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ELDERLY OR DISABLED REGISTERED SEX OFFENDERS: ARE THEY EXPERIENCING CRUEL AND UNUSUAL PUNISHMENT UNDER OHIO SEX OFFENDER CLASSIFICATION AND REGISTRATION LAWS?

Susana Tolentino[*]

I. INTRODUCTION

The elderly and disabled are often considered a burden, forgotten and neglected.[1] When the elderly and disabled are placed in long-term care housing, they may feel lonely, but at least they have a roof over their heads and someone to provide for their most basic needs. Such basic care is often lacking for the elderly or disabled (or elderly and disabled)[2] who are listed on the sex offender registry.[3] Because of the offense-based Tier system for registry placement, those registered individuals who are now elderly and/or disabled are not given an individualized evaluation of the risk they pose to society before being placed in a Tier. Further, most are prohibited from being removed from the registry, even if they show they have been rehabilitated. Throughout the United States, including Ohio, many officials "conclude that the offense-based Tier system 'pulls too many offenders onto the registry' and overlooks others who are most at risk to re-offend."[4] The Ohio Adam Walsh Act ("Ohio AWA"), Ohio's Tier system, pulls too many offenders in and fails to allow offenders out of the system.[5] These factors, combined with laws regulating sex offenders in long-term care ("LTC") housing[6] and residency restrictions placed on offenders[7], may constitute cruel and unusual punishment when the Ohio AWA is applied to offenders in need of LTC housing.

Many state courts have concluded that their sex offender registry laws

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1. WENDY PATTON, POLICY MATTERS OHIO, PROTECTING ELDERLY OHIOANS FROM ABUSE AND NEGLECT 1 (2014) (citing NATIONAL RESEARCH COUNCIL, ELDER MISTREATMENT: ABUSE, NEGLECT AND EXPLOITATION IN AN AGING AMERICA (2003)) ("Around 15,000 cases of elder abuse are reported in Ohio every year[,] but the actual number of cases is much higher. . . . [A] national study estimated that only one in 14 cases of elder abuse ever comes to the attention of authorities.").

2. This Comment will refer to the "elderly" and "disabled," which includes individuals who are elderly or disabled and those who are *both* elderly and disabled.

3. *See infra* note 176.

4. OHIO CRIMINAL SENTENCING COMMISSION, AD HOC COMMITTEE ON SEX OFFENDER REGISTRATION, REPORT & RECOMMENDATIONS 1 (2016), https://www.supremecourt.ohio.gov/Boards/Sentencing/resources/sentencingRecs/AdHocCommSexOffenderReg.pdf [https://perma.cc/H2G3-AAET].

5. *See* discussion *infra* Sections II.B, II.C.

6. *See* discussion *infra* Section II.D.

7. *See infra* note 43.

are remedial.[8] However, the Supreme Court of Ohio has concluded that the Ohio AWA is punitive.[9] Under this conclusion, an Eighth Amendment challenge and a state constitution corollary may be brought against its application.[10] The touchstone of a cruel and unusual punishment analysis is that the punishment must be proportionate to the crime.[11] The Ohio AWA offense-based Tier classification system precludes any proportionality review.[12] It eliminates judiciary discretion by basing classification on the offense alone rather than on a case-by-case risk assessment.[13]

Further compounding the potential for disproportionate punishment is the fact that the law does not provide a mechanism for Tier II or III offenders to petition for relief or reassessment of classification.[14] "The basic concept underlying the Eighth Amendment is nothing less than the dignity of [humanity]," and this dignity is violated when society does not even allow offenders a chance to reclaim their dignity.[15]

Sex offenders in need of LTC housing suffer an even greater loss of dignity when denied housing because of their registration status. Ohio law requires LTC facilities to search the sex offender database before admitting a prospective resident.[16] The law also requires the facility to alert all current residents of the incoming resident's status as an offender if they do allow admittance.[17] Again, akin to the Ohio AWA, the facility is not required to assess each person individually. Instead, the facility may turn a registered sex offender away without considering their personhood.[18] Finally, residency restrictions prohibit offenders from living within 1,000 feet of certain facilities where children congregate.[19] This limits the number of LTC facilities even qualified to house registered offenders.[20]

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8. *See generally* Smith v. Doe, 538 U.S. 84 (2003). The United State Supreme Court upheld Alaska's Sex Offender Registry Act ("SORA") as nonpunitive and therefore not a violation of the Ex Post Facto Clause when applied retroactively. *Id.* at 105-06.

9. State v. Williams, 129 Ohio St.3d 344, 2011-Ohio-3374, 952 N.E.2d 1108.

10. State v. Blankenship, 145 Ohio St.3d 221, 2015-Ohio-4624, 48 N.E.3d 516 (brining an Eighth Amendment challenge and state constitution corollary to the Ohio AWA); U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."); OHIO CONST. art. I, § 9.

11. *See infra* note 97.

12. *See infra* note 48.

13. *See infra* note 48.

14. *See infra* Section II.B.

15. Trop v. Dulles, 356 U.S. 86, 100 (1958).

16. *See* discussion *infra* Section II.D.

17. *See* discussion *infra* Section II.D.

18. *See* discussion *infra* Section II.D.

19. *See infra* note 43.

20. Ohio Att'y Gen. Op. No. 2005-001, 1 (2005), https://www.ohioattorneygeneral.gov/getattachment/329bd17e-24a7-470b-9ce4-231fcc14399f/2005-001.aspx [https://perma.cc/P5PG-3DTL] ("Pursuant to R.C. 2950.031, a person who has been convicted of, or has pleaded guilty to, . . . a sexually

This Comment demonstrates how the flaws within the Ohio sex offender statute affect some of our most vulnerable populations: the elderly and the disabled. Section II begins by providing a history of sex offender registry laws in the United States, followed by a summary of current registration frameworks and a discussion of the United States Supreme Court and the Supreme Court of Ohio's opinions on the constitutionality of various aspects of the laws. Section III then applies Ohio law's standard for evaluating cruel and unusual punishment challenges to a proposed proposition of law.

Finally, Section IV concludes that although a cruel and unusual punishment challenge would be difficult to win (considering the great deference the state has given legislatures in this area), an as-applied challenge brought by an elderly and/or disabled registered sex offender could be victorious.[21] Further, regardless of whether a victory could be won in court, legislative proposals should continue to advance the amendment of the statute. Because "[t]here is no clear evidence to support that SORNA [Sex Offender Registration and Notification Act] implementation has made the public safer, deterred any sexual offenses, or contributed to the arrest or discovery of any sex offender," the statute should not continue to stand as is.[22]

II. BACKGROUND

Parts (A) and (B) of this Section discuss current federal and state sex offender registration and classification laws. Part (C) follows with a summary of former sex offender laws in Ohio. Next, Part (D) summarizes Ohio's current system, the Ohio AWA. Part (E)(1) then describes how the United States Supreme Court interprets the constitutionality of sex offender registry laws. Part (E)(2) then delves into the Supreme Court of Ohio's opinions on the constitutionality of its sex offender registry schemes. Finally, Part (F) concludes by laying out Ohio elderly and disabled victims laws.

A. Federal Sex Offender classification and Registration Laws

Federal sex offender registry laws were first established in 1994 under the Jacob Wetterling Crimes Against Children and Sexually Violent

oriented offense . . . may not establish a residence or occupy residential premises in a nursing home, adult care facility, residential group home, [or] homeless shelter . . . .").

21. State v. Blankenship, 145 Ohio St.3d 221, 2015-Ohio-4624, 48 N.E.3d 516, at ¶ 36 (quoting State v. Weitbrecht, 715 N.E. 167, 172 (Ohio 1999)) ("We are mindful that 'reviewing courts should grant substantial deference to the broad authority that legislatures possess in determining the types and limits of punishments for crimes.'").

22. OHIO CRIMINAL SENTENCING COMMISSION, *supra* note 4, at 1.

Offender Registration Act ("JWA").[23] The JWA first established minimum standards for state sex offender and child-victim offender registration programs.[24] "Megan's Law," first enacted in New Jersey as state law, also went into effect in 1994; Megan's Law went further than the registration requirements of the JWA by requiring community notification (making registry information public).[25] Soon after, Congress passed an amendment to the JWA, adding a condition that states add community notification laws by 1997.[26] With this change, the law became known as the federal Megan's Law.[27] In 2006, Congress passed the Adam Walsh Child Protection and Safety Act ("AWA"), which included the Sex Offender Registration and Notification Act ("SORNA").[28] SORNA is a national sex offender registration system and mandates a set of uniform minimum registration requirements to the states.[29] SORNA requires that sex offenders be classified into Tiers, each of which are based solely on the offender's conviction.[30] Further, each Tier designates the number of years for which individuals within that Tier are required to register and it is a federal offense to fail to register or update registration as required (usually upon traveling or permanently moving).[31] An offender found in non-compliance with these requirements faces fines and up to ten years

23. The Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act,
42 U.S.C. § 14071 (2005), originally enacted as part of the Violent Crime Control and Law Enforcement Act of 1994, was repealed when Congress passed the Sex Offender Registration and Notification Act ("SORNA"). SORNA was passed as part of the Adam Walsh Child Protection and Safety Act of 2006. *See infra* note 28.

24. *See infra* note 28.

25. State v. Williams, 728 N.E.2d 342, 348 (Ohio 2000) (explaining that New Jersey enacted "Megan's Law" in response the abduction, sexual assault, and murder of seven year old New Jersey girl Megan Kanka, where the perpetrator was a previously convicted sex offender who was residing in the same neighborhood as the Kanka family and the family did not know there was a previously convicted sex offender in their neighborhood).

26. Megan's Law, Pub. L. No. 104-145, 110 Stat. 1345 (1996). Section 170101(d) of the Violent Crime Control and Law Enforcement Act of 1994 was amended to permit, under state law, the disclosure of information collected under state registration programs. 42 U.S.C. § 1407(d).

27. *Id.*

28. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (*codified at* 42 U.S.C. § 16901 *et seq.* (2006 ed.), *transferred to* 34 U.S.C. § 20901 *et seq.* (2017 ed.)). Subchapter I of the Adam Walsh Act is "Sex Offender Registration and Notification." 34 U.S.C. § 20901 subchapter I.

29. 34 U.S.C. § 20912(a) (2020) ("Each jurisdiction shall maintain a jurisdiction-wide sex offender registry conforming to the requirements of this subchapter."); § 20911 (including all 50 states, federally recognized Indian Tribes, the District of Columbia, and the principal U.S. territories); The United States Supreme Court has weighed in on the constitutionality of registration laws in *Smith v. Doe*, discussed in Part E(1) of this Section. 538 U.S. 84 (2003).

30. § 20911 (dictating which sex offenses fall into the three different tier classifications).

31. § 20915 (establishing the duration of registration requirements based on tiers, where Tier I must register for fifteen years, Tier II for twenty-five years, and Tier III for life); 18 U.S.C. § 2250 (2020).

in prison.[32]

B. State Sex Offender Registry Requirements

Although non-compliance with SORNA results in a potential ten percent annual reduction in Justice Assistance Grant federal funding, not all states have decided to comply.[33] As of January 25, 2022, twenty-two jurisdictions had met the minimum SORNA requirements. compliant.[34] Although all states have some form of sex offender registry and notification system, they are not uniform.[35] Some states allow for early termination of registration requirements, while others do not.[36] When states allow a petition for early termination, the requirements also vary.[37] For example, some states require the offender to have been on the registry and in compliance for a certain number of years; others evaluate the offender based on factors such as crimes committed after the first conviction or proof of rehabilitation for less serious offenses.[38] Only two states allow an offender with a qualifying physical disability to petition for relief at any time.[39]

C. Ohio Sex Offender Tier Classifications, Registration Requirements, and Residency Restrictions

Ohio has had sex offender registration and notification ("SORN")

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32. *Id.*

33. LISA N. SACCO, CONG. RSCH. SERV., R43954, FEDERAL INVOLVEMENT IN SEX OFFENDER REGISTRATION AND NOTIFICATION: OVERVIEW AND ISSUES FOR CONGRESS, IN BRIEF 5 n.20 (2015), https://sgp.fas.org/crs/misc/R43954.pdf [https://perma.cc/QGG7-QP8Q] ("For more information about the JAG Program, see CRS Report RS22416, *Edward Byrne Memorial Justice Assistance Grant (JAG) Program*.").

34. DEPARTMENT OF JUSTICE, OFFICE OF SEX OFFENDER SENTENCING, MONITORING, APPREHENDING, REGISTERING, AND TRACKING, SEX OFFENDER REGISTRATION AND NOTIFICATION ACT (SORNA): STATE AND TERRITORY IMPLEMENTATION PROGRESS CHECK 2-3 (2022), https://smart.ojp.gov/progress-check [https://perma.cc/HM6V-TL5Z]. States and territories meeting the minimum requirements included: Alabama, American Samoa, Commonwealth of the Northern Mariana Islands, Colorado, Delaware, Florida, Guam, Kansas, Louisiana, Maryland, Michigan, Mississippi, Missouri, Nevada, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, U.S. Virgin Islands, Virginia, and Wyoming. *Id.*

35. *50-State Comparison: Relief from Sex Offense Registration Obligations*, RESTORATION OF RIGHTS PROJECT, https://ccresourcecenter.org/state-restoration-profiles/50-state-comparison-relief-from-sex-offender-registration-obligations [https://perma.cc/24JR-6PB7] (last updated Oct. 2022).

36. *Id.* (see table column: "Early Termination").

37. *Id.*

38. *Id.*

39. *Id.* In Colorado, "[r]egistrants with a qualifying physical or intellectual disability may petition for termination at any time," and in Virginia, "[r]egistrants with a qualifying physical disability (including those ineligible to petition after 15/25 years) may petition for termination at any time. . . . Obligation to register may be reinstated if the disability no longer exists." *Id.* (citations omitted).

requirements in place since 1963.[40] Ohio has amended its laws over the years to meet the federally established requirements under the JWA of 1994, the federal Megan's Law of 1996, and the AWA of 2006.[41] The majority of changes came with the passage of Ohio Senate Bill 5 ("S.B. 5"), effective July 31, 2003, and Ohio Senate Bill 10 ("S.B. 10"), effective January 1, 2008.[42] S.B. 5 included the addition of a residency requirement prohibiting registered offenders from living within 1,000 feet of a school.[43] Subsequent case law has prohibited the residency requirement from being applied to offenders who committed their crimes before its passage.[44] S.B. 10 implemented Ohio's version of the federal AWA.[45] Under the Ohio AWA, sex offenders are categorized into three Tiers based solely on their convictions.[46] Ohio's previous seven Tiers of classification scheme was repealed, and risk assessment is no longer a part of categorizing individuals onto the registry.[47] The Supreme Court of Ohio ruled that offenders classified before the enactment of S.B. 10 cannot be reclassified under the new scheme.[48] S.B. 10 also added to the residency restriction: offenders who commit their crime after the bill was enacted are now prohibited from living within 1,000 feet of any school *and* any preschool or child daycare center.[49]

Under the Ohio AWA, adults in Tier I must register for fifteen years, Tier II for twenty-five years, and Tier III for life.[50] Juveniles in Tier I must

40. OHIO REV. CODE ANN. § 2950 (West 2022) (originally enacted as R.C. § 2950, 130 Ohio Laws 669).

41. *See* discussion *supra* Section II.A.

42. *See* State v. Ferguson, 120 Ohio St.3d 7, 2008-Ohio-4824, 896 N.E.2d 110, at ¶¶ 18-26 (summarizing changes wrought by S.B. 5; *See* State v. Bodyke, 126 Ohio St.3d 266, 2010-Ohio-2424, 933 N.E.2d 753, at ¶ 18-28 (summarizing the changes wrought by S.B. 10).

43. OHIO REV. CODE ANN. § 2950.034(A) (West). The current statute includes more restrictions: "No person who has been convicted of, is convicted of, has pleaded guilty to, or pleads guilty to a sexually oriented offense or a child-victim oriented offense shall establish a residence or occupy residential premises within one thousand feet of any school premises or preschool or child day-care center premises, children's crisis care facility premises, or residential infant care center premises." *Id.*

44. Hyle v. Porter, 117 Ohio St.3d 165, 2008-Ohio-542, 882 N.E.2d 899.

45. *See Bodyke*, 933 N.E.2d at ¶¶ 18-28.

46. OHIO REV. CODE ANN. § 2950.01(E-G) (West 2022); State v. Blankenship, 145 Ohio St.3d 221, 2015-Ohio-4624, 48 N.E.3d 516, at ¶ 11 (citing State v. Williams, 129 Ohio St.3d 344, 2011-Ohio-3374, 952 N.E.2d 1108, at ¶ 20) ("Unlike the earlier 'labeling' classification system under Megan's Law, . . . in which a judge could consider the characteristics of an offender before sentencing, 'Tier' classification is based solely upon the offense for which a person is convicted and the judge has no discretion to modify the classification.").

47. OHIO BUREAU OF CRIM. INVESTIGATION, OHIO ATTORNEY GENERAL'S GUIDE TO OHIO'S SEX OFFENDER REGISTRATION AND NOTIFICATION LAWS "SORN" 2 (2018) https://www.ohioattorneygeneral.gov/Files/Law-Enforcement/Law-Enforcement-Gateway/2018-Guide-to-Ohio-SORN-Laws [https://perma.cc/2CEX-82AV].

48. *Bodyke*, 933 N.E.2d 753.

49. *See supra* note 43.

50. OHIO REV. CODE ANN. § 2950.07(A) (West 2022).

register for ten years, Tier II for twenty years, and Tier III life.[51] Examples of Tier I offenses are voyeurism, promoting prostitution, menacing by stalking, and public indecency in front of a minor.[52] Examples of Tier II offenses are compelling prostitution, pandering involving a minor, unlawful sexual conduct, and kidnapping/abduction.[53] Examples of Tier III offenses are rape, sexual battery, and gross sexual imposition on a victim under age twelve.[54] Only Tier I registrants may petition the court for early termination after ten years of compliance.[55]

D. Ohio Sex Offender Notification Requirements for Long-Term Care Facilities

Ohio is one of many states that requires LTC facilities to determine whether a potential resident is on the sex offender registry before admission.[56] Ohio Revised Code requires that if the LTC facility decides to admit a registered offender, the administrator of the facility must: (1) create a plan of care to protect the other residents, (2) notify all the residents at the facility (and their sponsors) of the admission, (3) provide a copy of the plan of care to residents and sponsors, and (4) assist the registered offender in complying with address updates under the state SORN law.[57]

E. Case Law Regarding the Constitutionality of Sex Offender Classification and Registration Requirements

This Part first considers the United States Supreme Court's opinion on the constitutionality of a state sex offender classification and registration statute. Second, it examines the Supreme Court of Ohio's decisions on various constitutional challenges to Ohio's sex offender classification and registration laws.

51. § 2950.07(B); *but see In re* C.P., 131 Ohio St.3d 513, 2012-Ohio-1446, 967 N.E.2d 729, at ¶¶ 58, 69 (finding the application of automatic lifelong registration and notification requirements to juveniles tried within the juvenile system unconstitutional as a violation of the prohibition against cruel and unusual punishment of the United States and the Ohio Constitution).

52. OHIO BUREAU OF CRIM. INVESTIGATION, *supra* note 47, at 7 (non-exhaustive list).

53. *Id.* at 6. This is a non-exhaustive list.

54. *Id.* at 5. This, too, is a non-exhaustive list.

55. OHIO REV. CODE ANN. § 2950.15(C)(1) (West 2022).

56. Angeline N. Ioannou, *Sex Offender Notification Requirements for Long-Term Care Facilities by State*, GOLDBERG SEGALLA, https://www.americanconference.com/preventing-and-defending-long-term-care-litigation-803l14-mia/wp-content/uploads/sites/1391/2016/08/StateSurvey.pdf [https://perma.cc/R2E5-XFD6] (last accessed Jan. 23, 2023).

57. OHIO REV. CODE ANN. § 3721.122 (West 2022).

1. Federal Case Law

The United States Supreme Court weighed in on the constitutionality of Alaska's sex offender registration laws in *Smith v. Doe*.[58] Alaska's Sex Offender Registration Act applied retroactively, and the Court was asked to decide whether its retroactive application violated the ex post facto clause.[59] Article 1, § 9 of the United States Constitution prohibits Congress from passing any laws which apply ex post facto, meaning, in this case, a criminal statute that would impose additional punishment retroactively.[60] The Court held the statute was non-punitive (not punishment), so the ex post facto clause did not apply.[61]

However, Justice Stevens expressed in his concurring opinion that he would have found the statute only constitutional as applied to post-enactment offenses because he would have found the statute punitive.[62] He believed the statute affected a "constitutionally protected interest in liberty" because of the array of requirements placed on registered offenders.[63] Such requirements he viewed as punitive included the mandatory annual or quarterly address update, the mandatory reporting of a move within one day of the move, and the inability of the offender to "shave their beards, color their hair, change their employer, or borrow a car without reporting those events to the authorities."[64]

Although the Court upheld the retroactive application of Alaska's state registry law by holding the statute was non-punitive, some state courts have held that their state registry laws were punitive.[65] Therefore, these states hold that the laws violate the ex post facto clause of their state constitutions or the federal Constitution when applied retroactively.[66] Ohio is one of these states.[67]

58. Smith v. Doe, 538 U.S. 84 (2003).

59. *Id.* at 92.

60. U.S. CONST. art. I, § 10 (prohibiting states from passing any laws which apply ex post facto).

61. *Smith*, 538 U.S. at 92-96.

62. *Id.* at 110 (Stevens, J., concurring).

63. *Id.* at 111.

64. *Id.*

65. U.S. DEPT. OF JUST., OFF. OF SEX OFFENDER SENT'G, MONITORING, APPREHENDING, REGISTERING, & TRACKING, SEX OFFENDER REGISTRATION AND NOTIFICATION IN THE UNITED STATES: CASE LAW SUMMARY 93-100 (2022), https://smart.ojp.gov/doc/sorna-case-law-summary-july-2022.pdf [https://perma.cc/V8VJ-K2BL].

66. *See Doe v. State*, 189 P.3d 999 (Alaska 2008); *Wallace v. State*, 905 N.E.2d 371 (Ind. 2009); *State v. Letalien*, 985 A.2d 4 (Me. 2009); *Doe v. Dep't of Pub. Safety and Corr. Servs.*, 62 A.3d 123 (2013); *Starkey v. Dep't of Corrs.*, 305 P.3d 1004 (Okla. 2013).

67. State v. Williams, 129 Ohio St.3d 344, 2011-Ohio-3374, 952 N.E.2d 1108.

2. Ohio Case Law

This subpart summarizes the Supreme Court of Ohio's decisions on the constitutionality of various aspects of the Ohio sex offender classification and registration framework. It begins with a brief overview followed by a close examination of two cases: *State v. Blankenship* and *In re C.P.*, which posed cruel and unusual punishment challenges to the laws.[68]

a. An Overview of Constitutional Challenges Brought Against the Ohio Sex Offender Classification and Registration Requirements

The Supreme Court of Ohio has heard challenges regarding the constitutionality of (1) the retroactive application of the residency restrictions required under changes made by S.B. 5,[69] (2) the reclassification requirements under the changes made by the Ohio AWA,[70] and (3) as-applied challenges to the Ohio AWA registration requirements.[71] The court held, in *Hyle v. Porter*, that residency restrictions could not be applied retroactively, and, in *State v. Bodyke*, that offenders classified under the pre-Ohio AWA statute could not be reclassified under the new AWA-modeled Tier system.[72] Importantly, in *State v. Williams*, an as-applied challenge to the Ohio AWA, the court held that the statute is punitive.[73]

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68. State v. Blankenship, 145 Ohio St.3d 221, 2015-Ohio-4624, 48 N.E.3d 516; *In re* C.P., 131 Ohio St.3d 513, 2012-Ohio-1446, 967 N.E.2d 729.

69. Hyle v. Porter, 117 Ohio St.3d 165, 2008-Ohio-542, 882 N.E.2d 899, at ¶ 13, 24. The new residency restrictions, under S.B. 5, as -applied to an offender who had bought his home and committed his offense before the effective date of the statute was not applicable to this offender, the statute was ambiguous in its language, and ambiguity could not overcome a presumption that the statute was meant to be applied prospectively; therefore, the Court did not reach the constitutional question and held the statute was inapplicable to the offender. *Id.*

70. State v. Bodyke, 126 Ohio St.3d 266, 2010-Ohio-2424, 933 N.E.2d 753, at ¶ 22. Under the new Tier system of the Ohio AWA, "judges no longer have discretion to determine which classification best fits the offender," and, instead, the attorney general was directed to reclassify existing offenders. *Id.* The question before the court was whether the reclassification scheme violated the separation of powers doctrine. The Court held that it did, so this portion of the statute was severed. *Id.* at ¶¶ 61-66.

71. State v. Williams, 129 Ohio St.3d 344, 2011-Ohio-3374, 952 N.E.2d 1108; *In re C.P.*, 967 N.E.2d 729; *Blankenship*, 48 N.E.3d 516.

72. *Hyle*, 882 N.E.2d at ¶ 13, 24; *Bodyke*, 933 N.E.2d at ¶ 22.

73. *Williams*, 952 N.E.2d at ¶ 20 (answering the question of whether the Ohio AWA could be applied retroactively to an offender who committed his offense before the act went into effect but who was sentenced after its enactment). The court decided the statute was meant to apply retroactively and was punitive because it imposed new and additional "burdens, duties, obligations, or liabilities as to a past transaction;" therefore, it violated the state constitution's prohibition against retroactive laws, and the application of the statute to Williams was unconstitutional. *Id.* at ¶15 (quoting State v. Wilson, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, at ¶¶ 45–46) ("Therefore, I do not believe that we can continue to label these proceedings as civil in nature. These restraints on liberty are the consequences of specific criminal convictions and should be recognized as part of the punishment that is imposed as a result of the offender's actions."). "Following the enactment of S.B. 10, all doubt has been removed: R.C. Chapter 2950 is punitive. The statutory scheme has changed dramatically since this Court described the

b. Cruel and Unusual Punishment Challenges – comparing the Supreme Court of Ohio's analysis in Stave v. Blankenship and In re C.P.

This portion of subpart 2 compares the Supreme Court of Ohio's federal and state Constitutional analyses in two cruel and unusual punishment challenges to Ohio's classification and registration requirements.

i. The Court's Federal Constitutional Analysis in *Blankenship*

Because the *Williams* decision held that Ohio's AWA is punitive, it opened the door to a challenge that, as-applied, the statute amounts to cruel and unusual punishment.[74] A case that considers this, *State v. Blankenship*, involved a twenty-one-year-old man, Blankenship, who was convicted after a guilty plea to unlawful sexual conduct with a minor over thirteen but less than sixteen years of age.[75] The girl was fifteen years old, and the sex had been consensual.[76] The conviction automatically designated Blankenship a Tier II sex offender/child victim offender.[77] As a result, he was required to register in person with the sheriff of any county where he chose to reside within three days of arriving in that county.[78] He also had to register with the sheriff in the county where he attended school and where he was employed.[79] Every 180 days for twenty-five years, he was required to verify, in person, his address, place of employment, and place of education.[80]

Blankenship appealed, and the Supreme Court of Ohio accepted his sole proposition of law:

> Mandatory sex offender classifications under Senate Bill 10 [Ohio AWA] constitute cruel and unusual punishment [under the Eighth Amendment to the United States Constitution and Article I, Section 9 of the Ohio Constitution] where the classification is grossly disproportionate to the nature of the offense and character of the offender.[81]

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registration process imposed on sex offenders as an inconvenience 'comparable to renewing a driver's license." *Id.* at ¶ 16 (quoting State v. Cook, 700 N.E.2d 570, 582 (Ohio 1998)).

74. *Blankenship*, 48 N.E.3d at ¶ 9 ("While classification and registration schemes vary across states, most states addressing Eighth Amendment challenges to mandatory sex-offender classification for adults have dismissed those challenges based on their findings that the registration schemes are remedial rather than punitive.").

75. *Id.* at ¶ 3 ("[U]nlawful sexual conduct with a minor who was over 13 but less than 16 years of age, a violation of R.C. 2907.04, [was] a fourth-degree felony.").

76. *Id.* at ¶ 2.

77. *Id.* at ¶ 4.

78. *Id*.

79. *Id.*

80. *Id.*

81. *Id.* at ¶¶ 7, 16 (quoting Merit Brief of Appellant Travis Blankenship at 3, State v. Blankenship,

To support his argument, Blankenship offered evidence from a psychologist who evaluated Blankenship and found "none of the characteristics of what he [the psychologist] consider[ed] a sex offender… and concluded that Blankenship's risk of reoffending was low."[82]

The Court looked at the challenge as a request for a categorical prohibition of Tier II registration for individuals similar to Blankenship in age, psychological profile, and offense.[83] It noted that the United States Supreme Court has reviewed Eight Amendment challenges, addressing proportionality of the punishment to the offense, under two categories: (1) challenges to the length of a sentence given the facts of the case and (2) challenges proposing a law should not be imposed on a certain category of crime or offender.[84] Because the court believed Blankenship was "at best" suggesting a categorical prohibition [prohibiting mandatory classification for offenders similar to Blankenship in profile and offense], the federal analysis it applied consisted of two steps, as set out in *Graham v. Florida*.[85] *Graham* first requires courts to determine whether there is a national consensus against the sentencing practice at issue.[86] The second step requires courts to decide if the punishment violated the Constitution, guided by "the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose."[87] Because Blankenship conceded that there was no national consensus against the registry requirements imposed on individuals like himself, the court said it did not need to engage with the first step and moved on to the second step.[88]

The Eighth Amendment requires the punishment to be proportional to the crime and the goal of the two-step analysis is to ensure this

9 N.E.3d 1062, tbl. (Ohio 2014) (No. 2014-0363), 2014 WL 4168766, at *3).

82. *Id.* at ¶ 5; Margaret Troia, *Ohio's Sex Offender Residency Restriction Law: Does It Protect the Health and Safety of the State's Children or Falsely Make People Believe So*, 19 J.L. & HEALTH 331, 360 (providing a detailed summary of factors that have been shown to help predict recidivism and arguing that these factors should be used during individualized assessment of sex offenders before subjecting them to mandatory classification systems and one size fits all residency restrictions).

83. *Blankenship*, 48 N.E.3d at ¶ 19.

84. *Id.* at ¶ 18.

85. *Id.* at ¶¶ 18-20 (citing *Graham v. Florida*, 560 U.S. 48, 61 (2010)) ("In *Graham v. Florida*, the Court applied the categorical approach, as in *Roper* [which prohibited death as a punishment for the category "nonhomicide crimes"], *Kennedy* [which prohibited the death penalty for defendants who committed crimes before turning 18], and *Atkins* [which prohibited the death penalty for persons with low intellectual functioning], and concluded that the Eighth Amendment prohibits the imposition of life without parole on a juvenile who did not commit homicide."). *See* Roper v. Simmons, 543 U.S. 551 (2005); Kennedy v. Louisiana, 554 U.S. 407 (2008); Atkins v. Virginia, 536 U.S. 304 (2002).

86. *Blankenship*, 48 N.E.3d at ¶ 20.

87. *Id.* (quoting *Graham v. Florida*, 560 U.S. 48, 61 (2010)).

88. *Id.* at ¶¶ 20, 22.

proportionality.[89] The second step takes a closer look at proportionality and requires the court to consider "(1) the culpability of the offender in light of his crime and characteristics, (2) the severity of the punishment in question, and (3) the penological justification."[90] First, the court found Blankenship culpable because he knowingly engaged in the sex act with someone he knew was older than thirteen but younger than sixteen, the age of consent.[91] It did not agree that his case should be evaluated under a standard more similar to that of a juvenile, where the law has decided that children are less culpable than adults.[92] Therefore, he was culpable as an adult, albeit a young adult.[93]

Second, in evaluating the severity of the punishment, the court considered Blankenship's full awareness of the girl's age, the fact that she consented, and the registry requirements.[94] It had already concluded that he was aware of the girl's age.[95] The court next decided that consent did not play a role in defending his charge because the state was interested in protecting minors, even if the minor consented.[96] And it was equally unpersuaded that the registration requirements were so burdensome as to constitute cruel and unusual punishment.[97] Therefore, the court did not find Blankenship's punishment too severe.[98]

Finally, in looking at the penological justifications, the court admitted that registration schemes have been criticized as not serving the intended purpose of "protect[ing] the safety and general welfare of the people of this state."[99] However, the court held that the penological grounds for imposing the registration requirements were still justified "in part based upon the perceived high rate of recidivism and resistance to treatment among sex offenders."[100] Therefore, the court held the registration

89. *Id.* at ¶ 17, 21 (quoting *Weems v. United States*, 217 U.S. 349, 367 (1910)) ("The central precept is that 'punishment for crime should be graduated and proportioned to [the] offense.'").

90. *Id*. at ¶ 22 (citing *Graham v. Florida*, 560 U.S. 48, 67 (2010)).

91. *Id.* at ¶ 24.

92. *Id.* at ¶ 23.

93. *Id.* at ¶¶ 23-24.

94. *Id.* at ¶ 25-27.

95. *Id.* at ¶ 25.

96. *Id.* at ¶ 26.

97. *Id.* at ¶ 27; *but see In re* C.P., 131 Ohio St.3d 513, 2012-Ohio-1446, 967 N.E.2d 729, at ¶ 45. Evaluating the severity of the punishment, the court considered the secondary effects of the registration and notification requirements, stating that the juvenile would not "have a chance to establish a good character in the community" and that he would "be hampered in his education, in his relationships, and in his work" and ultimately found the requirements violated the prohibition against cruel and unusual punishment. *Id.*

98. *Blankenship*, 48 N.E.3d at ¶ 27.

99. *Id.* at ¶ 28.

100. *Id.* at ¶ 30; *but see* Shawn M. Rolfe et al., *Living Arrangements for Sex Offenders in Ohio: Effects of Economics, Law and Government Assistance Programs*, 98 PRISON J, 544, 546 (2018), https://doi.org/10.1177/0032885518793949 [https://perma.cc/2ZFU-XJSF] ("Research has shown that

requirements were not "so unjustified as to constitute cruel and unusual punishment" under federal law.[101]

ii. The Court's Federal Constitutional Analysis in *In re C.P.*

In contrast, the Supreme Court of Ohio applied a much more in-depth federal law analysis of the penological justifications in *In re C.P.*, which challenged lifetime registration and notification requirements for juveniles.[102] First, the court considered the Ohio Revised Code's stated goals for juvenile disposition which include "provid[ing] care, protection, and mental and physical development of children," "protect[ing] the public interest and safety . . . and rehabilitat[ing] the offender."[103] The court concluded that lifetime registration and notification requirements that attach juveniles to their crime for life hinder rehabilitation and do not aid mental and physical development.[104] It also disagreed with the idea that the registration and notification requirements necessarily furthered the aim of protecting the public interest and safety.[105] Because the judge is not permitted to assess the dangerousness of offenders case-by-case, the "level of registration or notification . . . adequate to preserve the safety of the public" necessarily could not have been determined.[106] The court also went through each justification for punishment—retribution, deterrence, incapacitation, and rehabilitation—and concluded that none of the justifications were satisfied by the statutory scheme of mandatory classification and registration as it applied to juvenile offenders adjudicated in the juvenile system.[107]

Retribution was not supported because "[t]he heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender," and this could not be the case when each juvenile with a Tier III eligible sex offense conviction received the same punishment as an adult.[108] Deterrence was not

SORN has little or no effect on sex offender recidivism."); *see generally* Laura M. Ragusa-Salerno & Kristen M. Zgoba, *Taking Stock of 20 Years of Sex Offender Laws and Research: An Examination of Whether Sex Offender Legislation Has Helped or Hindered Our Efforts*, 35 J. CRIME & JUST. 335 (2012); Richard Tewksbury & Wesley G. Jennings, *Assessing the Impact of Sex Offender Registration and Community Notification on Sex-Offending Trajectories*, 37 CRIM. JUST. & BEHAV. 570 (2010); Richard Tewksbury et al., *A Longitudinal Examination of Sex Offender Recidivism Prior to and Following the Implementation of SORN*, 30 BEHAV. SCIS. & LAW 308 (2012).

101. *Blankenship*, 48 N.E.3d at ¶ 30.

102. *In re C.P.*, 967 N.E.2d at ¶¶ 46-57.

103. *Id.* at ¶ 46 (quoting OHIO REV. CODE ANN. § 2152.01 (West 2022)).

104. *Id.* at ¶ 47.

105. *In re C.P.*, 967 N.E.2d at ¶ 48.

106. *Id.*

107. *Id.* at ¶¶ 38-58.

108. *Id.* at ¶ 51 (quoting Tison v. Arizona, 481 U.S. 137, 149 (1987)).

supported because juveniles are less likely to appreciate the gravity of the secondary effects of the registration requirements on their lives; therefore, they would not be deterred by the registration requirements hanging over their heads.[109] Incapacitation is explained as reducing crime by preventing the individual from committing additional crime by placing them behind bars. This justification was inapplicable to this case because the punishment occurred after release from prison.[110] Finally, rehabilitation was not met because the negative consequences of secondary effects, such as stigma and rejection by society, thwarted rehabilitation.[111] Because the mandatory registration could not be justified under any of the preceding rationales, the court held that the requirements constituted cruel and unusual punishment under federal law.[112]

iii. The Court's State Constitutional Analysis in *Blankenship*

The Ohio Constitution also contains a prohibition against cruel and unusual punishment.[113] The text of the Ohio Constitution mirrors the United States Constitution, yet "it [the Ohio Constitution] provides unique protection for Ohioans."[114] The Supreme Court of Ohio has said that cases involving this provision have been "limited to those involving sanctions which under the circumstances would be considered shocking to any reasonable person."[115] Put differently, Ohio law requires the punishment to be proportional to the crime, so as not to "shock the sense of justice of the community."[116] The *Blankenship* court focused its review of the challenge under Ohio law on the portion of the sentence that imposed registration and address-verification requirements for Tier II sex offenders (rather than the mandatory Tier placement).[117] In its analysis, it distinguished *In re C.P.* by highlighting that the goal of the juvenile

109. *Id.* at ¶ 52.

110. *Id.* at ¶ 53.

111. *Id.* at ¶ 54.

112. *Id.* at ¶ 58.

113. OHIO CONST. art. I, § 9 ("Excessive bail shall not be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted.").

114. *Blankenship*, 48 N.E.3d 516 at ¶ 31 (quoting *Arnold v. Cleveland*, 616 N.E.2d 163, 164 (Ohio 1993)) ("The Ohio Constitution is a document of independent force. In the areas of individual rights and civil liberties, the United States Constitution, where applicable to the states, provides a floor below which state court decisions may not fall. As long as state courts provide at least as much protection as the United States Supreme Court has provided in its interpretation of the federal Bill of Rights, state courts are unrestricted in according greater civil liberties and protections to individuals and groups.").

115. *Id.* at ¶ 32 (quoting McDougle v. Maxwell, 203 N.E.2d 334, 336 (Ohio 1964)).

116. *Id.* (quoting *State v. Chaffin*, 282 N.E.2d 46, 47 (Ohio 1972)).

117. *Id.* at ¶ 33.

system is rehabilitation and that individualized treatment by judges is essential for that system to function.[118] The court concluded that the concerns present in *In re C.P.* were "largely absent" from the facts of Blankenship's case.[119]

After distinguishing *In re C.P.*, the *Blankenship* Court then pointed to *State v. Bradley*, a First District Court of Appeals case that held Tier II registration requirements for unlawful sex with a minor were not cruel and unusual punishment.[120] It also highlighted *State v. Hairston*, another First District case, where the court held a 134-year prison sentence was not cruel and unusual punishment.[121] The court then concluded Blankenship had not overcome "the hurdle of showing that his punishment [was] cruel or unusual."[122]

iv. The Court's State Constitutional Analysis in *In re C.P.*

The *In re C.P.* court, in its analysis under the Ohio Constitution, considered (1) that the sex offender statutes did not allow for individualized assessment by the judge, (2) they did not permit case reevaluation of the classification when the juvenile disposition ended, but instead only allowed reconsideration after twenty-five years, and (3) that the punishment imposed was public, when confidentiality was a key component of the juvenile justice system.[123] For these reasons, the court found the punishment disproportionate to the crime because the punishment ran contrary to the state's goals for the juvenile system: the "well-being and rehabilitation" of juvenile offenders.[124] Therefore, the court held the statute's imposition here "shock[ed] the sense of justice of the

118. *Id.* at ¶ 34; *see In re C.P.*, 967 N.E.2d at ¶ 12-13.

119. *Blankenship*, 48 N.E.3d at ¶ 35.

120. *Id.* at ¶ 34; *see State v. Bradley*, No. C-100833, 2011 WL 6153624, at ¶ 9 (Ohio Ct. App. Dec. 9, 2011). Interestingly, the *Bradley* court cited the three part test adopted by the Supreme Court of Ohio in *Weitbrecht:* "[T]o determine whether the penalty imposed is disproportionate to the crime committed (1) the court looks to the 'gravity of the offense and harshness of the penalty;' (2) the court may compare the sentences imposed on other defendants in the same jurisdiction; and (3) the court may compare the sentences imposed for the same crime in other jurisdictions." *Bradley*, No. C-100833 at ¶ 9 (citing State v. Weitbrecht, 715 N.E.2d 167, 170 (Ohio 1999)). The test was adopted from the United States Supreme Court case *Solem v. Helm*, 463 U.S. 277 (1983), yet neither the *In re C.P.* court nor the *Blankenship* court mention this test.

121. *Blankenship*, 48 N.E.3d at ¶ 35 (citing State v. Hairston, 118 Ohio St.3d 289, 2008-Ohio-2338, 888 N.E.2d 1073).

122. *Id.* ¶ 35.

123. *In re C.P.*, 967 N.E.2d at ¶ 68 (quoting Phoebe Geer, *Justice Served? The High Cost of Juvenile Sex Offender Registration*, 27 DEV. MENTAL HEALTH L. 34, 47 (2008)) ("The state's interest in and responsibility for a juvenile's well-being and rehabilitation is not promoted by a practice that makes a juvenile's sex offenses public.").

124. *Id.* at ¶¶ 61-69.

community."[125]

v. The *Blankenship* Dissenters' Federal and State Analyses

Justice Pfeifer and Justice O'Neill both dissented in *Blankenship,* and each concurred with the other's dissent.[126] Justice Pfeifer argued that because the statutory scheme did not allow a sentencing judge to evaluate each offender on a case-by-case basis, it did not promote proportionality—"[t]he touchstone of federal cruel-and unusual-punishment analysis."[127] He also would have held that the statute violated the Ohio constitutional standard because, as applied in this case, it "would be considered shocking to any reasonable person."[128] He found it completely plausible that reasonable people would find it shocking to impose twenty-five years of bi-annual reporting and registration on this defendant.[129] To support this position, he reiterated that Blankenship had been determined by a psychologist to "have none of the characteristics of a sex offender and to have a low risk of reoffending."[130] Additionally, Pfeifer pointed to the fact that Blankenship was sentenced to the shortest sentence possible (six months) and was released by the judge after twelve days.[131] Considering the court had found the registration requirements punitive in *State v. Williams*, Justice Pfeifer concluded that in certain circumstances, such as this one, the court should also find the requirements to be cruel and unusual punishment.[132]

Justice O'Neill also took issue with the mandatory registration requirements but wrote separately to highlight his belief that criminal sentencing in Ohio is increasingly becoming "one-size-fits-all."[133] He agreed with Justice Pfeifer that the mandatory requirements imposed on Blankenship amounted to cruel and unusual punishment.[134]

F. Ohio Elderly and Disabled Victim Laws

Ohio Adult Protective Service law defines elder "abuse" as "the infliction upon an adult by self or by others of injury, unreasonable confinement, intimidation, or cruel punishment, with resulting physical harm,

125. *Id.* at ¶ 69.
126. *Blankenship*, 48 N.E.3d at ¶ 74, 83 (Pfeifer & O'Neill, JJ., dissenting).
127. *Id.* at ¶ 79 (Pfeifer, J., dissenting) (citing Weems v. United States, 217 U.S. 349, 367, (1910)).
128. *Id.* at ¶ 80 (quoting McDougle v. Maxwell, 203 N.E.2d 334, 336 (Ohio 1964)).
129. *Id.*
130. *Id.* at ¶ 81.
131. *Id*.
132. *Id.*
133. *Id.* at ¶ 83 (O'Neill, J., dissenting).
134. *Id.* at ¶ 87.

pain, or mental anguish."[135] It defines "neglect" as the "[f]ailure of an adult to provide for self the goods or services necessary to avoid physical harm, mental anguish, or mental illness."[136] An "adult" is a person sixty years or older who lives in an independent arrangement but cannot provide for their own care or protection because of a handicap either brought on by aging or because of physical or mental impairment.[137] The county department of jobs and family services has a duty, or may designate the duty to another agency, to investigate reports of "abuse, neglect, or exploitation" of adults.[138] Ohio also has mandatory reporting laws, which require individuals in certain professions designated by law to report suspected abuse, neglect, or exploitation.[139] Investigation can result in emergency protection orders and court proceedings against an abuser.[140] Further, Ohio has corollary laws focusing on charges and sentencing enhancements specific to crimes involving victims with disabilities.[141]

III. DISCUSSION

There are conceivably situations where the Ohio AWA, as applied to an offender needing LTC housing, will constitute cruel and unusual punishment. The challenge would not prevail as applied to every individual on the registry being denied LTC housing. However, there will be some—whose classification was disproportionate when they were sentenced or who have rehabilitated—who now suffer cruel and unusual punishment due to the one-size-fits-all scheme and the failure of the

135. OHIO ADMIN. CODE § 5101:2-20-01(B)(2) (2022).

136. § 5101:2-20-01(B)(21)(a).

137. § 5101:2-20-01(B)(3).

138. § 5101:2-20-03(B)(4); OHIO REV. CODE ANN. § 5101.63 (West 2022). Ohio law requires individuals in certain professions to report elder abuse as mandatory reporters: "An individual listed in [this] division [including attorneys, doctors, dentist, chiropractors, and nurses] . . . having reasonable cause to believe that an adult is being abused, neglected, or exploited, or is in a condition which is the result of abuse, neglect, or exploitation shall immediately report such belief to the county department of job and family services." § 5101.63.

139. *Practice Smart Online Holiday Shopping*, OHIO ATT'Y GEN.'S CONSUMER ADVOC. NEWSL., Dec. 2018, at 5-7, https://www.ohioattorneygeneral.gov/Files/Briefing-Room/Newsletters/Consumer-Advocate-Newsletter-(Printable-PDFs)/Consumer-Advocate-December-2018-PDF **[**https://perma.cc/PM3J-8P7H**]** ("To protect older adults, a new Ohio law expands the definition of elder abuse and the group of individuals – including pharmacists, first responders, and bankers – required to report suspicions of it. . . . Failure of mandatory reporters to report alleged abuse, neglect, or exploitation can result in a fine or misdemeanor criminal charges.").

140. OHIO ADMIN. CODE 5101:2-20-12 (2022).

141. *See* ADULT ADVOC. CTRS., PROSECUTOR'S GUIDE FOR CRIMES INVOLVING VICTIMS WITH DISABILITIES 6-7 (2020), https://www.adultadvocacycenters.org/assets/documents/prosecutors_guide_2020.pdf **[**https://perma.cc/8PNB-W54P**]**; *see also* OHIO REV. CODE ANN. §§ 2903.10, 2903.16, 2903.33, 2903.34, 2903.341, 2913.01, 2913.02(B)(3), 2913.03(D)(4), 2913(F)(4) (West 2022).

statute to provide relief or reclassification.[142]

Thus, the Supreme Court of Ohio should consider the following proposed proposition of law:

> Under the Ohio Adam Walsh Act ("Ohio AWA"), mandatory sex offender classification and the failure of the Act to provide relief or reassessment for Tier II and III offenders constitutes cruel and unusual punishment [under the Eighth Amendment to the United States Constitution and Article I, Section 9 of the Ohio Constitution] as applied to [some] offenders seeking long term care housing because the punishment is grossly disproportionate to the nature of the offense and character of the offender.

This Section will apply (A) the federal Eighth Amendment and (B) the Ohio Constitution, Article I, Section 9 cruel and unusual punishment clause to registered sex offenders in need of LTC housing.[143] In applying federal and state law, the discussion will consider the mandatory Tier classification,[144] the inability of Tier II and III offenders to petition for relief or reassessment,[145] the Ohio notification requirements for LTC facilities,[146] and offender residency restrictions.[147]

A. Application of the Federal Graham *Factors*

Recall that the federal standard applied in *Blankenship* and *In re C.P.* consisted of two parts.[148] The first considers whether a national consensus exists against the sentencing practice at issue.[149] The second requires courts to use their independent judgment to evaluate whether the punishment violates the Constitution, guided by "the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose."[150] Within the second step, courts are required to consider "(1) the culpability of the offender in light of his crime and characteristics, (2) the severity of the punishment in question, and (3) the penological justification."[151]

As the court reasoned in *Blankenship*, there is no national consensus against the current sentencing practice.[152] The *Blankenship* court then

142. *See* discussion *supra* Sections II.B, II.C, II.D, II.E.2.

143. *See* discussion *supra* Section II.E.2.b.

144. *See* discussion *supra* Section III.A.1.a.

145. *See* discussion *supra* Section III.A.2.a.

146. *See* discussion *supra* Section III.A.2.b.

147. *See* discussion *supra* Section III.A.2.c.

148. *See* discussion *supra* Section II.E.2.b.i.

149. *See supra* text accompanying note 96.

150. State v. Blankenship, 145 Ohio St.3d 221, 2015-Ohio-4624, 48 N.E.3d 516, at ¶ 20.

151. *Id.* at ¶ 22 (citing *Graham v. Florida*, 560 U.S. 48, 67 (2010)).

152. *See, e.g.*, Katie Wedell, *Sex Offenders in Nursing Homes: Answers Sought – Ohio*

performed a cursory review under the second step.[153] In contrast, the *In re C.P.* court performed a much more thorough analysis of the *Graham* factors when applying them to a challenge of the mandatory classification and registration scheme as applied to juveniles adjudicated in the juvenile court system.[154] The court believed the juvenile case presented many secondary effects and discussed them in its analysis.[155] In contrast, the *Blankenship* court's analysis did not consider the secondary effects of registration.[156] When considering the impact on a minor, the court more readily and naturally looked to the future consequences to assess the severity of the punishment.[157] In its assessment of these consequences, the penological justification for the mandatory classification and registration was not satisfied.[158]

An as-applied challenge to Ohio's AWA and its mandatory Tier classification (and failure to provide for reclassification or relief for Tier II and III offenders) made by a registered offender being denied LTC housing should be argued under the more thorough *In re C.P.* analysis for two main reasons.

First, the juvenile adjudication system is meant to foster rehabilitation; thus, the secondary effects of the registry were analyzed more thoroughly with that purpose in mind.[159] Rehabilitation is key to preventing recidivism, and sex offender registry laws are supported by the argument that they protect the public by deterring recidivism.[160] When the laws are applied to people seeking LTC housing, they make finding housing

Legislators Say Investigation Brings 'Problem to Light.' I-Team Investigation, DAYTON DAILY NEWS, Oct. 23, 2016, at A1 ("The reform group [Ohio chapter of Reform Sex Offender Laws] has pushed for a model similar to those used in Minnesota and Massachusetts . . . . Minnesota assigns registered individuals to levels . . . based on an assessment performed when they leave prison . . . . A committee considers multiple factors including criminal history, behavior while incarcerated, and relationship to the victim. They also can consider 'whether the offender demonstrates a physical condition that minimizes the risk of re-offense, including but not limited to advanced age or a debilitating illness or physical condition,' according to the state statute.").

153. *See* discussion *supra* Section II.E.2.b.i.

154. *See* discussion *supra* Section II.E.2.b.ii.

155. *See* discussion *supra* Section II.E.2.b.ii.

156. *See* discussion *supra* Section II.E.2.b.i.

157. *See* discussion *supra* Section II.E.2.b.ii.

158. *See* discussion *supra* Section II.E.2.b.ii.

159. *See* discussion *supra* Section II.E.2.b.ii.

160. *See* Karen Kersting, *New Hope for Sex Offender Treatment*, 34 AM. PSYCH. ASS'N 52 (2003), https://www.apa.org/monitor/julaug03/newhope **[**https://perma.cc/XN7Q-MYLU**];** State v. Blankenship, 145 Ohio St.3d 221, 2015-Ohio-4624, 48 N.E.3d 516, at ¶ 28 (citing the intended purpose of the registry laws is "protect[ing] the safety and general welfare of the people of this state," and registration requirements were still justified "in part based upon the perceived high rate of recidivism and resistance to treatment among sex offenders"); *but see* Rolfe, *supra* note 107, at 546 ("Research has shown that SORN has little or no effect on sex offender recidivism."); *see, e.g.*, ELIZABETH J. LETOURNEAU ET AL., EVALUATING THE EFFECTIVENESS OF SEX OFFENDER REGISTRATION AND NOTIFICATION POLICIES FOR REDUCING SEXUAL VIOLENCE AGAINST WOMEN 1-4 (2010), https://www.ojp.gov/pdffiles1/nij/grants/231989.pdf **[**https://perma.cc/LSK6-7X54]**.**

difficult, if not impossible, and when people do not have housing, they are inherently unstable, making rehabilitation harder to pursue. This could lead to recidivism, thwarting the purpose of the laws.[161] Therefore, the secondary effect of limiting housing options should be scrutinized more carefully as it arises with elderly and disabled populations. Second, we should treat the elderly and the disabled differently under the law, similar to what we do for juveniles.[162] Ohio values protecting the safety and well-being of these populations, with countless laws in place to do so.[163] Therefore, the secondary effects should be analyzed with Ohio's value of protecting these vulnerable populations in mind.

1. *Graham's* First Factor: "The Culpability of the Offender in Light of His Crime and Characteristics"

In an as-applied challenge by an offender in need of LTC housing, the first factor, "the culpability of the offender in light of his crime and characteristics," would need to be assessed on a case-by-case basis.[164]

a. Mandatory Tier Classification Under the Ohio AWA

When evaluating cruel and unusual punishment under the federal standard, the key question is whether the punishment was proportional to the crime.[165] Because the Ohio AWA does not allow judges to individually assess the offender, the nature of the crime, or their risk of re-offense, there is a high probability that the mandatory Tier classification imposed will not be proportional to the crime.[166] This is not to say that every offender's classification would violate the Eighth Amendment; there are cases where the classification would fit the crime.

But stripping courts of the ability to assess individual circumstances in applying Tiers leads to overly harsh penalties for individuals who do not neatly fit into a Tier. Consider the individual who has to register for fifteen years, twenty-five years, or life and who arguably should not be in

161. *See, e.g.*, *In re* Taylor, 343 P.3d 867, 876 (Cal. 2015). The *In re Taylor* court held residency restriction laws imposed on paroled sex offenders were unconstitutional after failing a rational basis test, reasoning that after the law went into effect homelessness among this population increased 4 to 5 times to the point where 34% of the population was homeless. *Id.* Further, "[e]vidence was also presented showing that homelessness pose[d] significant challenges to sex offender treatment professionals in their efforts to rehabilitate sex offenders." *Id.*

162. *See* discussion *supra* Section II.F.

163. *See* discussion *supra* Section II.F.

164. *Blankenship*, 48 N.E.3d at ¶ 22 (citing *Graham v. Florida*, 560 U.S. 48, 67 (2010)).

165. *Id.* at ¶ 17 (quoting *Weems v. United States*, 217 U.S. 349, 367 (1910)) ("The central precept is that 'punishment for crime should be graduated and proportioned to [the] offense.'").

166. *See* discussion *supra* Section II.E.2.b.v.

the Tier they were placed. Now consider that an inappropriately categorized individual needs twenty-four-hour care in an LTC facility. It may not be just because they grew old; other factors could lead to the need. Perhaps the individual here experienced the onset of a degenerative disease that, without LTC, will only get worse. Or perhaps the individual was disabled at the time of the offense and, after incarceration, will immediately need LTC housing.[167] Many individuals could experience a life-altering accident that renders them permanently disabled.

From these examples, it is clear: the classification system not only affects the registrant's life during their able-bodied years but follows them as they deteriorate into old age, illness, or both. The inability to apply a proportional punishment on the front end exacerbates harm in a cruel and unusual way when these individuals need the assistance provided in LTC facilities, help that is necessary for them to meet their basic needs.

The dissenters in *Blankenship* would have held the mandatory tier classification of the Ohio AWA unconstitutional as applied to Blankenship for this reason alone—its failure to allow for a proportionality review. This failure meant the statute's application violated the principal precept behind a cruel and unusual punishment analysis—proportionality.[168]

2. *Graham's* Second Factor: "The Severity of the Punishment in Question"

The second factor, "the severity of the punishment in question," should consider the effects of the failure of the act to provide a mechanism for relief for Tier II and III offenders and the secondary effects of the registration status on offenders in need of LTC housing.[169]

a. The Inability to Petition for Reassessment or Relief

An overlooked aspect of the punishment under the Ohio AWA is that adult offenders classified as Tiers II or III cannot petition for early relief from registration or reclassification.[170] Tier II offenders must register for

167. THE ARC NATIONAL CENTER ON CRIMINAL JUSTICE AND DISABILITY, SEX OFFENDERS WITH INTELLECTUAL/DEVELOPMENTAL DISABILITIES: A CALL TO ACTION FOR THE CRIMINAL JUSTICE COMMUNITY 7 (2015), http://thearc.org/wp-content/uploads/2019/07/NCCJD-White-Paper-2_Sex-Offenders-FINAL.pdf [https://perma.cc/5RPL-FBKM] ("Unquestionably, the two biggest areas of impact for offenders with I/DD [intellectual/developmental disabilities] are housing and employment. . . . [F]ear and stigma reduce the likelihood that they will be accepted into [supported] housing.").

168. *See* discussion *supra* Section II.E.2.b.v.

169. *Blankenship*, 48 N.E.3d at ¶ 22 (citing *Graham v. Florida*, 560 U.S. 48, 67 (2010)).

170. OHIO REV. CODE ANN. § 2950.07(B) (West 2022).

twenty-five years and Tier III offenders must register for life.[171] Tier I offenders must register for fifteen years but may petition the court to terminate the requirements after ten years.[172] A pardon could relieve an offender from registration, but there is no authority on this point.[173] There is no option for individuals with permanent physical or intellectual disabilities or elderly individuals who need full-time care to petition for early relief.[174] This population cannot even ask for a reevaluation of their risk profile, risk of re-offense, or level of rehabilitation to adjust their Tier classification or to seek relief from registration when they need supportive housing. Denying someone the possibility of adequate housing when they cannot care for themselves without an opportunity to be individually evaluated constitutes severe punishment.

b. Ohio Notification Requirements for Long Term Care Facilities and No Requirement for a Case-by-Case Risk Assessment

Recall that in Ohio, if an LTC facility decides to admit a registered offender to the facility, the facility must (1) create a plan of care to protect the other residents, (2) notify all residents at the facility (and their sponsors) of the admission, (3) provide a copy of the plan of care to residents and sponsors, and (4) assist the registered offender in complying with address updates under the state SORN laws.[175] The facility is not required to perform a case-by-case evaluation of the offender before deciding to provide or deny the offender residence at the facility.[176]

These requirements protect those living in LTC facilities, which is a legitimate objective. However, while providing adequate safeguards for the current residents, the law fails to provide safeguards for the offender. Offenders can systematically be denied admittance to all LTC facilities in the state area where they and their families live.[177] This denial comes

171. § 2950.07(A) (Westlaw).

172. § 2950.15(C)(1) (Westlaw).

173. § 2967.04(B) (Westlaw).

174. § 2950.15(C)(1) (Westlaw).

175. § 3721.122 (Westlaw).

176. *Id.*; Katie Wedell, *Handling Offenders a Vexing Issue, Ohio Tries to Balance Providing Care to Those in Need with Protecting Others*, DAYTON DAILY NEWS, Oct. 16, 2016, at A10 ("'No nursing home in Wood County would accept me so they sent me here,' said Campos, who wanted to be closer to family in northeast Ohio. 'But thank God I've got a place to stay out of the weather. I've got hot water and soap to wash up and clean clothes.'").

177. Caroline J. Berdzik & Angeline Ioannou, DRI, *Danger from Within? Sex Offenders in Long-Term Care Facilities*, FOR THE DEFENSE 44, 48 (2013), https://media.goldbergsegalla.com/uploads/cb1-ani_driforthedefense_august2013.pdf **[**https://perma.cc/V77T-CLCU**]** ("Some facilities will outright deny admission to any registered sex offenders without conducting any type of risk analysis and would rather deal with litigation.").

without having been allowed an opportunity to be heard.[178] This system inflicts further cruelty and punishment on already vulnerable populations, the disabled and elderly, as a secondary effect of their registration status.

In 2016, the Dayton Daily News investigated LTC facilities in Ohio and the number of registered sex offenders living within them. The investigation found 136 sex offenders residing within Ohio nursing homes and reported:

> [A]bout 44 percent of the 136 sex offenders living in nursing homes reside at just five facilities – two of them with an overall rating of 1 (far below average) or 2 (below average) on the 5-point scale Medicare.gov uses to compare nursing homes. Two others were given a rating of 3 (average) and one . . . received a 5, the highest rating.[179]

Peter Van Runkle, executive director of the Ohio Health Care Association at the time, said: "The places that are going to be willing to take the difficult patients are those that may struggle to attract less difficult people."[180] The Dayton Daily News interviewed an individual who believed his status as a sex offender affected the quality and location of care he had been able to obtain.[181] He was convicted in 1979 of rape, kidnapping, and attempted rape.[182] At age sixty-eight, he used a wheelchair and needed long-term care due to a gunshot wound to the spine.[183] He said he was denied admittance to all nursing homes in Wood County, where his family resided.[184] The only facility that would accept him was in Columbus, Ohio, a two-hour drive southeast of Wood County.[185] At the time, this facility housed eighteen registered sex offenders.[186]

Understandably, LTC facilities often do not want the added liability that many may erroneously believe comes from housing registered sex offenders.[187] A Government and Accountability Office study found that residents with prior sex offenses were not necessarily more likely than

178. *Id.*; *see supra* note 175.

179. Katie Wedell, *Safeguards Designed to Protect Ohio's Nursing Home Residents from Sex Offenders Are Failing, Seniors at Risk*, DAYTON DAILY NEWS, Oct. 16, 2016, at A1.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. BERDZIK & IOANNOU, *supra* note 177, at 44-45 ("In 2006, Congress asked the Government and Accountability Office (GAO) to evaluate the prevalence of sex offenders living in long-term care facilities . . . . Interestingly, the GAO report did not necessarily determine that individuals with prior sexual convictions were more likely than other residents to commit sexual abuse. In fact, administrators of facilities expressed more concern about cognitively impaired individuals and individuals with mental health issues committing sex crimes than registered sex offenders.").

other residents to commit a sex offense at the facility.[188] The typical argument for denying an offender is that under the Ohio Revised Code, nursing home and residential care residents have the right to "a safe and clean living environment" and to be "free from physical, verbal, mental, and emotional abuse."[189] The implication is a blanket one: admitting any offenders puts the environment at risk. Perhaps there are instances where this is true. But it is very difficult to make that determination without a thorough evaluation of the individual in question.[190] Making matters worse for offender applicants, an individualized assessment was not provided when the offender was first classified; therefore, their Tier level may insinuate a level of risk to a nursing home that was *inaccurate from the beginning*. Further, because some offenders may not be able to petition for reclassification, the offender may be helpless, despite an ability to demonstrate rehabilitation, a change to physical or intellectual functioning, or any other change in circumstance that would preclude or severely limit the ability to re-offend. Even when the offender can demonstrate low risk, the LTC facility may still deny the offender an individual evaluation.[191]

Another barrier: even if the LTC facility wished to perform a risk assessment by looking at the offender's "level of offense, years since an offense was committed, the nature of the offense, any rehabilitation that the offender received, and the resident's current medical condition," the information necessary for this assessment may or may not be available on the registry. [192] The Ohio public registry, in most cases, lists the name of the offense and provides a "victim" tab that lists the sex of the victim and the designation as either a juvenile or adult.[193] However, this victim tab is not always completed, and the victim's age is not required to be listed.[194] Such information would be helpful for LTC facilities wishing to perform

188. *Id.*

189. OHIO REV. CODE ANN. § 3721.13 (West 2022).

190. Wedell, *Safeguards Designed to Protect*, *supra* note 179 ("Sheriff Kelly in Clark County said common-sense exceptions are needed for some offenders. An 81-year old resident, who recently came off the registry, has advanced Alzheimer's . . . . [A]nother . . . on the registry has suffered a stroke and is paralyzed on one side of his body . . . . 'These individuals are not physically capable of getting out of their rooms or their beds,' Kelly said.").

191. OHIO REV. CODE ANN. § 3721.122 (West 2022) (listing no requirement to provide individual evaluations).

192. *See* BERDZIK & IOANNOU, *supra* note 177, at 48; *Sex Offender Search*, OHIO.GOV https://ohio.gov/residents/resources/sex-offender-search (last visited Apr. 21, 2022) ("Registered sex offenders in Ohio are required by law to register their home address, work address, and vehicle information . . . .").

193. Wedell, *Safeguards Designed to Protect*, *supra* note 179 ("The Daily News' examination of the nursing home residents on Ohio's sex offender registry shows it is missing critical information on some offenders, including the type of crime committed. . . . The actual Tier designation – I, II, or III – was omitted in 21 of the 136 registrations [of sex offenders residing in Ohio nursing facilities] . . . .").

194. *Id.*; *see also Sex Offender Search*, *supra* note 192.

risk analyses.[195]

c. Ohio Residency Restrictions and Their Impact on Long Term Care Housing Options

A final barrier to finding LTC housing for the disabled and elderly population on the registry derives from the residency restriction of the Ohio AWA sex offender statute.[196] Under Ohio law, registered sex offenders cannot reside within 1,000 feet of "any school premises or preschool or child day-care center premises, children's crisis care facility premises, or residential infant care center premises."[197] An analysis should be completed to determine what percentage of LTC facilities in Ohio are disqualified from housing registered sex offenders because of these residency restrictions. It could be that many LTC facilities would be disqualified, which would only make it more difficult for registered offenders to find LTC housing.

To recap, offenders that are inappropriately classified face a litany of hurdles in receiving LTC care, including: (1) the mandatory Tier classification system, (2) the inability to petition for reclassification or relief, (3) the Ohio notification requirements, (4) the lack of case-by-case assessment from LTCs, and (5) the residency restrictions. This scheme propagated by the Ohio AWA, taken as a whole, amounts to severe punishment under *Graham*.

3. *Graham*'s Third Factor: "The Penological Justification"

The third factor, "the penological justification" factor, cannot be supported. Similar to how the *In re C.P.* court considered the purpose behind the juvenile system, the court should also consider Ohio legislation governing the protection of the elderly and disabled.[198] Ohioans made the decision that individuals in a myriad of professions should be, and could be, punished for failing to report "abuse, neglect, or exploitation" of the elderly and disabled.[199] The state's justification for these laws is its profound interest in protecting this vulnerable population.

195. Wedell, *Safeguards Designed to Protect*, *supra* note 179 ("Roselawn [a nursing care facility] . . . will no longer admit sex offenders whose crimes were against those 55 or older.").

196. OHIO REV. CODE ANN. § 2950.034(A) (West 2022).

197. *Id.*

198. *See* discussion *supra* Section II.E.2.b.ii.

199. OHIO REV. CODE ANN. §§ 5101.63(A)(2)(a)-(ff) (West 2022). The list of mandatory reporters includes: licensed attorneys, doctors, chiropractors, dentists, nurses, counselors, therapists, employees at a community mental health agency, firefighters, first responders, members of clergy, certified public accountants, licensed real estate brokers, investment advisors, and bankers. This is not an exhaustive list. *Id.*; *see also* discussion *supra* Section II.F.

As applied against this population, the Ohio AWA runs contrary to this aim. "Neglect" is defined by the state as the "[f]ailure of an adult to provide for self the goods or services necessary to avoid physical harm, mental anguish, or mental illness."[200] The effects of the registry on this population serve to prevent adults from being able to provide themselves services to prevent harm. If a registered offender is systematically denied LTC housing, they will experience neglect and abuse in the form of "cruel punishment with resulting physical harm . . . or mental anguish."[201] The abuse could be seen as emanating from the hands of the government by way of the Ohio AWA statute's failure to allow individualized assessment or reassessment, or relief from its registry provisions. Therefore, the penological justification for providing mechanisms for reporting and punishing the failure to report elder abuse in Ohio is not served by the application of the Ohio AWA's mandatory classification scheme and its failure to allow relief.

Next, the traditional penological justifications—retribution, deterrence, incapacitation, and rehabilitation—are also not supported. Retribution is not supported because "[t]the heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender."[202] Without a case-by-case assessment before classification, the offender's sentence, here the Tier classification, cannot be said to directly relate to the "personal culpability of the criminal offender."[203] Further, based on a possibly faulty classification, the offender may be subject to registration for twenty-five years or life without the possibility of relief or reclassification. This compounds the severity of the sentence and possibly brings it further from direct relation to the offender's culpability.

Arguably, registration requirements can be seen as an effort to deter offenders from re-offending rather than committing the offense in the first instance. The registration requirements are imposed after conviction and after release from imprisonment. The requirements serve to keep tabs on the offender so they may think twice before acting because their whereabouts are known. In some cases, registered offenders seeking LTC housing are in serious physical disrepair and unable to move about without assistance. Therefore, deterrence in such cases would no longer be a valid justification for the registration requirements. In other cases, the offender may have been rehabilitated, or the predilection for the offense does not apply to the age population of the LTC facility. In those

200. OHIO ADMIN. CODE 5101:2-20-01(B)(21)(a) (2022).

201. § 5101:2-20-01(B)(2).

202. *In re* C.P., 131 Ohio St.3d 513, 2012-Ohio-1446, 967 N.E.2d 729, at ¶ 51 (quoting Tison v. Arizona, 481 U.S. 137, 149 (1987)).

203. *Id.*

situations, deterrence would also no longer be applicable.

The justification of incapacitation—where placing someone behind bars prevents them from committing further crime—does not apply because the punishment here occurs after release from prison. Finally, offenders classified in Tiers II or III cannot petition to have their rehabilitation considered; therefore, rehabilitation could not justify the statute. The registration requirements also serve to hinder rehabilitation. Like the court held in *In re C.P.*, the registration requirements for the juvenile population would only hurt the chance of rehabilitation.[204] This would also be the case for healthy adults on the registry but is even more applicable to those needing LTC housing. Individuals on the registry may be rejected from all housing options, rendering them unhoused.[205] Or, if a registered offender is permitted to live in a given LTC facility, the facility's rating will likely be well below average because of inadequate care and living conditions, they will be outed as an offender upon arrival, and they will likely be forced to live hours away from their network of friends and family.[206] Any of these options is destabilizing, which is the opposite of what the state hopes to accomplish with its sex offender laws.[207] The Ohio AWA mandatory Tier classification system and registration, and its failure to allow for reassessment, cannot be justified under a theory that the law serves to rehabilitate.

Therefore, as applied to certain sex offenders needing LTC housing, the mandatory classification and lack of relief or reclassification for Tier II and III offenders constitutes cruel and unusual punishment under federal law.

B. Application of the Ohio Cruel and Unusual Punishment Standard

"The Ohio Constitution is a document of independent force."[208] The Supreme Court of Ohio precedent involving its state constitutional prohibition on cruel and unusual punishment has been "limited to those [fact patterns] involving sanctions which under the circumstances would be considered shocking to any reasonable person."[209] The critical factor is that the punishment must be proportional to the crime to not "shock the

204. *Id.* at ¶¶ 67-69.

205. *See, e.g.*, *In re* Taylor, 343 P.3d 867, 876 (Cal. 2015) (linking homelessness to an individual's registration status).

206. *See supra* text accompanying notes 179-86; OHIO REV. CODE ANN. § 3721.122 (West 2022).

207. Troia, *supra* note 82, at 341 ("Sex offenders with positive informed support systems commit significantly fewer criminal and technical probation violations than offenders with negative or no support systems.").

208. State v. Blankenship, 145 Ohio St.3d 221, 2015-Ohio-4624, 48 N.E.3d 516, at ¶ 31 (quoting *Arnold v. Cleveland*, 616 N.E.2d 163, 164 (Ohio 1993)).

209. *Id.* at ¶ 32 (quoting *McDougle v. Maxwell, 203 N.E.2d 334, 336 (Ohio 1964)).*

sense of justice of the community."[210] In some instances, the application of the Ohio AWA will "shock the sense of justice of the community" when applied to individuals on the registry in need of LTC housing. There will be instances where the offender, denied an individualized risk assessment by the judge, will have been classified to a Tier with registration requirements disproportionate to the crime, i.e., Blankenship. Consider if Blankenship had a degenerative disease (such as Huntington's disease, early onset Alzheimer's disease, or ALS) that years after his conviction, while still on the registry, progressed to the point where he needed supportive housing without which his basic needs could not be met.

Compounding the injustice of not receiving an individualized assessment for Tier classification, Blankenship would not be able to petition for relief or reclassification. Because he would be classified in a Tier of offenders where he arguably would not belong and could not escape, he would potentially be systematically denied supportive housing. He could even become unhoused. If he were lucky enough to find a facility that would accept him, he would likely have to move far away from friends and family members, and the facility would likely be operated at well below-average standards.[211] Worst case scenario, the instability of his situation, brought on by being on the registry, could lead him to recidivate and perhaps even go back to jail.[212] Under these circumstances, the mandatory Tier classification and the inability to petition for relief or reclassification under the Ohio AWA would constitute cruel and unusual punishment under the Ohio Constitution. This scenario would indeed be "shocking to any reasonable person."[213]

IV. CONCLUSION

Not only does society punish sex offenders more harshly than other criminals by requiring public notification of their status as a criminal, but when they are at their most vulnerable and seeking supportive housing, society continues to shun them. The Ohio AWA does not afford offenders proper evaluation at the start before turning them into pariahs and also refuses to allow them relief from this status. The effects of the Ohio AWA classification and registry scheme are compounded when applied to the elderly and disabled population. Because LTC facilities are required by law to look up the prospective resident's status and are not required to evaluate each candidate for risk factors individually, many are denied

210. *Id.* (quoting *State v. Chaffin*, 282 N.E.2d 46, 49 (Ohio 1972)).

211. *See supra* text accompanying note 179.

212. *See supra* notes 161, 207.

213. *Blankenship*, 48 N.E.3d at ¶ 32 (quoting *State v. Chaffin*, 282 N.E.2d 46 (Ohio 1972)).

housing. The offender is again shunned without individual consideration of who they may have become since the commission of their offense. Many LTC facilities may be prohibited from housing registered sex offenders because they sit within 1,000 feet of certain facilities where children congregate, further limiting the number of available facilities. These factors mean some elderly or disabled (or elderly and disabled) individuals—individuals Ohio is by law required to protect from abuse and neglect—are experiencing cruel and unusual punishment under the Ohio AWA's mandatory classification system and the statute's failure to provide a mechanism for reassessment or relief. If the scenarios laid out here do not "shock a reasonable person" and the court were to deny as-applied challenge such as the one laid out here, then the legislature must act to amend the Ohio AWA.[214]

214. OHIO CRIMINAL SENTENCING COMMISSION, *supra* note 4 (providing an in-depth analysis of why the Ohio AWA is flawed and how it should be amended).