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Sealing the Record: An Analysis of Jurisdictional Variations of Juvenile Sex Offender Record Sealing Laws

Nori Wieder

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SEALING THE RECORD: AN ANALYSIS OF JURISDICTIONAL VARIATIONS OF JUVENILE SEX OFFENDER RECORD SEALING LAWS

Nori Wieder[†]

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[†] J.D., 2014, Case Western Reserve University School of Law; M.S., 2008, Ithaca College; B.S., 2007, Syracuse University. I would like to thank Professors Sharona Hoffman, Jessie Hill, and Carmen Naso for their support and guidance throughout the writing process. I am also extremely grateful to the Health Matrix Volume 24 staff.

INTRODUCTION

In 1996 a 16-year-old male was kissing and caressing a girl in the hallway at school. The act was consensual until the girl's boyfriend appeared and the girl pushed the boy off of her. The boy, not having realized what had just happened or that the girl's boyfriend had arrived, grabbed the girl's breast trying to continue to caress the girl. It was that one last action of touching the girl's breast that got the 16-year-old charged with Gross Sexual Imposition (GSI), a felony of the fourth degree if committed by an adult according to Ohio law.¹ The boy pled guilty and was adjudicated delinquent of one count of GSI. He was sentenced to probation. He was not required to register as a sex offender but was required to attend outpatient sex offender therapy. After completing his probationary period and his therapy, the boy went on to attend college and received training in computer programming. He never committed another offense either as a juvenile or as an adult. However, until September 28, 2012, this man, now 32 years old and an Ohio resident, was unable to have his juvenile record sealed because he had committed a sexual offense.²

Currently, there are four models that states follow in regard to juvenile sex offender record sealing laws.³ Approximately one-quarter of states allow all juvenile sex offender records to be sealed.⁴ Another quarter of states prohibit all juvenile sex offenses from being sealed.⁵ The majority of states allow sex offender records to be sealed but leave the decision to a judge on a case-by-case basis.⁶ A minority of states permit some sex offenses to be sealed but exclude the records of the most heinous sex offenses from being sealed.⁷ Three states – Indiana,⁸ Michigan⁹ and Minnesota¹⁰ – fail to address whether a juvenile is permitted to have his record sealed or not.

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1. OHIO REV. CODE ANN. § 2907.05(C)(1) (West 2014).
 2. Letter from Brant DiChiera, Assistant Public Defender, Cuyahoga Cnty. Public Defender's Office, to Nori Wieder, Law Student, Case Western Reserve University (Apr. 16, 2014) (on file with author). Since this juvenile's delinquency adjudication has been expunged, the record is no longer accessible by the public.
 3. *See* Appendix.
 4. *Id.*
 5. *Id.*
 6. *Id.*
 7. *Id.*
 8. IND. CODE ANN. § 31-39-8-2 (West 2012).
 9. *See* Appendix.

This paper will compare competing jurisdictions' policies on sealing juvenile sex offenders' records. It will argue that jurisdictions should balance both the public safety concerns about juvenile sex offenders and the rehabilitation of juvenile delinquents who were emotionally immature and less culpable for their actions at the time of the offense. Part I of this paper will define the terms commonly used throughout this paper and in juvenile law and the differences in the way juveniles and adults are treated by the court system. Next, the paper will examine traits and characteristics of juvenile sex offenders.

Part II of this paper will examine the juvenile brain and other biological differences between juveniles and adults. Part III will discuss the public health and safety concerns in regard to sex offenders. This section will delve into information about sex offender registries and the risk assessment tests that are used to determine the risk of recidivism of juvenile sex offenders and will conclude by discussing civil commitment of sex offenders. Part IV explores the collateral consequences of not sealing a juvenile's record and the significance of juvenile record sealing.

Part V of this paper will examine the four models of juvenile sex offender record sealing laws. Section A will discuss the states that automatically seal all juvenile sex offender records. While this model is advantageous for the juvenile, it fails to address the public's concern about sex offenders in the community. Section B discusses the states that prohibit all juvenile sex offender records from being sealed. While this model addresses the public's concern about sex offenders, it does not sufficiently address the interests of the juveniles who are themselves a vulnerable population. Section C examines jurisdictions that allow juvenile sex offender records to be sealed but leave the decision to the discretion of the individual jurist. This model fails to take into account limited judicial administrative resources and many states following this model fail to provide specific factors for jurists to consider.

Section D of this section examines the model that permits the sealing of some juvenile sex offender records, but not all. Jurisdictions that follow this model take a middle ground between the all or nothing approaches of some jurisdictions. Furthermore, a model like Ohio's would allow for judicial review of the offenses before they are sealed. This allows a judge to determine on a case-by-case basis whether a person who committed an offense as a juvenile should be allowed to have his record sealed.¹¹ This paper will argue that the Ohio model is optimal because it balances the public safety concerns

10. MINN. STAT. ANN. § 260B.198(6) (West 2014).

11. OHIO REV. CODE ANN. § 2151.356(C)(2)(e) (West 2014).

regarding sex offenders while recognizing that many juveniles commit sex offenses because of their emotional immaturity.

I. LEGAL BACKDROP

A. *Definitions and Terms*

1. Adjudication

Juveniles are not “convicted of a crime” but instead are “adjudicated delinquent.” Many employment applications ask whether a person has been “convicted of a crime.” In order to prevent juveniles from being discriminated against as they get older, many states have differentiated the terms used with respect to juveniles and adults.¹² While in theory this works, juveniles are required to report to schools if they have been adjudicated delinquent.¹³ Schools often take disciplinary action against students who have been in trouble with the law, such as suspending or expelling them from school. While a juvenile will not necessarily have to notify a college of a juvenile offense, he will have to discuss any disciplinary action taken by the school.¹⁴ Therefore, the collateral consequences that this change of language was supposed to prevent sometimes fall short of this goal.

2. Record Sealing

Courts recognize the importance of allowing records to be sealed and/or expunged. In a concurrence in *State v. Coleman*, Judge Bettman stated that the purpose of having an expungement statute is “to encourage those who have committed crimes, who have been appropriately punished, and who have been properly rehabilitated to get on with their lives.”¹⁵ The Ohio Supreme Court also noted in *Barker v. State* that the purpose of the expungement statute “is to provide remedial relief to qualified offenders in order to facilitate the prompt transition of these individuals into meaningful and productive roles.”¹⁶ The court went on to state that the expungement statute should be liberally construed to promote this purpose. Therefore, courts have recognized the importance of allowing offenders a “second chance.”

12. UNIV. OF N.C. CTR. FOR CIVIL RIGHTS, JUVENILE DELINQUENCY ADJUDICATION, COLLATERAL CONSEQUENCES, AND EXPUNGEMENT OF JUVENILE RECORDS, at iii, *available at* <http://www.law.unc.edu/documents/civilrights/centerforcivilrightsexpungementreport.pdf> (last visited Mar. 21, 2014).

13. *Id.*

14. *Id.*

15. *State v. Coleman*, 691 N.E.2d 369, 370-71 (Ohio Ct. App. 1997).

16. 402 N.E.2d 550, 555 (Ohio 1980).

The phrases “sealing of a record” and “expungement” are often used interchangeably but have very different legal definitions. When a record is “sealed,” the record is closed to ensure that it is unavailable. A sealed record ordinarily cannot be viewed by anyone other than the individual; however, the record is not completely destroyed and can be re-opened with a court order.¹⁷ Law enforcement officers, county attorneys, sentencing judges, and attorneys involved in a matter pertaining to the sealed record may also view the record.¹⁸ In addition, all proceedings in the records are “deemed never to have occurred.”¹⁹ By contrast, an expungement involves the total destruction of the court document. Once a court document has been expunged, it can never be retrieved or recovered.²⁰

This paper focuses only on whether states seal juveniles’ records, not on expungement. This paper argues that states should consider a juvenile’s immaturity at the time of the offense and allow at least some of the records of individuals who committed lower level felony offenses to be sealed.

3. Prosecutorial Discretion

Another important factor to consider is prosecutorial discretion. It is not unusual for an individual to be charged with a more serious offense and, in exchange for a plea agreement, be offered the opportunity to plead to a different felony or misdemeanor that carries with it less serious penalties. For example, someone might originally be charged with rape (a non-sealable offense in some jurisdictions) but would plead down to a GSI (a sealable offense), a lesser offense that might not require registering as a sex offender.²¹ Therefore, individuals can commit the same crime but end up with different convictions based on the prosecutor’s decisions. This can impact juveniles in jurisdictions in which state law differentiates between certain crimes that are eligible for record sealing and other crimes that are not.

B. The Juvenile Justice System

There is a tension between rehabilitation and punishment in the juvenile justice system. While one belief revolves around the need to punish juveniles, another belief supports the need to rehabilitate juveniles.²² Because of the recognized maturity differences between

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17. *See, e.g.*, N.Y. FAMILY COURT ACT LAW § 375.3 (McKinney 1983).
 18. *E.g.*, NEB. REV. ST. § 43-2,108.05 (2012).
 19. *E.g.*, NEV. REV. STAT. § 62H.170 (2013).
 20. *See, e.g.*, N.Y. FAMILY COURT ACT LAW § 375.3 (McKinney 1983).
 21. In the Matter of L.F., NO. DL05104968 (Cuyahoga Cnty. Juv. Ct. 2005) (on file with author).
 22. MICHAEL G. KALOGERAKIS, HANDBOOK OF PSYCHIATRIC PRACTICE IN THE JUVENILE COURT 5 (1992).

juveniles and adults, juveniles have their own court system and their own detention facilities.

1. State Variations

States vary as to the age at which a juvenile becomes ineligible for the juvenile court system.²³ The majority of states terminate juvenile court jurisdiction at age eighteen, while some states such as New York and North Carolina cutoff eligibility at the age of fifteen.²⁴ This means that although an individual is still a juvenile for all other purposes, he is tried in the court system as an adult.

In addition, states vary on the age requirement for juveniles to participate in certain activities, such as the age at which a juvenile may drive or marry. And while the age of eighteen has been determined as the age of adulthood and responsibility by the federal courts (the age at which juveniles can vote),²⁵ “developmental neuroscience consistently indicates that structural brain maturation is incomplete at age eighteen.”²⁶ Since the brain does not mature until the mid-twenties, it is not surprising that young men, between the ages of eighteen and twenty-four, have the highest criminal offense rate among adults.²⁷

Furthermore, if a juvenile is adjudicated as a juvenile, he can only be incarcerated until the age of twenty-one.²⁸ However, courts vary as to the age at which a juvenile can be bound over to adult court or tried as an adult.²⁹ It is important to note whether juveniles were tried as juveniles or as adults when determining if their records can be sealed. Some states do not permit certain adult offenses to be sealed, even if that same offense can be sealed if committed by a juvenile.³⁰

Sexual offenses involve the issues of consent, equality, and coercion.³¹ Furthermore, states differ as to the age of consent for sexual

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23. Terry A. Maroney, *Adolescent Brain Science and Juvenile Justice*, in LAW AND NEUROSCIENCE: CURRENT LEGAL ISSUES 2010, at 255, 273 (Michael Freeman ed., 2010).
 24. Sarah Hammond, *Adults or Kids?*, STATE LEGISLATURES, Apr. 2008, at 32, *available at* http://www.ncsl.org/Portals/1/documents/magazine/articles/2008/08SLApr08_AdultKids.pdf.
 25. U.S. CONST. amend. XXVI. *Cf.* *Roper v. Simmons*, 543 U.S. 551, 558 (2005) (stating that age should make a difference in sentencing).
 26. Maroney, *supra* note 23, at 273.
 27. *Id.*
 28. OHIO REV. CODE ANN. §2153.23 (West 2014); ALA. CODE §12-15-117 (2012); N.Y. EXECUTIVE LAW § 507-a (McKinney 2014).
 29. Hammond, *supra* note 24, at 32.
 30. OHIO REV. CODE ANN. § 2151.23.
 31. GAIL RYAN ET AL., JUVENILE SEXUAL OFFENDING 4 (2010).

relationships; however, it is usually between ages 14 and 16.³² Some view these ages as arbitrary because they are based on society's intention to protect the exploitation of children and not based on scientific evidence.³³

2. Juvenile Justice Reformed

It was not until 1967 with the Supreme Court's decision in *In re Gault* that a reform of the juvenile justice system occurred. In that case, the Supreme Court determined that juveniles were entitled to many of the same protections that were afforded to adults such as: the right to counsel, the right to notice of specific charges of the offense, the right to confront and cross-examine a witness, the right to remain silent, and the right to subpoena witnesses for their defense.³⁴ The Court, however, did not grant all of the same rights to juveniles as are afforded to adults. Most notably absent from the Court's decision, and still absent in some states today, is the right to a trial by a jury and the right to a speedy trial.³⁵

While juveniles are afforded due process rights similar to those enjoyed by adults, they are nevertheless treated differently by the courts. In *Schall v. Martin*, the court stated that absent exceptional circumstances, juveniles were not to be detained in the same prison or lockup facility as adult criminals.³⁶

Another important case in the reform of the juvenile justice system came in 2005 in *Roper v. Simmons*. In *Roper*, the Supreme Court held that the Eighth and Fourteenth Amendments forbid the imposition of the death penalty on offenders who were under 18 years of age when they committed the offense.³⁷ The basis for the Court's decision was in large part the immaturity of juveniles' brains.³⁸ During the trial, Simmons' attorney reminded the jurors that juveniles of Simmons' age "cannot drink, serve on juries, or even see certain movies, because 'the legislatures have wisely decided that individuals of a certain age aren't responsible enough.'"³⁹ The *Roper* court also cited *Thompson v. Oklahoma*, which forbade the mentally retarded from receiving the death penalty, comparing juvenile culpability to that of the mentally retarded. The Court reiterated *Thompson*, "The reasons

32. *Id.*

33. *Id.*

34. *In re Gault*, 387 U.S. 1 (1967).

35. OHIO R. JUV. P. 29(A).

36. *Schall v. Martin*, 467 U.S. 253, 270 (1984).

37. *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

38. *Id.* at 555.

39. *Id.* at 558.

why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult.”⁴⁰

The Court felt that juveniles, as a result of their immaturity, were less culpable than adults.⁴¹ The majority opinion stated that “[r]etribution is not proportional if the law’s most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity.”⁴² Therefore, the Court has held that the Constitution prohibits states from sentencing juveniles to death for their crimes, even if they were tried as adults.

The Supreme Court further limited the consequences available to juveniles when it determined in *Graham v. Florida* in 2009 that the imposition of a life without parole sentence for a juvenile who did not commit homicide violated the Eighth Amendment and was unconstitutional.⁴³ Although in the case, Graham was never sentenced to life without the possibility of parole, Florida had abolished its parole system, which left those individuals, like Graham, who violated their probation with a life sentence.⁴⁴ As in *Roper*, the Court found that because juveniles are less culpable for their actions, they are therefore “less deserving of the most serious forms of punishment.”⁴⁵

Most recently, in 2012’s *Miller v. Alabama*, the Supreme Court reaffirmed its prior rulings that juveniles are less culpable for their crimes than adults by determining that mandatory life imprisonment without parole for those under the age of 18 at the time of their offense violated the Eighth Amendment’s prohibition on cruel and unusual punishment.⁴⁶

As improvements in neuroscience continue to be made and our understanding of the juvenile brain continues to develop, the Court continues to reform the juvenile justice system to reflect this understanding of a juvenile’s immaturity and culpability. While the Court recognizes that a juvenile’s crime can be just as heinous as a crime committed by an adult, the Court has also begun to balance the growing understanding of the juvenile brain with the need for rehabilitation and retribution. The same principles that the Supreme Court has used in its most recent juvenile decisions should also be applied

40. *Id.* at 561 (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988)).

41. *Id.* at 567.

42. *Id.* at 571.

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

44. *Id.* at 2014-15.

45. *Id.* at 2016.

46. *Miller v. Alabama*, 132 S.Ct. 2455, 2455 (2012).

by legislators when determining whether a juvenile's record should be sealed.

3. Defining the Juvenile Sexual Offender

It is important for legislators to understand what is known about juvenile sex offenders when determining whether or not a sex offender's record should be eligible to be sealed. Not all sex offenders are alike. In addition, not all sex offenses are alike.

The following paragraphs will explain what is currently known about juvenile sex offenders. According to research, “[s]exual offenses are perpetrated by juveniles of all racial, ethnic, religious, geographic, and socioeconomic groups in approximate proportion to these characteristics in the general population.”⁴⁷ Nearly all adolescent sex offenders are male.⁴⁸ Females account for less than 5% of all cases.⁴⁹ In addition, most victims of male adolescent sex offenders are female, except when the victim is a child, in which case the proportion of boys is higher.⁵⁰

Juvenile sex offenders have no defining social characteristics that are shared among them, and many exhibit no personality or behavior characteristics that would differentiate them from their peers.⁵¹ While many sex offenders suffer from mental illness, few of the offenders have previously been diagnosed or treated for mental illnesses prior to committing an offense.⁵²

Sexual abuse may be committed by children as young as three years old.⁵³ While three year olds may not understand why they are sexually offending and will not be sexually aroused by the offense, they may mimic behavior of abuse perpetrated against them.

While “stranger rape” is often feared the most by society, more than “95% of child victims of sexual abuse know the perpetrator as an acquaintance, friend, neighbor, or relative.”⁵⁴ The vast majority of offenses occur in the victim's home during babysitting.⁵⁵ In addition, more than 65% of juvenile sexual offenses involve a significantly

47. RYAN ET AL., *supra* note 31, at 6.
48. KALOGERAKIS, *supra* note 22, at 105.
49. *Id.*
50. *Id.*
51. RYAN ET AL., *supra* note 31, at 6-7.
52. *Id.* at 6.
53. *Id.*
54. *Id.* at 7.
55. KALOGERAKIS, *supra* note 22, at 105.

younger child, and 45% of victims are siblings or other children residing in the same home.⁵⁶

In addition, research from the 1990s found the average number of victims of juvenile perpetrators to be seven.⁵⁷ However, there is significant concern about underreporting of sexual abuse by children.⁵⁸ This concern about underreporting stems from the fact that the victim often knows the perpetrator and is therefore scared to report the abuse.⁵⁹ Underreporting is also a concern because when a perpetrator is caught for the first time, he often confesses to violating more than one victim.⁶⁰

FBI data from 2003 showed that juvenile arrests accounted for 16% of all arrests made during the year. Of that 16%, 92,300 arrests were made for “violent crimes,” which included 4,240 rapes and 18,300 other sex offenses.⁶¹

However, adolescent offenders are more likely to have a history of being physically or sexually abused.⁶² Research indicates that adolescent sex offenders have more sexual experiences, including consensual ones, than non-sex offending adolescents.⁶³

Because there is a high correlation between juvenile victims of sexual abuse and the commission of sexual offenses, legislators must consider the fact that many of these perpetrators were once victims themselves. Legislators therefore must balance a duty to protect victims with that of punishing sexual offenders who are sometimes one in the same.

Legislators should learn about the statistics and characteristics of juvenile sex offenders before they enact or amend juvenile sex offender record sealing laws. This knowledge can best help them appreciate the balance that must be obtained between society’s fears of sex offenders and the need for rehabilitated juveniles to be free from a tarnished record. This balance can best be met by a enacting a law similar to that enacted in Ohio.

II. UNDERSTANDING THE JUVENILE BRAIN

Legislators consider many factors when creating juvenile sex offender record sealing laws. One factor is juvenile brain development

56. RYAN ET AL., *supra* note 31, at 7.

57. *Id.*

58. *Id.* at 10.

59. *Id.* at 7.

60. *Id.*

61. *Id.* at 10.

62. KALOGERAKIS, *supra* note 22, at 106.

63. *Id.*

and culpability. When legislators determine whether a juvenile's offense should be sealed or not, they consider a juvenile's state of mental maturity at the time of the offense. While neuroscience is a field of study that advances our understanding of the human brain, one uncontested fact is that juveniles are emotionally less developed than adults. The differences in development are directly relevant to juveniles' culpability, deterrence, and potential for rehabilitation.⁶⁴

The field of neuroscience has developed dramatically since the early 1990s.⁶⁵ It was at this time that widely publicized structural imaging studies revealed that the adolescent brain is still developing.⁶⁶ These studies showed that healthy brains developing from childhood to adulthood have a linear progression that leads to an increase in speed and efficiency in communication among brain systems.⁶⁷ The studies also established that "the brain's frontal cortices (responsible for higher-order reasoning and 'executive control') are the last [areas of the brain] fully to achieve structural maturity."⁶⁸ This structural immaturity in the frontal lobes explains juveniles' "deficiency in imagining the future, including the long-term consequences of their actions."⁶⁹ Therefore, when juveniles commit crimes, their brains are not fully developed. Compared to adults, juveniles are unable to make as rational decisions as adults and therefore have much less control over the decisions they make. This inability to make rational decisions directly relates to juveniles' committing criminal offenses.

Furthermore, the brain's frontal lobe, which controls impulsive behavior, does not begin to mature until 17 years of age.⁷⁰ While there is some debate as to when brain maturation peaks, the range is from 20 to 25 years.⁷¹ Therefore, the oldest juvenile being tried in the juvenile justice system (an 18 year old) is still beneath the age of brain maturation.

Adolescent juveniles also have to cope with hormonal changes and desires with a brain that has not fully developed to control these impulses. Terry A. Maroney, a professor of law at Vanderbilt University, explains, "Brain regions associated with executive function fully mature only in late adolescence and early adulthood, while those

64. Maroney, *supra* note 23, at 256.

65. *Id.* at 257.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* at 260.

70. Mary Beckman, *Crime, Culpability and the Adolescent Brain*, 305 SCIENCE 596, 596 (2004).

71. *Id.*

associated with primary emotional arousal and social information mature shortly after puberty.⁷² She continues by explaining that the “teenager will experience a ‘maturity gap’ during which [he is] attracted to risky or irresponsible behaviors [which he] lack[s] full capacity to appreciate or control.”⁷³ This physical change is extremely important for legislators and courts to consider when addressing juvenile sex offenders. The sexual offense can be linked to the juvenile’s sexual desires as a result of raging hormones, coupled with an immature brain that lacks the ability to appreciate the long-term consequences of the action.

By the early 2000s, scientists agreed that adolescent behavior was in part biologically determined because juvenile brains are not fully developed.⁷⁴ In 2005, the Supreme Court, while determining whether states should allow juveniles to receive the death penalty,⁷⁵ examined the brain’s development and human behavior in conjunction with “how the legal system determines culpability, competency and the manner in which such cases should be handled.”⁷⁶

In *Roper v. Simmons*, the majority opinion stated that there are “three general differences between juveniles under 18 and adults:” (1) a greater likelihood of immaturity and irresponsibility, resulting in overrepresentation in ‘virtually every category of reckless behavior;’ (2) increased vulnerability and susceptibility to negative influences, including ‘peer pressure;’ and (3) ‘more transitory, less fixed’ personalities, reflective of less ‘well formed’ character.⁷⁷ It was these factors that led the Court to strike down the death penalty for juveniles.

“Capacities relevant to criminal responsibility are still developing when you’re 16 or 17 years old,” says psychologist Laurence Steinberg of the American Psychological Association.⁷⁸ In *Roper v. Simmons*, one of the amici curiae, the American Medical Association, explained in its brief that “[a]dolescents’ behavioral immaturity mirrors the anatomical immaturity of their brains.”⁷⁹ Because of juveniles’ immature brains, adolescents sometimes “cannot make good decisions under stress, control their emotions, suppress violent impulses, foresee consequences, or defy antisocial peers.”⁸⁰ Therefore, adults behave

72. Maroney, *supra* note 23, at 260.

73. *Id.*

74. *Id.* at 258.

75. See generally *Roper v. Simmons*, 543 U.S. 551 (2005).

76. Kevin Davis, *Brain Trials: Neuroscience Is Taking a Stand in the Courtroom*, A.B.A. J., Nov. 2012, at 38.

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

78. Beckman, *supra* note 70, at 596.

79. Maroney, *supra* note 23, at 272.

80. *Id.*

differently not solely because their brains are physically different but because of the way in which they use their brains.⁸¹

Legislators amend laws that impact the sealing of juvenile records because of “evolving standards of decency.”⁸² When amending the laws, they should use the same three factors that the Supreme Court used in *Roper*. Because juvenile brains are physically different from adult brains, when juveniles commit offenses, they lack the same impulse control and decision making skills that adults are capable of making. Therefore, juveniles should still be held accountable for their actions, but legislators need to account for juveniles’ anatomical immaturity at the time that they committed the offense.

III. PUBLIC HEALTH AND SAFETY CONCERNS IN REGARD TO SEX OFFENDERS

A. *Sex Offender Registries*

Some juveniles, after being adjudicated delinquent of a sex offense, are required to register as a sex offender; however, states vary significantly on who is required to register and for how long.⁸³ For example, some states limit the ages of the offenders who are required to register, while others limit the offense for which they require juveniles to register.⁸⁴ Furthermore, the Ohio Supreme Court held that the automatic lifetime registration requirements as applied to adjudicated juveniles violated due process and the prohibition against cruel and unusual punishment.⁸⁵ In addition, twelve states do not require adjudicated juveniles to register as sex offenders at all.⁸⁶

As of 2011, among the states that register juveniles as sex offenders and make the numbers available to the public, there were more

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81. Beckman, *supra* note 70, at 597.
82. Miller v. Alabama, 132 S.Ct. 2455, 2463 (2012).
83. Carmen Naso, *Sext Appeals: Re-Assessing the Exclusion of Self-Created Images from First Amendment Protection*, 7 AM. U. CRIM. L. BRIEF 4, 7 (2011).
84. U.S. DEP’T OF JUSTICE, SEX OFFENDER REGISTRATION AND NOTIFICATION IN THE UNITED STATES: CURRENT CASE LAW AND ISSUES 6 (2012), *available at* http://www.ojp.usdoj.gov/smart/caselaw/handbook_july2012.pdf.
85. *In re C.P.*, 131 Ohio St. 3d 513, 513 (2012).
86. *Juvenile Sex Offender Registration and SORNA*, NAT’L CONFERENCE OF STATE LEGISLATORS (May 2011), <http://www.ncsl.org/issues-research/justice/juvenile-sex-offender-registration-and-sorna.aspx> (reporting that Alaska, Connecticut, Georgia, Hawaii, Maine, Nebraska, New Mexico, New York, Pennsylvania, Tennessee, Vermont, and West Virginia do not require adjudicated juveniles to register as sex offenders).

than 22,290 juveniles registered. This number does not include the sixteen states that do not publicly report juvenile sex offender registry numbers.⁸⁷

Many states that require juveniles to register as sex offenders do not permit those juveniles to seal their records while they are currently registering.⁸⁸ Texas precludes individuals who were required to register as sex offenders from ever being able to seal their records.⁸⁹ Therefore, whether a juvenile has to register as a sex offender can significantly impact his ability to seal his record and when he can apply to have his record sealed.

B. Risk Assessment of Juvenile Sex Offenders

Risk assessment instruments play an important role in juvenile sexual offense cases and in the creation and amending of juvenile sex offender record sealing laws. Juvenile sex offenders have a substantially lower rate of recidivism than adult sex offenders. The risk for juvenile sexual offense recidivism is around 10%.⁹⁰ This risk of recidivism is calculated by using a risk assessment instrument. Not only have legislators relied on these instruments when creating laws that determine whether a juvenile should be eligible to have his record sealed or not, but judges also heavily rely on these instruments.

Today, more than 85% of juvenile court jurisdictions use formal risk assessment at some point in the judicial process.⁹¹ Risk assessment tools can be used at intake to determine whether the juvenile should return home to await trial or remain in a detention facility because he poses too great a risk if he is released.⁹² Risk assessment tools are also used during sentencing to determine if probation or incarceration is appropriate.⁹³ It is also used to determine whether community notification is appropriate.⁹⁴ Assessment tools are also used to determine if a juvenile is rehabilitated for reentry into the community.⁹⁵

There are three types of risk assessment techniques that can be used: unstructured clinical assessment, actuarial assessment, and

87. *Id.*

88. OHIO REV. CODE ANN. § 2151.356(C)(1)(c) (West 2014).

89. TEX. FAM. CODE ANN. § 58.003 (West 2013).

90. KALOGERAKIS, *supra* note 22, at 106.

91. Christopher Slobogin, *Risk Assessment and Risk Management in Juvenile Justice*, A.B.A. CRIM. JUST. MAG., Winter 2013, at 11.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

structured professional judgment.⁹⁶ Clinical assessment means that an evaluator determines, based on his own knowledge and research, whether the juvenile presents relevant risk factors that should be brought to the attention of a judge during the judicial process.⁹⁷ However, clinical assessment fails to establish uniformity across the courts because different clinical experts may have different opinions about the same case. Therefore, two similar juvenile sex offenders could get two very different evaluations.

The second type of risk assessment technique, and the one most favored by the courts, is the actuarial assessment. Actuarial prediction devices “rely on empirical discovery of factors associated with recidivism.”⁹⁸ However, all of the actuarial instruments currently used are so flawed that they fail to accurately predict a juvenile’s risk of recidivism.⁹⁹

One test that is used is the Minnesota Sexual Offender Screening Tool-Revised (MnSOST-R). The instrument looks at static risk factors that are part of a person’s demographic profile and life history.¹⁰⁰ Static factors are those that cannot be changed through human intervention.¹⁰¹ These include gender, age, and prior criminal history.¹⁰² The MnSOST-R provides a standard set of questions to be answered by the juvenile sex offender but fails to provide instruction on how negative answers should be weighed when the question is unfairly prejudicial to the juvenile. For example, one of the questions asks about the employment history of the sex offender.¹⁰³ A juvenile who was incarcerated since age 15 will be scored as having a higher risk of recidivism because he has not had a job while incarcerated.¹⁰⁴ Therefore, he is unfairly going to score worse on the test because he was unable to obtain a job due to his incarceration.

Another instrument that is used to assess juvenile recidivism rates, the STATIC-99, is not recommended to be used in assessing individuals younger than age 18.¹⁰⁵ However, it is unclear whether “age of 18” refers to the age at which the juvenile committed the

96. *Id.*

97. KALOGERAKIS, *supra* note 22, at 107.

98. Slobogin, *supra* note 91, at 11.

99. KALOGERAKIS, *supra* note 22, at 107.

100. FRANK C. DICATALDO, THE PERVERSION OF YOUTH 50 (2009).

101. Slobogin, *supra* note 91, at 10.

102. *Id.*

103. DICATALDO, *supra* note 100.

104. *Id.*

105. *Id.*

offense or the current age of the offender.¹⁰⁶ This test consists of ten variables and does not require an interview with the subject.¹⁰⁷ All information analyzed by the test can be obtained through demographic data and the individual's criminal record.¹⁰⁸ While two people may look the same on paper, one may be at a higher risk for recidivism than the other, and this test fails to account for the differences in these individuals.

In the STATIC-99, a juvenile who has a low risk for re-offending will have a score close to zero.¹⁰⁹ The more points assigned, the higher the risk of recidivism.¹¹⁰ However, there are significant scoring problems for juveniles using the STATIC-99. For example, juveniles are automatically credited a point for being young when the offense occurred because offenders under the age of 25 have a higher rate of recidivism than other individuals.¹¹¹ Another point is given if the juvenile has never lived with an intimate partner for a minimum of two years.¹¹² This question is included on the test because individuals who have lived with an intimate partner have a lower recidivism rate.¹¹³ Consequently, most juveniles automatically have a minimum score of two, which correlates to a 16% recidivism rate over a fifteen-year time frame.¹¹⁴ A 16% recidivism rate is higher than the actual rate of juveniles who reoffend, which is only 10%. Therefore, most juveniles are being scored at a higher risk score than statistically are known to reoffend.

There are many assessment tests, developed over the last decade, that are specifically aimed at determining juveniles' recidivism rates; however, no one instrument is more accurate at predicting which juvenile will offend again. One such test is the Juvenile Sexual Offense Recidivism Risk Assessment Tool-II (JSORRAT-II).¹¹⁵ This test relies on twelve factors: five factors having to do with sex offenses, other offenses, or school disciplinary actions; four factors having to do with the nature of the sexual offense; two factors relating to whether the juvenile was abused; and one factor relating to special education

106. *Id.*

107. *Id.* at 59.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at 61.

112. *Id.* at 62.

113. *Id.* at 61-62.

114. *Id.* at 62.

115. Slobogin, *supra* note 91, at 11-12.

experience.¹¹⁶ The main reason that it is difficult for psychiatrists to create an accurate actuarial test is due to the low rate of reoffending by youth sex offenders. Because juveniles do not offend at a high enough rates, researchers cannot validate the accuracy of the tests.¹¹⁷

The third type of risk assessment used by courts is structured professional judgment.¹¹⁸ This type of risk assessment is a combination of the clinical and actuarial methods.¹¹⁹ The clinician administering the test is provided with a set of specific risk factors that research has shown to be linked to sexual offending recidivism.¹²⁰ However, the clinician is free to weigh the answers unequally, allowing for a less biased assessment of the juvenile sex offender.¹²¹

Courts across the nation use different risk assessment instruments because researchers have yet to create an accurate risk assessment instrument. Because of the flaws of these instruments, both judges and legislators should be cautious of the recidivism rate predicted for each individual. Because of the low recidivism rate of juvenile sex offenders and because of the inability for researchers to develop an accurate risk assessment test, judges should evaluate sexual offenders on a case-by-case review.

C. *Civil Commitment*

In 1997, the Supreme Court held in *Kansas v. Hendricks* that “involuntary commitment statutes that detain people who are unable to control their behavior and thereby pose a danger to the public health and safety, provided the confinement takes place pursuant to proper procedures and evidentiary standards,” are constitutional.¹²² The case examined Kansas’s Sexually Violent Predator Act, which established procedures for individuals who were “likely to engage in ‘predatory acts of sexual violence.’”¹²³ The Court determined that “because the Act is civil in nature, its commitment proceedings do not constitute a second prosecution” and therefore do not violate the Double Jeopardy Clause, even though the commitment follows a prison term.¹²⁴

Civil commitment statutes, like the Kansas statute upheld in *Hendricks*, focus on society’s fear of recidivism of sex offenders.

116. *Id.* at 12.

117. DICATALDO, *supra* note 100, at 52.

118. Slobogin, *supra* note 91, at 12.

119. *Id.*

120. *Id.*

121. *Id.* at 17.

122. *Kansas v. Hendricks*, 521 U.S. 346, 346 (1997).

123. *Id.*

124. *Id.* at 348.

Because there is no accurate way to predict who will reoffend, states such as Kansas have approved laws that permit the civil commitment of sex offenders until they are rehabilitated. However, the biggest difference between juvenile sex offenders and adult sex offenders is the recidivism rate. Juveniles only have a 10% recidivism rate of reoffending in their lifetime. However, the public fear of sex offenders stems from our knowledge about adult sex offenders. The adult recidivism rate can be as high as 71%.¹²⁵ Adult exhibitionists have the highest sex offense recidivism rates averaging from 41% to 71%.¹²⁶ Adult child molesters who offend boys have the next highest recidivism rates of 13% to 40%.¹²⁷ The recidivism rates of rapists are 7% to 35%.¹²⁸ Followed by the recidivism rate of child molesters who target girls at 10% to 29%.¹²⁹ Incest offenders have the lowest recidivism rates of 4% to 10%.¹³⁰

For example, a 2006 study on adult sex offenders conducted by the University of London and the University of Leicester found that “sexual offending, like many medical conditions, cannot be cured.”¹³¹ Because it cannot be cured, the study stated that “sexual offending is a public health issue and a social problem.” The study found that although psychological therapy may reduce the rate at which adult sex offenders re-offend, it does not cure them. Thus, many states opt for civil commitment of adult sex offenders after their sentence has ended because there is no available cure.

The state statutes that permit civil commitment allow for individuals to be committed only until they are cured. In *Hendricks*, the Court stated that “we have never held that the Constitution prevents a State from civilly detaining those for whom no treatment is available”¹³² Therefore, because there is no current cure for some sex

125. LIN SONG & ROXANNE LIEB, WASH. INST. FOR PUB. POL’Y, ADULT SEX OFFENDER RECIDIVISM: A REVIEW OF STUDIES 5 (1994), *available at* http://www.wsipp.wa.gov/ReportFile/1161/Wsipp_Adult-Sex-Offender-Recidivism-A-Review-of-Studies_Full-Report.pdf. One must be cautious about adult recidivism rates as many adult sex offenders are incarcerated for long periods after they commit their offense or are civilly committed and therefore do not have the opportunity to commit additional sex crimes.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. Belinda Brooks-Gordon & Charlotte Bilby, *Psychological Interventions for Treatment of Adult Sex Offenders*, BRIT. MED. J. (June 29, 2006), *available at*: <http://www.bmj.com/content/333/7557/5>.

132. *Kansas v. Hendricks*, 521 U.S. 346, 366 (1997).

offenses such as pedophilia, many individuals civilly committed will most likely be committed for the remainder of their lives.

Currently, twenty states permit civil commitment of sexually violent predators,¹³³ ten of which permit some form of juvenile sex offender civil commitment.¹³⁴ Of those states, four do not permit juveniles to have their sex offense records sealed,¹³⁵ four automatically seal a juveniles' sex offense record,¹³⁶ four permit some sex offenses to be sealed,¹³⁷ and seven leave the determination to seal the record up to the jurist.¹³⁸ The remaining state, Minnesota does not have any law regarding the sealing of records for juveniles.¹³⁹

The four states that do not permit juveniles adjudicated delinquent of a sex offense from having their record sealed and that have civil commitment of sexually violent predators seem to take a clear stance on their jurisdictions' concern about sex offenders. However, the four states that automatically seal a juvenile's record seem to be providing mixed signals to their communities. Perhaps these communities would be better served by not permitting all juvenile sex

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133. *Civil Commitment of Sexually Violent Predators*, ASS'N FOR THE TREATMENT OF SEXUAL ABUSERS (Aug. 17, 2010), <http://www.atsa.com/civil-commitment-sexually-violent-predators>.
134. Scott Michels, *Juvenile Sex Offenders: Locked Up For Life?*, JUVENILE JUSTICE INFORMATION EXCHANGE (Oct. 1, 2012), <http://jjie.org/juvenile-sex-offenders-locked-up-for-life>.
135. *Civil Commitment for Sexually Violent Predators*, *supra* note 133. The states that do not permit juveniles from sealing their records and do allow for civil commitment are: Arizona, California, South Carolina, and Washington. ARIZ. REV. STAT. ANN. § 8-208(G) (2010); CAL. WELF. & INST. CODE § 707(b) (2014); CAL. WELF. & INST. CODE § 781 (2014); CAL. R. CT. 5.830; S.C. CODE ANN. § 63-19-2050(A) (2012); WASH. REV. CODE § 13.50.050(11) (2010).
136. The states that automatically seal juvenile records and allow for civil commitment are: Illinois, Nebraska, New Hampshire, and North Dakota. North Dakota however only seals records after fifty years have elapsed from the time of the adjudication. 705 ILL. COMP. STAT. ANN. 405/5-915 (West 2010); NEB. REV. STAT. § 43-2,108.03 (2012); N.H. REV. STAT. ANN. § 169-B:35 (2013); N.D. CENT. CODE § 54-23.4-17(5) (2011).
137. The states that permit some sex offenses to be sealed and allow for civil commitment are: Florida, Kansas, Texas and Virginia. FLA. STAT. § 943.059 (1)(3)(2011); KAN. REV. STAT. ANN. § 38-2312(b) (2010); TEX. FAM. CODE ANN. § 58.204 (West 2013); VA. CODE ANN. § 16.1-301 (2010).
138. The states that follow the discretionary model and allow for civil commitment are: Iowa, Massachusetts, Missouri, New Jersey, New York, Pennsylvania, and Wisconsin. IOWA CODE § 232.150(1) (2010); MASS. GEN. LAWS ch. 276, § 100B (2010); MO. REV. STAT. § 211.321(5) (2013); N.J. STAT. ANN. § 2A:4A-62 (2010); 18 PA. CONS. STAT. § 9123 (2013); WIS. STAT. § 938.355(4m) (2011).
139. *See* MINN. STAT. ANN. § 260B.198(6) (West 2014).

offenders to have their records sealed, as to help predict those individuals who might be deemed sexually violent predators later in life and to protect their communities from those individuals.

IV. COLLATERAL CONSEQUENCES OF NOT SEALING A JUVENILE RECORD

While record sealing does not completely erase a juvenile's record, it is very important that juveniles apply to have their records sealed, if jurisdictions permit it. Despite popular opinion, a juvenile record appears on a background check by employers if it is not sealed. While a juvenile record that is sealed is never completely "gone," it does prevent the majority of employers from accessing the information and can be important for obtaining certain licenses.

However, a state board of nurses, animal euthanasia technicians boards, public fire departments, ambulance services, the Department of Homeland Security, the military, boards of medicine, boards of midwifery, boards of physical therapy, certified real estate appraiser boards, and state banking commissioners can obtain access to a juvenile record even if it has been sealed.¹⁴⁰ In addition, even if a record is sealed, a Board of Education may maintain a separate file regarding the adjudication of the juvenile, if that adjudication was used to determine permanent expulsion.¹⁴¹ Furthermore, some jurisdictions allow police officials to maintain access to sealed records.¹⁴² Juvenile records that are sealed can be opened by the court for adult sentencing purposes as well.

For repeat offenders that continue a criminal career into adulthood, sealing of juvenile records probably is not very important. But for those individuals who are looking to have one youthful indiscretion cleared from their record, sealing can be the difference between a lengthy discussion about a single event in an interview with a potential employer and not having to discuss it at all.

V. ANALYSIS OF JURISDICTIONAL MODELS

A. *Automatically Sealed Model*

Eleven states (Alaska,¹⁴³ Hawaii,¹⁴⁴ Illinois,¹⁴⁵ Maryland,¹⁴⁶ Montana,¹⁴⁷ Nebraska,¹⁴⁸ New Hampshire,¹⁴⁹ North Dakota,¹⁵⁰ Rhode

140. WYO. STAT. ANN. § 14-6-240 (2013).

141. OHIO REV. CODE ANN. § 2151.357(D) (West 2014).

142. TEX. FAM. CODE ANN. § 58.204 (West 2013).

143. ALASKA STAT. § 47.10.090(c) (2011).

144. HAW. REV. STAT. § 571-84(e) (2011).

145. 705 ILL. COMP. STAT. ANN. 405/5-915 (West 2010).

Island,¹⁵¹ Vermont,¹⁵² and West Virginia¹⁵³) automatically seal all records obtained by a juvenile. In Alaska, this occurs thirty days after the individual is no longer subject to the juvenile court's jurisdiction.¹⁵⁴ However, other states, such as North Dakota, automatically seal the record after fifty years and do not permit the record to be sealed for sex offenses prior to that.¹⁵⁵ The states following this model (excluding North Dakota) understand the impact a juvenile record can have on an individual. Of the eleven states, nine are in the top fourteen least populated states.¹⁵⁶ Statistically, therefore, these states will have fewer sex offenders than other states. While this does not impact the heinous nature of some of the sex crimes committed by some offenders, it does suggest that fewer individuals are impacted by the sealing of the records than in other more populated states.

In addition, the automatic sealing of juvenile records is beneficial because many states do not provide for the right to counsel in the post-dispositional phase.¹⁵⁷ Because a limited number of attorneys are available to represent indigent clients, many states do not provide for the right to counsel after the disposition of a case.¹⁵⁸ Therefore, individuals desiring to have their records sealed in states that do not automatically seal records must file a pro se motion. If the motion is denied, many individuals will not be able to appeal the decision because of both a lack of knowledge about the court system and the inability to write an appeal. Furthermore, this can be detrimental to

146. MD. CODE ANN., CTS. & JUD. PROC. § 3-8A-27(c) (2013).

147. MONT. CODE ANN. § 41-5-216 (2013).

148. NEB. REV. STAT. § 43-2,108.03 (2012).

149. N.H. REV. STAT. ANN. § 169-B:35 (2013).

150. N.D. CENT. CODE § 54-23.4-17(5) (2011).

151. R.I. GEN. LAWS ANN. § 14-1-6.1 (2010).

152. VT. STAT. ANN. tit. 33, § 5119(a)(1) (2013).

153. W. VA. CODE ANN. § 49-5-18 (2013).

154. ALASKA STAT. § 47.12.300 (2012).

155. N.D. CENT. CODE § 54-23.4-17(5) (2011).

156. *United States*, WORLD ATLAS, <http://www.worldatlas.com/aatlas/populations/usapops.htm> (last accessed Mar. 12, 2014).

157. Mark Walsh, *Fifty Years After Gideon, Lawyers Still Struggle to Provide Counsel to the Indigent*, ABA JOURNAL (Mar. 2013), available at http://www.abajournal.com/magazine/article/fifty_years_after_gideon_lawyers_still_struggle_to_provide_counsel/.

158. *See id.*

clients in states such as Florida that only permit an individual to apply once for his record to be sealed.¹⁵⁹

The approach taken by these jurisdictions best reflects the ideas that juveniles can be rehabilitated and should be afforded a second chance. However, it fails to address any of the public safety concerns that society has regarding sex offenders. States that follow this model should reform their statutes to address the public health concerns of society and require that cases be reviewed by a judge before being sealed or mandate that records of serious sex crimes, such as rape, cannot be sealed.

B. No Sex Offenses Sealed Model

Eleven states (Alabama,¹⁶⁰ Arizona,¹⁶¹ California,¹⁶² Colorado,¹⁶³ Louisiana,¹⁶⁴ Nevada,¹⁶⁵ North Carolina,¹⁶⁶ Oregon,¹⁶⁷ South Carolina,¹⁶⁸ Tennessee,¹⁶⁹ and Washington¹⁷⁰) prohibit any juvenile sex offenses from being sealed. Under this model, no juvenile who has been adjudicated delinquent of a sex offense is permitted to have his record sealed. While this view most heavily protects the public safety concerns regarding sexual offenders, it fails to balance this concern with the knowledge that juveniles are less mature than adults when they commit offenses. Juveniles often cannot appreciate the long-term consequences of their actions and struggle to control their raging hormones.¹⁷¹ These biological factors often lead to juveniles' irresponsible behavior.

Furthermore, this approach fails to consider that not all sex offenses are the same. Not all sex offenses require a juvenile to register as a sex offender nor are they all "heinous crimes." In addition, this approach fails to appreciate that 90% of juveniles are rehabilitated

159. FLA. STAT. § 943.059 (1)(3)(2011).

160. ALA. CODE § 12-15-136 (2012).

161. ARIZ. REV. STAT. ANN. § 8-208(G) (2010).

162. CAL. WELF. & INST. CODE § 707(b) (2014); CAL. WELF. & INST. CODE § 781 (2014); CAL. R. CT. 5.830.

163. COLO. REV. STAT. § 19-1-306(7)(a) (2010).

164. LA. CHILD. CODE ANN. art. 918(C) (2004 & Supp. II 2014).

165. NEV. REV. STAT. § 62H.150(6) (2009).

166. N.C. GEN. STAT. § 7B-3000(e) & (f) (2012).

167. OR. REV. STAT. § 137.225(5) (2013).

168. S.C. CODE ANN. § 63-19-2050(A) (2012).

169. TENN. CODE ANN. § 37-1-153(f)(1) (2012).

170. WASH. REV. CODE § 13.50.050(11) (2010).

171. Maroney, *supra* note 23, at 260.

and never commit another sex offense in their lifetime. However, this model tarnishes a person's record for life. Because of acts such as public indecency or, as the opening illustration described, fondling that changed from a consensual act to a non-consensual act within seconds, this model is unnecessarily harsh. Therefore, states that follow this model should reform their statutes to reflect the immaturity of juvenile sex offenders and allow at least some juveniles the right to have their records sealed.

C. Discretionary Model

Seventeen states (Arkansas,¹⁷² Connecticut,¹⁷³ Iowa,¹⁷⁴ Kentucky,¹⁷⁵ Maine,¹⁷⁶ Massachusetts,¹⁷⁷ Mississippi,¹⁷⁸ Missouri,¹⁷⁹ New Jersey,¹⁸⁰ New Mexico,¹⁸¹ New York,¹⁸² Oklahoma,¹⁸³ Pennsylvania,¹⁸⁴ South Dakota,¹⁸⁵ Utah,¹⁸⁶ Wisconsin,¹⁸⁷ and Wyoming¹⁸⁸) do not specify in their statutes whether sex offenses are sealable. Instead, the statutes state that in order for a juvenile record to be sealed, regardless of the offense, the court must examine the motion on a case-by-case basis. While some states provide broad factors for the court to consider when determining whether to seal a juvenile record, other states do not. For example, in Wyoming, a judge is encouraged to seal a juvenile's record "unless there is a finding that a release of information will serve to protect the public health or safety or that due to the nature or severity of the offense in question the release of infor-

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172. ARK. CODE ANN. § 9-27-309(b)(1) (2012).
173. CONN. GEN. STAT. §§ 46b-146, 54-76o (2011).
174. IOWA CODE § 232.150(1) (2010).
175. KY. REV. STAT. ANN. § 610.330(3) (West 2011).
176. ME. REV. STAT. ANN. tit. 15, § 3308(8)(A) (2009).
177. MASS. GEN. LAWS ch. 276, § 100B (2010).
178. MISS. CODE ANN. § 43-21-263(1) (2009).
179. MO. REV. STAT. § 211.321(5) (2013).
180. N.J. STAT. ANN. § 2A:4A-62 (2010).
181. N.M. STAT. § 32A-2-26 (A) (2010).
182. N.Y. FAM. CT. ACT § 375.2(1) (McKinney 2011).
183. OKLA. STAT. tit. 10A, § 2-6-108(B) (2014).
184. 18 PA. CONS. STAT. § 9123 (2013).
185. S.D. CODIFIED LAWS § 26-7A-115 (2011).
186. UTAH CODE ANN. § 78A-6-1105 (1)(a)(i)-(ii) (West 2013).
187. WIS. STAT. § 938.355(4m) (2011).
188. WYO. STAT. ANN. § 14-6-240 (2013).

mation will serve to deter the minor or others similarly situated from committing similar offenses.”¹⁸⁹

The case-by-case analysis is a good way for the court to examine each case individually because not all individuals who commit sex crimes are the same. Some individuals may present signs of rehabilitation, while other individuals may have committed such egregious crimes that the court wishes to keep the record open to the public. However, because these states do not limit what crimes may or may not be sealed, these states are wasting court resources in instances where the crime was so egregious that as a matter of public policy no judge would seal the record.

Furthermore, states should avoid this model because of potential due process violations.¹⁹⁰ Because some states fail to provide any criteria or factors for the court to consider, there is substantial leeway for judicial rulings in these matters. Thus, two individuals who were adjudicated delinquent for the same offense and assessed to have the same recidivism rate and had not been in trouble with the law since might have two different rulings to their record sealing motion: one record sealed and one not. Therefore, because of judicial administrative interests and potential due process violations, states should not allow juvenile sex offender record sealing to be solely discretionary.

D. Some Sex Offenses Sealable Model

Eight states (Delaware,¹⁹¹ Florida,¹⁹² Georgia,¹⁹³ Idaho,¹⁹⁴ Kansas,¹⁹⁵ Ohio,¹⁹⁶ Texas,¹⁹⁷ and Virginia¹⁹⁸) allow some sex offenses to be sealed but not others. For all the states except Florida, the offenses that are not permitted are those that are the most egregious crimes, such as rape, sodomy, and incest. Florida, the outlier, only excludes juveniles adjudicated delinquent of acts that publicly exposed sexual organs. While this is the approach taken by the minority of states, this note

189. *Id.*

190. See Arthur Dyeve, *Social Justice and the Judiciary: Will Judges React Differently in Different Member States to the Europeanization of Social Justice?* (Dec. 10, 2009) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1521742.

191. DEL. CODE ANN. tit. 10, § 1018(a)(4) (2012).

192. FLA STAT. § 943.059 (2011).

193. GA. CODE ANN. § 15-11-79.2(b) (2011).

194. IDAHO CODE ANN. § 20-525A(4) (2009).

195. KAN. REV. STAT. ANN. § 38-2312(b) (2010).

196. OHIO REV. CODE ANN. § 2151.356 (West 2014).

197. TEX. FAM. CODE ANN. § 58.003 (2013).

198. VA. CODE ANN. § 16.1-301 (2010).

argues that the model adopted by these states (excluding Florida) is the best balance of public health and safety concerns and juvenile justice considerations.

Ohio is the latest state to modify its juvenile sex offender record sealing laws to follow this model. In June 2012, Ohio's Governor John Kasich signed into law Senate Bill 337, which Ohio Revised Code Section 2151.356, allowing juvenile sex offenders who commit a sexual offense of Gross Sexual Imposition or Sexual Battery to have their records sealed.¹⁹⁹ Prior to the bill, Ohio's law prohibited all juvenile sex offenders from having their records sealed. While the bill still prohibited juveniles adjudicated delinquent of rape from having their record sealed,²⁰⁰ the bill, also known as the "Collateral Sanctions" bill, was intended to help juveniles have opportunities that they might have originally been barred from as a result of their adjudications.²⁰¹

Under the new statute, juveniles who have been adjudicated delinquent of GSI or Sexual Battery are permitted to apply for a court order to have their record sealed six months after their discharge from juvenile prison. Although the decision as to whether to seal a record is left to the discretion of the court, courts are instructed to order records sealed if they find that the offender has been "rehabilitated."²⁰²

The statute lists five factors that the court should consider when determining whether an individual has been "rehabilitated." The factors are: (1) the age of the person; (2) the nature of the case; (3) the cessation or continuation of delinquent, unruly, or criminal behavior; (4) the education and employment history of the person; and (5) any other circumstances that may be related to the rehabilitation of the person.²⁰³

Some courts have required that there be a nexus between a defendant's willingness to acknowledge his guilt and accept responsibility for the crimes he committed and being successfully rehabilitated.²⁰⁴ However, the Ohio statute does not list this as a requirement. A problem with this requirement is that it might make some individuals acknowledge guilt and accept responsibility for the sole purpose of getting their records sealed when, in actuality, they are not remorseful.

199. S.B. 337, 129th Gen. Assemb., Reg. Sess. (Ohio 2012).

200. OHIO REV. CODE ANN. § 2151.356 (West 2014).

201. Alan Johnson, *Bills Boost Job Hopes of Former Offenders*, THE COLUMBUS DISPATCH (May 25, 2012, 8:07 AM), <http://www.dispatch.com/content/stories/local/2012/05/25/bills-boost-job-hopes-of-former-offenders.html>.

202. OHIO REV. CODE ANN. § 2151.356(C)(2)(e) (West 2014).

203. *Id.*

204. *Brady v. United States*, 397 U.S. 742, 753 (1970).

The Ohio and Texas statutes prohibit certain individuals, such as those registering as sex offenders, from being able to have their records sealed.²⁰⁵ In addition, those juveniles adjudicated delinquent for rape, a felony of the first degree if committed by an adult, are ineligible to have their records sealed.²⁰⁶

The approach taken by these six states best balances two competing concerns: (1) the rehabilitation of juveniles and (2) protecting society from sex offenders. These states balance these concerns by first prohibiting any juvenile adjudicated delinquent of the most heinous sex offenses, such as rape and sodomy, from having his record sealed.²⁰⁷ Rape is the most violent sexual offense. Therefore, people who commit this heinous act should not be eligible for record sealing.

This model also best addresses the issues of collateral consequences. The juvenile justice approach focuses on rehabilitation.²⁰⁸ However, those children who commit egregious or violent sexual acts should not be afforded the same “clean slate” that a child who committed a minor infraction is also given. While a juvenile may be rehabilitated after committing a rape, most parents would not want a former rapist interacting with their children as a teacher or coach, and many adults would not want to be alone in their home with a cable repair man who was a former rapist. Even though many juveniles who are convicted of egregious sexual acts will be rehabilitated, society still fears these individuals because it cannot predict which of those individuals will reoffend.²⁰⁹ In these jurisdictions that do not permit rape convictions to be sealed, the legislators have found a way of balancing society’s concerns related to recidivism by preventing those individuals convicted of rape from holding certain jobs in the future.

This model also considers the factors of a juvenile’s brain development. It is undisputed that a juvenile’s brain is not fully developed by the age of 18 and that because of this juveniles have a hard time appreciating the long-term consequences of their actions.²¹⁰ However, not all juvenile indiscretions are the same. Legislators in these jurisdictions differentiate a juvenile making a small mistake, such as grabbing an individual’s breast without permission, with that of another juvenile forcibly penetrating another. While juveniles are unable to make rational decisions as adults, there must still be accountability for the crimes that some juveniles commit because they are too egregious. Legislators in these jurisdictions have balanced a

205. OHIO REV. CODE ANN. § 2151.356 (West 2014).

206. *Id.*

207. *Id.*

208. *See supra* Part I.B.

209. *See supra* Part II.B.

210. *See supra* Part I.

juvenile's underdeveloped brain and their accountability with the consequences that certain actions warrant stronger punishments.

States in this model vary as to whether a record is automatically sealed for certain sex offenses. Texas and Virginia automatically seal sex offense records that are not prohibited from being sealed. For example, Virginia automatically seals the record when the juvenile is: (1) at least 19 years old and (2) five years have passed since the juvenile was adjudicated delinquent of the offense.²¹¹ While this approach is best for juveniles, this approach fails to take into account the problem of prosecutorial discretion, such as where individuals committed the act of rape but pled down to a GSI.²¹²

Therefore, because the harm to public safety of "guessing wrong" about who will recidivate is too great, a better approach is Ohio's. Ohio imparts an additional protection for public safety into its statute: A judge must determine on a case-by-case basis whether a juvenile sex offender's record should be sealed.²¹³ This additional protection guards against automatic record sealing for juveniles who benefitted from prosecutorial discretion. Because of the heinous nature of a crime, a judge can review the case and determine whether the actions of that juvenile warrant the sealing of his record. Furthermore, because the Ohio statute lists specific factors that the court must consider when determining whether to seal the record or not,²¹⁴ there is less of a concern that there will be due process violations, as is seen in the discretionary model.²¹⁵ Therefore, the Ohio model best protects both the interests of the public and individuals adjudicated delinquent of less-serious sex offenses who seek to have their records sealed.

CONCLUSION

Because juveniles are emotionally immature as compared to adults when they commit offenses, there need to be protections in place to help them later in life. These protections come in the form of allowing the offenders to seal their records. However, juvenile sex offenders still pose a risk, as 10% of all juvenile sex offenders will reoffend during their lifetime. Because recidivism risk assessment tools are inaccurate at assessing juveniles' risk of recidivism, there is currently no data on whether the juveniles who commit the most serious sex offenses are those who fall within the 10% that reoffend.

211. VA. CODE ANN. § 16.1-306(A) (2010).

212. *See supra* Part I.A.3.

213. OHIO REV. CODE ANN. § 2151.356(C)(2)(e) (West 2014).

214. *See supra* Part III.D.

215. *See supra* Part III.C.

Until we are better able to predict which individuals will reoffend, the best way to address public safety concerns is to prohibit the worst sex offenders from being able to seal their records. Ohio presents the best model for states to follow in regard to record sealing laws for juvenile sex offenders because they prevent the worst sex offenders from sealing their records. Ohio also places an additional barrier by requiring all juvenile sex offenders wishing to seal their records to have the case reviewed by a judge who must adhere to strict factors when determining whether to seal the record. Therefore, juveniles who cause public safety concerns will not slip through the cracks.

As our understanding of the juvenile brain continues to improve, we will see continued reform of the juvenile justice system. In addition, risk assessment tools are continuously being improved to better help courts understand the risk an individual juvenile has of reoffending. Juvenile record sealing laws across the country should be reformed to reflect society's concerns about sex offenders and juveniles' ability to be rehabilitated.

APPENDIX

State	Sexual Offense Sealable?	Automatically Sealed?	Statute	Other Information
Alabama	No	No	Ala. Code § 12-15-136 (2010).	
Alaska	Yes	Yes	Alaska Stat. § 47.10.090(c) (2011).	
Arizona	No	No	Ariz. Rev. Stat. Ann. § 8-208(G) (2010).	
Arkansas	Yes	No	Ark. Code Ann. § 9-27-309(b)(1) (2012).	If a juvenile is adjudicated delinquent of a crime for which she could be tried as an adult, then the state will keep the record open for 10 years. If not, then it is automatically sealed when the juvenile turns 21.
California	No	No	Cal. Welf. & Inst. Code § 707(b) (2010); Cal. Welf. & Inst. Code § 781 (2010); Cal. R. Ct. 5.830.	
Colorado	No	No	Colo. Rev. Stat. § 19-1-306(7)(a) (2010).	

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Connecticut	Yes	No	Conn. Gen. Stat. § 46b-146 (2011); Conn. Gen. Stat. § 54-76o (2011).	
Delaware	Some	No	Del. Code Ann. tit. 10, § 1018(a)(4) (2012).	First and second degree rape are not sealable.
Florida	Some	No	Fla Stat. § 943.059 (2011).	A juvenile can only apply once to have her record sealed and cannot apply if she has been adjudicated delinquent for an exposure of sexual organs in public.
Georgia	Some	No	Ga. Code Ann. § 15-11-79.2(b) (2011).	Juveniles adjudicated delinquent of rape are excluded from having their records sealed.
Hawaii	Yes	Yes	Haw. Rev. Stat. § 571-84(e) (2011).	
Idaho	Some	No	Idaho Code Ann. § 20-525A(4) (2009).	Juveniles adjudicated delinquent of rape or forcible sexual penetration with a foreign object are excluded from having their records sealed.
Illinois	Yes	Yes	705 Ill. Comp. Stat. 405/5-915 (2010).	
Indiana	N/A	No	Ind. Code § 31-39-8-2 (2012).	There is no specific law on sealing, just factors for the court to consider.

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Iowa	Yes	No	Iowa Code Ann. § 232.150(1) (2010).	
Kansas	Some	No	Kan. Stat. Ann. § 38-2312(b) (2010).	Juveniles adjudicated delinquent of rape, aggravated criminal sodomy, sexual exploitation, or aggravated incest are excluded from having their records sealed.
Kentucky	Yes	No	Ky. Rev. Stat. Ann. § 610.330(3) (2011).	
Louisiana	No	No	La. Child. Code Ann. art. 918(C) (2011).	
Maine	Yes	No	Me Rev. Stat. Ann. tit. 15, § 3308(8)(A) (2009).	
Maryland	Yes	Yes	Md. Code Ann., Cts. & Jud. Proc. § 3-8A-27(c) (2011).	
Massachusetts	Yes	No	Mass. Gen. Laws ch. 276, § 100B (2010).	
Michigan	N/A	No	N/A	There is no law specifically regarding juveniles' ability to seal records; it is unclear whether the adult law applies to the juvenile court system.

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Minnesota	N/A	No	Minn. Stat. § 260B.198(6) (2009).	There is no law specifically in regard to juveniles' ability to seal records; it is unclear whether the adult law applies to the juvenile court system.
Mississippi	Yes	No	MISS. CODE ANN. § 43-21-263(1) (2009).	
Missouri	Yes	No	Mo. Rev. Stat. § 211.321(5) (2010).	
Montana	Yes	Yes	Mont. Code Ann. § 41-5-215 (2009).	Automatically sealed on 18th birthday.
Nebraska	Yes	Yes	NEB. REV. STAT. § 43-2,108.03 (2010).	
Nevada	No	No	Nev. Rev. Stat. § 62H.150(6) (2009).	
New Hampshire	Yes	Yes	N.H. Rev. Stat. Ann. § 169-B:35 (2010).	Police still have access to the sealed records.
New Jersey	Yes	No	N.J. Stat. Ann. § 2A:4A-62 (2010).	
New Mexico	Yes	No	N.M. Stat. § 32A-2-26 (A) (2010).	
New York	Yes	No	N.Y. Fam. Ct. Act § 375.2(1) (McKinney 2011).	
North Carolina	No	No	N.C. Gen. Stat. § 7B-3000(e) & (f) (2012).	

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North Dakota	Yes	Yes	N.D. Cent. Code § 54-23.4-17(5) (2011).	Records are expunged 50 years after the date of disposition (N.D. Sup. Ct. Admin. R. 19(12) Append.).
Ohio	Some	No	Ohio Rev. Code Ann. § 2151.356(A) (2010).	Juveniles adjudicated delinquent of rape are excluded from having their records sealed.
Oklahoma	Yes	No	Okla. Stat. tit. 10A, § 2-6-108(B) (2010).	If a record is sealed, after 10 years the sealed record is automatically expunged.
Oregon	No	No	Or. Rev. Stat. § 137.225(5) (2009).	
Pennsylvania	Yes	No	18 Pa. Cons. Stat. Ann. § 9123 (2010).	
Rhode Island	Yes	Yes	R.I. Gen. Laws § 14-1-6.1 (2010).	
South Carolina	No	No	S.C. Code Ann. § 63-19-2050(A) (2010).	
South Dakota	Yes	No	S.D. Codified Laws § 26-7A-115 (2011).	
Tennessee	No	No	Tenn. Code Ann. § 37-1-153(f)(1) (2012).	

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Texas	Some	Yes	Tex. Fam. Code Ann. § 58.204 (2009).	Juveniles who have to register as sex offenders are excluded from having their records sealed. For those who do seal their records, law enforcement still has access to sealed records.
Utah	Yes	No	Utah Code Ann. § 78A-6-1105 (1)(a)(i)-(ii) (2011).	
Vermont	Yes	Yes	VT. STAT. ANN. tit. 33, § 5119(a)(1) (2010).	The state may make a motion to prohibit the record from being sealed for sex offenses. (VT. STAT. ANN. tit. 13, § 5301(7) (2010)).
Virginia	Some	No	Va. Code Ann. § 16.1-301 (2010).	Juveniles adjudicated delinquent of rape, sodomy, or penetration with an object are excluded from having their records sealed.
Washington	No	No	Wash. Rev. Code § 13.50.050(11) (2010).	
West Virginia	Yes	Yes	W. Va. Code § 49-5-18 (2011).	
Wisconsin	Yes	No	Wis. Stat. § 938.355(4m) (2011).	
Wyoming	Yes	No	Wyo. Stat. Ann. § 14-6-240 (2010).	