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Reconciling the Sex Offender Registration Act and the Family Court Act: Why the New York Legislature Should Allow Consideration of Prior Juvenile Delinquency Adjudications in Sora Risk Level Determinations

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RECONCILING THE SEX OFFENDER REGISTRATION ACT AND THE FAMILY COURT ACT: WHY THE NEW YORK LEGISLATURE SHOULD ALLOW CONSIDERATION OF PRIOR JUVENILE DELINQUENCY ADJUDICATIONS IN SORA RISK LEVEL DETERMINATIONS

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INTRODUCTION

Why do we have laws? What should they accomplish? Whether it is criminal law,[1] laws regulating travel,[2] or human rights law,[3] one basic goal of the law is the same: to provide social order.[4] To meet this objective, the number of laws has expanded over time,[5] often in response to tragic events.[6] One such law is

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[1] *See, e.g.*, N.Y. PENAL LAW § 1.05 (McKinney 2006).

[2] *See, e.g.*, N.Y. VEH. & TRAF. LAW § 398-a (McKinney 1975).

[3] *See, e.g.*, N.Y. EXEC. LAW § 290 (McKinney 1974).

[4] Russell Hardin, *Law and Social Order*, 11 PHIL. ISSUES 61, 61–62 (2001), *available at* http://www.nyu.edu/gsas/dept/politics/faculty/hardin/research/Law&SocialOrder.pdf (arguing that "actual legal systems in reasonably successful societies have a clear moral principle behind at least much of their law" and "[t]hat moral principle is mutual advantage, which, at a minimum, includes social order").

[5] Gary Fields & John R. Emshwiller, *As Criminal Laws Proliferate, More Are Ensnared*, WALL ST. J. (July 23, 2011), http://online.wsj.com/article/SB10001424052748703749504576172714184601654.html (stating that while "[t]he U.S. Constitution mentions three federal crimes by citizens: treason, piracy and counterfeiting," by the 1900s "the number of criminal statutes numbered in the dozens," and in 2008, one study estimated there were "4,500 crimes [listed] in federal statutes").

[6] *See, e.g.*, Ben Jones, *Growing Number of Laws Propelled by Crime Victims*, USA TODAY (Sept. 23, 2011), http://usatoday30.usatoday.com/news/nation/story/

Megan's Law,[7] which was enacted in 1994 after the brutal rape and murder of seven-year-old Megan Kanka.[8] Megan's Law, a federal statute, provides that all states must establish sex offender registration laws that track the whereabouts and risk levels of released convicted sex offenders upon re-entry into the community.[9] In compliance with Megan's Law, New York established the Sex Offender Registration Act ("SORA"), which took effect on January 21, 1996.[10] SORA's stated goal is to "provide law enforcement with additional information critical to preventing sexual victimization and to . . . allow them to alert the public when necessary for the continued protection of the community."[11]

To fulfill this mission, SORA both established a system in which sex offenders, prior to their release from prison, are assessed a risk level ranging from one to three, and also set increasingly broadened reporting requirements as the risk level increases.[12] SORA further provided for the establishment of a

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2011-09-23/child-laws/50518548/1 (discussing how certain tragic events spur the creation of legislation).

[7] 42 U.S.C. § 16901 (2012). Megan's Law requires states to create their own laws governing the release of information regarding convicted sex offenders; states that did not comply with this law risked losing ten percent of federal crime-fighting funding. Daniel M. Filler, *Making the Case for Megan's Law: A Study in Legislative Rhetoric*, 76 IND. L.J. 315, 316 & n.9 (2001). This federal statute should not be confused with some state statutes, enacted in response to this federal mandate, that are similarly referred to as Megan's laws. *See id.* at 316.

[8] *See Megan's Law Website*, PA. ST. POLICE, http://www.pameganslaw.state.pa.us/History.aspx?dt= (last visited Aug. 25, 2014).

[9] Daniel L. Feldman, *The "Scarlet Letter Laws" of the 1990s: A Response to Critics*, 60 ALB. L. REV. 1081, 1083 & n.1 (1997).

[10] *See About the New York State Sex Offender Registration Act (SORA)*, N.Y. ST. DIVISION OF CRIM. JUST. SERVICES, http://www.criminaljustice.ny.gov/nsor/legalinfo.htm (last visited Aug. 26, 2014) [hereinafter *About SORA*].

[11] Sex Offender Registration Act, Ch. 192, § 11-B, 1995 N.Y. Laws, WL NY-LEGIS 192 (1995); *see also* People v. Wroten, 286 A.D.2d 189, 197, 732 N.Y.S.2d 513, 519–20 (4th Dep't 2001); *Sex Offender Registry*, WELCOME TO THE CITY OF ELMIRA, http://www.cityofelmira.net/police-department/sex-offender-registry (last visited Aug. 26, 2014).

[12] *See* N.Y. CORRECT. LAW § 168-l (McKinney 2011). The reporting requirements for each respective risk level is as follows: (1) An offender assessed as a risk level one must report changes in address, must register every year, and is generally removed from the offender registry after ten years but is not subject to community notification; (2) An offender assessed as a risk level two has the same requirements and is included for the same length of time on the registry as a risk level one offender but is subject to community notification; police may distribute to vulnerable populations his name, description, photograph, approximate address and zip-code, and details regarding his offense, and anyone receiving this information may

board of examiners ("BOE") and entrusted it with the task of determining an offender's risk level, which is based primarily on an offender's likelihood of recidivism.[13] As of August 2014, there were approximately 37,445 registered sex offenders in New York, all of whom have already been, or will be, assessed as a risk level one, two, or three.[14]

Yet the application of this straightforward law is in dispute. In *People v. Campbell*,[15] an intermediate-level appellate court in New York found that the BOE exceeded its authority by considering a sex offender's juvenile delinquency adjudication when assessing his risk level, thereby improperly raising the offender's risk level from one to three.[16] The court in *Campbell* explained that section 381.2 of the Family Court Act ("FCA")[17] states in clear language that except for the purposes of sentencing, records of a juvenile's delinquency adjudication must be kept confidential and may not be used by other courts for any other purpose.[18] *Campbell* is significant, in part because it split from earlier appellate court holdings,[19] and also because it potentially undermines hundreds, if not thousands, of the BOE's risk assessments. In determining whether the BOE should be allowed to consider juvenile delinquency adjudications in sex offender risk level assessments, the relevant questions the legislature and courts must ask themselves are: How important is it to keep a child's juvenile delinquency adjudication

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distribute it freely; (3) An offender assessed as a risk level three has the same requirements and is subject to the same notification as a risk level two offender, but in addition, he is included on the sex offender registry for life and the information distributed may include the offender's exact address, address of his employment, and name of the offender's college, if he is a student. JAMES ECKERT, SEX OFFENDER REGISTRATION ACT CLASSIFICATION PROCEDURE DEFENSE OUTLINE 29–30 (2008), *available at* http://www.monroecountypublicdefender.com/training/sora_outline_2_08.pdf.

[13] CORRECT. § 168-l.

[14] *See Registered Sex Offenders by County*, N.Y. ST. DIVISION OF CRIM. JUST. SERVICES, http://www.criminaljustice.ny.gov/nsor/stats_by_county.htm (last visited Aug. 26, 2014).

[15] 98 A.D.3d 5, 946 N.Y.S.2d 587 (2d Dep't 2012).

[16] *Id.* at 12–13, 946 N.Y.S.2d at 592.

[17] N.Y. FAM. CT. ACT § 381.2 (McKinney 1982).

[18] *Campbell*, 98 A.D.3d at 12, 946 N.Y.S.2d at 592.

[19] *See id.*; People v. Catchings, 56 A.D.3d 1181, 1182, 867 N.Y.S.2d 618, 619 (4th Dep't 2008); People v. Dort, 18 A.D.3d 23, 26, 792 N.Y.S.2d 236, 238 (3d Dep't 2005).

confidential? How important to the determination of a sex offender's risk level is that offender's juvenile delinquency adjudication? Is it possible to reconcile both of these concerns?

This Note argues that advisory boards should not be prevented from considering juvenile delinquency proceedings in determining an adult offender's risk level. While one of the FCA's goals is to protect children from the stigma associated with a criminal conviction, the harm caused by the blanket prohibition against disclosing an offender's juvenile delinquency history outweighs its benefits. That is, despite the legislature's mandate that a juvenile's records be kept confidential, it is nonetheless time to revisit that decision. As currently constituted, the FCA adversely affects the ability of officials to make appropriate recommendations for the safety of the community. This puts society at risk.

This issue is important because the current state of New York law regarding risk level determinations is unclear. The implications of this uncertainty are great. Presently, risk level assessments for New York's registered sex offenders, regardless of which criminal court conducted the SORA proceeding, are maintained in the same registry.[20] Because New York state courts are now at odds as to whether juvenile delinquency adjudications may be accounted for in risk assessments, it is probable, and eventually certain, that some sex offenders who would have been assessed, for instance, as a risk level two or three by one court, will instead be grouped in the registry together with other sex offenders assessed as a risk level one or two by another court. Put differently, the uniformity of risk level designations in the registry will become compromised.[21] The effect of this inconsistency in the sex offender database is that it undermines the very purpose of SORA and maintaining the sex offender registry—to alert the public that a registered sex offender lives nearby and of the degree of risk that the sex

[20] *See Registered Sex Offenders by County*, *supra* note 14.

[21] One potential solution to this issue would be to alert a person searching the database that a sex offender would have been assessed a higher risk level if his SORA proceeding had taken place in another court. This could be done by including in the registry an asterisk, or some other symbol, next to the name or risk level number of an offender, alerting the searcher to this fact.

offender poses to the community. Accordingly, the legislature should amend the FCA to allow the BOE to consider juvenile delinquency adjudications in SORA proceedings.

Part I of this Note explores the history of SORA and the FCA, the seeming contradiction between the two statutes, and the relevant case law from the Second, Third, and Fourth Departments of the New York Supreme Court, Appellate Division. Part II deals with the question of whether the New York Legislature *should* allow the BOE to consider a sex offender's juvenile delinquency adjudications when assessing what the appropriate risk level should be. Part III suggests that the New York Legislature should amend the FCA to allow the BOE to consider juvenile delinquency adjudications in assessing an adult offender's risk level.

I. THE RELEVANT STATUTES AND CASE LAW

A. *New York's Sex Offender Registration Act*

New York's Sex Offender Registration Act ("SORA"),[22] passed on July 25, 1995 and modeled after New Jersey's "Megan's Law,"[23] requires individuals convicted of certain sex offenses to register with the Division of Criminal Justice Services.[24] SORA was enacted for the purpose of "(1) protecting members of the community, particularly their children, by notifying them of the presence of individuals in their midst who may present a danger, and (2) enhancing law enforcement authorities' ability to investigate and prosecute future sex crimes."[25] To further these objectives, the names of those registered are available for public inspection over the Internet or by phone.[26] Moreover, SORA established a three-tiered notification system whereby law enforcement agencies and the public may be provided with information about a particular sex offender.[27] If there is a higher

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[22] N.Y. CORRECT. LAW § 168 (McKinney 1995).

[23] Doe v. Pataki, 120 F.3d 1263, 1266 (2d Cir. 1997); Maria Orecchio & Theresa A. Tebbett, Note, *Sex Offender Registration: Community Safety or Invasion of Privacy?*, 13 ST. JOHN'S J. LEGAL COMMENT. 675, 686 n.76 (1999).

[24] *See About SORA*, *supra* note 10.

[25] *Pataki*, 120 F.3d at 1266.

[26] *Id.* at 1269–70.

[27] N.Y. CORRECT. LAW § 168-l (McKinney 2011).

risk that an offender will re-offend, then a greater amount of information will be distributed to a greater number of individuals.[28]

Furthermore, SORA provides that "[t]here shall be a board of examiners of sex offenders which shall possess the powers and duties . . . specified."[29] The board must be comprised of individuals who are "experts in the field of the behavior and treatment of sex offenders."[30] One of the primary duties of the BOE is to develop a set of guidelines to use to assess a sex offender's risk level.[31] The legislature explicitly stated that these guidelines are to be based upon "the risk of a repeat offense by [the] sex offender and the threat posed to the public safety."[32] While the statute indicates that there is no exclusive list of factors to consider in assessing this risk,[33] it specifically lists certain "criminal history factors indicative of [a] high risk of repeat offense,"[34] including "the age of the sex offender at the time [he committed his] first sex offense."[35]

Pursuant to SORA, the BOE created the Sex Offender Registration Act: Risk Assessment Guidelines and Commentary (the "Guidelines").[36] The Guidelines allocate a certain number of points for each risk factor.[37] More points are assessed to an

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[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.* ("Such guidelines shall be based upon, but *not limited to*, the following . . . .") (emphasis added).

[34] *Id.*

[35] *Id.*

[36] SEX OFFENDER REGISTRATION ACT: RISK ASSESSMENT GUIDELINES AND COMMENTARY (2006) [hereinafter SEX OFFENDER REGISTRATION ACT], *available at* http://www.nycourts.gov/reporter/06_SORAGuidelines.pdf.

[37] *See id.*

offender when his actions are deemed to be more egregious.[38] Elaborating on SORA Factor Eight (Age at First Sex Crime), the Guidelines state that the BOE will take into account:

> The offender's age at the commission of his first sex crime, which includes his age at the time of the commission of the instant offense, [because it] is a factor associated with recidivism: those who offend at a young age are more prone to reoffend. For this reason, the guidelines assess 10 points if an offender's first sex crime, whether a felony or misdemeanor, was at age 20 or less. . . . [C]riminal convictions, youthful offender adjudications and juvenile delinquency findings are to be considered in scoring this category . . . .[39]

B. *The Family Court Act*

From the time of early common law, courts have recognized that children are not just "little adults,"[40] and therefore, should not be held to adult standards of crime and punishment.[41] For instance, in the fourteenth century, courts held that children

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[38] *See id.* at 3. For example, under "Factor 3: Number of Victims," the BOE would assess the offender twenty points if he victimized two persons and thirty points if he victimized three or more persons. *Id.* at 10. The rationale behind this system is that more points should be assessed when the violation measured by that factor indicates a higher risk of re-offense or a threat to public safety. *Id.* at 1–2. Thus, in the example given, the BOE states that more points are allocated to offenders with a higher number of victims because "[t]he existence of multiple victims is indicative of compulsive behavior and is, therefore, a significant factor in assessing the offender's risk of reoffense and dangerousness." *Id.* at 10.

[39] *Id.* at 13 (internal citations omitted).

[40] A crucial difference between children and adults is that children may not have yet developed the mental capacity to make informed, intelligent decisions, and therefore, are not as culpable as adults for committing a crime. Kenneth J. King, *Waiving Childhood Goodbye: How Juvenile Courts Fail To Protect Children from Unknowing, Unintelligent, and Involuntary Waivers of* Miranda *Rights*, 2006 WIS. L. REV. 431, 439 (2006) ("The frontal lobes are the part of the brain that enables abstract thought, inhibits impulsiveness, considers consequences, and weighs alternatives. The frontal lobes, which are commonly believed to be the site of reasoning and higher-order mental processes and have 'reciprocal connections' with every other region of the brain and are responsible for 'flexibly coordinating' with other regions of the brain, develop last.").

[41] *See* John P. Woods, *New York's Juvenile Offender Law: An Overview and Analysis*, 9 FORDHAM URB. L.J. 1, 2 (1980–1981); *see also* Rose M. Charles & Jennifer V. Zuccarelli, Note, *Serving No "Purpose": The Double-Edged Sword of New York's Juvenile Offender Law*, 12 ST. JOHN'S J. LEGAL COMMENT. 721, 722–23 (1997) (explaining that a separate juvenile justice system was enacted, in part, because of the "fundamental notion" that children are unable to fully comprehend the consequences of committing crimes, and therefore, "[p]rosecuting children as adults failed to address the child's lack of mental culpability").

convicted of crimes would be subject to lesser punishments than would adults convicted of the same crimes.[42] The system in place, however, was seriously flawed; convicted adults and children were still housed in the same prison facilities, and the focus was on punishment rather than rehabilitation of all convicts, regardless of age.[43] In the nineteenth century, reformers believed that the effect of the states lumping children and adults together in the same system was that "instead of the state's training its bad boys so as to make of them decent citizens, it permitted them to become the outlaws and outcasts of society."[44] In response to this realization, in 1909, the New York Penal Law required that children between the ages of seven and thirteen who committed an offense to be adjudicated as "juvenile delinquents," instead of as criminals.[45] By the early twentieth century, the Children's Courts were established and held jurisdiction over various delinquency proceedings.[46]

In 1962, New York enacted the Family Court Act ("FCA"),[47] which superseded the Children's Court system and is still in effect today.[48] One of the legislature's stated purposes in enacting the FCA was to ensure that courts presiding over delinquency proceedings would "consider the needs and best interests of the respondent as well as the need for protection of the community."[49] Indeed, one of the underlying principles of the juvenile justice system is that juveniles should be rehabilitated, rather than punished for crimes they committed.[50] In essence,

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[42] Woods, *supra* note 41, at 2–3.

[43] *Id.* at 3.

[44] Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 107 (1909–1910).

[45] N.Y. PENAL LAW § 2186 (1909) (amended 1949, 1950, 1956, 1962).

[46] Woods, *supra* note 41, at 5.

[47] Katheryn D. Katz, *Family Law*, 55 SYRACUSE L. REV. 1053, 1058 (2005).

[48] Woods, *supra* note 41, at 8–9.

[49] N.Y. FAM. CT. ACT § 301.1 (McKinney 1983); *see* Barry C. Feld, *Juvenile Court Legislation Reform and the Serious Young Offender: Dismantling the "Rehabilitative Ideal"*, 65 MINN. L. REV. 167, 170 (1981) ("Juvenile courts have traditionally assigned primary importance to individualized treatment of juvenile offenders on the theory that the interests of both offenders and society are best served by regenerative treatment.").

[50] *In re* Gault, 387 U.S. 1, 15 (1967) (explaining that from the time of their inception, juvenile courts believed that "society's role was not to ascertain whether the child was 'guilty' or 'innocent,' but '[w]hat is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career' ") (quoting Mack, *supra* note 44, at 119–20), *abrogated by* Allen v. Illinois, 487 U.S. 364 (1986).

the family court seeks to give children offenders another chance to succeed in life by focusing on rehabilitation and preventing the stigma associated with having a criminal record.[51] Accordingly, it is not surprising that the family court takes confidentiality of its records seriously.[52]

C. *The Split Among the New York Courts*

Until recently, New York courts did not even mention that there could be a potential conflict between the FCA and any of SORA's provisions or the actions that the BOE regularly takes pursuant to SORA. In fact, the Appellate Division, Third and Fourth Departments, both ruled that the BOE was within its authority to consider an adult offender's juvenile delinquency adjudications in assessing the risk level, without mentioning the family court's obligation under the FCA to keep these records confidential.[53]

In *People v. Campbell*,[54] however, the Appellate Division, Second Department addressed the conflict between SORA and the FCA head-on and held that the BOE had exceeded its authority by considering, in a SORA proceeding, the confidential documents filed during the defendant's prior delinquency adjudications.[55] In that case, the defendant, Joe Campbell, pled guilty to sexual abuse in the first degree.[56] The BOE assessed

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[51] *In re* Kiara C., 31 Misc. 3d 1245(A), *8, 934 N.Y.S.2d 34 (Family Ct. Queens Cnty. 2011) ("The purpose of juvenile delinquency proceedings is to empower the Family Court to intervene and provide services to troubled youth with the goal of rehabilitating them so that they live law abiding adult lives without the necessity of burdening them with the stigma of a criminal conviction.").

[52] *In re* S Children, 140 Misc. 2d 980, 987, 532 N.Y.S.2d 192, 196 (Family Ct. Orange Cnty. 1988) (stating that "[a]s a general rule, [t]he traditional . . . veil of confidentiality descends upon all [Family Court] proceedings" (internal quotation marks omitted)).

[53] People v. Dort, 18 A.D.3d 23, 26, 792 N.Y.S.2d 236, 238 (3d Dep't 2005) ("[W]e reject defendant's contention that his prior juvenile delinquency adjudication cannot be scored against him under SORA. The Board's guidelines for risk assessment establish that a sex offender will be assessed additional points for any court 'conviction or adjudication for a sex crime occurr[ing] at age 20 or less.' "); People v. Catchings, 56 A.D.3d 1181, 1182, 867 N.Y.S.2d 618, 619 (4th Dep't 2008) ("With respect to risk factor 9, concerning the nature of defendant's prior crimes, the court properly concluded that defendant's prior juvenile delinquent adjudication for endangering the welfare of a child warranted a 30–point assessment under that risk factor.").

[54] 98 A.D.3d 5, 946 N.Y.S.2d 587 (2d Dep't 2012).

[55] *Id.* at 12–13, 946 N.Y.S.2d at 592.

[56] *Id.* at 7, 946 N.Y.S.2d at 588.

the defendant as a "level two sex offender."[57] This calculation was based, in part, on the defendant's juvenile adjudication at the age of thirteen.[58] On appeal, the defendant argued that the FCA forbade the court from taking his juvenile delinquency into account;[59] therefore, he argued, he should not have been assessed as many risk factor points.[60] The prosecution, however, argued that the BOE's Guidelines "provide that prior crimes include 'criminal convictions, youthful offender adjudications and juvenile delinquency findings.' "[61] In rejecting the prosecution's argument, the court's reasoning was simple: Section 381.2 of the FCA is "clear on its face" that "the fact that a person was before the Family Court in a juvenile delinquency proceeding . . . [is not] admissible in any other court."[62] The court held that the Guidelines, which purportedly allow the BOE to consider juvenile delinquency adjudications, are non-determinative because the BOE—which promulgated them—is "merely an advisory panel" and has no right to establish procedures that conflict with the will of the legislature.[63] For the BOE to take a juvenile delinquency finding into account, the legislature would first have to amend the statute to permit it.[64] Accordingly, the court removed ten points from the defendant's score under the Guidelines, lowering his risk assessment to a level one sex offender.[65]

It is difficult to argue, from a statutory interpretation perspective, that the Second Department's decision is incorrect. While, as mentioned above, the Third and Fourth Departments had previously allowed the BOE to take juvenile delinquency findings into account, section 381.2 of the FCA expressly

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[57] *Id.*

[58] *Id.* (noting that the risk factor at issue on appeal was "defendant's age at the time of his first sex offense").

[59] 98 A.D.3d at 8, 946 N.Y.S.2d at 589.

[60] *Id.* at 9, 13, 946 N.Y.S.2d at 590, 592. The defendant was initially assessed as a level two sex offender, but an upward departure, based on three prior incacerations, resulted in him being assessed as a level three sex offender; a ten point decrease would have resulted in defendant being assessed as a level one sex offender. *Id.* at 7, 13, 946 N.Y.S.2d at 588–89, 592.

[61] *Id.* at 8–9, 946 N.Y.S.2d at 589 (quoting SEX OFFENDER REGISTRATION ACT, *supra* note 36).

[62] *Id.* at 12, 946 N.Y.S.2d at 592 (citing N.Y. FAM. CT. ACT § 381.2(1) (McKinney 1982)).

[63] *Id.* at 12–13, 946 N.Y.S.2d at 592.

[64] *Id.* at 13, 946 N.Y.S.2d at 592.

[65] *Id.*

prohibits other courts from using family court confidential documents in other proceedings.[66] Indeed, it is somewhat disturbing that the Third and Fourth Departments, both of which were certainly aware of this section, failed to mention that the Guidelines could be encroaching upon FCA provisions.[67]

This Note does not suggest that the Second Department ruled incorrectly in *Campbell*. Rather, this Note argues that it is necessary to look beyond the current state of the law and to ask whether the proper rules are in place to effectively protect the welfare and safety of our citizens, and therefore, whether the legislature should amend the FCA to permit consideration of juvenile delinquency adjudications in SORA proceedings.

II. WEIGHING THE ARGUMENTS FOR AND AGAINST CONFIDENTIALITY OF JUVENILE DELINQUENCY ADJUDICATIONS IN SORA PROCEEDINGS: WHY THE LEGISLATURE SHOULD AMEND THE FCA

"[Y]ou do not examine legislation in the light of the benefits it will convey if properly administered, but in the light of the wrongs it would do and the harms it would cause if improperly administered."[68] This famous quote, attributed to President Lyndon B. Johnson,[69] encapsulates the idea that laws have the potential to cause harm, even if they are designed to be beneficial. States have increasingly added exceptions to the previously absolute rule of confidentiality in juvenile delinquency adjudications, perhaps out of concern for the potential harm that it could cause.[70]

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[66] FAM. CT. ACT § 381.2(1).

[67] *See generally* People v. Catchings, 56 A.D.3d 1181, 867 N.Y.S.2d 618 (4th Dep't 2008); People v. Dort, 18 A.D.3d 23, 792 N.Y.S.2d 236 (3d Dep't 2005).

[68] STEPHEN R. DAY, BALANCING THE PENDULUM OF FREEDOM 7 (2008) (quoting BRYAN HORRIGAN, ADVENTURES IN LAW AND JUSTICE: EXPLORING BIG LEGAL QUESTIONS IN EVERYDAY LIFE 247 (2003)) (internal quotation marks omitted).

[69] *Id.*

[70] *See* Kristin Henning, *Eroding Confidentiality in Delinquency Proceedings: Should Schools and Public Housing Authorities Be Notified?*, 79 N.Y.U. L. REV. 520, 533–37 (2004) (explaining that confidentiality in the family courts is eroding due to the general public's desire to hold juveniles responsible for their actions, and in turn, many state legislatures' focus on public safety and individual accountability rather than rehabilitation). Since the 1990s, an increasing number of states have abandoned mandatory closure of juvenile proceedings in favor of open proceedings when a child is over a specific age or commits a serious offense, or when certain interested parties petition the court. *See id.*

New York's legislature, whether or not it intended to, enacted confidentiality laws in the FCA that, on their face, were designed to protect children,[71] but which also have, in some circumstances, unintended negative consequences. Thus, it is important to examine not only the advantages of maintaining confidentiality of juvenile proceedings, but also the disadvantages of doing so. In evaluating what New York's law should be, one thing is clear: There is no clear answer. While it is convenient to suggest that a certain law is in need of change, it is crucial to first understand the potential negative impacts of changing a law.

At its core, the argument against disclosing a sex offender's prior juvenile adjudication in SORA proceedings is that it is not worth compromising the family court's goal of rehabilitating juvenile offenders by disclosing their prior delinquency adjudications for the small, if any, benefit to law enforcement and the public by allowing the BOE to consider those adjudications in risk level determinations.[72] This argument relies on two distinct assumptions: first, that shielding a juvenile's offense history from public scrutiny is a necessary element in rehabilitating troubled youth,[73] and second, that the BOE's ability to consider an adult's juvenile delinquency finding will not, in any considerable way, improve public safety.[74] While in some circumstances these propositions may be true, when

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[71] *See* Danielle R. Oddo, Note, *Removing Confidentiality Protections and the "Get Tough" Rhetoric: What Has Gone Wrong with the Juvenile Justice System?*, 18 B.C. THIRD WORLD L.J. 105, 105–08 (1998); CALLAGHAN'S FAMILY COURT LAW & PRACTICE NY § 9:1 (2013) (Westlaw).

[72] As discussed above, this Note argues that despite the current state of the law, the BOE *should* be allowed to consider juvenile delinquency adjudications when determining a sex offender's risk level. Therefore, even though opponents of disclosing a juvenile's confidential history to the BOE can argue, as the *Campbell* court held, that the legislature plainly forbids such disclosure, this Note explores the reasoning underlying the FCA and SORA, and whether or not disclosure should be prohibited.

[73] *See* Leila R. Siddiky, Note, *Keep the Court Room Doors Closed So the Doors of Opportunity Can Remain Open: An Argument for Maintaining Privacy in the Juvenile Justice System*, 55 HOW. L.J. 205, 207 (2011) ("Changing the juvenile justice system to increase public access and eliminate privacy and confidentiality undermines the juvenile justice system's goals of rehabilitation.").

[74] This assumption relies on the argument that "the recidivism rate is not disproportionately high among juvenile offenders when they reach adulthood." Michael Kennedy Burke, Comment, *This Old Court: Abolitionists Once Again Line Up the Wrecking Ball on the Juvenile Court When All It Needs Is a Few Minor Alterations*, 26 U. TOL. L. REV. 1027, 1027 (1995).

applied to SORA proceedings they may be flawed in significant ways, thereby seriously undermining arguments opposing disclosure of juvenile records in SORA proceedings.

A. *An Adult Offender Should Not Be Protected by the FCA's Confidentiality Provisions*

One argument against disclosing an adult offender's juvenile records is that doing so would be detrimental to the FCA's rehabilitative goals.[75] To sufficiently evaluate the strength of this argument, two questions must first be answered: What is meant by rehabilitation? Why would disclosing a juvenile's records interfere with efforts to rehabilitate a wayward juvenile?

The answer to these questions, quite simply, is that the juvenile justice system is primarily concerned with "nurtur[ing] children so that they [can] learn from their mistakes and become contributing members of society."[76] To further this purpose, the legislature implemented a system in which a juvenile's court records are hidden from the public because, without this protection, "the youth involved in the juvenile justice system will see more closed doors, and society will see greater recidivism among juveniles."[77] For instance, youths that are required to carry the stigma of being a "juvenile delinquent" may face difficulty finding employment, thereby hindering that juvenile's ability to reintegrate into society, and effectively foreclosing the possibility that rehabilitation will be successful.[78]

This argument for protecting a juvenile's delinquency adjudication history breaks down, however, when a juvenile re-offends as an adult, as is the case when a delinquent youth subsequently commits a sex offense as an adult and is therefore

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[75] *See* Siddiky, *supra* note 73, at 207.

[76] *Id.* at 207.

[77] *Id.* at 208; *see also* Arthur R. Blum, Comment, *Disclosing the Identities of Juvenile Felons: Introducing Accountability to Juvenile Justice*, 27 LOY. U. CHI. L.J. 349, 351–52 (1996) ("In order to provide the children appearing before the juvenile courts with a chance to enjoy productive and untroubled futures, the juvenile justice system had to protect these children from the punishing stigmas that society attaches to those with troubled pasts.").

[78] Oddo, *supra* note 71, at 131–32 ("The existence of a juvenile police or court record and the publication of numerous cases of juvenile misbehavior and criminality have been identified as major obstacles to rehabilitation. The only empirical data about the effect of the availability of criminal history information to employers, educators or others indicates the result is less employment, educational or other opportunities for offenders.").

subject to a SORA proceeding.[79] While the juvenile justice system seeks to rehabilitate children—because juveniles are not responsible for their actions[80]—the criminal justice system holds adults accountable for the crimes they commit. It makes little sense, therefore, to continue to hide an adult's past from authorities—authorities that, in turn, could use this important information to protect the public. Indeed, "[w]hen yesterday's juvenile delinquent becomes today's adult criminal, the reasons behind society's earlier forbearance disappear."[81]

In contrast to juveniles who are able to be rehabilitated, juveniles who re-offend as adults have already shown that they were not successfully rehabilitated.[82] Furthermore, the justifications for keeping a juvenile's delinquency adjudication records confidential, as discussed earlier, do not apply as strongly to youths who recidivate as adults. Surely the legislature cannot save adults from the stigma of being labeled as a criminal by concealing their juvenile records, since these offenders have already been labeled due to their more recent adult convictions. The benefit of confidentiality, in other words, is squandered through recidivism as an adult.

Furthermore, it may be argued that because a juvenile delinquency adjudication is not a conviction of a crime,[83] an adult should not be burdened with disclosing his prior delinquency adjudications. The FCA seems to be at odds with this conclusion,

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[79] In New York, the overwhelming majority of offenders that are subject to SORA proceedings are adults. This is because "[a]n individual who is adjudicated as a youthful offender or juvenile delinquent is not convicted of a crime, and his or her records are not available to the public. As a result, he or she is not required to be registered in New York State." *See Frequently Asked Questions*, N.Y. ST. DIVISION OF CRIM. JUST. SERVICES, http://www.criminaljustice.ny.gov/nsor/faq.htm (last visited Aug. 26, 2014).

[80] *See* Blum, *supra* note 77, at 351.

[81] T. Markus Funk, *A Mere Youthful Indiscretion? Reexamining the Policy of Expunging Juvenile Delinquency Records*, 29 U. MICH. J.L. REFORM 885, 886 (1996); *see* United States v. McDonald, 991 F.2d 866, 872 (D.C. Cir. 1993) ("Setting aside a conviction may allow a youth who has slipped to regain his footing by relieving him of the social and economic disabilities associated with a criminal record. But if a juvenile offender turns into a recidivist, the case for conferring the benefit dissipates." (citation omitted)).

[82] *See* Funk, *supra* note 81, at 891 (arguing that "[i]f a former delinquent is still engaging in criminal activity in adulthood, clearly the juvenile justice system has failed to rehabilitate him, and our concern with his possible stigmatization and its effect on his potential for rehabilitation should be replaced with a concern for protecting society from a predatory recidivist").

[83] N.Y. FAM. CT. ACT § 380.1 (McKinney 2007).

however, because as this Note discusses, the Act allows a court to consider an adult's prior family court records for the purposes of sentencing.[84] Because the considerations and concerns that serve as the rationale for keeping a juvenile's records confidential do not easily apply to adults that are subject to SORA proceedings, the legislature should allow the BOE to consider an adult's prior delinquency records when necessary.

B. An Offender's Criminal History Contains Important Information Regarding the Likelihood of Recidivism

In enacting SORA, the legislature took special care in mandating that risk assessments of sex offenders be calculated by experts who are familiar with the ways sex offenders act and who know how to properly treat them.[85] Moreover, the legislature instructed these experts to determine an offender's risk level by basing it upon "factors indicative of high risk of repeat offense."[86] In fact, criminal history Factors Eight, Nine, and Eleven[87] are included in the risk assessment Guidelines in response to specific studies that support the finding that those factors are associated with higher risks of recidivism.[88] Furthermore, several research studies support the notion that prior sex crimes and criminal history, generally, are major predictors of recidivism.[89]

Despite the legislature's delegation of risk assessment to the BOE, and despite the BOE's determination that the age of a first offense is critical information in determining how best to protect

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[84] N.Y. FAM. CT. ACT § 381.2 (McKinney 1982).

[85] N.Y. CORRECT. LAW § 168-l (McKinney 2011).

[86] *Id.*

[87] SEX OFFENDER REGISTRATION ACT, *supra* note 36, risk factors 8–11.

[88] *See id.* at 13, 15, 20–22.

[89] *See, e.g.*, R. Karl Hanson, *Will They Do It Again? Predicting Sex-Offense Recidivism*, 9 CURRENT DIRECTIONS PSYCHOL. SCI. 106, 106 (2000) ("The major predictors of sexual-offense recidivism are factors related to sexual deviance (e.g., deviant sexual preferences, previous sex crimes) and, to a lesser extent, criminal lifestyle (e.g., antisocial personality disorder, total number of prior offenses)."); R. Karl Hanson & Kelly E. Morton-Bourgon, *The Characteristics of Persistent Sexual Offenders: A Meta-Analysis of Recidivism Studies*, 73 J. CONSULTING & CLINICAL PSYCHOL. 1154, 1154 (2005) ("There is now a general consensus that sexual recidivism is associated with at least two broad factors: (a) deviant sexual interests and (b) antisocial orientation/lifestyle instability."). *But see generally* Amanda Y. Agan, *Sex Offender Registries: Fear Without Function?*, 54 J.L. & ECON. 207 (2011) (arguing that sex offender registries do little, if anything, to lower the rates of sex offense recidivism).

the public from sex offenders, the BOE may nonetheless be denied this information if it comes in the form of a juvenile delinquency adjudication.[90] But the fact that a prior crime was committed by a person when he was a juvenile, as opposed to when he was adult, should not be dispositive of whether the BOE may consider this useful information. If the BOE is to do the job the legislature entrusted to it—that is, properly assess risk of recidivism in order to protect the public—then the BOE should be able to rely on prior delinquency adjudications, as they have direct bearing on the risk of recidivism.[91]

C. *Juvenile Delinquency Proceedings Should Be Treated Similarly to Youthful Offender Adjudications*

While the conflict between SORA and the FCA concerns the issue of keeping juvenile delinquency proceedings confidential and has been litigated thus far only in the *Campbell* case, there is already a substantial body of case law involving the potential conflict between SORA and section 720.35 of the New York Criminal Procedure Law ("NYCPL"), which governs the adjudication of *youthful offenders*.[92] Once an individual reaches the age of sixteen, his or her criminal adjudication will take place in criminal court instead of family court.[93] A criminal court, however, in the interest of justice, may label an individual between the ages of sixteen and eighteen as a "youthful offender" instead of as a criminal.[94]

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[90] *See* People v. Campbell, 98 A.D.3d 5, 12–13, 946 N.Y.S.2d 587, 592 (2d Dep't 2012).

[91] *See* Barry C. Feld, *The Constitutional Tension Between* Apprendi *and* McKeiver*: Sentence Enhancements Based on Delinquency Convictions and the Quality of Justice in Juvenile Courts*, 38 WAKE FOREST L. REV. 1111, 1183 (2003) ("[A] prior record of persistent offending, whether acquired as a juvenile or as an adult, provides the best evidence of career criminality.").

[92] N.Y. CRIM. PROC. LAW § 720.35 (McKinney 2011).

[93] *See* ASHLEY CANNON, CITIZENS CRIME COMM'N OF N.Y.C., GUIDE TO JUVENILE JUSTICE IN NEW YORK CITY 4 (Richard Aborn & John Bennett eds., 2010).

[94] *Id.* Once children turn sixteen, they are deemed criminally responsible for their behavior, and therefore, their adjudications take place in the adult criminal justice system; they are no longer eligible to appear in family court. *Id.* It is within a court's discretion to adjudicate the person as a "Youthful Offender" instead of a criminal. *Id.* This distinction is significant largely because youthful offenders do not have a criminal record, and as will be discussed, they are treated very similarly to juvenile delinquents.

While *Campbell* makes clear that juvenile delinquency adjudications may not be considered in SORA proceedings, New York courts have consistently allowed the BOE to consider youthful offender adjudications.[95] Relying on the determinations set forth in the Guidelines, these courts have rejected arguments made by offenders appealing their risk level assessment on the grounds that their prior youthful offender adjudications were used against them: "In the context of the criminal history section of the risk assessment instrument, the term 'crime' includes criminal convictions, youthful offender adjudications and juvenile delinquency findings."[96] In fact, the Second Department—the same court that decided *Campbell*—has allowed the BOE to consider an adult's prior youthful offenses.[97] *People v. Vite-Acosta*[98] is enlightening on the question of why these courts were not concerned with the apparent contradiction between the NYCPL, which prohibits the release of such an offender's youthful adjudication,[99] and the Guidelines, which permit their consideration.[100] The court first noted that the legislative intent behind NYCPL and SORA were not in conflict: "In light of the fact that a repeat offender has elected to cast away his youthful offender fresh start, the decision of the Board to take such adjudication into consideration is consistent with the legislative intent of SORA and not inconsistent with other statutory authority."[101] In any event, the court explained that the BOE

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[95] *See* People v. Stacconi, 81 A.D.3d 1046, 1046, 916 N.Y.S.2d 310, 310–11 (3d Dep't 2011); People v. Goodwin, 35 A.D.3d 1285, 1285, 825 N.Y.S.2d 414, 415 (4th Dep't 2006); People v. Peterson, 8 A.D.3d 1124, 1124, 778 N.Y.S.2d 626, 626–27 (4th Dep't 2004); People v. Moore, 1 A.D.3d 421, 421, 766 N.Y.S.2d 700, 701 (2d Dep't 2003).

[96] People v. Irving, 45 A.D.3d 1389, 1389, 846 N.Y.S.2d 487, 488 (4th Dep't 2007) (internal quotation marks omitted).

[97] *See, e.g.*, People v. Arnold, 35 A.D.3d 827, 827, 828 N.Y.S.2d 119, 120 (2d Dep't 2006) ("[I]t was not error to assess the defendant points for his commission of a prior sex offense which resulted in his adjudication as a youthful offender."); People v. Smith, 35 A.D.3d 693, 694, 828 N.Y.S.2d 112, 112 (2d Dep't 2006) (raising an offender's risk level from two to three "[i]n light of the defendant's prior youthful offender adjudication for criminal possession of stolen property in the first degree").

[98] 184 Misc. 2d 206, 708 N.Y.S.2d 583 (Sup. Ct. Bronx Cnty. 2000).

[99] N.Y. CRIM. PROC. LAW § 720.35 (McKinney 2011).

[100] *Vite-Acosta*, 184 Misc. 2d at 209, 708 N.Y.S.2d at 585 ("The issue thus becomes: is this administrative determination consistent with, or in conflict with, SORA and CPL article 720?").

[101] *Id.* at 209, 708 N.Y.S.2d at 585 (internal citation omitted). In addition, the court noted that "[f]urther support of this conclusion may be found in the fact that the 1999 amendments to SORA are silent with respect to this issue. Presumably, if

was created as a part of the Division of Parole,[102] and therefore, it fits squarely within an exception under section 720.35(2) of the NYCPL,[103] which allows the disclosure of a youthful offender's records to the probation department.[104]

To be sure, there is no exception under section 381.2 of the FCA for disclosure of a juvenile delinquency proceeding to the probation department and, at first blush, it is easy to assume that this difference alone precludes any comparison between juvenile delinquents and youthful offenders.[105] Nevertheless, upon closer examination, these two groups of offenders share many of the same legal characteristics, and, as such, the exception applied to youthful offender adjudications should apply in the context of juvenile delinquency adjudications as well. While the difference between juvenile delinquents and youthful offenders is merely a separation of a single year in age,[106] courts allow the BOE to consider youthful offender adjudications in risk level assessments.[107] This is the case only because youthful offenders are not adjudicated under the FCA; rather, the NYCPL governs their adjudications.[108] Despite the convenience of falling under the NYCPL exception, it is worth noting that courts have rarely relied on, or at the very least, mentioned, this exception when explaining why a youthful offender's records may be disclosed for the purposes of risk assessment under SORA. Rather, these courts usually rely on the same language and

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the Guidelines (which were published in 1997) were inconsistent with the Legislature's intent, this would have been remedied in the amendments." *Id.* at 209 n.4, 708 N.Y.S.2d at 585 n.4.

[102] *Id.* at 209, 708 N.Y.S.2d at 585; People v. McFarland, 29 Misc. 3d 1206(A), *7, 958 N.Y.S.2d 309 (Sup. Ct. N.Y. Cnty. 2010), *aff'd*, 88 A.D.3d 547, 931 N.Y.S.2d 225 (1st Dep't 2011) (stating that three of the five members of the BOE "are required to be employees of the Division of Parole").

[103] CRIM. PROC. LAW § 720.35.

[104] That section provides for confidentiality of youthful offender adjudication records from the public, except from "an institution to which such youth has been committed, the department of corrections and community supervision and *a probation department of this state that requires such official records and papers for the purpose of carrying out duties specifically authorized by law*." *Id.* (emphasis added).

[105] *See* N.Y. FAM. CT. ACT § 381.2 (McKinney 1982).

[106] *See* CANNON, *supra* note 93, at 3–4 (stating that while children over the age of seven and under the age of sixteen who commit criminal acts are considered juvenile delinquents, individuals between the ages of sixteen and eighteen who commit crimes may be designated as youthful offenders).

[107] *See supra* text accompanying notes 95–97.

[108] *See* CRIM. PROC. LAW § 720.35.

reasoning in the Guidelines that the *Campbell* court rejected: "In the context of the criminal history section of the risk assessment instrument, the term 'crime' includes criminal convictions, youthful offender adjudications and juvenile delinquency findings."[109] Furthermore, while a youthful offender adjudication is technically "not a conviction," the BOE may consider it when determining an offender's risk level because "it constitutes a reliable determination that an offender committed the underlying criminal conduct."[110]

In evaluating the similarities between the two categories of child offenders, it is important to note that neither an adjudication as a juvenile delinquent, nor an adjudication as a youthful offender is considered a crime.[111] In effect, they both give juveniles a clean slate and allow them to avoid the stigma associated with having a criminal conviction.[112] The fact that a youthful offender adjudication takes place in criminal court, where the court's main goal is to punish an offender—as opposed to family court, where the court's main objective is to rehabilitate the juvenile—does not preclude a comparison between the two types of offenders. Like the family court's goals with respect to juvenile delinquents, "the objectives of special measures for youthful offenders include rehabilitative treatment and protection from a lifetime stigma."[113]

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[109] People v. Thomas, 59 A.D.3d 783, 784, 873 N.Y.S.2d 757, 758 (3d Dep't 2009) (quoting People v. Irving, 45 A.D.3d 1389, 1389, 846 N.Y.S.2d 487, 488 (4th Dep't 2007)) (internal quotation marks omitted); *see also* People v. Campbell, 98 A.D.3d 5, 12–13, 946 N.Y.S.2d 587, 592 (2d Dep't 2012).

[110] People v. Stacconi, 81 A.D.3d 1046, 1046, 916 N.Y.S.2d 310, 311 (3d Dep't 2011) (quoting SEX OFFENDER REGISTRATION ACT, *supra* note 36); *Irving*, 45 A.D.3d at 1389–90, 846 N.Y.S.2d at 488; People v. Hernandez, 7 Misc. 3d 151, 157, 794 N.Y.S.2d 797, 801 (Sup. Ct. Bronx Cnty. 2005).

[111] CRIM. PROC. LAW § 720.35 ("A youthful offender adjudication is not a judgment of conviction for a crime or any other offense . . . ."); N.Y. FAM. CT. ACT § 380.1(1) (McKinney 2007) ("No adjudication under this article may be denominated a conviction and no person adjudicated a juvenile delinquent shall be denominated a criminal by reason of such adjudication.").

[112] *In re* Kiara C., 31 Misc. 3d 1245(A),*8, 934 N.Y.S.2d 34 (Family Ct. Queens Cnty. 2011).

[113] Capital Newspapers Div. of the Hearst Corp. v. Moynihan, 71 N.Y.2d 263, 268–69, 519 N.E.2d 825, 828, 525 N.Y.S.2d 24, 27 (1988). When considering whether to grant a person "youthful offender status," courts will take into account, among other factors, the "defendant's attitude toward society and respect for the law, and the prospects for rehabilitation and hope for a future constructive life." People v. Cruickshank, 105 A.D.2d 325, 334, 484 N.Y.S.2d 328, 336 (3d Dep't 1985).

Another significant similarity between juvenile delinquents and youthful offenders is that they are both afforded protection with regard to their court documents. In the same way that the FCA provides for confidentiality of juvenile delinquency proceedings,[114] the NYCPL seals a youthful offender's records from inspection by the public, courts, and administrative agencies.[115]

D. The General Shift Away from Confidentiality in State Courts

New York would not be the first state to allow consideration of juvenile delinquency adjudications when assessing an offender's risk level pursuant to state law. In fact, various states have passed laws requiring juvenile sex offenders as young as twelve years old to register on the same state sex offender registries as adults.[116] Examples of eroding confidentiality provisions abound; more than half of the states allow the public to access some juvenile crime records,[117] and there is an increasing desire to enable easier access to these records for use in adult proceedings.[118] While the reasons for this movement towards broader disclosure encompass a wider range of issues than just sex offender registration proceedings, they are applicable to SORA as well.

Before moving on to a discussion of suggested amendments, it is essential to reiterate that the importance in keeping juvenile delinquency records confidential should not be understated. The thrust of the argument in favor of allowing disclosure for risk assessment purposes relies upon the notion that the legislature can still keep the majority of family court documents confidential, while allowing for exceptions in circumstances in which such information is necessary to make informed decisions involving public safety, such as in SORA proceedings.

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[114] N.Y. FAM. CT. ACT § 381.2 (McKinney 1982).

[115] CRIM. PROC. LAW § 720.35.

[116] *See* State *ex rel.* B.G., 674 A.2d 178, 180, 185 (N.J. Super. Ct. App. Div. 1996); *see also* Henning *supra* note 70, at 537; Stacey Hiller, *The Problem with Juvenile Sex Offender Registration: The Detrimental Effects of Public Disclosure*, 7 B.U. PUB. INT. L.J. 271, 278 (1998).

[117] *See* Oddo, *supra* note 71, at 115.

[118] *See, e.g.*, Kelcey Carlson, *Should There Be Easier Access to Juvenile Court Records?*, WRAL.COM (Mar. 9, 2009), http://www.wral.com/news/local/story/4182291/.

III. SUGGESTED AMENDMENTS TO THE FAMILY COURT ACT

A. *Give More Leeway to Courts in Deciding Whether or Not To Disclose Juvenile Records*

One way the legislature could resolve the conflict between the FCA and the SORA Guidelines is by giving the family court discretion to decide whether to disclose juvenile delinquency records to the court adjudicating the SORA proceeding. Doing so would give family courts the flexibility to allow the introduction of a juvenile's delinquency findings when necessary. It is interesting to note that section 166 of the FCA, which requires confidentiality of family court records from the public generally[119]—as opposed to section 381.2 of the FCA, which mandates confidentiality of family court documents in other courts[120]—allows the family court to share its records when it deems proper.[121] Thus, the FCA contemplates that there may be times when it becomes necessary for disclosure of these otherwise private documents, and it allows the family court, after consideration of the purposes of obtaining the information, to do so.[122] Nevertheless, the generic confidentiality provision of section 166 of the FCA is generally ineffective for parties who wish to apply for disclosure of a juvenile's records for use in other court proceedings because it has been superseded by the stricter confidentiality provision of section 381.2 of the FCA.[123]

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[119] N.Y. FAM. CT. ACT § 166 (McKinney 1962).

[120] N.Y. FAM. CT. ACT § 381.2(1) (McKinney 1982).

[121] N.Y. FAM. CT. ACT § 166 provides:

> The records of any proceeding in the family court shall not be open to indiscriminate public inspection. However, the court in its discretion in any case may permit the inspection of any papers or records. Any duly authorized agency, association, society or institution to which a child is committed may cause an inspection of the record of investigation to be had and may in the discretion of the court obtain a copy of the whole or part of such record.

[122] *In re* J. Children, 101 Misc. 2d 479, 480, 421 N.Y.S.2d 308, 309 (Family Ct. Kings Cnty. 1979) ("Factors upon which such a determination should be made . . . include the person or official making the request, the purpose for which the information is needed; and the possibility for improper disclosure.").

[123] Green v. Montgomery, 95 N.Y.2d 693, 697, 746 N.E.2d 1036, 1039, 723 N.Y.S.2d 744, 747 (2001) ("As a rule, a juvenile delinquency adjudication cannot be used against the juvenile in any other court for any other purpose."); 10 NEW YORK FAMILY COURT PRACTICE § 1:16 (2d ed. 2012).

Section 720.35(2) of the NYCPL is instructive on this point.[124] This statute provides that a youthful offender's records must be kept confidential "[e]xcept where specifically required or permitted by statute *or upon specific authorization of the court*."[125] Thus, in the case of youthful offenders, as should be with juvenile delinquents, the court may consider whether the importance of disclosing an offender's records for use in another court's proceedings outweighs the offender's right to confidentiality.[126]

As discussed above, there is little reason to distinguish between juvenile delinquents and youthful offenders.[127] Administrative agencies, like the BOE, should be allowed to petition the family court and present evidence that disclosure of the juvenile's records is warranted in a particular situation.

B. Treat SORA Proceedings Like "Sentencings" Under the FCA for the Purpose of Exempting Them from the FCA's Confidentiality Provision

Thus far, this Note has referred to section 381.2 of the FCA as a blanket provision that generally prohibits disclosure of family court documents for use in other courts. That section of the FCA, however, does contain one exception. Specifically, section 381.2(2) allows other courts to consider records on file with the family court for the purposes of "imposing [a] sentence upon an adult after conviction."[128] In *Campbell*, the Second Department noted that because a risk level determination is not a sentence, this statutory exception does not apply.[129]

But analyzing the distinctions and similarities between sentencings and risk level determinations makes clear that the rationale behind the exception under section 381.2 of the FCA

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[124] N.Y. CRIM. PROC. LAW § 720.35(2) (McKinney 2011).

[125] *Id.* (emphasis added).

[126] People v. John F., 174 Misc. 2d 540, 545, 665 N.Y.S.2d 822, 826 (Dist. Ct. Nassau Cnty. 1997) (holding that a court may grant "specific authorization" to unseal a youthful offender's records if the applicant demonstrates by "clear and convincing evidence . . . that the applicant's interests outweigh the statutorily granted protection interests of the youthful offenders").

[127] *See supra* Part II.C.

[128] N.Y. FAM. CT. ACT § 381.2 (McKinney 1982) (indicating, however, that this provision does not apply if the delinquent's files have been sealed, pursuant to section 375.1 of the Family Court Act).

[129] People v. Campbell, 98 A.D.3d 5, 12, 946 N.Y.S.2d 587, 592 (2d Dep't 2012).

could, and should, apply to SORA proceedings. The first similarity is that both sentencing recommendations and SORA proceedings are means by which a court will determine what type of action to take against a convicted offender.[130] While courts insist that SORA proceedings are merely "civil in nature,"[131] and thus, not a punishment,[132] calling a risk level assessment "civil" does not necessarily make it so.[133] The reality is that a SORA proceeding can have equally devastating consequences for a sex offender and his family as a sentencing has.[134] Although there is little doubt that the notification procedures that SORA permits are aimed towards protecting the public, these procedures are often implemented more extensively than is necessary to protect the communities in which an offender lives.[135] These procedures can adversely affect an offender's ability to secure employment,[136] and can even cause great humiliation that may drive an offender

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[130] That is, sentencings assess what level of punishment will be inflicted upon an individual, and SORA proceedings determine how much of and how far a sex offender's personal information will be distributed.

[131] *See, e.g.*, People v. Mingo, 12 N.Y.3d 563, 571, 910 N.E.2d 983, 988, 833 N.Y.S.2d 154, 159 (2009).

[132] *In re* North v. Bd. of Exam'rs of Sex Offenders of N.Y., 8 N.Y.3d 745, 752, 871 N.E.2d 1133, 1138, 840 N.Y.S.2d 307, 312 (2007) ("Rather than imposing punishment for a past crime, SORA is a remedial statute intended to prevent future crime."). Even though the courts and legislature support their claim that SORA is not punishment by insisting that it is merely remedial, the New York Penal Law itself provides that one of the purposes of the NYPL, and for doling out punishment under it, is "[t]o insure the public safety." N.Y. PENAL LAW § 1.05 (McKinney 2006). Thus, it is not necessary to conclude, as the legislature seems to imply, that punishing an individual and protecting the public are mutually exclusive goals.

[133] *See generally But Seriously Folks–SORA Is Punishment*, APPELLATESQUAWK, http://appellatesquawk.wordpress.com/but-seriously-folks-sora-is-punishment/ (last visited Aug. 26, 2014) (critiquing the assertion that SORA is not punishment).

[134] *See* Caroline Louise Lewis, *The Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act: An Unconstitutional Deprivation of the Right to Privacy and Substantive Due Process*, 31 HARV. C.R.-C.L. L. REV. 89, 90–91 (1996) (observing that sex offender laws "substantially infringe [upon] the rights . . . of individuals" who have already served their prison sentences).

[135] *See* Jane A. Small, *Who Are the People in Your Neighborhood? Due Process, Public Protection, and Sex Offender Notification Laws*, 74 N.Y.U. L. REV. 1451, 1453 (1999) ("[I]f SORAs are truly public protection measures, notification should be limited to a population that might actually be protected by notification, and notification should be carried out in a manner that imposes the least possible burden on the offender.").

[136] *See generally* CTR. FOR SEX OFFENDER MGMT., U.S. DEP'T OF JUSTICE, TIME TO WORK: MANAGING THE EMPLOYMENT OF SEX OFFENDERS UNDER COMMUNITY SUPERVISION (2002), *available at* http://www.csom.org/pubs/timetowork.pdf (discussing issues that sex offenders face with respect to employment).

to commit suicide.[137] Despite the label the courts have put on it, SORA is "nominally a civil action, but is criminal in nature, effect and caption."[138] Furthermore, similar to probation proceedings, which consider various criminal history factors when recommending a sentence to the court,[139] as set out in SORA, the BOE must take various criminal history factors into account.[140] Last, in describing the role that the BOE plays in the execution of SORA proceedings, even the court in *Campbell* recognized the similarities between sentencings and risk assessment recommendations.[141] The court stated that the BOE "serves . . . in an advisory capacity that is similar to the role served by a probation department in submitting a sentencing recommendation."[142]

To place SORA proceedings on an equal footing with sentencings with respect to the amount of information made available to courts for the purpose of determining proper sentences, the legislature has the option of amending the FCA to include SORA proceedings within the same exception that is applied to sentencings. This simple change would allow the BOE to consider an adult offender's juvenile delinquency findings in assessing a sex offender's risk level.

CONCLUSION

The Second Department's recent interpretation, while accurate, highlights the need for change in New York's family court system. As currently constituted, the FCA unnecessarily ties the hands of officials who have made expert determinations that society needs to be afforded more protections from certain sex offenders than others. While there certainly are good reasons to keep a juvenile's delinquency proceedings confidential, the need to protect society outweighs those benefits. By carefully amending the FCA to allow the BOE to use all of the information

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[137] *See, e.g.*, Tanya Kessler, Note, *"Purgatory Cannot Be Worse Than Hell": The First Amendment Rights of Civilly Committed Sex Offenders*, 12 N.Y. CITY L. REV. 283, 285 (2009).

[138] *See* ECKERT, *supra* note 12, at 1.

[139] *See, e.g.*, People v. Frazier, 84 A.D.3d 676, 676, 923 N.Y.S.2d 535, 536–37 (1st Dep't 2011).

[140] N.Y. CORRECT. LAW § 168-l (McKinney 2011).

[141] People v. Campbell, 98 A.D.3d 5, 11, 946 N.Y.S.2d 587, 591 (2d Dep't 2012).

[142] *Id.* (quoting *In re* N.Y. State Bd. of Exam'rs of Sex Offenders v. Ransom, 249 A.D.2d 891, 892, 672 N.Y.S.2d 185, 186 (4th Dep't 1998)).

necessary to properly determine a sex offender's risk level, the legislature is capable of satisfying the needs of juvenile delinquents who demand their privacy, and the public, which is entitled to protection from those who may cause them harm.