618 (Scalia, J., Rehnquist, C.J. & Thomas, J., dissenting). Some commentators have presented similar arguments. See Deborah W. Denno, *The Scientific Shortcomings of Roper v. Simmons*, 3 *Ohio St. J. Crim. L.* 379, 379–381 (2006) (arguing that the scientific research relied upon by the *Roper* majority was insufficient and outdated).

represented statistically in virtually every category of reckless behavior.”¹⁵¹ In addition, state laws recognize the immaturity and irresponsibility of juveniles by prohibiting persons younger than eighteen from voting, serving on juries, or marrying without parental consent.¹⁵² Second, juveniles are more likely to be negatively influenced by external pressures, including peer pressure, because they possess “less control, or less experience with control, over their own environment.”¹⁵³ All juveniles are minors in the eyes of the law; they therefore “lack the freedom that adults have to extricate themselves from a criminogenic setting.”¹⁵⁴ Finally, the majority stated that the underdeveloped character of juveniles results in personality traits that are “more transitory, less fixed.”¹⁵⁵

In sum, the majority concluded that juveniles cannot be classified “among the worst offenders” because these characteristics cause them to be more prone to “immature and irresponsible behavior.”¹⁵⁶ Thus, juveniles’ “irresponsible conduct is not as morally reprehensible as that of an adult.”¹⁵⁷ Under this reasoning, juveniles are more entitled to forgiveness.¹⁵⁸ Even the most heinous crimes cannot support a determination of “irretrievably depraved character”¹⁵⁹ because juvenile offenders are far more susceptible to rehabilitation and reform than their adult counterparts.¹⁶⁰ Thus, the majority extended *Thompson’s* reasoning to support a categorical prohibition against the execution of all juveniles under the age of eighteen.¹⁶¹

151. *Roper*, 543 U.S. at 569 (quoting Jeffrey Jensen Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 *Developmental Rev.* 339, 339 (1992)).

152. *Id.* (referencing *id.* at 581–587, apps. B–D (listing state statutes that establish a minimum age to vote, serve on a jury, and marry without parental consent)).

153. *Id.* at 569 (citing Steinberg & Scott, *supra* n. 147, at 1014).

154. *Id.* (quoting Steinberg & Scott, *supra* n. 147, at 1014).

155. *Id.* at 570 (generally referencing Erikson, *supra* n. 147).

156. *Id.*

157. *Id.* (quoting *Thompson*, 487 U.S. at 835).

158. *Id.* (citing *Stanford*, 492 U.S. at 395 (Brennan, J., dissenting)).

159. *Id.*

160. *Id.*

161. *Id.* at 570–571. In her dissent, Justice O’Connor took issue with the majority’s categorical holding, stating “[t]he fact that juveniles are generally less culpable for their misconduct than adults does not necessarily mean that a [seventeen]-year-old murderer cannot be sufficiently culpable to merit the death penalty.” *Id.* at 599 (O’Connor, J., dissenting) (emphasis in original). When he was seventeen, the defendant, Christopher Simmons, murdered Shirley Crook along with two friends, Charles Benjamin (age fifteen) and

2. Social Goals of Retribution and Deterrence Inapplicable to Juvenile Executions

Capital punishment is justified because it serves the social purposes of retribution and deterrence.¹⁶² Retribution involves the concept that one who commits a crime must get his “just deserts.”¹⁶³ Appropriate punishment therefore hinges on the culpability or blameworthiness of the offender.¹⁶⁴ The idea behind deterrence is that potential offenders are more likely to avoid capital crimes when they are aware of the possibility of being sentenced to death.¹⁶⁵ Echoing *Atkins*, the *Roper* majority concluded that the juvenile death penalty fails to advance either of these social goals.¹⁶⁶ Retribution is not appropriate based on the diminished culpability of juveniles because it is inequitable to impose “the law’s most severe penalty” on a person “whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity.”¹⁶⁷ Furthermore, juveniles are less likely to be deterred by the possibility of facing the death penalty because it is highly unlikely they engage in any sort of applicable cost-benefit analysis before they act.¹⁶⁸ Even without the threat of

John Tessmer (age sixteen). *Id.* at 556. Simmons and Benjamin broke into the victim’s house at 2:00 a.m., duct-taped her eyes and mouth, and bound her hands. *Id.* (noting that Tessmer left before Simmons and Benjamin set out for the victim’s house). After driving the victim to a state park, they tied her hands and feet together, covered her entire face with duct tape, and threw her into the Meramec River, where she drowned. *Id.* at 556–557. Simmons later bragged to friends that he killed the woman “because the bitch seen my face.” *Id.* at 557. At seventeen, Simmons was outside the jurisdiction of Missouri’s juvenile court system; he was tried as an adult and convicted of first-degree murder. *Id.* He was sentenced to the death penalty and the Missouri Supreme Court subsequently affirmed his conviction and sentence. *Id.* at 558–559. At the time, Missouri was one of two states (along with Virginia) that had enacted statutes expressly setting the minimum age for execution at sixteen. *Id.* at 596 (O’Connor, J., dissenting (citing Mo. Rev. Stat. § 565.020.2 (2000))).

162. *Id.* at 571 (citing *Atkins*, 536 U.S. at 319).

163. *Atkins*, 536 U.S. at 319.

164. *Id.* (remarking that Supreme Court jurisprudence “has consistently confined the imposition of the death penalty to a narrow category of the most serious crimes”).

165. *Id.* at 319–320.

166. *Roper*, 543 U.S. at 572.

167. *Id.* at 571.

168. *Id.* at 571–572 (quoting *Thompson*, 487 U.S. at 837); see Marty Beyer, *Immaturity, Culpability & Competence in Juveniles: A Study of 17 Cases*, 15 *Crim. Just.* 27 (2000) (explaining that the circumstances surrounding juvenile criminal acts demonstrate lack of planning and failure to understand the seriousness or consequences of one’s actions).

execution, juveniles will be sufficiently deterred by the possibility of a life-without-parole prison sentence.¹⁶⁹

The *Roper* majority concluded by clarifying that its decision imposes a categorical prohibition against the juvenile death penalty—that anything less risks executing an undeserving adolescent.¹⁷⁰ Youth in itself is a mitigating factor that affects capital sentencing, but the likelihood exists that the “brutality or cold-blooded nature” of certain crimes could nonetheless cause juries to recommend the death penalty.¹⁷¹ “When a juvenile offender commits a heinous crime, the State can exact forfeiture of some of the most basic liberties, but the State cannot extinguish his life and his potential to attain a mature understanding of his own humanity.”¹⁷² By recognizing that the diminished culpability of all juveniles prevents them from being classified among the worst offenders, the *Roper* decision provides a solid framework to assist juvenile-justice advocates who seek to invoke the Court’s reasoning to challenge other areas of juvenile sentencing.¹⁷³

169. *Roper*, 543 U.S. at 572. For information about how *Roper* may affect life-without-parole sentencing for juveniles, see *infra* note 173.

170. 543 U.S. at 572–573. Justice Kennedy recognized that even expert psychologists find it difficult “to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.” *Id.* at 573 (citing Steinberg & Scott, *supra* n. 147, at 1014–1016). For example, the American Psychiatric Association prohibits psychiatrists from diagnosing antisocial personality disorder in patients younger than eighteen years of age. *Id.* (citing Am. Psychiatric Assoc., *Diagnostic and Statistical Manual of Mental Disorders*, 701–706 (4th ed., text rev., Am. Psychiatric Assoc. 2000); Steinberg & Scott, *supra* n. 147, at 1015). Thus, the majority concluded jurors should not have the ability to subject an adolescent to “a far graver condemnation.” *Id.*

171. *Id.* at 573. Although juveniles can (and do) commit serious, heinous crimes, the majority was unwilling to continue to allow juries to determine, on a case-by-case basis, whether juveniles should be put to death. *Id.* at 572–573 (noting that a juvenile’s youth could, in some cases, be argued as an aggravating, rather than mitigating, factor). During closing arguments at the sentencing phase of the instant case, defense counsel presented Simmons’ age (seventeen) as a mitigating factor. *Id.* at 558. However, the prosecutor responded by arguing the defendant’s youth was in fact an aggravating factor, supporting imposition of the death penalty: “Seventeen years old. Isn’t that scary? Doesn’t that scare you? Mitigating? Quite the contrary I submit. Quite the contrary.” *Id.*

172. *Id.* at 573–574.

173. For example, during its 2009–2010 term, the Supreme Court extended *Roper*’s reasoning to invalidate life without parole sentences for juveniles charged with nonhomicide crimes. *Graham v. Florida*, 2010 WL 1946731 (U.S. May 17, 2010) (holding that life without parole sentences for nonhomicide juvenile offenders are unconstitutional); see also *Sullivan v. Florida*, 2010 WL 1946756 (U.S. May 17, 2010) (under circumstances similar to *Graham*, dismissing petitioner’s claims based on the prior holding in *Graham v. Florida*). By invoking an analysis similar to that utilized in *Roper*, the *Graham* Court concluded

IV. APPLYING *ROPER'S REASONING TO INVALIDATE SORNA*

Roper opens the door for potential challenges to the Adam Walsh Act and SORNA. As applied to juveniles, SORNA should be constitutionally invalidated for three reasons. First, the Act fails to recognize important differences between adult and adolescent sex offenders, categorizing the latter among the worst offenders and subjecting them to the strictest registration requirements. In addition, SORNA fails to distinguish between teenagers who can be rehabilitated and those who present a real threat to the community by lumping all adolescents into public registries alongside convicted child molesters, pedophiles, and adult rapists. Second, the social interest in public safety, the primary justification for sex offender registries, is ill-served by applying registration and notification laws to juveniles. Finally, SORNA undermines the rehabilitative goals and concerns for confidentiality inherent in the juvenile justice system. This section explains how *Roper's* conclusions can be used to challenge SORNA. Specifically, it applies the focal points of *Roper* to the most significant provisions of SORNA against the backdrop of the traditional goals of the juvenile justice system.

A. SORNA Fails to Differentiate between Adult and Adolescent Sex Offenders

The *Roper* majority recognized three distinct differences between juvenile and adult offenders, which ultimately supported its conclusion that all juveniles possess a diminished culpability

that life without parole sentences for juveniles who commit nonhomicide offenses violates the Eighth Amendment's prohibition against cruel and unusual punishments. *Id.* at *2. Once again, the Court based its ruling on the diminished culpability of juveniles—particularly that of juveniles who do not commit homicide offenses. *Id.* at *2. In terms of severity, life without parole is second only to capital punishment “and is especially harsh for a juvenile offender, who will on average serve more years and a greater percentage of his life in prison than an adult offender.” *Id.* at *2 (citing *Roper*, 543 U.S. at 572). Furthermore, the *Graham* Court concluded that “none of the legitimate goals of penal sanctions—retribution, deterrence, incapacitation, and rehabilitation”—are sufficient to justify life without parole sentences for juveniles. *Id.* at *2. “Because age ‘18 is the point where society draws the line for many purposes between childhood and adulthood,’ it is the age below which a defendant may not be sentenced to life without parole for a nonhomicide crime.” *Id.* at *2 (quoting *Roper*, 543 U.S. at 574).

that exempts them from execution.¹⁷⁴ These same characteristics—immaturity and irresponsibility, susceptibility to peer pressure, and undeveloped character—support an argument that juvenile sex offenders should not be subjected to the same registration and notification requirements as adult offenders.

Because of their immaturity and inexperience, juveniles do not fully understand the legal process or the consequences of their actions.¹⁷⁵ Compounding the problem, their susceptibility to negative influences and peer pressure can cause erratic behavior, especially if the juvenile is himself a victim of abuse or other trauma.¹⁷⁶ Juveniles' undeveloped character is easily explained by neuroscience studies that demonstrate the differences between brain development in adults and adolescents.¹⁷⁷ Adolescence itself is a transitional stage, “representing the period of time during which a person may physically be considered an adult but may not in fact be emotionally at full maturity.”¹⁷⁸ Brain development is one of many factors that must be considered when determining the culpability or accountability of juveniles.¹⁷⁹ Personality as well as cognitive and social behaviors are controlled by the brain's prefrontal cortex, which continues to develop into early adulthood.¹⁸⁰ Separate juvenile courts recognize that adolescents are less responsible for their actions because their developmental immaturity impairs their decisionmaking processes, and that they are likewise more susceptible to rehabilitation.¹⁸¹ Regardless of society's views on sex offenders, this system must continue to

174. To review the identified differences, see *supra* Part III(C)(1).

175. Beyer, *supra* n. 168, at 27, 34 (summarizing the findings of developmental assessments of seventeen juveniles and explaining that adolescents do not engage in adult thought processes and are ignorant of the legal process).

176. *Id.* at 31.

177. See Staci A. Gruber & Deborah A. Yurgelun-Todd, *Neurobiology and the Law: A Role in Juvenile Justice?*, 3 Ohio St. J. Crim. L. 321, 322–324 (2006) (concluding “adolescence is a critical period for brain development” based on the described neurobiologic findings).

178. *Id.* at 322.

179. *Id.*

180. *Id.* at 322, 324 (explaining that the prefrontal cortex plays “a pivotal role in the development and execution of novel thoughts and behaviors,” including the concepts of insight, judgment, and goals).

181. Steinberg & Schwartz, *supra* n. 2, at 9.

recognize that juveniles “are different both structurally and functionally from adults.”¹⁸²

Arrest statistics and recidivism rates signify another significant difference between juvenile and adult sex offenders. Juveniles account for less than 20% of all arrests for sex crimes.¹⁸³ On an annual basis, there are roughly 26,000 arrests for forcible rape and more than 90,000 arrests for other sex crimes.¹⁸⁴ Juveniles account for only 18% of sex offense arrests and 15% of forcible rape arrests.¹⁸⁵ By comparison, juveniles are far more likely to commit other crimes (such as property crimes) than sex offenses.¹⁸⁶ For example, in 2008, juveniles were involved in 47% of arson arrests, 38% of vandalism arrests, and 27% of disorderly conduct arrests.¹⁸⁷

There is no clear consensus about recidivism rates among juvenile sex offenders,¹⁸⁸ primarily because most published studies fail to follow representative groups of offenders and instead focus on small groups of juveniles within the justice system, correctional settings, or clinical settings.¹⁸⁹ However, most studies show low rates of recidivism for sex offenses and much higher rates for

182. Gruber & Yurgelun-Todd, *supra* n. 177, at 331.

183. Ctr. Sex Offender Mgmt., *Fact Sheet: What You Need to Know about Sex Offenders* 1, http://www.csom.org/pubs/needtoknow_fs.pdf (Dec. 2008).

184. *Id.* (citing FBI arrest reports for 2004).

185. *Id.*; U.S. Dept. Just., Off. Juvenile Just. & Delinquency Prevention, *Natl. Crim. Just. Ref. Serv., Juvenile Justice Bulletin: Juvenile Arrests 2008* 4, <http://www.ncjrs.gov/pdffiles1/ojdp/228479.pdf> (Dec. 2009) [hereinafter *Juvenile Arrests 2008*].

186. *Supra* n. 183, at 7 (citing L.R. Reitzel & J.L. Carbonell, *The Effectiveness of Sex Offender Treatment for Juveniles as Measured by Recidivism: A Meta-Analysis*, 18 *Sexual Abuse: J. Research & Treatment*, 401–421 (2006)).

187. *Juvenile Arrests 2008*, *supra* n. 185, at 4.

188. For a discussion of recidivism rates for sex offenders in general, see Charles H. Rose III, *Caging the Beast: Formulating Effective Evidentiary Rules to Deal with Sexual Offenders*, 34 *Am. J. Crim. L.* 1 (2006). Rose suggests that evidentiary rules regarding the admissibility of prior sexual misconduct should be amended to reflect the predictive ability of recidivism data, stating: “The present rules were based upon fear, supposition and a laudable desire to do something in the face of what appeared to be an epidemic of sexual abuse. Unfortunately, most recent studies establish a lack of sound statistical data supporting those initial assumptions.” *Id.* at 30.

189. Franklin E. Zimring, *An American Tragedy: Legal Responses to Adolescent Sexual Offending* 118 (U. Chi. Press 2004) (explaining the need “to spend a few years and a modest budget obtaining a long-range, multisite measure of recidivism for sex offenses and other offenses among broad samples of juvenile offenders”). A comprehensive study would allow legislators to frame sex offender laws to specifically address the dangerousness of adolescent sex offenders. *Id.*

other types of crime.¹⁹⁰ A 1996 study by the National Council on Crime and Delinquency (NCCD) followed all sex crimes referred to juvenile courts in Baltimore, Maryland; San Francisco, California; and Lucas County, Ohio.¹⁹¹ Studied cases involved a full spectrum of relatively serious offenses.¹⁹² NCCD measured recidivism by looking at subsequent arrests for sex and non-sex offenses for eighteen months after the initial adjudication.¹⁹³ The study revealed a typical pattern of high rates of arrest for non-sex crimes, set off by a much lower rate of recidivism by sex offenses.¹⁹⁴ Overall, re-arrests for non-sex crimes ranged from 21–43.6%, while recidivism rates for sex crimes were only 3.2–5.5%.¹⁹⁵ By comparison, nearly 50% of adult sex offenders commit future sex crimes.¹⁹⁶ Such a drastic differential suggests that juveniles are far more likely to be rehabilitated than adult sex offenders. Furthermore, it suggests that many adolescent sex crimes can be attributed to immaturity, irresponsibility, peer pressure, and undeveloped character.

SORNA should be invalidated because it fails to account for fundamental differences between adult and adolescent offenders, including their low rates of recidivism; indeed, it fails to recognize the varying degrees of severity among juvenile offenses in general. Instead, SORNA classifies juveniles among the worst offenders, regardless of the seriousness of their offense, and publicizes them on Internet registries alongside adult rapists, pedophiles, and child molesters. In *Roper*, the Supreme Court recognized that even expert psychologists have difficulty distinguishing between

190. *Id.* at 174–181 (summarizing the results of published and unpublished recidivism research).

191. *Id.* at 58–59, 174–175 (citing Natl. Council on Crime & Delinquency, prepared by Richard G. Wiebush, *Juvenile Sex Offenders: Characteristics, System Response, and Recidivism* (1996) [hereinafter *NCCD Study*]).

192. *Id.* at 58. “According to police reports . . . ‘40–60% of the offenses involved penetration; 25–60% involved the use of force; 36–54% involved (at least) a four-year age differential between the offender and the victim; and 20–36% of the cases involved repeat victimization.’” *Id.* (citing *NCCD Study*, *supra* n. 191, at 34).

193. *Id.* at 59.

194. *Id.*

195. *Id.* at 60.

196. *Id.* at 31 (suggesting that “[t]here is a dark figure of undetected recidivism that is quite large” because repeat offenders develop methods of avoiding arrest). *Id.* However, there is no evidence to suggest that juvenile re-offenders have a similar ability to escape arrest. *Id.* at 62.

juveniles who pose a real threat and those “whose crime reflects unfortunate yet transient immaturity.”¹⁹⁷ This conclusion supports another challenge to SORNA: it fails to differentiate between adolescents who engage in childish, less-serious conduct from those who present a real threat to the public because they are at risk of becoming true sexual predators.¹⁹⁸ This overly broad classification system assumes that juvenile sex offenders are more like adult sex offenders and less like juveniles who commit other non-sex crimes. However, recent research suggests that juveniles convicted of sex offenses are no more likely to commit another sex offense than juveniles convicted of other non-sex crimes.¹⁹⁹

In sum, SORNA should be invalidated as applied to juveniles because—like the juvenile death penalty—it fails to account for the inherent characteristics of juvenile offenders that diminish

197. 543 U.S. at 573.

198. For example, eighteen-year-old Phillip Alpert was required by a Florida court to register as a sex offender for “sexting” after he sent a nude photo of his sixteen-year-old girlfriend to her friends and family after an argument. Deborah Feyenck & Sheila Steffen, *CNN, “Sexting” Lands Teen on Sex Offender List*, <http://www.cnn.com/2009/CRIME/04/07/sexting.busts/index.html> (updated Apr. 8, 2009). In Georgia, seventeen-year-old Genarlow Wilson was convicted of aggravated child molestation, punished by a mandatory ten-year prison sentence, and required to register as a sex offender after he had consensual oral sex with a fifteen-year-old girl at a party in 2003. CNN, *Genarlow Wilson: Plea Deal Would Have Left Me Without a Home*, <http://edition.cnn.com/2007/US/law/10/29/wilson.released/index.html#cnnSTCText> (updated Oct. 29, 2007). Wilson served two years of his prison sentence and was released in 2005 when the Georgia Supreme Court held his sentence violated the Eighth Amendment’s prohibition against cruel and unusual punishment. *Id.* Compare these stories to that of Patrick Melton, a sixteen-year-old Florida boy who faces adult charges after law enforcement discovered more than 200 child pornography photos and videos on his computer, including a video that showed a two-year-old being molested by an adult man. Kevin Graham, *Hillsborough Detective Testifies Teen’s Interest in Child Pornography Started with Typo*, *St. Petersburg Times* (July 24, 2009) (available at <http://www.tampabay.com/news/courts/criminal/article1020998.ece>) (last modified July 23, 2009). When an investigating detective asked Melton whether he would have “acted out on a child,” Melton said he might have. *Id.*

199. Michael F. Caldwell, Mitchell H. Ziemke & Michael J. Vitacco, *An Examination of the Sex Offender Registration and Notification Act as Applied to Juveniles: Evaluating the Ability to Predict Sexual Recidivism*, 14 *Psychol. Pub. Policy & L.* 89, 92 (2008) (discussing two 2007 studies that found no meaningful difference in terms of subsequent sex offenses committed by juveniles charged with sex crimes and those charged with non-sex offenses). The authors conducted their own study to record the recidivism rates of ninety-one juvenile males adjudicated for sex offenses as compared to 174 juvenile males adjudicated for non-sex offenses. *Id.* at 96–97. All participants were treated in correctional programs. The mean age was 15.4 years, and the participants were tracked for an average of six years. *Id.* In the end, 12.1% of the juvenile sex offenders were charged with subsequent sex offenses, as were 11.6% of the non-sex offenders. *Id.* at 101.

their culpability. Furthermore, by classifying all juveniles among the worst sex offenders, SORNA fails to distinguish between adolescents whose conduct is truly attributable to immaturity and those who present a real threat to society.

B. Applying SORNA to Juvenile Sex Offenders Fails to Promote Public Safety

The *Roper* majority recognized that the traditional justifications for capital punishment—retribution and deterrence—are inapplicable in light of juveniles’ lessened culpability.²⁰⁰ Sex offender registration and community-notification laws are primarily justified as means to safeguard the public from sex offenders and child predators.²⁰¹ However, public safety is ill-served by applying these laws to juvenile offenders because SORNA fails to account for the harm adolescents will suffer under its requirements.

Sex offender legislation is, at least in part, the result of public outrage and fear of child predators.²⁰² Registration and community-notification programs are justified by notions that sex crimes are inherently different (or worse) than other crimes, and therefore those who commit such crimes may be subjected to *special* requirements and penalties.²⁰³ General stereotypes about sex offenders stem from the assumptions that they “[specialize] in sex offenses” and pose a threat to public safety (partially because of high recidivism rates).²⁰⁴ As stated above, the likelihood that juvenile sex offenders will reoffend is miniscule when compared to adult recidivism rates.²⁰⁵ Nevertheless, SORNA subjects juvenile sex offenders to *special* treatment that would not be allowed in any other area of juvenile law. To achieve its stated purpose of protecting the public,²⁰⁶ the Adam Walsh Act classifies adolescents among the worst offenders, subjects them to lifetime regis-

200. *Supra* pt. III(C)(2) (explaining the *Roper* Court’s conclusions regarding retribution and deterrence).

201. Zimring, *supra* n. 189, at 26.

202. *Id.*

203. *Id.* at 27.

204. *Id.* at 28–29.

205. *Supra* pt. IV(A) (discussing recidivism rates for juvenile and adult sex offenders).

206. See 42 U.S.C. § 16901 (declaring the purpose of SORNA is “to protect the public from sex offenders and offenders against children”); *supra* n. 42 and accompanying text (explaining the expressly stated purpose of SORNA).

tration requirements, and allows for public dissemination of their personal information.²⁰⁷ In the name of public safety, this treatment completely departs from the rehabilitation and confidentiality that have served as the cornerstones of the juvenile justice system for more than one hundred years.

Sex offender registration and community-notification programs may be necessary to protect the public from rapists, child molesters, and pedophiles, but these laws cannot be upheld for the sake of public safety when, at the same time, they *harm* a specific group of America's children. Placing juveniles on publicly accessible Web sites actually disserves public safety by creating substantial hardships for affected adolescents²⁰⁸ and failing to identify those who pose a real threat to the community.²⁰⁹ Once their sex offender status is discovered, adolescents are bullied at school, barred from extracurricular activities, and their families are cast out by the community.²¹⁰ Consider, for example, the earlier story of Johnnie: Once his classmates discovered his profile on the state's online sex offender registry, he was bullied, taunted, and harassed to the point of suicidal tendencies.²¹¹ Under SORNA, juveniles (like Johnnie) who commit sex offenses can remain on public registries for the rest of their lives.²¹² This can significantly impair their employment and higher education opportunities.²¹³ Perhaps the real concern for juveniles is that being

207. See *supra* pt. II(B) (explaining how SORNA affects juvenile offenders).

208. See Jones, *supra* n. 1 (describing the effects of registration on several adolescent sex offenders).

209. Caldwell, Ziemke & Vitacco, *supra* n. 199, at 106 (explaining that SORNA fails to identify high-risk juvenile offenders and, therefore, actually results in a greater risk to public safety).

210. See Jones, *supra* n. 1 (recounting stories about juveniles who were beaten up, ostracized by their neighbors, and denied the opportunity to participate on school athletic teams once it was discovered that they were registered sex offenders).

211. *Supra* n. 1 and accompanying text (illustrating Johnnie's plight after fellow students discovered his status as a sex offender).

212. See *supra* pt. II(B)(3) (discussing registration duration requirements under SORNA).

213. See Jones, *supra* n. 1 (stating that a consequence of the sex offender label is the adolescent's struggle to stay in the mainstream as he moves into adulthood). Registered sex offenders are unable to find employment at any place that conducts background screening, which includes some fast-food restaurants and department stores. *Id.* Moreover, SORNA is retroactive, and therefore, its registration requirements apply to adults who were adjudicated delinquent for a qualifying offense even if they were not required by law to register at the time of the adjudication. 28 C.F.R. § 72.3 (2007). Clearly, this can severely affect the lives of these individuals and their families. See *e.g.* The Economist, *Sex*

labeled and treated as a criminal during adolescence can lead to adult criminal behavior.²¹⁴ It has also been suggested that community notification as applied to juveniles is “cruel and unusual” punishment that should, like the juvenile death penalty, be outlawed.²¹⁵ In fact, the Supreme Court has recognized that Eighth Amendment crime-punishment proportionality also applies to noncapital sentences.²¹⁶

By harming juveniles that come within its grasp and increasing the likelihood that these adolescents will become adult criminals, SORNA actually disserves public safety. Because SORNA fails to accomplish its stated purpose, it should, in accordance with *Roper*, be held inapplicable to juvenile offenders.

C. SORNA Undermines the Traditional Goals of the Juvenile Justice System

Historically, states established juvenile courts as separate entities for the main purpose of rehabilitating, not punishing, adolescent offenders.²¹⁷ With the utmost respect for confidentiality, these courts were closed to the public and juvenile records remained sealed.²¹⁸ Illinois created the first juvenile court with the Juvenile Justice Act of 1899, which aimed to “regulate the

Laws, Unjust and Ineffective: America has Pioneered the Harsh Punishment of Sex Offenders. Does it Work? (Aug. 6, 2009) (available at http://www.economist.com/displaystory.cfm?story_id=14164614) (relaying the story of Wendy Whitaker, a Georgia woman required to register as a sex offender because, at the age of seventeen, she engaged in consensual oral sex with a classmate three weeks before his sixteenth birthday). Whitaker was sentenced to probation for five years in 1996, but wound up spending more than one year in county jail because she failed to meet technical requirements of her probation. *Id.* Although released from probation in 2002, Whitaker is still a registered sex offender. *Id.* Because of state residential restrictions and registration laws, she and her husband continue to face difficulties in securing housing and employment. *Id.*

214. See Jones, *supra* n. 1 (quoting Elizabeth Letourneau: “If kids can’t get through school because of community notification, or they can’t get jobs, they are going to be marginalized”).

215. Caitlin Young, *Children Sex Offenders: How the Adam Walsh Child Protection and Safety Act Hurts the Same Children It Is Trying to Protect*, 34 New Eng. J. Crim. & Civ. Confinement 459, 483 (2008).

216. *Harmelin v. Mich.*, 501 U.S. 957, 997–998 (1991) (Kennedy, O’Connor & Souter, JJ., concurring in part and concurring in the judgment).

217. Daniel M. Filler & Austin E. Smith, *The New Rehabilitation*, 91 Iowa L. Rev. 951, 956 (2006) (providing a comprehensive account of the historical development of the juvenile justice system and the rise and fall of its rehabilitative purpose).

218. Steinberg & Schwartz, *supra* n. 2, at 14.

treatment and control of dependent, neglected and delinquent children.”²¹⁹ Twenty-two states quickly followed suit by enacting legislation that mirrored this rehabilitative goal.²²⁰ Aside from Maine and Wyoming, every state established a separate juvenile justice system by 1925.²²¹ Early proponents of this system “believed that society’s role was not to ascertain whether the child was ‘guilty’ or ‘innocent,’ but ‘[w]hat is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career.’”²²² By creating separate justice systems, states were able to “recognize the special needs and immature status” of juvenile offenders and “emphasize rehabilitation over punishment.”²²³ This system successfully differentiated juvenile adjudications from adult criminal convictions, but children were denied many procedural protections.²²⁴

In 1967, the Warren Court decided *In re Gault*²²⁵ and forever changed the juvenile justice system by defining the criminal procedural rights of adolescents within its jurisdiction. *Gault* held that juveniles are entitled to constitutional protections analogous to those of adult criminals, including the right to counsel, the privilege against self-incrimination, notice of charges, and the right to confront and cross-examine witnesses.²²⁶ Juvenile courts were further aligned with adult criminal courts during the mid-1990s when states passed laws in response to a surge in violent crimes committed by juveniles.²²⁷

219. Filler & Smith, *supra* n. 217, at 956 (quoting the Juvenile Court Act, 1899 Ill. Laws 131).

220. *Id.*

221. *Id.* Maine and Wyoming created their own juvenile justice systems by 1945. *Id.* at 956 n. 28.

222. *In re Gault*, 387 U.S. 1, 15 (1967) (quoting Julian Mack, *The Juvenile Court*, 23 Harv. L. Rev. 104, 119–120 (1909)). Julian Mack served as the second judge in Chicago’s juvenile court system. Steinberg & Schwartz, *supra* n. 2, at 12.

223. Steinberg & Schwartz, *supra* n. 2, at 9.

224. Filler & Smith, *supra* n. 217, at 958–959.

225. 387 U.S. 1.

226. *Id.* at 31–59.

227. Steinberg & Schwartz, *supra* n. 2, at 13–14 (explaining that these laws resulted in an increase in the number of juveniles transferred to adult court, harsher penalties in the juvenile system, and lessened confidentiality with regard to juvenile records and proceedings).

Although it appears the juvenile justice system is moving toward a more punitive model, the recent establishment of juvenile specialty courts (including drug, gun, mental health, and truancy) shows that hope for juvenile rehabilitation still thrives.²²⁸ The Adam Walsh Act and SORNA seek to extinguish this hope—advocates must not let this happen. Challenging the Adam Walsh Act is a crucial part of maintaining the rehabilitative nature of the juvenile justice system. SORNA undermines the rehabilitative goals of the juvenile justice system by stigmatizing adolescent sex offenders for life. Furthermore, SORNA completely disregards confidentiality by requiring that juveniles’ personal information be publicly disseminated on state and federal Internet registries.

When juveniles are forced to register as sex offenders and appear on publicly accessible Internet registries, their potential for rehabilitation is stunted.²²⁹ Once discovered by their peers, these adolescents may drop out of school to avoid harassment.²³⁰ They may become victims of threatened violence and vigilantism.²³¹ Treatment and rehabilitation are further hindered by the stigma associated with registered sex offender status.²³² By requiring juveniles to register for the rest of their lives, SORNA ensures this stigma will continue to undermine rehabilitation long into adulthood. Sex offender status can impede higher education and employment opportunities and lead to marginalization that may ultimately cause these juveniles to become adult criminals.²³³ Not only does SORNA undercut the goals of rehabilitation and confidentiality, it fails to recognize juveniles’ immaturity and diminished culpability—the very characteristics that prompted the initial creation of a separate juvenile court system.²³⁴ In the end, SORNA’s application to juvenile adjudications is unnecessary. To

228. Filler & Smith, *supra* n. 217, at 954.

229. ABA Crim. Just. Sec., *Commission on Youth at Risk: Report to the House of Delegates* 4–5 (ABA Nov. 2008) (available at <http://www.abanet.org/leadership/2009/midyear/recommendations/101A.pdf>) [hereinafter ABA Report] (urging Congress to reconsider the Adam Walsh Act as it applies to juvenile sex offenders).

230. *Id.* at 4.

231. *See* Jones, *supra* n. 1 (recounting several instances where registered sex offenders have been murdered by people who tracked them down through Internet registries).

232. ABA Report, *supra* n. 229, at 4–5.

233. *See* Jones, *supra* n. 1 (illustrating the hardships imposed on juveniles by the stigma associated with being labeled a sex offender).

234. Steinberg & Schwartz, *supra* n. 2, at 9.

the extent society is concerned about juvenile sex offenders who pose a real threat to public safety, an adequate alternative is already in place.

V. A SUPERIOR ALTERNATIVE SYSTEM ALREADY EXISTS

While the above analysis explains how SORNA negatively impacts juvenile sex offenders and how the Adam Walsh Act should be challenged by utilizing the Supreme Court's *Roper* reasoning, one problem remains should SORNA be invalidated as it applies to adolescents: courts must retain procedures for dealing with juvenile sex offenders who truly pose a serious threat to public safety. But in these circumstances, SORNA becomes obsolete because such a system already exists—the adult court transfer system, which allows juveniles to be prosecuted in adult criminal courts.²³⁵ Juveniles convicted in adult courts are, of course, subject to the same penalties as adults, including sex offender registration and notification requirements.²³⁶

When Congress enacted the Adam Walsh Act, it did so for the express purpose of “protect[ing] the public from sex offenders.”²³⁷ It is this exact interest—protection of the public—that underlies the adult court transfer system.²³⁸ Juveniles who engage in particularly violent crimes are acting more like adults (not children), and the transfer system presumes that these adolescents are not acting because of peer pressure, immaturity or inexperience, but rather, that they are engaging in conduct that demonstrates their

235. This solution aligns with legal scholar Franklin Zimring's “total exclusion strategy,” by which he proposes that sex offender registration and notification requirements should apply only to juveniles who are transferred to and convicted in adult criminal court. Zimring, *supra* n. 189, at 154–155.

236. See *supra* pt. II(B)(1) (explaining that prior to SORNA juveniles convicted as adults were required to register as sex offenders under the Jacob Wetterling Act).

237. 42 U.S.C. § 16901; see *supra* n. 42 and accompanying text (explaining the expressly stated purpose of SORNA).

238. See Elizabeth Scott, *Criminal Responsibility in Adolescence: Lessons from Developmental Psychology*, in *Youth on Trial: A Developmental Perspective on Juvenile Justice* 291, 297 (Thomas Grisso & Robert G. Schwartz eds., U. Chi. Press 2000) (providing an account of the various periods of reform that have blurred the lines between the adult and juvenile justice systems).

maturity.²³⁹ Thus, it becomes acceptable to charge, prosecute, and convict these juveniles within the adult criminal system.²⁴⁰

All states set a maximum age limit for juvenile court jurisdiction, which ranges from age fifteen to seventeen.²⁴¹ However, younger juveniles may be transferred to and tried in adult criminal court by three various mechanisms.²⁴² In states that provide for concurrent jurisdiction, prosecutors have the discretion to initiate proceedings against a juvenile in adult criminal court.²⁴³ Other states automatically transfer juveniles to adult court; these states allow adult courts original jurisdiction for certain classes of offenses.²⁴⁴ For the purposes of juvenile sex-offense cases, the preferable transfer mechanism is the judicial waiver system, which allows juvenile court judges to determine whether a particular adolescent should be transferred to adult court.²⁴⁵ During this process, judges must often consider the “totality of circumstances” to determine whether the juvenile before them is sufficiently mature to be tried as an adult.²⁴⁶

In deciding whether an adolescent charged with a sex offense should be transferred to adult court, the presiding judge must consider the particular facts and circumstances of each case.²⁴⁷ To determine whether the juvenile actually poses a threat to public safety, courts must assess a variety of factors including the offender’s age, the nature and severity of the offense, the likelihood

239. *Id.* at 298.

240. *Id.*

241. U.S. Dept. Just., Off. Juvenile Just. & Delinquency Prevention, *Natl. Crim. Just. Ref. Serv., OJJDP Fact Sheet: Delinquency Cases Waived to Criminal Court, 2005* 1, <http://www.ncjrs.gov/pdffiles1/ojjdp/224539.pdf> (June 2009) [hereinafter *OJJDP Waiver*].

242. *Id.*

243. *Id.*; Steinberg & Schwartz, *supra* n. 2, at 17. Once their case is filed in adult court, juveniles may request their case be transferred to juvenile court. Again, this process varies depending on state law. *Id.*

244. *OJJDP Waiver*, *supra* n. 241, at 1.

245. *Id.* (noting that forty-five states allow for judicial discretion); Steinberg & Schwartz, *supra* n. 2, at 17. This judicial discretion usually applies when the juvenile is fourteen or older and is charged with a felony, but the requirements vary according to state statutes. *Id.*

246. Elizabeth Cauffman & Laurence Steinberg, *Researching Adolescents’ Judgment and Culpability in Youth on Trial: A Developmental Perspective on Juvenile Justice* 325, 332 (Thomas Grisso & Robert G. Schwartz eds., U. Chi. Press 2000) (suggesting that judges consider “responsibility, perspective, and temperance” when deciding how to prosecute juveniles).

247. *Id.*

that he will become a repeat offender, and whether or not he actually presents a danger to the community.²⁴⁸ For example, if a seventeen-year-old molests or rapes a five-year-old, the court could (and in all likelihood would) consider the severity of the offense sufficient to transfer the adolescent to adult court. There, he would be charged and tried as an adult. If convicted, the criminal system would (regardless of SORNA) require him to register as a sex offender. On the other hand, if a seventeen-year-old faces sex-offense charges as a result of consensual oral sex with his fifteen-year-old girlfriend, the court could (under its discretion) determine that this juvenile should be prosecuted in juvenile court, where (if SORNA were invalidated as applied to juvenile adjudications) it would be able to keep this juvenile off the public sex offender registry and spare him the lifetime registration requirements and associated stigma. It would be quite a stretch to argue that this adolescent presents a threat to public safety sufficient to justify transfer to the adult system. Thus, SORNA becomes obsolete. Where SORNA fails, the justice system succeeds—the adult court transfer system already treats sufficiently culpable juveniles as adult criminals. Unless juveniles commit acts so egregious that a judge determines they should be tried and convicted as adults, SORNA serves no purpose in the lives of juvenile offenders.

VI. CONCLUSION

By extending sex offender registration and notification requirements to juvenile adjudications, SORNA undermines the goals of the juvenile justice system and fails to protect public safety. Because SORNA classifies juvenile sex offenders among the worst class of sex offenders and subjects them to lifelong registration requirements, it contradicts *Roper's* clear pronouncement that juveniles “cannot with reliability be classified among the worst offenders.”²⁴⁹ By applying *Roper's* reasoning to SORNA,

248. See Britney Bowater, Student Author, *Adam Walsh Child Protection and Safety Act of 2006: Is There a Better Way to Tailor the Sentences of Juvenile Sex Offenders?*, 57 *Cath. U. L. Rev.* 817, 849–850 (2008) (arguing that such factors should be considered under an alternative system that allows judicial discretion when determining whether a juvenile sex offender should be required to register).

249. *Roper*, 543 U.S. at 569.

2010] *Classifying Juveniles “among the Worst Offenders”* 409

advocates can argue for SORNA’s invalidation with respect to juvenile offenders because it fails to recognize important differences between adult and adolescent offenders and fails to distinguish between juveniles who can be successfully rehabilitated and those who are a real danger to the public. Furthermore, SORNA deserves its own stated purpose of protecting the public and completely undermines the rehabilitative goals and concerns for confidentiality inherent in the juvenile justice system. Finally, the current criminal court transfer process adequately addresses any remaining concern regarding those juveniles at risk of becoming true predators. SORNA is ripe for challenge—advocates must act now to prevent its deleterious effects and preserve a juvenile justice system that continues to protect *all* children.