Dear Members of the Commission:

I write as an individual, not on behalf of any group or organization. I write because I have grave concerns about the public safety efficacy, public fisc expenditures, and public health outcomes for residents of our state, as well the former juvenile offenders, by requiring continued juvenile registration and notification. As the Commission has already received into the record a surfeit of data and scientific empirical studies evincing the oftentimes iatrogenic nature of juvenile registration and notification, I write to express my legal concerns about the constitutionality of continuing a juvenile registry regime, in addition to those concerns noted above. Put simply, I believe, the continuation of requiring former offenders to register for juvenile offenses runs afoul of both the Massachusetts Declaration of Rights and the U.S. Constitution.

The brief sections that follow contain a few of the major legal arguments illustrating some of the Constitutional problems in requiring former juvenile offenders to register. This is by no means an exhaustive iteration, but rather the thoughts of one concerned resident of Massachusetts. I thank the Commission for its work, diligence, and attention to this pressing matter, ask forgiveness for any errors, and indulgence for the legalese.

I. The Supreme Court Has Determined That Mandatory Lifetime Sentencing Regimes For Juveniles Are Unconstitutional Under the 8th and 14th Amendments.

The United States Supreme Court has held that juveniles offenders cannot be classified among the worst offenders and sentenced to mandatory lifetime punishments because of three main differences between juveniles and adults: 1) juveniles lack maturity and have an underdeveloped sense of responsibility; 2) juveniles are more vulnerable or susceptible to negative influences and outside pressures; and 3) juveniles have personality traits that are more transitory and less fixed than adults making them more amenable to change and treatment. The Court relied on the prevailing scientific evidence concerning adolescent development. *Roper v. Simmons*, 543 U.S. 551, 569 (2005); See Brief of the American Medical Association, et al. as Amici Curiae in *Roper v. Simmons* (Adolescent brains are anatomically immature).

In *Graham v. Florida*, 130 S. CT. 2011 (2010), following the reasoning of *Roper v. Simmons*, the Supreme Court held that sentencing a juvenile to life without parole for non-homicide offenses violates the 8th Amendment prohibition against cruel and unusual punishment. Relying on “developments in psychology and brain science” the Court found that science “continue[s] to show fundamental differences between juvenile and adult minds.” Graham at 2026. These differences include, inter alia, lack of executive function development, greater impulsivity, and lack of understanding of consequences.

Expanding on *Roper v. Simmons* and *Graham v. Florida*, the Supreme Court held that the 8th Amendment forbids a sentencing scheme that mandates life in prison without parole for juvenile homicide offenders.  *Miller v. Alabama*, 132 S.Ct. 2455 (2012).  The Court found that “[c]hildren are constitutionally different from adults for purposes of sentencing.”  Id. at 2464. They have “diminished culpability and greater prospects for reform.” Id.

This trilogy of Supreme Court cases requires that juveniles be treated differently than adults. The SORB statute makes minimal distinction between adult offenders and juvenile offenders in terms of qualifications for registration and then relief from registration. See 803 CMR 1.37B. Under the SORB’s interpretation of its regulation, owing to the nature of juvenile sex offending, many juveniles will never be allowed off the registry no matter if they are wholly reformed, present no risk, and are at no danger. This is because many juvenile sex offenders offend against their age cohort and lower. See Zimring, An American Travesty, pgs.43-68; Raised on the Registry, Human Rights Watch, May 1, 2013; Letourneau, Elizabeth. This in turn becomes a life sentence because if an individual offends against a child, they may never be relieved of the obligation to register.

Thus, the very people who, as the Supreme Court found, are most amendable to treatment, rehabilitation, and environmental influences- juveniles- are the very people, who owing to their majority peer or younger offending, are precluded from having that treatment and rehabilitation assessed, recognized, and taken into account. Instead, they are marked for life with no possibility of redemption.

1. Developing Juvenile Science Militates Against Treating Individuals Who Offend As Juveniles In The Same Manner As Adults.

The Supreme Court has found that “juveniles are different”[[1]](#footnote-1) and that this difference has Constitutional ramifications. The Court adumbrated the major differences between adults and juveniles in *Miller v. Alabama*:

“To start with the first set of cases: *Roper* and *Graham* establish that children are constitutionally different from adults for purposes of sentencing. Because juveniles have diminished culpability and greater prospects for reform, we explained, "they are less deserving of the most severe punishments." *Graham,* 560 U.S., at \_\_\_, [130 S.Ct., at 2026](http://scholar.google.com/scholar_case?case=6982366090819046045&q=miller+v.+alabama&hl=en&as_sdt=2,22). Those cases relied on three significant gaps between juveniles and adults. First, children have a "`lack of maturity and an underdeveloped sense of responsibility,'" leading to recklessness, impulsivity, and heedless risk-taking. [*Roper,* 543 U.S., at 569, 125 S.Ct. 1183](http://scholar.google.com/scholar_case?case=16987406842050815187&q=miller+v.+alabama&hl=en&as_sdt=2,22). Second, children "are more vulnerable ... to negative influences and outside pressures," including from their family and peers; they have limited "contro[l] over their own environment" and lack the ability to extricate themselves from horrific, crime-producing settings. *Ibid.* And third, a child's character is not as "well formed" as an adult's; his traits are "less fixed" and his actions less likely to be "evidence of irretrievabl[e] deprav[ity]." *Id.,* at 570, [125 S.Ct. 1183](http://scholar.google.com/scholar_case?case=16987406842050815187&q=miller+v.+alabama&hl=en&as_sdt=2,22).” *Miller v. Alabama*, 132 S.Ct. 2455, 2463 (2012).

The Court then noted that these differences were based on science, as well as common sense:

“Our decisions rested not only on common sense — on what ‘any parent knows’ — but on science and social science as well. *Id.,* at 569, [125 S.Ct. 1183](http://scholar.google.com/scholar_case?case=16987406842050815187&q=miller+v.+alabama&hl=en&as_sdt=2,22). In *Roper,* we cited studies showing that `[o]nly a relatively small proportion of adolescents' who engage in illegal activity `develop entrenched patterns of problem behavior.' *Id.,* at 570, [125 S.Ct. 1183](http://scholar.google.com/scholar_case?case=16987406842050815187&q=miller+v.+alabama&hl=en&as_sdt=2,22) (quoting Steinberg & Scott, Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty, 58 Am. Psychologist 1009, 1014 (2003)). And in *Graham,* we noted that ‘developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds’ — for example, in ‘parts of the brain involved in behavior control.’ 560 U.S., at \_\_\_, [130 S.Ct., at 2026](http://scholar.google.com/scholar_case?case=6982366090819046045&q=miller+v.+alabama&hl=en&as_sdt=2,22).[5] We reasoned that those findings — of transient rashness, proclivity for risk, and inability to assess consequences — both lessened a child's "moral culpability" and enhanced the prospect that, as the years go by and neurological development occurs, his `deficiencies will be reformed.' *Id.,* at \_\_\_, [130 S.Ct., at 2027](http://scholar.google.com/scholar_case?case=6982366090819046045&q=miller+v.+alabama&hl=en&as_sdt=2,22) (quoting [*Roper,* 543 U.S., at 570, 125 S.Ct. 1183](http://scholar.google.com/scholar_case?case=16987406842050815187&q=miller+v.+alabama&hl=en&as_sdt=2,22)).” *Id*. at 2465.

The Court notes, contrary to popular belief, but validated empirically, that only a small fraction of juvenile offenders continue offending into adulthood. Adolescence is fraught with rash decisions which were not the product of reflection and whose consequences were never envisioned. These characteristics, science has shown, will change as the brain develops. See, Current Directions in Psychological Science, Association of Psychological Science, 2013 (compendium of adolescent brain development science).

The majority of current scientific literature on the subject of juvenile sexual recidivism and risk points in the direction of less registration requirements and no notification for juvenile offenders. As “the board has not updated its regulations since 2002” these scientific and legal changes have not been incorporated. Doe 151564 v. SORB, 456 Mass. 612, 620 (2010). A few examples, in addition to those from the Supreme Court cases, from 2007 through May 2013, will demonstrate this inexorable direction.

The International Association for the Treatment of Sexual Offenders, leaders in the study, assessment, treatment, documentation, and science of sexual offenses adopted “Minimal Standards of Care For Juvenile Sexual Offenders” in 2007. (The original standards were developed in 1990, refined in 2000, and adopted in 2000, with a committee being appointed in 2004 to revisit the standards which were then adopted in 2007). While the committee avoided “making specific recommendations about particular procedures, techniques, or instrumentation” because the “field is still evolving” they did propose and adopt minimum safeguards for the protection of the public and offenders. Specifically:

“7 **Dignity.**

Young people are inherently more dependent upon the environment around them. This can be especially true with respect to the language we use to describe them. Adults working with youth who have sexually abused other individuals should take every precaution against actions that label youth as deviant, perverted, or destined to persist in sexual harm. Professionals are increasingly using language that labels the behavior and not the identity of the youth.” Ex. 21. (Standards of Care for Juvenile Sexual Offenders Of the International Association for the Treatment of Sexual Offenders).

“8. **Sexual offender registries and community notification**

Given the developmental needs of youth, their culpability being different from adults, and the label and stigmas that adults can place on children through unproven avenues such as registration and notification, IATSO is extremely skeptical of the long-term utility of such policies and is concerned by their potentially harmful effects on the very community these policies seek to serve.

Dr. Zimring[[2]](#footnote-2) of University of California Berkeley authored, “The Predictive Power of Juvenile Sex Offending: Evidence from the Second Philadelphia Birth Cohort Study.” He found that “juvenile sex offenders are at a low risk of adult sexual offending.” (pg. 15) He developed that scientific data further in his book “An American Travesty- Legal Responses to Adolescent Sexual Offending.”

On May 1, 2013, the Human Rights Watch released a 111-page report detailing the state of juvenile sex offender registries and notification provisions throughout the country. After an exhaustive review of 20 states, the authors, in section 9, Recommendations, suggest, inter alia:

“Amend state and federal law to explicitly exempt all persons who were below the age of 18 at the time of their offense (youth sex offenders) from all sex offense registration, community notification, and residency restriction laws unless and until evidence-based research demonstrates that such requirements provide a significant, measurable improvement in public safety that outweighs the harms to former youth offenders and their families. “ Raised on the Registry, Human Right Watch, May 1, 2013.

As noted juvenile recidivism expert, Dr. Elizabeth Letourneau from Johns Hopkins, summarizes:

1. Sexual recidivism rates for juveniles are low.
2. Registration of juveniles fails, in any way, to improve community safety.
3. Registration is associated with unintended and impactful consequences on the adjudication of youth.

There is a clear movement legally, based on science and “commonsense,” away from the over-inclusive, non-data driven approach to juvenile registries. The Supreme Court has recognized the inherent differences of juveniles, and science has validated such differences. The juvenile registry approach of the past 15 years, which eschewed data and empiricism, and circumvented the purposes of the juvenile justice systems, has been overtaken. Mandatory registry and notification are often iatrogenic when applied to juveniles[[3]](#footnote-3). The recidivism science shows low recidivism rates for juvenile sex offenders as they age into adulthood. Until the science supports the claim that public safety is served by requiring registration for juvenile offenses, oftentimes for life, offenses committed as juveniles should not trigger registration or notification. Any legislation which purportedly links the two is not rational as there is no proven causal link between requiring individuals who offended before 18 to register and a reduction in recidivism rates for the same.

III. The Statute is Not Rational In Its Application to Individuals Who Offended as Juveniles.

“The Massachusetts Constitution requires, at a minimum, that the exercise of the State's regulatory authority not be arbitrary or capricious. Under both the equality and liberty guarantees, regulatory authority must, at very least, serve a legitimate purpose in a rational way; a statute must bear a reasonable relation to a permissible legislative objective. Any law failing to satisfy the basic standards of rationality is void.” Goodridge 440 Mass. 309, 329-330 (2003) (internal citations omitted).

The Act violates juveniles’ rights to equal protection and due process as it is irrational and serves no legitimate public purpose. “For due process claims, rational basis analysis requires that statutes bear a real and substantial relation to the public health, safety, morals, or some other phase of the general welfare.” Id. (Citations omitted). “For equal protection challenges, the rational basis test requires that an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class." Id. (Citations omitted).

The Appeals Court has determined that the Board’s regulations, as applied to a juvenile, a 10 year-old offender, are “both arbitrary and capricious.” Doe 136652 v. SORB, Appeals Court, No. 10-P-435, April 27, 2012. The Appeals Court found, ““While the general validity of the regulations the examiner applied to the plaintiff requires no extended discussion, the applicability of those regulations to someone of the plaintiff's age at the time of the offenses is entirely unclear.” Although the petitioner there was charged with both rape and indecent assault under 14, and he was juvenile himself at the time, the Court found “indeed, the regulations appear to have been written with a much older offender in mind” and found them wholly inapplicable. The regulations have not been updated and are still “unclear” as to juveniles.

The Appeals Court looked at whether the state action was rationally related to the purpose of protecting the public by comparing the stated purpose of the regulation to its application to a juvenile offender. “The increased risk determination embodied in § 1.40(9)(c)(12) flows from several conclusions stated earlier in the regulation. At the outset, § 1.40(9) states that "[a]n offender's prior criminal history is significantly related to his likelihood of sexual recidivism and degree of dangerousness, particularly when his past includes violent crimes or sex offenses." Doe 136652, quoting 803 CMR§ 1.40(9). The Court found that the indicia the Board uses to assess the “likelihood of recidivism and degree of dangerousness” was not aptly tied to the particulars of the juvenile offender. Instead, the Court found, “the plaintiff's indecent assault and battery was "violent" for SORB purposes only because it falls in that statutory classification. See G.L. c. 6, § 178C, definition of "[s]exually violent offense." The Court, noting the dearth of explanation, “apart from the rote application of the statute and regulation,” to the juvenile case, of “why either the definition or the considerations contained in the regulation apply to the facts” of the case, found it arbitrary and capricious.

Further demonstrating this lack of relationship between the purpose of the Act and its imposition on juveniles is the existence of the Massachusetts Juvenile Justice System. The Massachusetts Juvenile Justice System is premised upon rehabilitation and reintegration, not punishment. In *Commonwealth v. Magnus M.*, the SJC held:

“[The juvenile justice] system is not a punitive scheme strictly akin to the adult justice system. Rather, it is primarily rehabilitative, cognizant of the inherent differences between juvenile and adult offenders, and geared toward ‘the correction and redemption to society of delinquent children’. . . ‘The rationale of [the dual system for adult and juvenile offenders] is diminished culpability: deviant behavior of children may be regarded as generally less culpable than similar adult behavior for the reason that a child’s capacity to be culpable. . . is not as fixed or absolute as that of an adult’. As a result, we have allowed ‘certain basic changes in the traditional method of dealing with criminal offenders’ and empowered Juvenile Court judges with ‘very broad discretion. . . with regard to disposition.”

461 Mass. 459, 461 (2012) (internal citations omitted).

Similarly, in *Hanson H.*, the SJC reiterated the primary purpose of the juvenile justice system is rehabilitation. The Court added that, in a case addressing whether

a juvenile being adjudicated for a sex offense was required to wear a GPS monitoring device while on probation, “[w]e have recognized that, as currently implemented, GPS monitoring is inherently stigmatizing, a modern-day “scarlet letter….To the extent [it] is potentially visible to the public, it may have the additional punitive effect of exposing the offender to persecution and ostracism….” *Commonwealth v. Hanson H.*, No. SJC-11121, April 11, 2013.

Although Juvenile records used to be completely confidential, they are now available to the public through SORB notification, presently for Level 2 and 3. This level of notification is far greater, and far more intrusive, than a GPS device that the SJC found is “potentially visible to the public” and is punitive in nature.

A majority of juveniles offend against their age cohort or younger. See, Zimring, An American Travesty, passim. This then creates a class of former offenders, juvenile offenders, who will have mandatory lifetime registration, irrespective of severity of harm or likelihood of recidivism, irrespective of forensic evaluations, irrespective of non-physical offenses. This punishment is disproportionate when required for offenses committed as juveniles. See, Raised on the Registry, Human Rights Watch, May 1, 2013; Miracle Village, New York Times, May 21, 2013; See, How Can You Distinguish A Budding Pedophile From a Kid With Real Boundary Problems?, New York Times, Magazine, July 22, 2007.

Understanding that no amount of reform, rehabilitation, or even the passage of decades, will prevent registration for former juvenile offenders, has been shown to adversely impact public safety. With no guarantee of stability, no opportunity for prosocial engagement, minimal housing, education, and employment opportunities, the risk of recidivism actually increases. Registration and possible dissemination, especially of juvenile information, has the opposite of the stated and desired effect.

There is no empirical evidence that increased juvenile registration and public notification increases public safety. As Justice Souter wrote:

“The fact that the Act uses past crime as a touchstone, probably sweeping in a significant number of people who pose no real threat to the community, serves to feed suspicion that something more than regulation of safety is going on; when a legislature uses prior convictions to impose burdens that outpace the law’s stated civil aims, there is room for serious argument that the ulterior purpose is to revisit past crimes, not prevent future ones.”

*Smith v. Doe*, 538 U.S. 84 (2003) (Souter, J, concurring).

As the SJC put it in *Hanson H.*, this is “inherently stigmatizing, a modern-day ‘scarlet letter.’” Juveniles are different and that has Constitutional ramifications. Offenses committed as juveniles should be treated differently and they should not have to register.

This uniformity in treatment, requiring the registration and notification for juveniles in the same manner as adults, elides the admonition from the Supreme Court that “juveniles are different” and from the Supreme Judicial Court that the purpose of the juvenile system is rehabilitative, not punitive.

IV. The Requirement of Juvenile Registration and Notification is Unconstitutional As It Converts An Otherwise Civil Regulatory Statute into a Punitive and Remedial Statute.

The more a civil, regulatory law resembles punishment, the more open it is to

challenge on Constitutional grounds. Kennedy v. Martinez-Mendoza, 372 U.S. 14 (1963)(Ex. 25); Camara v. Municipal Court of the City and County of San Francisco, 387 US 523 (1967). Juvenile registration and notification impinges on a juvenile’s rights to due process, equal protection, to be free from cruel and unusual punishments, ex post facto and double jeopardy rights, and 1st, 8th, 9th, and 14th Amendments rights.

1. The Act Violates Substantive Due Process

Both the United States and Massachusetts Constitutions protect individuals from arbitrary and unreasonable government interference with an individual's right to life, liberty, and property without due process of law. See U.S. Const. Amend. 14; Mass. Const. Pt. 1, Art. 12. “The Massachusetts Constitution protects matters of personal liberty against government incursion as zealously, and often more so, than does the Federal Constitution, even where both Constitutions employ essentially the same language.” Goodridge v. Department of Public Health, 440 Mass. 309, 328. One component of due process - so-called “substantive due process” - “prevents the government from engaging in conduct that ‘shocks the conscience,’ Rochin v. California, 342 U.S. 165, 172 (1952), or interferes with rights ‘implicit in the concept of ordered liberty,’ Palko v. Connecticut, 302 U.S. 319, 325-326 (1937).” Querubin v. Commonwealth, 440 Mass. 108, 112 (2003), quoting United States v. Salerno, 481 U.S. 739, 746 (1987).

The Supreme Court has defined the contours of which rights are “implicit in the concept of ordered liberty” and thus fundamental. Palko at 326. Among them are: a parent’s right “to direct a child’s upbringing” and choose the school of their choice, Pierce v. Society of Sisters, 268 US 510, 535 (1925); the right to choice of a child’s religious practices, Wisconsin v. Yoder, 406 US 205 (1972); the right to teach a foreign language in a religious school, Meyer v. Nebraska, 262 US 390 (1923); a right to marry, Loving v. Virginia, 388 US 1 (1967), a right to procreate, Skinner v. Oklahoma ex rel. Williamson, 316 US 535 (1942); a right to personal privacy, Roe v. Wade, 410 US 113 (1973); the right to family integrity, Moore v. City of East Cleveland, 431 US 494 (1977) and; a right to use contraceptives, Griswold v. Connecticut, 381 US 479 (1965).

The registration and notification requirements for former juvenile offenders encroaches on many of these rights, both for the individual, as well as parents directing such children. Former offenders have been barred from schools, have been forced to leave the congregations of their choice, have been forced to move, and have had their privacy stripped away. Many parents cannot direct their child’s upbringing owing to the stigma which flows from such registration and notification.

2. The Mandatory Registration Requirement of the Act As Applied to Individuals Who Offended as Juveniles Violates Ex Post Facto, Double Jeopardy, the 8th Amendment, and Equal Protection.

i. Ex Post Facto

The pavane to determine whether or not an Act violates the ex post facto clause follows the familiar steps employed in Kansas v. Hendricks. 521 U.S. 346, 361 (1997). The first question is whether the Act is civil or did it impose punishment. To ascertain that the Court looked to the legislative intent. If the intent was clearly non-punitive then the question becomes “’is the statutory scheme so punitive either in purpose or effect so as to negate the State’s intention to deem it civil.” Smith v. Doe, 438 U.S. 84, 92 (2003) (quoting Hendricks).

In assessing the intent of the legislature the Court is not bound by the Legislature’s denomination of civil or criminal. “A fertile source of perversion in constitutional theory is the tyranny of labels. Out of the vague precepts of the Fourteenth Amendment a court frames a rule which is general in form, though it has been wrought under the pressure of particular situations. Forthwith another situation is placed under the rule because it is fitted to the words, though related faintly, if at all, to the reasons that brought the rule into existence.” Snyder v. Massachusetts, 291 US 97, 114 (1934). The Court instead looks to the statutory structure and text of the Act.

The stated purpose of the Act here is to protect public safety. That is also a stated goal of the criminal justice system. The structure of the Act required changes to Massachusetts Criminal Procedure. While “invoking the criminal process in aid of a statutory regime” where it never had been before for juveniles, “does not render the statutory scheme itself punitive” it moves it a long way from simply being regulatory. Doe v Smith, 96. There were changes in charging documents, plea colloquies, and the discretion of judges. Criminal penalties attached to violations of the new regulatory scheme. The Act mandates coordination between the courts and probation, between the state and the federal government, between the state and state police, between the state and local police, between the state and the department of corrections, between all levels of law enforcement. The purpose of the Act, appears, at least as applied to individuals who offended as juveniles, to be punishment, in violation of the Ex Post Facto provision.

Assuming, arguendo, that the Act is facially civil and regulatory, the Smith Court then looked to the “effects” of the statute to determine if they converted the statute from regulatory to punishment. In doing so, the Court applied the Kennedy v. Mendoza-Martinez factors. 372 US 144, 168-169 (1963). While “[t[hese factors are ‘neither exhaustive nor dispositive’” they mark a beginning point for assessment. Smith at 97 quoting U.S. v. Ward, 448 U.S. 249.

Following Mendoza, the Court looked to whether the Act had: 1. affirmative disabilities or restraints; 2. historically been regarded as punishment; 3. comes into play only on a finding of scienter; 4. whether it will promote traditional aims of punishment- retribution and deterrence; 5. whether the behavior to which it applies is already a crime; 6. whether an alternative purpose to which it may rationally be connected is assignable for it; 7. and whether it appears excessive in relation to the alternative purpose. Mendoza- Martinez at 168-169.

The Act creates affirmative disabilities for individuals who offended as juveniles. The Act restricts where an individual may reside and where an individual may work and the type of professions (e.g., school zone exclusions, nursing home exclusions, day cares). This affirmative disability usually has no end point for former juvenile offenders.

Additionally, similar to the affirmative restraints of probation or parole, individuals are monitored, are required to report if they simply plan on moving, must inform the police upon commencing work in a city or town, may be deprived of their liberty for failing to abide by the regulatory framework, and be sentenced to lifetime community parole. C. 6, §178C-P. While the Supreme Court in Smith found “this argument has some force” it ultimately, owing to the greater freedoms of movement, employment, living, and supervision, found in that Act, it determined it inapplicable to the Alaska Act in the Smith case.

Here however those same factors do not bear the distinguishing characteristics of the Alaska statute and instead are more restrictive, more similar to the punishment of probation or parole, and especially so when visited upon an individual who offended as a juvenile.

The Act’s pronounced effects on individuals who offended as juveniles has “historically been regarded as punishment.” A juvenile’s name is published and made part of the public record. His name, address, occupation, weight, height, classification level and index offense now appears on the internet (for those classified as 2 and 3), a registry, with the local police, and with the state and with the federal government. This is contrary to the over 100-year-old purpose of the Massachusetts juvenile justice system which historically has tried to maintain the confidentiality of juveniles. The public acknowledgement and publication of the names of juveniles is punishment. Exacerbating that punishment is the fact that a former offenders address is also that of his family, siblings, parents, and others. When describing simply the placement of a GPS monitor on a juvenile sex offender during probation the SJC wrote, “We have recognized that, as currently implemented, GPS monitoring is  inherently stigmatizing, a modern-day "scarlet letter." Commonwealth v. Hanson H., SJC docket 11121, April 11, 2013. The Court then went on to express concern that in addition to the inherent stigma, there could potentially be persecution and ostracism visited on the individual for the juvenile offenses.

As the SJC has said repeatedly, juveniles, and offenses committed as juveniles, are different. A purpose in establishing a juvenile court system and treating those who offend as juveniles differently is to obviate punishment through rehabilitation and reintegration. Aiding in that process of rehabilitation and reintegration was maintenance of the confidentiality of individuals who offended as juveniles. In addressing this exact distinction the SJC held in *Commonwealth v. Magnus M.*:

“[The juvenile justice] system is not a punitive scheme strictly akin to the adult justice system. Rather, it is primarily rehabilitative, cognizant of the inherent differences between juvenile and adult offenders, and geared toward ‘the correction and redemption to society of delinquent children’. . . ‘The rationale of [the dual system for adult and juvenile offenders] is diminished culpability: deviant behavior of children may be regarded as generally less culpable than similar adult behavior for the reason that a child’s capacity to be culpable. . . is not as fixed or absolute as that of an adult’. As a result, we have allowed ‘certain basic changes in the traditional method of dealing with criminal offenders’ and empowered Juvenile Court judges with ‘very broad discretion. . . with regard to disposition.”

461 Mass. 459, 461 (2012) (internal citations omitted).

The Act operates only upon conviction of specified criminal offenses. All of the offenses possess a scienter requirement. The Act “only comes into play on a finding of scienter.” Mendoza-Martinez, at 169. This weighs the balance towards the punitive nature of the Act.

The Act promotes traditional aims of punishment, namely deterrence and retribution. The purpose of the registration law, stated clearly in the emergency preamble to its revision in 1999, is to protect "the vulnerable members of our communities from sexual offenders." The Legislature found "the danger of recidivism posed by sex offenders, especially sexually violent offenders who commit predatory acts characterized by repetitive and compulsive behavior, to be grave and that the protection of the public from these sex offenders is of paramount interest" (emphasis added). St. 1999, c. 74, § 1. The aim is clearly to deter recidivism, “especially [by] sexually violent offenders.”

The Act's registration obligations are also retributive, another traditional aim of punishment. The Act’s length of the reporting requirement, here, oftentimes mandatory for a lifetime pursuant to juvenile offenses, is categorically calibrated by the type of offense, not by any assessment of the risk of recidivism or danger. This retributive aspect could be partially mitigated if the Act based the registration requirements on assessments of recidivism risks, but it does not. The empirical evidence shows, juveniles sexually reoffend at an extremely low rate.[[4]](#footnote-4)

All of the Mendoza- Martinez factors are present here as applied to juveniles. The effect of the Act on individuals who offended as juveniles is not regulatory, but rather operates as punishment. The Act is constitutional infirm if it continues to include registration and notification provisions for juveniles.

ii. The Act Violates Double Jeopardy

The Fifth Amendment provides that "No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb . . . ." The Double Jeopardy Clause protects against a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and successive punishments for the same offense. North Carolina v. Pearce 395 US 711, 717 (1969).

The roots of the Double Jeopardy Clause stretch back to the Massachusetts Bay Colony. “As early as 1641, the Colony of Massachusetts in its "Body of Liberties" stated: "No man shall be twise sentenced by Civill Justice for one and the same Crime, offence, or Trespasse." US v. Halper, 490 US 435, 440 (1989) quoting, American Historical Documents 1000-1904, 43 Harvard Classics 66, 72 (C. Eliot ed. 1910).

The Supreme Court in numerous cases assessing when civil statutes offend Double Jeopardy has looked to factors similar to those discussed in the ex post facto arena. In US v. Halper, Mr. Halper was convicted of 65 fraudulent Medicaid claims. His total theft was $585.00. He was sentenced to two years in prison and fined $2,000.00 for his criminal convictions. Halper, 446. After the criminal trial the government then sought a $2,000.00 civil penalty for each of the 65 violations. The Court found no rational relationship between the hugely disparate monetary penalty and the civil regulatory scheme. The Court determined that the fine was actually punishment. In arriving at this conclusion the Court dispensed with the civil versus criminal label finding, “the labels, ‘criminal and civil’ are not of paramount important.” The Court found “a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent the second sanction may not be fairly characterized as remedial, but only as a deterrent or retribution.” Id at 448-449. The Court held “that the disparity between its approximation of the Government's costs [$16,000] and Halper's $130,000 liability is sufficiently disproportionate that the sanction constitutes a second punishment in violation of double jeopardy.” Id at 452.

In Halper the Court dispensed with the formulaic approach finding it “not well suited to the context of the "humane interests" safeguarded by the Double Jeopardy Clause's proscription of multiple punishments.” Id at 447. Instead, the Court, based on the history of the clause and the precedents, found this “constitutional protection is intrinsically personal.” In determining whether the clause has been violated the Court found “its violation can be identified only by assessing the character of the actual sanctions imposed on the individual by the machinery of the state.” Id.

The Court found that the disparity of $114,000 was enough, after a criminal trial and prior punishment, to constitute “successive punishment” under the double jeopardy clause. That successive punishment involved money, a fine.

When the “sanctions imposed on the individual by the machinery of the state” do not further the remedial purpose of the Act, as here, and instead only serve deterrence and retributive ends, the Act violates double jeopardy.

Similarly, even when a state calls something a “tax” and not a fine, it may still operate punitively and thus run afoul of double jeopardy. Department of Revenue of Montana v. Kurth Ranch, 511 US 767 (1994). In Kurth, Montana passed a sizeable tax on seized drugs. The Court, in finding this “tax” violative of double jeopardy, looked at how it operated and the effects. Kurth at 774. It found the tax only applied after a criminal conviction and only for behavior which was already a crime. Id. The tax therefore required a scienter requirement. Id. It found the tax to be disproportionate, excessive. Id. It found there was no public record or findings showing how the tax would further the legislative goal. “[T]here comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment.” Id at 779 (internal citations omitted). The Court found the purpose to be punishment because the tax exclusively served the purposes of regulation and deterrence. Id.

The situation obtains with former juvenile offenders. The Act is only operative after a criminal conviction. It requires scienter. It is for behavior which was already a crime. And, the regulation is excessive in length, as well as not being linked to any individual finding that the juveniles presently poses a risk or danger.

In these cases there was no threatened loss of liberty, or infringement upon the same. They merely dealt with monetary issues. Here, the protected interests are much greater than money and the regulation is much more disproportionate with the interest.

1. The Act Is Cruel and Unusual

“The Eighth Amendment's prohibition of cruel and unusual punishment "guarantees individuals the right not to be subjected to excessive sanctions. That right, we have explained, "flows from the basic `precept of justice that punishment for crime should be graduated and proportioned to both the offender and the offense. As we noted the last time we considered life-without-parole sentences imposed on juveniles, "[t]he concept of proportionality is central to the Eighth Amendment." And we view that concept less through a historical prism than according to "`the evolving standards of decency that mark the progress of a maturing society.” Miller v. Alabama, 132 S.Ct. 2455, 2464 (2012) (internal quotations omitted).

The Court has shown great exactness when addressing cases under this provision as it is concerned “with proportionate punishment”. Owing to this proportionality the Court has adopted “categorical bans on sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty.” Id. At 2464. Juvenile offenders fall into that category:

“To start with the first set of cases: *Roper* and *Graham* establish that children are constitutionally different from adults for purposes of sentencing. Because juveniles have diminished culpability and greater prospects for reform, we explained, "they are less deserving of the most severe punishments." *Graham,* 560 U.S., at \_\_\_, [130 S.Ct., at 2026](http://scholar.google.com/scholar_case?case=6982366090819046045&q=miller+v.+alabama&hl=en&as_sdt=2,22). Those cases relied on three significant gaps between juveniles and adults. First, children have a "`lack of maturity and an underdeveloped sense of responsibility,'" leading to recklessness, impulsivity, and heedless risk-taking. [*Roper,* 543 U.S., at 569, 125 S.Ct. 1183](http://scholar.google.com/scholar_case?case=16987406842050815187&q=miller+v.+alabama&hl=en&as_sdt=2,22). Second, children "are more vulnerable ... to negative influences and outside pressures," including from their family and peers; they have limited "contro[l] over their own environment" and lack the ability to extricate themselves from horrific, crime-producing settings. *Ibid.* And third, a child's character is not as "well formed" as an adult's; his traits are "less fixed" and his actions less likely to be "evidence of irretrievabl[e] deprav[ity]." *Id.,* at 570, [125 S.Ct. 1183](http://scholar.google.com/scholar_case?case=16987406842050815187&q=miller+v.+alabama&hl=en&as_sdt=2,22). Miller at 2464-2465.

In the Statute there is no substantive distinction between those who offended as adults and those who offended as juveniles, as has been validated by empirical research. A former juvenile offender’s “lack of maturity,” susceptibility to “outside pressures,” and inchoate nature are not used by the SORB to differentiate. Rather, those very aspects of a former offender’s age that the Supreme Court found militated against juvenile inclusion in mandatory sentencing schemes even when those juveniles committed homicide, are used against them by the Board.

The disproportionality of the Act is readily apparent. Juveniles are different. They may be required to register for the rest of their lives. This allows for no realistic hope of reformation, no realistic hope for rehabilitation. There is only punishment. And that punishment, which will be borne by the former juvenile offender and his family, is permanent.

The very people who are most amendable to treatment, rehabilitation, and environmental influences- juveniles- are the very people, who owing to their majority peer or younger offending, are precluded from having that treatment and rehabilitation assessed, recognized, and taken into account. They instead are punished with a lifetime sentence.

V. Conclusion

In keeping with the evolving concepts of decency, now buttressed by empirical studies, research, data, we should no longer mandate registration and notification for former offenders who committed their offenses as juveniles. It does not promote public safety. It is not cost effective. And it does not comport with the Massachusetts Declaration of Rights, or the U.S Constitution.

Very truly yours,

[TPN]

Terence Noonan

280 Hillside Avenue

Needham, Ma. 02494

781.455.8300

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1. Of particular Constitutional concern should be the requirement for mandatory lifetime registration for acts committed as a juvenile. “The Eighth Amendment's prohibition of cruel and unusual punishment ‘guarantees individuals the right not to be subjected to excessive sanctions.’ [*Roper,* 543 U.S., at 560, 125 S.Ct. 1183](http://scholar.google.com/scholar_case?case=16987406842050815187&q=miller+v.+alabama&hl=en&as_sdt=2,22). That right, we have explained, ‘flows from the basic `precept of justice that punishment for crime should be graduated and proportioned' to both the offender and the offense. *Ibid.* (quoting [*Weems v. United States,* 217 U.S. 349, 367, 30 S.Ct. 544, 54 L.Ed. 793 (1910)](http://scholar.google.com/scholar_case?case=8944369929987696113&q=miller+v.+alabama&hl=en&as_sdt=2,22)). As we noted the last time we considered life-without-parole sentences imposed on juveniles, ‘[t]he concept of proportionality is central to the Eighth Amendment.’ *Graham,* 560 U.S., at \_\_\_, [130 S.Ct., at 2021](http://scholar.google.com/scholar_case?case=6982366090819046045&q=miller+v.+alabama&hl=en&as_sdt=2,22). And we view that concept less through a historical prism than according to `the evolving standards of decency that mark the progress of a maturing society.' [*Estelle v. Gamble,* 429 U.S. 97, 102, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976)](http://scholar.google.com/scholar_case?case=4755107314332030951&q=miller+v.+alabama&hl=en&as_sdt=2,22) (quoting [*Trop v. Dulles,* 356 U.S. 86, 101, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958) (plurality opinion)](http://scholar.google.com/scholar_case?case=8267310144688717588&q=miller+v.+alabama&hl=en&as_sdt=2,22)).” *Miller v. Alabama*, 132 S.Ct. 2455, 2464 (2012). [↑](#footnote-ref-1)
2. Dr. Zimring was one of the few juvenile experts cited and relied upon by the SORB in its regulations. [↑](#footnote-ref-2)
3. In assessing the efficacy of registration and notification systems for juveniles (SORN) a Department of Justice commissioned study determined: While the research on SORN for juvenile sexual offenders remains limited and provides little support for use of this management strategy, federal and state law continues to expand in terms of the application and scope of SORN. Research needs to identify whether juveniles are similar in kind to adult sexual offenders prior to utilizing such policies with this population. Indeed, if juveniles who commit sexual offenses have more in common with those who commit non-sexual offenses, tenets of the juvenile justice system such as a rehabilitation focus and confidentiality should be maintained rather than a more punitive and publicly accessible system. The goal of intervention with juveniles who commit sexual offenses is to prevent recidivism and society benefits from proper intervention with this population. This may ultimately require some modification of existing SORN laws to limit applicability for juveniles who commit sexual offenses.” United States Department of Justice, Juvenile Sexual Offenders An Annotated Summary of the Literature on Key Topics. This project was supported by subcontract #2001-S-2010Q-050 with Circle Solutions, Inc. under contract with the Office of Justice Programs (SMART), U.S. Department of Justice. [↑](#footnote-ref-3)
4. For example, Gfellner, B.M. (2000), *Profiling Adolescent Sex Offenders*, Sex Offender Treatment Advisory Group (SOTAG), available at [www.gfellner@brandonu.ca](http://www.gfellner@brandonu.ca)., finding 3.7% recidivism rate for cohort of 75 adolescent males with a 4.25 year follow-up period; Wiebush, Richard G., *Juvenile Sex Offenders: Characteristics, system response, and recidivism*, National Council on Crime and Delinquency (NCCD), available from National Criminal Justice Reference Service, 800-851-3420, finding 3.2 - 5.5% recidivism rate for 492 youths based on new arrests with a follow-up of 18 – 35 months; Leidecke, D & Marbibi, M. (2000), *Risk Assessment and Recidivism in Juvenile Sexual Offenders*, Texas Youth Commission, available from 4900 N. Lamar Blvd., P.O. Box 4260, Austin, TX 78765, finding 3 out of 72 juveniles reoffended across three years, based on new arrests; Caldwell, Michael (2013), Accuracy of Sexually Violent Person Assessments of Juveniles Adjudicated for Sexual Offenses. [↑](#footnote-ref-4)