NOTES

NO CHILD LEFT BEHIND BARS: APPLYING THE PRINCIPLES OF STRICT SCRUTINY WHEN SENTENCING JUVENILES TRIED AS ADULTS

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INTRODUCTION

"Our most important task as a nation is to make sure all our young people can achieve their dreams."[1] These words, as part of a strong message from President Barack Obama, came with a call on the United States to create better futures for children across the country.[2] Indeed, such a call to action by the President was not unfounded.

Beginning in the 1990s, the emergence of the "tough on crime" era resulted in years of draconian punishments that left many young people behind bars, robbing them of their futures.[3] The "tough on crime" era started as a direct result of the widespread fear that violent juvenile crime rates were on the rise.[4] This fear prompted state legislatures to enact harsh sentencing laws that instituted mandatory minimum and life imprisonment without parole (LWOP) sentences on juveniles.[5] At the same time, states across the country were passing transfer laws that mandated or allowed prosecutors to try juveniles as adults, opening the door for these children to be prosecuted in adult criminal courts.[6] Although these sentencing laws were passed over twenty years ago, their legacy continues today.

Unfortunately, only a few states have addressed the intersection between mandatory minimum sentences and juvenile transfers to adult criminal courts.[7] The Commonwealth of Virginia was the first in the nation to pass legislation that provides judges with the discretion to veer away from the mandatory minimum sentence and

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1. Barack Obama (@BarackObama), TWITTER (Mar. 19, 2018, 5:48 PM), https://twitter.com/BarackObama/status/975851480648421376 [https://perma.cc/W9WS-RZEZ].

2. *See id.*

3. Kallee Spooner & Michael S. Vaughn, *Sentencing Juvenile Homicide Offenders: A 50-State Survey,* 5 VA. J. CRIM. L. 130, 132-33 (2017).

4. *Id.* at 132.

5. *Id.*

6. *See* PATRICK GRIFFIN, SEAN ADDIE, BENJAMIN ADAMS & KATHY FIRESTINE, U.S. DEP'T OF JUST., TRYING JUVENILES AS ADULTS: AN ANALYSIS OF STATE TRANSFER LAWS AND REPORTING 1 (2011).

7. *See, e.g.*, State v. Lyle, 854 N.W.2d 378, 404 (Iowa 2014) ("[T]he Iowa Constitution forbids a mandatory minimum sentencing schema for juvenile offenders that deprives the district court of the discretion to consider youth and its attendant circumstances as a mitigating factor.").

to impose trauma-informed and age-appropriate sentences for juvenile offenders convicted of felonies and tried as adults.[8] Although Virginia's new law, House Bill 744 (HB 744), is a pioneering step in the right direction,[9] this Note argues that the law may now provide judges with too much discretion. In other words, HB 744 alone, without more guidance, does not go far enough to protect the rights of juvenile offenders.

Therefore, this Note proposes a new judicial policy to guide judges in Virginia, before they exercise their discretion to sentence a juvenile offender in adult court. Judges operating under the proposed standard must adopt the principles of strict scrutiny when deciding the individual sentence of a juvenile offender tried as an adult. Accordingly, judges must ensure that their sentences are narrowly tailored to serve a compelling governmental interest.[10] This Note argues that juvenile offenders are a suspect class under *Carolene Products*' Footnote Four,[11] and thereby deserve such heightened scrutiny[12] over the judicial review of laws that affect their rights under the Equal Protection Clause of the Fourteenth Amendment.[13] Simply put, if judges fail to abide by the principles of strict scrutiny when deciding upon a sentence, appellate judges must strike the sentence down as unconstitutional if the sentence is subsequently appealed.

This Note proceeds in four parts. Part I provides a brief background on the current state of juvenile sentencing in the United States. Specifically, this Part discusses mandatory minimum sentences for juvenile offenders and the Supreme Court's recent jurisprudence over the issue. Folded into this Part is an argument

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8. VA. CODE ANN. § 16.1-272(D) (2021); *see also* Vivian Watts, *Justice System Reforms Will Help Protect Children*, THE VIRGINIAN-PILOT (May 6, 2020, 12:05 AM), https://www.pilotonline.com/opinion/columns/vp-ed-column-watts-0506-20200506-huanalzapfehxfyfiyk3rakou4-story.html [https://perma.cc/HT5L-V2AW].

9. *See* Watts, *supra* note 8.

10. *See* Sonu Bedi, *Collapsing Suspect* Class *with Suspect* Classification*: Why Strict Scrutiny Is Too Strict and Maybe Not Strict Enough*, 47 GA. L. REV. 301, 303 (2013).

11. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (stating that there are some classifications of people that deserve "a correspondingly more searching judicial inquiry" when laws are seemingly prejudicial against them).

12. *See* Bedi, *supra* note 10, at 303 n.1 (explaining that heightened scrutiny "mean[s] any kind of scrutiny greater than rational review").

13. *See* U.S. CONST. amend. XIV, § 1.

about why the Supreme Court's invocation of the Eighth Amendment alone is not enough to protect the rights of juvenile offenders. Part II provides a brief overview of transfer laws across the country and introduces HB 744 in greater detail. This Part then explains how the bill changes current Virginia law. Part III introduces *Carolene Products*' Footnote Four and explores how courts apply the principles of the historic footnote. This Part then explains why juvenile offenders fall under Footnote Four's conception of a protected class that is awarded strict scrutiny. Lastly, Part IV discusses how the principles of strict scrutiny may be applied when judges exercise their discretion under HB 744 and how appellate judges should review sentences under this Note's proposed standard.

I. STATE OF JUVENILE SENTENCING TODAY

This Part first provides a brief overview of mandatory minimum sentences for juveniles. Next, a discussion of recent Supreme Court cases illustrates the Court's modern attempts to reform the state of juvenile sentencing. The final Section examines why the Eighth Amendment alone is inadequate for protecting juveniles tried as adults.

A. Mandatory Minimum Sentences for Juveniles

HB 744 is a trailblazing piece of legislation because it allows judges in Virginia to veer away from the mandatory minimum when sentencing a juvenile in adult court.[14] A mandatory minimum sentence is the least amount of time an individual convicted of a specific crime can be sentenced to.[15] In other words, a mandatory minimum sentence removes most judicial discretion and mandates that the law alone determines the punishment that the individual receives.[16] While mandatory minimum sentences were devised to

14. *See* Watts, *supra* note 8.

15. James Cullen, *Sentencing Laws and How They Contribute to Mass Incarceration*, BRENNAN CTR. FOR JUST. (Oct. 5, 2018), https://www.brennancenter.org/our-work/analysis-opinion/sentencing-laws-and-how-they-contribute-mass-incarceration [https://perma.cc/68ZC-DKDJ].

16. *Id.*

create a fairer justice system, they have, in contrast, led to more inequitable sentences.[17]

According to a fifty-state survey on juvenile sentencing conducted in 2017, thirty-nine states still permit mandatory minimum sentences of some form for juvenile homicide offenders.[18] By far, the most severe mandatory minimum available is mandatory LWOP.[19] The high number of people[20] serving juvenile LWOP sentences has also proven to be costly.[21] Fortunately, these costs have been somewhat mitigated by a string of Supreme Court cases beginning in 2005 and culminating in 2016 with the Court's ruling in *Montgomery v. Louisiana*, in which the Court invalidated all existing juvenile LWOP sentences that were imposed as a result of a mandatory minimum statute.[22]

B. Recent Supreme Court Jurisprudence

Over the past few years, the Supreme Court has instituted much-needed juvenile sentencing reform on its own. Recent cases have invalidated state laws that were found to be too harsh on juvenile offenders.[23] Notably, the Court began to recognize the differences in culpability between juvenile and adult offenders and the need for these differences to be considered during sentencing.[24] The Court also reinforced the importance of judicial discretion and

17. *See id.* ("Mandatory minimums often apply to nonviolent drug offenders, forcing judges to harshly punish those who pose the least physical danger to communities.").

18. Spooner & Vaughn, *supra* note 3, at 151.

19. *See id.* at 132.

20. In 2017, an estimated two thousand people were serving LWOP sentences for crimes committed when they were juveniles. *See id.* at 132-33.

21. For example, assuming LWOP sentences last longer when imposed upon juveniles compared to adults, one juvenile's fifty-year sentence could possibly cost taxpayers around $2.25 million. JOSH ROVNER, THE SENT'G PROJECT, JUVENILE LIFE WITHOUT PAROLE: AN OVERVIEW 4 (2021), https://www.sentencingproject.org/publications/juvenile-life-without-parole/ [https://perma.cc/BQB3-9NYH].

22. *See id.* at 1-3; Montgomery v. Louisiana, 136 S. Ct. 718, 736-37 (2016).

23. *See* Barry C. Feld, *Adolescent Criminal Responsibility, Proportionality, and Sentencing Policy:* Roper*,* Graham*,* Miller/Jackson*, and the Youth Discount*, 31 LAW & INEQ. 263, 263-64 (2013).

24. *See infra* notes 29-30 and accompanying text.

individualized sentencing in striking down mandatory LWOP sentences for juvenile offenders.[25]

Three Supreme Court cases in particular were chiefly responsible for the "juvenile justice revolution in America."[26] Professor Cara Drinan refers to these cases as "the *Miller* trilogy."[27] First, in *Roper v. Simmons*, the Court proscribed states from imposing the death penalty on offenders under the age of eighteen.[28] In reaching this landmark decision, the Court held that juveniles, as compared to adults, (i) possess an underdeveloped sense of responsibility, (ii) are more vulnerable to negative influences and external pressures, and (iii) lack fully developed characters and personality traits.[29] Scholars refer to these differences in culpability as the "diminished responsibility rationale."[30]

Five years later, in *Graham v. Florida*, the Court held that it was unconstitutional for states to impose LWOP sentences on juvenile offenders convicted of non-homicide offenses.[31] *Graham* further emphasized that children are assumed to have reduced culpability even when their crimes involve no intent to take the life of another.[32] In *Miller v. Alabama*, the Court reaffirmed that "children are constitutionally different from adults for purposes of sentencing"[33] and declared as unconstitutional mandatory LWOP sentences for juvenile offenders convicted of homicide.[34] The Court found that

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25. *See* Miller v. Alabama, 567 U.S. 460, 477 (2012).

26. *See* Cara H. Drinan, *The* Miller *Revolution*, 101 IOWA L. REV. 1787, 1788 (2016).

27. *Id.* at 1789.

28. 543 U.S. 551, 570-71 (2005) ("[W]ith respect to juveniles under 16 ... the Eighth Amendment prohibit[s] the imposition of the death penalty on juveniles below that age. We conclude the same reasoning applies to all juvenile offenders under 18." (citation omitted)); *see also* Feld, *supra* note 23, at 263 ("The Supreme Court in *Roper v. Simmons* prohibited states from executing offenders for murders committed when younger than eighteen years of age.").

29. *Roper*, 543 U.S. at 569-70.

30. *See, e.g.*, Feld, *supra* note 23, at 263.

31. 560 U.S. 48, 74 (2010) ("This Court now holds that for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole."); *see also* Feld, *supra* note 23, at 263.

32. *Graham*, 560 U.S. at 69; *see also* Elizabeth S. Scott, *"Children Are Different": Constitutional Values and Justice Policy*, 11 OHIO ST. J. CRIM. L. 71, 78 (2013).

33. 567 U.S. 460, 471 (2012).

34. *Id.* at 479 ("We therefore hold that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders."); *see also* Feld, *supra* note 23, at 264.

the lack of discretion associated with mandatory LWOP sentences prevents judges from considering a juvenile's "immaturity, impetuosity, and failure to appreciate risks and consequences,"[35] thus "pos[ing] too great a risk of disproportionate punishment."[36] More importantly, the *Miller* Court unequivocally declared that LWOP sentences for juveniles should be "uncommon."[37] In summary, it is implicit from the *Miller* trilogy that judges must engage in a "proportionality analysis" before deciding upon a juvenile's sentence.[38]

A few years after *Miller*, the Court's decision in *Montgomery v. Louisiana* required states to conduct individualized mitigation inquiries before LWOP sentences could be imposed.[39] However, the ruling only requires states to hold sentencing hearings to "separate those juveniles who may be sentenced to life without parole from those who may not."[40] In other words, these hearings merely identify the juveniles "whose crimes reflect [the] permanent incorrigibility" that warrants a life sentence.[41] Such safeguards are undoubtedly crucial for protecting those children facing life sentences. But, they do not solve the more widespread problem of mandatory minimum sentences for juveniles tried as adults.[42]

C. The Inadequacy of Eighth Amendment Protections

There is no doubt that the *Miller* trilogy prompted states across the country to reevaluate their own sentencing laws to reflect the idea that children are different from adults.[43] In reaching these critical decisions, however, the Court relied almost exclusively on the Eighth Amendment's prohibition on cruel and unusual

35. *Miller*, 567 U.S. at 477.

36. *Id.* at 479.

37. *See id.*

38. *See* Scott, *supra* note 32, at 72. Such an analysis should invoke "behavioral and neurobiological research to delineate the attributes of adolescence that distinguish teenage offending from adult criminal activity." *Id.*

39. 136 S. Ct. 718 (2016).

40. *Id.* at 735.

41. *Id.* at 734.

42. *See* Spooner & Vaughn, *supra* note 3, at 151.

43. *See id.* at 153; *see also* Drinan, *supra* note 26, at 1788 ("Legislatures, courts and executive actors are reconsidering the propriety of criminal laws as they apply to children in fundamental ways.").

punishment.[44] For example, the *Graham* Court stated that "the Eighth Amendment bars ... punishments that are disproportionate to the crime committed."[45] With regards to proportionality, the Court in *Miller* reaffirmed that criminal procedure laws must consider a defendant's youthfulness to pass constitutional muster.[46]

While the *Miller* trilogy represents an unprecedented invocation of the Eighth Amendment to protect juveniles,[47] its application is nonetheless limited. Though *Miller* mandated individualized consideration before a juvenile is sentenced to LWOP, theoretically, juveniles convicted of homicide could still receive LWOP even after such a hearing.[48] Thus, it has been suggested that the *Miller* trilogy simply provided some boundaries within which juveniles can receive the law's harshest sentence without violating the Eighth Amendment.[49] Still, some state courts have found that a child's Eighth Amendment rights are not violated when sentenced to the LWOP mandatory minimum.[50]

Hence, while *Miller* facilitated reform that was not possible before,[51] this Note argues that the Eighth Amendment alone does not protect the large number of juveniles who are not being sentenced to LWOP or similarly harsh punishments. In other words, every time juveniles are prosecuted as adults,[52] greater protections should be instituted to ensure that children are indeed afforded individualized consideration due to the differences in culpability

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44. *See* Scott, *supra* note 32, at 72 ("Three times in the past seven years the Supreme Court has held that imposing harsh criminal sentences on juvenile offenders violates the Eighth Amendment prohibition of cruel and unusual punishment."). It is worth noting that the Court also invoked the Fourteenth Amendment in these cases, but did so just to explain that the Eighth Amendment was made applicable to the states by the Fourteenth Amendment's Due Process Clause. *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 560 (2005).

45. Graham v. Florida, 560 U.S. 48, 59 (2010).

46. Miller v. Alabama, 567 U.S. 460, 473-74 (2012) (citing *Graham*, 560 U.S. at 76).

47. *See* Scott, *supra* note 32, at 81 ("*Graham* represents the only occasion on which the Court has categorically banned a sentence other than death on Eighth Amendment grounds.").

48. *Id.* at 76, 81.

49. *See* Drinan, *supra* note 26, at 1803.

50. *See, e.g.*, State v. Taylor G., 110 A.3d 338, 345 (Conn. 2015).

51. *See* Drinan, *supra* note 26, at 1803.

52. *See* Anne Teigen, *Juvenile Age of Jurisdiction and Transfer to Adult Court Laws*, NAT'L CONF. STATE LEGISLATURES (Apr. 8, 2021), https://www.ncsl.org/research/civil-and-criminal-justice/juvenile-age-of-jurisdiction-and-transfer-to-adult-court-laws.aspx [https://perma.cc/F546-ZUSK] (discussing states' abilities to prosecute juveniles as adults).

between them and adults.[53] Therefore, even in states where juveniles are no longer subjected to mandatory minimum sentences when tried as adults, there must be other constitutional protections over the rights of juvenile offenders during sentencing in general, particularly after being transferred to adult court.

II. OVERVIEW OF TRANSFER LAWS AND HB 744

This Part details how transfer laws enable states to charge juveniles as adults. It then examines Virginia's own transfer laws before explaining how HB 744 changes the way judges can sentence juveniles tried as adults in the Commonwealth.

A. Overview of Transfer Laws

Currently, all fifty states have transfer laws that allow or mandate juvenile offenders to be tried in adult court for committing serious crimes.[54] These transfer laws apply regardless of a juvenile's age.[55] By far, the most common form of transfer law provides juvenile courts the discretion, often after a prosecutor's motion, to waive juvenile jurisdiction.[56] As noted in *Miller*, there is cause for concern when judges or prosecutors are given broad discretion during the transfer process.[57] Such concern partially stems from the fact that judges are not given the full picture of a juvenile's unique circumstances during the pretrial stages.[58]

After *Miller*, several states responded by enacting meaningful reform.[59] In 2020, eight years after *Miller* was decided, there was still momentum among the states in favor of reform.[60] For example, Virginia increased the age at which a prosecutor can directly charge

53. *See* Roper v. Simmons, 543 U.S. 551, 569-70 (2005).
54. Teigen, *supra* note 52.
55. *Id.*
56. *See* GRIFFIN ET AL., *supra* note 6, at 2.
57. *See* Miller v. Alabama, 567 U.S. 460, 487-88 (2012).
58. *Id.* at 488.
59. *See* Drinan, *supra* note 26, at 1816.
60. *See* Brian Evans, *It's Not All Bad. Really...*, CAMPAIGN FOR YOUTH JUST. (Mar. 13, 2020), http://www.campaignforyouthjustice.org/news/blog/item/it-s-not-all-bad-really [https://perma.cc/Y6FR-LCWC] ("[G]ood legislation to reduce the number of children transferred to the adult court ... has started to move in state legislatures.").

a juvenile in adult criminal court.[61] While much work has been done to keep juveniles out of the adult system, presently, juveniles may still be charged in adult court in all fifty states.[62] Moreover, few states have addressed whether juveniles may also be subject to mandatory minimum sentences once they are transferred to adult court,[63] and a majority of states still allow mandatory minimums for juveniles convicted of homicide.[64] Therefore, this Note focuses on the protections that juveniles should receive when tried as adults in criminal courts by using Virginia sentencing laws as an example.

B. Background of HB 744

In Virginia, once a juvenile is transferred to adult court, he or she faces the possibility of higher sentences and the likelihood of being sent to adult prison.[65] When HB 744 was passed in March 2020, Virginia became the first state in the nation to allow judges to depart from the mandatory minimum sentence when sentencing juveniles in adult court.[66] The new law provides courts the discretion to "depart from any mandatory minimum sentence required by law"[67] and requires judges to "consider (i) the juvenile's exposure to adverse childhood experiences, early childhood trauma, or any child welfare agency and (ii) the differences between juvenile and adult offenders."[68] According to the author of the bill, Delegate Vivian Watts, at the time of the bill's passage, approximately 90 percent of children tied up in the criminal justice system had experienced a minimum of two traumatic events during their early childhood.[69]

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61. *Id.*

62. *See* Teigen, *supra* note 52.

63. *See* QUINNIPIAC U. SCH. OF L. JUV. SENT'G PROJECT, ENDING MANDATORY MINIMUM SENTENCES FOR CHILDREN 2-3 (2020), https://juvenilesentencingproject.org/wp-content/uploads/model_reforms_ending_mandatory_minimums_for_children.pdf [https://perma.cc/8HMB-NE76] (providing only five examples of state legislatures addressing the issue).

64. *See* Spooner & Vaughn, *supra* note 3, at 151.

65. M. Randell Scism, Comment, *Children Are Different: The Need for Reform of Virginia's Juvenile Transfer Laws*, 22 RICH. PUB. INT. L. REV. 445, 452-53 (2019). In Virginia, there are three ways to transfer a juvenile to adult court: (1) judicial discretionary waiver; (2) certification; and (3) mandatory waiver. *Id.* at 448.

66. *See* Watts, *supra* note 8.

67. VA. CODE ANN. § 16.1-272(A)(3) (2021).

68. *Id.* § 16.1-272(D).

69. Watts, *supra* note 8.

With such jarring statistics in mind, Delegate Watts authored HB 744 to allow judges to consider a minor's exposure to adverse childhood experiences, and the resulting trauma, before imposing a sentence.[70] Put differently, HB 744 provides judges with full discretion to depart from any mandatory minimum sentence that would have applied to adults when sentencing a juvenile in adult court.[71]

While HB 744 created a "paradigm shift"[72] in juvenile sentencing laws in Virginia, this Note argues that it does not go far enough. Delegate Watts herself admitted that the new law still allows judges to impose the statutory minimum, so long as the court considers the juvenile's trauma and childhood experiences before sentencing.[73] Such discretion, even after a mandated "consideration," still gives judges too much leeway to impose comparatively harsher sentences on juveniles transferred to adult court. Therefore, while HB 744 gives judges new freedom to veer away from the mandatory minimum, judges have to be given more guidance while exercising their discretion during sentencing. To provide such guidance, this Note argues that Virginia judges must henceforth apply the principles of strict scrutiny when sentencing juveniles tried in adult court. In other words, judges must apply the standard awarded to suspect classes and ensure that their sentences are narrowly tailored to serve a compelling governmental interest.[74]

III. *CAROLENE PRODUCTS*' FOOTNOTE FOUR AND SUSPECT CLASSES

Under the Equal Protection Clause of the Fourteenth Amendment, no state shall "deny to any person within its jurisdiction the equal protection of the laws."[75] The idea that the Equal Protection Clause affords some classifications of individuals more rigorous review than others is drawn from Footnote Four of the Supreme

70. *See id.*
71. *Id.*
72. *Id.*
73. *Id.*
74. *See* Bedi, *supra* note 10, at 303.
75. U.S. CONST. amend. XIV, § 1.

Court's *United States v. Carolene Products Co.* decision.[76] This Part first explains the history behind suspect classes. It then explores the possibility of additional suspect classes and why juvenile offenders must be considered a suspect class.

A. History of Suspect Classifications

Footnote Four of the *Carolene Products* decision (henceforth referred to as "Footnote Four") is unequivocally the most well-known footnote in all of constitutional law.[77] Footnote Four famously invokes the idea that "discrete and insular minorities" should be awarded a more "searching judicial inquiry" over laws that infringe upon their rights due to the fact that these groups are unable to partake in the political process.[78] Such limitations on political participation might be a direct result of the minority group's diminished capacity to form political alliances with larger groups within the political process, thereby rendering them politically powerless.[79] Thus, the footnote established the foundation for judicial review of "legislation which affects those ... for whom the democratic process does not work fairly."[80] In such instances, the "courts have a duty to step in to end the unfair treatment."[81]

Unfortunately, the revolutionary footnote "did not specify what precisely constituted such a minority" group that deserved heightened scrutiny.[82] It was equally uncertain whether a failure of the political process to protect such minority groups was dispositive to warrant special consideration, or if evidence of affirmative prejudice was also necessary for such protections.[83] Eventually, the Supreme Court introduced "suspect classifications" of groups that warrant

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76. Marcy Strauss, *Reevaluating Suspect Classifications*, 35 SEATTLE U. L. REV. 135, 143 (2011).

77. *See* Felix Gilman, *The Famous Footnote Four: A History of the* Carolene Products *Footnote*, 46 S. TEX. L. REV. 163, 165 (2004).

78. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

79. *See* Heather L. McKay, Note, *Fighting for Victoria: Federal Equal Protection Claims Available to American Transgender Schoolchildren*, 29 QUINNIPIAC L. REV. 493, 504 (2011).

80. Gilman, *supra* note 77, at 165-66.

81. McKay, *supra* note 79, at 504.

82. Strauss, *supra* note 76, at 144.

83. *Id.*

strict judicial scrutiny.[84] Such examples include race, national origin, alienage, and illegitimacy.[85] Classifications based on race were the first to be deemed suspect.[86] A few years later, in *Graham v. Richardson*, the Supreme Court extended suspect class status to aliens,[87] but neglected to expound on its reasons for doing so.[88]

Notwithstanding the Supreme Court's lack of guidance, a list of relevant, but not exhaustive, factors for determining suspect classifications has been inferred from the Court's subsequent jurisprudence on the matter.[89] These factors are: (i) evidence of prejudice or historical discrimination suffered by the class; (ii) political powerlessness signaling the class's inability to effect change through political means; and (iii) the immutability of the class's particular defining trait.[90] The more factors that a group meets, the more likely the reviewing court will find the group to be a suspect class and subject their equal protection claims to strict scrutiny.[91] If only some factors are met, there is a possibility that the group will be considered quasi-suspect instead,[92] subjecting its equal protection claims to only intermediate scrutiny.[93] With these factors in mind, several arguments have been made regarding the possibility of other groups being awarded suspect or quasi-suspect status.

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84. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 16 (1973).

85. *Id.* at 61 (Stewart, J., concurring); *see also* Selene C. Vázquez, Note, *The Equal Protection Clause & Suspect Classifications: Children of Undocumented Entrants*, 51 U. MIA. INTER-AM. L. REV. 63, 88 (2020).

86. Vázquez, *supra* note 85, at 75 ("The first established suspect classification ... was race."). In *Korematsu v. United States*, the Court definitively declared that classifications based on race were "immediately suspect" and subject to "the most rigid scrutiny." 323 U.S. 214, 216 (1944). Later, in *McLaughlin v. Florida*, the Court reaffirmed that racial classifications were "constitutionally suspect." 379 U.S. 184, 192 (1964) (quoting Bolling v. Sharpe, 347 U.S. 497, 499 (1954)).

87. 403 U.S. 365, 372 (1971) ("Aliens ... are a prime example of a 'discrete and insular' minority for whom such heightened judicial solicitude is appropriate." (citation omitted)).

88. *See* Ben Geiger, Comment, *The Case for Treating Ex-Offenders as a Suspect Class*, 94 CALIF. L. REV. 1191, 1209 (2006).

89. *See, e.g.*, Vázquez, *supra* note 85, at 80. Scholars have also referred to these factors as the "traditional indicia of suspectness." Geiger, *supra* note 88, at 1206.

90. Vázquez, *supra* note 85, at 80; *see also* Geiger, *supra* note 88, at 1206.

91. Vázquez, *supra* note 85, at 80.

92. *Id.*

93. *See id.* at 72. For example, gender is a quasi-suspect classification. Strauss, *supra* note 76, at 146. Under intermediate scrutiny, "the Court asks if the law is substantially related to an important governmental purpose." Bedi, *supra* note 10, at 303.

B. Arguments for an Expansion of Suspect or Quasi-Suspect Classifications

Experts frequently lobby for more groups to be awarded suspect or quasi-suspect status. Ex-offenders have been identified as a possible group that should be treated as a suspect class that receives heightened scrutiny.[94] Central to this argument is the fact that ex-offenders, as a class, have historically faced discrimination in the United States.[95] Furthermore, significant societal barriers prevent ex-offenders from disassociating from their label[96] and partaking in the political process through voting.[97]

Attempts have also been made to classify youths under the age of eighteen as a suspect class because of their inability to vote.[98] Although the Supreme Court has yet to rule on the issue,[99] Justice Thurgood Marshall wrote in his concurring opinion in *City of Cleburne v. Cleburne Living Center, Inc.* that he was "not aware of any suggestion that legislation affecting [minors] be viewed with the suspicion of heightened scrutiny."[100] Lower courts have suggested that children, in general, do not qualify as a suspect class without a greater showing of the "need [for] extraordinary protection from the majoritarian political process."[101] As a result, there is a possibility that children who share certain characteristics may be awarded heightened scrutiny.

In *Plyler v. Doe*, the Supreme Court contemplated such a possibility when the Court invalidated a Texas law that gave local school districts the authority to deny undocumented children access to free public education.[102] Because the law outwardly discriminated

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94. *See* Geiger, *supra* note 88, at 1193 ("[A] reasonable interpretation of the Equal Protection Clause demands that ex-offenders be accorded suspect status.").

95. *Id.* at 1225. For example, before the 1960s, several laws prevented ex-offenders from making contracts or suing in civil court. *Id.*

96. *See id.* at 1224. Laws allowing ex-offenders to erase a criminal conviction from their criminal history are only available in fewer than half the states. *See id.* at 1219.

97. *See id.* at 1191.

98. *See, e.g.*, Brown v. Heckler, 589 F. Supp. 985, 990 (E.D. Pa. 1984).

99. Ramos v. Town of Vernon, 353 F.3d 171, 181 & n.4 (2d Cir. 2003).

100. 473 U.S. 432, 472 n.24 (1985) (Marshall, J., concurring in part and dissenting in part).

101. *Brown*, 589 F. Supp. at 991. The court found that children, simply by virtue of their age, do not belong to a group that has faced "a history of purposeful or unequal treatment" or has been subjected to "unique disabilities on the basis of stereotyped characteristics." *Id.*

102. 457 U.S. 202, 205, 230 (1982).

against undocumented children, who the court considered a "discrete class,"[103] Texas had to show that the law "further[ed] some substantial state interest," a burden the state could not meet.[104]

Building upon *Plyler*, Selene Vázquez has argued that undocumented children should actually be considered a suspect class instead.[105] Undocumented children should be viewed separately from undocumented adults because they are not responsible for their undocumented status.[106] Rather, their legal status is a result of "the violation of a third party and not their own volition."[107] Nonetheless, undocumented children still face the discrimination and stereotyping historically directed toward immigrants,[108] and they are precluded from the political process because of their age and legal status.[109]

Similarly, Heather McKay has advocated for transgender students to be considered a quasi-suspect class for the purposes of equal protection.[110] Transgender individuals have suffered discrimination on many levels in the United States,[111] especially during their youth.[112] Not only does federal law falsely associate being transgender with disorders such as pedophilia,[113] but transgender employees have also faced an alarming amount of workplace discrimination.[114] Moreover, in addition to being too young to vote themselves, evidence suggests that biases and misunderstandings

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103. *Id.* at 220, 223 (describing the undocumented status as "a legal characteristic over which children can have little control").

104. *Id.* at 230. Such a burden most closely mirrors intermediate scrutiny, leading to the inference that undocumented children are at least a quasi-suspect class. *See supra* notes 92-93 and accompanying text.

105. *See* Vázquez, *supra* note 85, at 104.

106. *See id.*

107. *See id.* at 82.

108. *See id.* at 96.

109. *See id.* at 99.

110. McKay, *supra* note 79, at 503.

111. *Id.* at 509.

112. *Id.* at 510-11 ("Transgender students ... face even more harassment in schools than their gay, lesbian, and bisexual peers.").

113. *See* 42 U.S.C. § 12211(b)(1) (establishing that the term "disability" does not include "transsexualism, pedophilia ... gender identity disorders not resulting from physical impairments, or other sexual behavior disorders"); McKay, *supra* note 79, at 508 (arguing that there is no evidence to prove a causal link between transgender identity and pedophilia).

114. McKay, *supra* note 79, at 509 ("When employers detect an applicant's transgender identity, it is not uncommon for them to refuse to interview or hire that applicant.").

might hinder parents and other adults from adequately representing the interests of transgender youths in the political process.[115]

Lastly, Spencer Klein has called for juvenile sex offenders to receive heightened scrutiny.[116] Through a joint analysis of both the principles of Footnote Four and the four rationales behind the judicial presumption that state and federal laws are constitutional,[117] Klein argues that laws burdening juvenile sex offenders should at least be reviewed under the "rational basis plus" level of scrutiny.[118]

As the aforementioned examples illustrate, there are strong arguments for the expansion of suspect and quasi-suspect classes to include groups of children who experience similar levels of prejudice and political powerlessness and who share certain immutable traits.

C. Juvenile Offenders as a Suspect Class

It is crucial to reiterate that this Note maintains that juvenile offenders tried as adults in Virginia must be considered a suspect class in order to require judges to apply the principles of strict scrutiny before sentencing. Therefore, the "class" at issue is limited to juveniles in Virginia who have been transferred to the adult court system. It is further assumed that these juveniles will go on to be sentenced and thereby be considered "ex-offenders" upon release. When analyzing whether this category of juveniles deserves suspect

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115. *Id.* at 515-16.

116. Spencer Klein, Note, *The New Unconstitutionality of Juvenile Sex Offender Registration: Suspending the Presumption of Constitutionality for Laws that Burden Juvenile Offenders*, 115 MICH. L. REV. 1365, 1368 (2017). While juvenile sex offenders, on the surface, meet the requirements to be a suspect class, such a classification has never been recognized by courts. *Id.* at 1376-77.

117. *See id.* at 1378. Examination of the four rationales reveals that they do not apply to laws that burden juvenile sex offenders. *Id.* at 1378-82. For example, one of the rationales, the idea that laws are presumed to be constitutional because legislatures are democratically accountable, is inapplicable because juvenile offenders have no say in a law's passage. *Id.* at 1379. Thus, laws that burden juvenile sex offenders are not constitutional per se and require heightened scrutiny. *See id.* at 1388.

118. *Id.* at 1389. Under "rational basis plus" scrutiny, "the existence of animus toward a particular community overrides any rational basis that might exist for the legislation and renders the law constitutionally invalid." *Id.* at 1388-89.

classification, this Note considers the suspect class factors[119] as they relate to the juveniles' status as offenders being tried in adult court, as well as the inevitability of their status as ex-offenders upon release. As discussed below, the class's immutable "trait"[120] of being labeled an ex-offender is especially significant in the face of arguments that age itself is not an immutable trait because all juveniles do eventually turn eighteen.[121]

Having defined the exact constituents of the class at issue (henceforth referred to simply as "juvenile offenders"), as well as the factors that will be examined, this Note argues that this class of juvenile offenders must be a protected, suspect class. To substantiate this claim, this Section explains how juvenile offenders (i) have encountered prejudice or historical discrimination,(ii) are politically powerless, and (iii) have defining immutable traits.[122]

1. Juvenile Offenders Have Faced Historical Discrimination

"[I]n order to be deemed suspect, the members of the class must experience a history of discrimination."[123] There is no question juvenile offenders have faced a history of discrimination. There has always been a stigma surrounding juveniles appearing in court.[124] Such stigma initiated the development of juvenile courts catered to the needs of children, where more measures were put in place to protect juveniles' privacy.[125] Thus, even before sentencing, juvenile offenders already face prejudice without serving a single minute of their sentences. Such discrimination continues even after juveniles exit the juvenile justice system.

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119. *See supra* note 90 and accompanying text.

120. McKay, *supra* note 79, at 505 (using the word "trait" to describe a quality that all members of the suspect class possess).

121. *See infra* notes 175-77 and accompanying text. To clarify, the other immutable "trait" juvenile offenders possess is their inability to vote because of age.

122. *See* Vázquez, *supra* note 85, at 80; *see also* Geiger, *supra* note 88, at 1206.

123. McKay, *supra* note 79, at 505.

124. *See* Anne Rankin Mahoney, *The Effect of Labeling upon Youths in the Juvenile Justice System: A Review of the Evidence*, 8 LAW & SOC'Y REV. 583, 583 (1974) ("Treatment-oriented reformers ha[ve] been concerned for many years about the potentially harmful effects upon individuals of arrest, court appearance, and incarceration.").

125. *Id.* (describing the "efforts in the juvenile court to minimize stigmatization by having informal procedures, hearings closed to the public and press, and limited access to court records").

Ex-juvenile offenders experience multiple short- and long-term consequences as a result of their contact with courts.[126] Such youths are more likely to be picked up by police officers for questioning if an incident occurs within their neighborhoods.[127] They are also more likely to be dealt with harshly by judges if they make a reappearance in court.[128] Even in school, juveniles labeled as delinquents are perceived less favorably by their classmates and teachers.[129] It is no wonder that studies have shown a negative association between being identified as a juvenile delinquent and school performance.[130] Eventually, when these youths grow older, most experience the same barriers that adult ex-offenders face.[131] Thus, juvenile offenders face a never-ending cycle of discrimination from the moment they walk through the courthouse doors.

Furthermore, discriminatory legal classifications that subordinate a specific group of individuals increase the likelihood that the group is a suspect class.[132] When juvenile offenders are released, they inevitably take on a new identity as ex-offenders. Historically, ex-offenders, as a class, have had many rights stripped away upon their release from incarceration.[133] For example, ex-offenders have had their marriages automatically dissolved and many employment opportunities and other licenses automatically denied.[134] However, the most enduring form of discrimination ex-offenders experience has been their historical disenfranchisement by the states.[135]

When the Fourteenth Amendment was passed, more than three-quarters of the states had provisions in their state constitutions that explicitly prevented, or authorized the legislature to prohibit,

126. *See id.* at 597.
127. *Id.* at 598.
128. *Id.*
129. *Id.* at 600.
130. *See id.*
131. *See id.* at 598 (stating that ex-offenders face difficulties in obtaining licenses, jobs, and even enlistment into the armed forces).
132. *See* Vázquez, *supra* note 85, at 94.
133. *See supra* notes 95-97 and accompanying text.
134. *See* Geiger, *supra* note 88, at 1225.
135. *See id.*

people convicted of felonies from voting.[136] The practice of felon disenfranchisement has pervaded modern society as well. As of 2021, in twenty-one states felons lose their right to vote when they are incarcerated.[137] In sixteen states, felons are also disenfranchised for a period of time after release.[138] Furthermore, in eleven states, felons lose their voting rights indefinitely after the commission of specific types of crimes.[139] The large number of laws that subject ex-offenders to draconian penalties such as the loss of voting rights is a strong reason why ex-offenders, regardless of age, must be considered a suspect class.[140] When the unique history of prejudice that juvenile offenders face in their schools and communities is considered as well,[141] it is clear that juvenile offenders have faced historical discrimination that warrants suspect classification.

2. Juvenile Offenders Experience Political Powerlessness

To be awarded suspect classification, a group has to be "relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."[142] Whether a group rises to the threshold of political powerlessness depends on its status as a "discrete and insular minorit[y]."[143] A strong case can be made that juvenile offenders, as a class, qualify as a discrete and insular minority.

136. *Id.* For example, when the California state constitution was adopted in 1879, there was a provision authorizing the enactment of laws that excluded persons convicted of specific crimes from voting. Richardson v. Ramirez, 418 U.S. 24, 27 (1974).

137. *Felon Voting Rights*, NAT'L CONF. OF STATE LEGISLATURES (June 28, 2021), https://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx [https://perma.cc/NPV7-M9VC].

138. *Id.*

139. *Id.*

140. *See supra* notes 94-97 and accompanying text.

141. *See* Mahoney, *supra* note 124, at 600.

142. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973); *see also* McKay, *supra* note 79, at 505 (stating that "isolat[ion] from the political process" is a factor used in determining whether a group deserves suspect classification).

143. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938); *see also* Geiger, *supra* note 88, at 1225; McKay, *supra* note 79, at 505.

A class is discrete when its members are easily identifiable to others due to a distinguishable trait.[144] Children are easily recognized through common-sense observation. Juvenile offenders, by virtue of being in the justice system, are also easily identifiable. However, it may be argued that it is almost impossible to tell from appearances alone whether a child is an ex-juvenile offender.[145]

Courts' historical concern for and treatment of juvenile offenders, however, rebukes this "invisibility" argument. Even in the 1970s, when technology was less advanced, there were concerns that records of juvenile offenders were too easily accessible to employers and interested parties, making ex-juvenile offenders easily identifiable.[146] Youths who were involved in the justice system also reported feeling like their neighbors suspected them of committing every subsequent offense in the area.[147] Accordingly, courts went to great lengths to maintain the privacy of juveniles within the justice system.[148] Such efforts suggest a strong desire by the public to seek out juvenile offenders, further establishing the group's discreteness.

The class's insularity, on the other hand, is a trickier element to prove. Whether a group is insular depends on the "tendency of group members to interact with great frequency in a variety of social contexts."[149] It is very unlikely that juveniles sentenced as adults interact extensively with each other while in the court system, or even after they are released from prison. Therefore, it is unclear whether juvenile offenders qualify as an insular minority. It has been argued, however, that insular groups actually possess more political clout than diffuse groups because their constant interaction allows them to organize easily.[150] Therefore, some political scientists suggest that it is instead diffuse groups that should be awarded heightened protection.[151] As such, there is still disagreement as to what exactly makes a group "discrete and insular."[152]

144. *See* Geiger, *supra* note 88, at 1226.

145. *See id.* ("[T]here is no way to tell a formerly incarcerated person from a person without a criminal history simply on the basis of appearance.").

146. Mahoney, *supra* note 124, at 597.

147. *Id.* at 604.

148. *See id.* at 597 (stating that juvenile courtrooms are typically closed to visitors).

149. Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713, 726 (1985).

150. *See id.* at 723-24; Geiger, *supra* note 88, at 1229.

151. *See* Ackerman, *supra* note 149, at 724.

152. Strauss, *supra* note 76, at 149 (emphasis omitted).

Scholars have also suggested that a minority group is "discrete and insular" if the group is "blocked from accessing the political process" and its interests are unrepresented, thereby subjecting the group to "unjustifiably heavy burdens" forced upon it by an "unthinking majorit[y]."[153] Juvenile offenders under the age of eighteen are not able to vote and are thereby removed from the political process entirely.[154] On the surface, it seems like juvenile offenders are the prototypical "discrete and insular" class because their age precludes them from taking political action to change sentencing laws that unjustifiably burden them, or from voting out legislators who appoint unfair judges. However, it has often been suggested that children do not qualify as a discrete and insular minority because their parents can vote for their interests on their behalf.[155] While this might be true for the average child, this belief might not apply in the same way in regards to juvenile offenders.

There are several reasons why parents do not serve as proxies for juvenile offenders in the political process. First, in arguing that transgender youth should be a protected class, Heather McKay explained that parents are generally ill-suited to represent the interests of transgender children because of the biases toward transgender youth and the general lack of acceptance by family members.[156] Similarly, it is unclear whether the parents of juvenile offenders actually represent their children's interests in the political sphere, especially if they are not ex-offenders themselves. Moreover, studies have shown that 56 percent of juveniles taken into custody come from single-parent households, while 26 percent were not living with any parent.[157] This suggests that the bulk of juvenile offenders have already lost representation from either one or both of their alleged proxies in the political process.

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153. Richard C. Worf, *The Case for Rational Basis Review of General Suspicionless Searches and Seizures*, 23 TOURO L. REV. 93, 152 (2007).

154. *See* U.S. CONST. amend. XXVI, § 1.

155. *See, e.g.*, Worf, *supra* note 153, at 153; McKay, *supra* note 79, at 515.

156. McKay, *supra* note 79, at 515.

157. NAT'L CONF. OF STATE LEGISLATURES, JUVENILE JUSTICE GUIDEBOOK FOR LEGISLATORS 1, 2 (2011), https://www.ncsl.org/research/civil-and-criminal-justice/juvenile-justice-guidebook-for-legislators.aspx [https://perma.cc/L4DE-YHLZ].

Upon release, many ex-juvenile offenders also become homeless or return to unstable housing situations,[158] further adding to the loss of adult representation. Studies also show that "a large percentage of violent juveniles have themselves been victims of serious abuse or neglect" from their family members.[159] Therefore, it is unlikely that many juvenile offenders have voting-age surrogates that adequately represent their interests in the political system.

Accordingly, these young people are essentially powerless to advocate against unduly burdensome sentencing laws or the appointment of unreasonable judges. Given Virginia's long history of felon disenfranchisement, it is very likely that ex-juvenile offenders will remain politically powerless after they are released, even if they are over the age of eighteen.[160] Hence, there are compelling reasons to conclude that juvenile offenders in Virginia are a politically powerless, discrete, and insular minority.

It is important to recognize the counterargument that the Equal Protection Clause specifically contemplates and authorizes voting restrictions against convicted criminals.[161] In other words, the Constitution allows states to render ex-offenders a politically powerless group.[162] However, as Ben Geiger contends, just because the Framers approved of a group's political disempowerment does not mean that ex-offenders should not be given judicial protection against laws that are prejudicial against them.[163] Moreover, Footnote Four was written to protect suspect classes that have been historically discriminated against, have an immutable trait, *and* are politically powerless.[164] Just because the Constitution appears to accept political powerlessness in this case does not mean that ex-offenders are any less deserving of suspect classification, especially given the well-documented prejudice against them.[165]

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158. *Id.* at 4 (stating that nearly half of homeless juveniles between the ages of ten and seventeen were previously in a correctional facility).

159. Byron R. White, Remarks, *Presentation of the Fordham-Stein Prize to Judge Gerald Bard Tjoflat: October 31, 1996*, 65 FORDHAM L. REV. 2405, 2412 (1997).

160. *See infra* notes 181-82 and accompanying text.

161. *See* Richardson v. Ramirez, 418 U.S. 24, 55 (1974); *see also* Geiger, *supra* note 88, at 1231.

162. *See* Geiger, *supra* note 88, at 1232.

163. *Id.* at 1233-34.

164. *See id.* at 1234.

165. *Id.*

Furthermore, it is also argued that the Fourteenth Amendment is "generally forward looking, meaning that its interpretation reflects modern social values."[166] As more states restore felons' right to vote,[167] perhaps felon disenfranchisement, though constitutionally permissible, should be viewed as a form of legally sanctioned discrimination, thereby awarding heightened protections to ex-offenders.[168]

3. Juvenile Offenders Share Immutable Traits

The final factor in deciding whether a group merits suspect classification is the existence of an immutable, common trait among the group.[169] An immutable characteristic is one "determined solely by the accident of birth."[170] Simply put, such a trait is unchangeable on command, thereby requiring judicial protection if discrimination occurs on account of that trait.[171]

In this case, the immutable traits that all juvenile offenders in Virginia share are their youth, their status as offenders, and their inability to vote as a result (even after turning eighteen). No child chooses to be born in a certain year, and certainly no one is able to choose their age at any given point. Juvenile offenders who decide that sentencing laws unfairly burden them cannot miraculously decide to be of voting age the next day. In the analogous case of undocumented children, the Supreme Court has deemed their undocumented status to be an immutable trait because it is "a legal characteristic over which children can have little control."[172] Similarly, juveniles' young age and the consequent inability to vote may certainly be considered an uncontrollable "legal characteristic"[173]

166. Vázquez, *supra* note 85, at 90.

167. *Felon Voting Rights*, *supra* note 137 ("In 21 states, felons lose their voting rights only while incarcerated, and receive automatic restoration upon release.").

168. *See* Geiger, *supra* note 88, at 1234.

169. McKay, *supra* note 79, at 506.

170. Frontiero v. Richardson, 411 U.S. 677, 686 (1973).

171. McKay, *supra* note 79, at 506, 520 (explaining that the transgender trait is immutable because it is "a core aspect of one's self-definition").

172. *See* Plyler v. Doe, 457 U.S. 202, 220 (1982).

173. *See id.*

because the voting age of eighteen is nothing more than an arbitrary legal creation set forth in the Constitution.[174]

Scholars, however, have challenged whether youthfulness is an "immutable" trait.[175] Specifically, critics have asked if children can really be considered an immutable class because their age will inevitably change over time.[176] In fact, the Supreme Court has held that old age "marks a stage that each of us will reach if we live out our normal span," thereby suggesting that age-based traits should not be used to classify a group as suspect.[177]

However, this debate does not exactly pertain to juvenile offenders as it does to regular youths. First, to address the Court's holding that old age is not a trait to be considered for suspect classification, short of the ability to purchase alcohol,[178] there are no meaningful burdens enacted by law, *purely on the basis of age*, after the age of eighteen. In other words, it matters more that someone is under the age of eighteen than it does if someone is elderly because the underaged cannot participate in the political process to change laws that nonetheless affect them heavily. Second, even if all juvenile offenders eventually turn eighteen, the difficulties associated with expungement mean that many juvenile offenders live with the "ex-offender" label for life.[179] The ex-offender label is yet another defining, immutable trait that juvenile offenders possess.

As ex-offenders, these individuals are still unable to vote in many states, even if they are over the age of eighteen when they are released.[180] Specifically, the Constitution of Virginia states that "[n]o person who has been convicted of a felony shall be qualified to vote unless his [or her] civil rights have been restored by the Governor or other appropriate authority."[181] The typical process for restoration is by application to the governor or by petition to the courts, both of which can be challenging.[182]

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174. *See* U.S. CONST. amend. XXVI, § 1.

175. *See* Strauss, *supra* note 76, at 163.

176. *Id.*

177. *See* Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313-14 (1976) (per curiam).

178. *See* 23 U.S.C. § 158(a).

179. *See* Geiger, *supra* note 88, at 1219, 1224.

180. *See Felon Voting Rights*, *supra* note 137.

181. VA. CONST. art. II, § 1.

182. *See Felon Voting Rights*, *supra* note 137. For example, in 2016, the Virginia Supreme Court further specified that restoration cannot happen en masse, but rather only on an

While it may be argued that some ex-offenders in Virginia do eventually get their voting rights restored, the wait is often long and arduous.[183] Most juvenile offenders wait years before their voting rights are restored.[184] Hence, even after turning eighteen, ex-offenders' status (which results in an inability to vote) might continue to be an uncontrollable legal characteristic that unduly burdens juvenile offenders.

Such a conclusion closely mirrors arguments made to treat undocumented children as a suspect class.[185] These arguments state that the legal status of undocumented children "prevents them from ... voting for a representative that will consider their interests,"[186] even when they reach the required age. Similarly, even if one questions the immutability of youth, there is good reason to believe that juvenile offenders in Virginia will still be unable to vote due to their immutable status as felons.

Since juvenile offenders fulfill all three factors[187] that warrant suspicion, they should be awarded suspect classification. Consequently, judges in Virginia must apply the principles of strict scrutiny when sentencing a juvenile in adult court.

IV. APPLYING STRICT SCRUTINY DURING JUVENILE SENTENCING

Under the proposed framework, for judges in Virginia to stay true to the principles of strict scrutiny, sentences must be narrowly tailored to serve a compelling governmental interest.[188]

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individual basis. *Id.*

183. *See* Holly Prestidge, *'Never Too Late:' Virginia Woman Votes for the First Time*, WASH. TIMES (Nov. 8, 2020), https://www.washingtontimes.com/news/2020/nov/8/never-too-late-virginia-woman-votes-for-the-first-/ [https://perma.cc/2SEF-8URR] (telling the story of a Virginian who waited "decades" to restore her voting rights).

184. *See id.* In 2016, Republican legislators in Virginia successfully challenged the Democrat governor's blanket restoration of voting rights, indicating that progress towards felon reenfranchisement remains an uphill battle in the politically divided Commonwealth. *See* Howell v. McAuliffe, 788 S.E.2d 706, 723-25 (Va. 2016) (finding Governor McAuliffe's blanket restoration of voting rights to be unconstitutional); *see also* Gary Robertson, *Virginia High Court Hears Republican Voting-Rights Lawsuit*, REUTERS (July 19, 2016, 6:08 AM), https://www.reuters.com/article/us-virginia-felons-idUSKCN0ZZ0Z5 [https://perma.cc/48U7-8WEL].

185. *See supra* notes 105-09 and accompanying text.

186. Vázquez, *supra* note 85, at 99.

187. *See supra* notes 89-91 and accompanying text.

188. *See* Bedi, *supra* note 10, at 303.

A survey of current scholarship reveals some arguments for subjecting criminal sentences to strict scrutiny. For example, Salil Dudani argues that criminal sentences should be subject to strict scrutiny because criminal confinement infringes upon the fundamental right to be free from physical restraint.[189] Therefore, any criminal sentence that is "not necessary to serve a compelling government interest violates" the Fourteenth Amendment's Due Process Clause.[190] Put differently, to pass constitutional muster, courts must decide whether the sentence is the least restrictive way to promote the government's interests in subjecting individuals to incarceration.[191] Similarly, this Note argues that judges in Virginia must apply the principles of strict scrutiny when sentencing a juvenile tried in adult court, but rests its argument on the Fourteenth Amendment's Equal Protection Clause instead.

A. Determining a Compelling Governmental Interest

For a sentence to pass strict scrutiny, there must first be a compelling governmental interest that is served by the sentence.[192] The Supreme Court has identified several justifications for prison sentences: (i) retribution, (ii) deterrence, (iii) rehabilitation, and (iv) incapacitation.[193]

First, retribution cannot be the state's compelling interest in putting juvenile offenders behind bars. The Court has held "that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes."[194] Because of youths' "immaturity, impetuosity, and failure to appreciate risks and consequences," blameworthiness for the harshest crimes, which is the main rationale for retribution, cannot apply in the same way to juveniles as it does to adults.[195]

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189. *See* Salil Dudani, *Unconstitutional Incarceration: Applying Strict Scrutiny to Criminal Sentences*, 129 YALE L.J. 2112, 2117-18 (2020).

190. *Id.* at 2118.

191. *Id.* at 2136.

192. *See* Bedi, *supra* note 10, at 303.

193. Ewing v. California, 538 U.S. 11, 25 (2003).

194. Miller v. Alabama, 567 U.S. 460, 472 (2012).

195. *Id.* at 472, 477.

Likewise, the goal of deterrence, which is contingent upon actors rationally considering the punishments from potential offenses before following through, does not apply to juveniles because they are "less likely to consider potential punishment" due to their "immaturity, recklessness, and impetuosity."[196] The same logic applies to general deterrence as well. It is highly plausible that even if juveniles are aware of others receiving harsh sentences, "they are less likely to take a possible punishment into consideration."[197] Accordingly, deterrence is unlikely to be a compelling interest for incarcerating youths.

Rehabilitation is also unlikely to be the compelling governmental interest in sentencing juveniles in adult court. Commentators have argued that the primary purpose of the juvenile justice system is rehabilitation.[198] Hence, if the government's interest in creating the juvenile justice system is to promote rehabilitation, it may be implied that transferring a juvenile offender to adult court means that rehabilitation is no longer the primary goal of the sentence.

Finally, with regards to incapacitation, the Court has held that incapacitation cannot be the governmental interest supporting a juvenile LWOP sentence because a juvenile cannot possibly be a danger to society forever, unless the youth is "incorrigible" and incapable of change.[199] Thus, "criminal procedure laws that fail to take ... youthfulness into account" are inherently flawed.[200] However, having eliminated retribution, deterrence, and rehabilitation for stronger reasons, this Note argues that, to apply the principles of strict scrutiny when sentencing juveniles in Virginia adult courts, LWOP sentences aside, the only acceptable compelling governmental interest is incapacitation. Such a position is further supported by Supreme Court precedent reaffirming the compelling state

196. *See id.* at 472.

197. *See* Graham v. Florida, 560 U.S. 48, 72 (2010).

198. *See, e.g.*, Andrea Huerta, Comment, *Juvenile Offenders: Victims of Circumstance with a Potential for Rehabilitation*, 12 FIU L. REV. 187, 216 (2016) ("States should begin by refocusing the juvenile justice system to reflect its originally intended purpose ... focuse[d] on individualized rehabilitation.").

199. *See Miller*, 567 U.S. at 472-73 (quoting *Graham*, 560 U.S. at 72-73).

200. *Id.* at 473-74 (quoting *Graham*, 560 U.S. at 76).

interest in protecting society from the dangers of crime—the goal of incapacitation[201]—regardless of the age of the perpetrator.[202]

Having identified that the government's compelling interest in sentencing juvenile offenders in adult court is incapacitation, this Part proceeds to analyze how Virginia judges may impose sentences that are narrowly tailored to serve the interest of incapacitation.

B. Determining a Narrowly Tailored Sentence

A sentence is narrowly tailored if it is both necessary and its duration is no longer than required to realize the government's compelling interest.[203] In other words, "where alternatives to confinement would suffice to meet the government's interests, confinement is unconstitutional."[204] Practically speaking, a sentence is narrowly tailored to promote the incapacitation of juvenile offenders when it is "*necessary*, based on all the evidence, to prevent the individual from causing serious harm during or after the sentence."[205] There are various alternatives to incarceration that promote incapacitation, such as GPS monitoring, home detention, and community supervision.[206] Under the right circumstances, Virginia judges must consider these alternatives. As mentioned, however, juveniles being tried in adult court typically come from violent environments themselves,[207] and the suggested alternatives might not be effective in most cases.

Therefore, when deciding upon the necessity and length of sentences, empirical evidence must predominantly inform the ruling.[208] The Court held in *Miller* that a juvenile's immaturity and impetuosity, home and family environment, and extent of participation in the actual offense, as well as the role of peer pressure, are all factors to consider before sentencing a juvenile offender.[209] Therefore, for a

201. *See* Ewing v. California, 538 U.S. 11, 25 (2003).
202. Schall v. Martin, 467 U.S. 253, 264-65 (1984).
203. Dudani, *supra* note 189, at 2119.
204. *Id.*
205. *Id.* at 2145.
206. *See id.*
207. *See* White, *supra* note 159, at 2412.
208. *See* Dudani, *supra* note 189, at 2145.
209. Miller v. Alabama, 567 U.S. 460, 477 (2012).

sentence to be narrowly tailored, judges must take all of these additional factors into account and evaluate how they promote the interest of incapacitation.

Perhaps, in cases where juveniles were not a significant part of the offense but were peer pressured into being at the scene, the prison sentence should only incapacitate the juvenile long enough to prevent them from immediately reconnecting with those peers and getting into the same trouble. In cases where juveniles acted alone, the juvenile's age and immaturity, as well as empirical evidence of when individuals typically "'age out' of crime," should be jointly considered to determine the appropriate length of incapacitation.[210]

For the most extreme displays of juveniles failing to comprehend the risks associated with their offenses, perhaps a professionally administered psychological examination should be conducted to determine whether the youth is facing a developmental issue that will be eradicated in time. If so, the sentence should only be for the length of time appropriate to prevent the juvenile from causing more harm to others due to his or her lack of judgment. Limiting the length of time that juveniles remain in the adult criminal system benefits society as well, since a juvenile offender who is tried in adult court is 34 percent more likely to be rearrested for a felony than a juvenile who is not transferred from the juvenile justice system.[211]

While HB 744 already requires judges to make similar considerations before sentencing a juvenile as an adult,[212] applying the principles of strict scrutiny provides additional guidance by tying such considerations to the goal of incapacitation. This means that Virginia judges have to use a juvenile's individual circumstances to craft the most necessary form of punishment that promotes the interest of incapacitation. Such guidance provides much clarity to HB 744's otherwise ambiguous mandate to consider mitigating factors, and it dissuades judges from burying their prejudices under

210. Dudani, *supra* note 189, at 2146 (stating that after their mid-twenties, very few juvenile offenders still engage in criminal activity).

211. Huerta, *supra* note 198, at 219.

212. *See* VA. CODE ANN. § 16.1-272(D) (2020).

a merely performative "consideration" of the juvenile's unique situation.

While the proposed standard significantly protects juveniles tried as adults, some may object to its impact on judicial expediency. Indeed, though it may take longer for judges to decide on sentences, the additional time is worthwhile, particularly given heightened scrutiny is likely to reduce juvenile incarceration rates.[213] No amount of waiting should be more important than securing a child's freedom. Others may also argue that the proposed standard will negatively impact taxpayers due to increases in judicial spending. However, if the standard successfully lowers juvenile incarceration, the government may actually save on costly prison sentences.[214] Therefore, while these objections are valid, the positives generated by the proposed standard significantly outweigh the negatives.

C. Appellate Review of Sentences Under HB 744

This Note maintains that if a juvenile offender believes that his or her sentence does not conform with the principles of strict scrutiny, he or she may appeal their sentence to higher courts in Virginia. Under this framework, appellate judges must use strict scrutiny to review all sentences because juvenile offenders make up a suspect class. This is in line with the spirit of *Carolene Products*' Footnote Four, which calls for courts to protect discrete and insular minorities who are unable to protect themselves through the political process.[215]

While this Note provides trial judges with guidance over the judicial principles that must be applied during juvenile sentencing, in reality, the true protection of juvenile offenders will come from appellate judges and their duty to strike down sentences that are not narrowly tailored to serve a compelling governmental interest. This is especially important because juvenile offenders cannot vote out the legislators responsible for passing laws like HB 744, nor can they vote out legislators who approve the appointments of unfair trial judges.

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213. *See* Dudani, *supra* note 189, at 2175.

214. *Id.*; *see also supra* note 21 and accompanying text.

215. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

Practically speaking, what this means for judges in Virginia is that after a juvenile tried in adult court is sentenced under HB 744, he or she may appeal the sentence as an unconstitutional violation of the right to equal protection under the Fourteenth Amendment. At the appellate level, the appropriate standard of review to be applied by judges is strict scrutiny. If judges apply the principles of strict scrutiny as suggested in this Note, they would retain their discretionary powers awarded under HB 744, while preserving the protections offered to juvenile offenders under *Carolene Products*' Footnote Four.

CONCLUSION

This Note began by painting a grim picture of the nation's "tough on crime" era. However, after the *Miller* trilogy, meaningful reform started to occur across the country.[216] In particular, the Commonwealth of Virginia led the nation by becoming the first state to allow judges to veer away from the mandatory minimum sentence for juveniles tried in adult court.[217] Nonetheless, this Note maintains that Virginia's new law does not go far enough to protect juvenile offenders. Instead, juvenile offenders in adult court must be awarded heightened scrutiny because they are a suspect class under *Carolene Products* Footnote Four.

Accordingly, judges in Virginia, as a matter of judicial policy, have to apply the principles of strict scrutiny when sentencing juveniles in accordance with HB 744. In doing so, judges have to ask if their sentences are narrowly tailored to further a compelling governmental interest. If such principles are not applied, it is very likely that the sentence will be struck down on appeal. Therefore, the judicial principles submitted by this Note serve as the first layer

216. *See supra* notes 59-61 and accompanying text.
217. *See* Watts, *supra* note 8.

of protection over the rights of juvenile offenders, while preserving the balance between judicial discretion and the fundamental principles embodied in Footnote Four. In the future, if other states pass legislation similar to HB 744, they should provide specific language that requires judges in their states to apply the principles of strict scrutiny when deciding upon adult sentences for juveniles.

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