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**NO CHILD LEFT BEHIND BARS:  
THE NEED TO COMBAT CRUEL AND  
UNUSUAL PUNISHMENT OF STATE  
STATUTORY RAPE LAWS**

*Meredith Cohen\**

INTRODUCTION

Before he was convicted and incarcerated, Genarlow Wilson was a model teenager.<sup>1</sup> He had no criminal record and a 3.2 GPA.<sup>2</sup> He was also a star football player and homecoming king.<sup>3</sup> College football coaches courted him regularly and offered full tuition scholarships.<sup>4</sup> Genarlow Wilson was released from prison on October 26, 2007, after spending more than two years behind bars.<sup>5</sup> How did this seemingly ideal teenager end up in prison

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<sup>1</sup> Patrick Gilbert, *Waiting For Justice*, THE BATTALION VIA U-WIRE, July 10, 2007.

<sup>2</sup> Leonard Pitts Jr., *Georgia's Twisted Sense of Justice*, VIRGINIAN PILOT & LEDGER-STAR, Apr. 4, 2007, at B9.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Brenda Goodman, *Man Convicted as Teenager in Sex Case is Ordered Freed By Georgia Court*, N.Y. TIMES, Oct. 27, 2007, at A9. The Supreme Court of Georgia held:

the [Superior Court of Monroe County] properly ruled that Wilson's sentence of ten years in prison for having consensual oral sex with a fifteen-year-old girl when he was only seventeen years old constitutes cruel and unusual punishment, but erred in convicting and sentencing Wilson for a misdemeanor crime that did not exist when the conduct in

instead of sitting at home and debating over which college to attend? In December of 2003,<sup>6</sup> Wilson and some of his teenage friends rented rooms at a motel and had a New Year's Eve Party.<sup>7</sup> During the party, a fifteen-year-old girl performed oral sex on Wilson, who was then seventeen years old.<sup>8</sup> Wilson insisted that the girl not only willingly performed the act, but in fact, initiated the activity.<sup>9</sup> Nonetheless, Wilson was charged with aggravated child molestation.<sup>10</sup> He was offered a plea bargain, but "[h]e could not see himself admitting to something he did not do, becoming a registered sex offender, having that follow him for the rest of his life, and being forbidden even to live in the same house with his younger sister."<sup>11</sup> Consequently, Wilson was convicted of aggravated child molestation and received a mandatory sentence of ten years imprisonment without possibility of parole.<sup>12</sup>

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question occurred.

*Humphrey v. Wilson*, 282 Ga. 520 (Ga. 2007). The case was remanded to the habeas court for it to reverse Wilson's conviction and discharge him from custody. *Id.*

<sup>6</sup> Gilbert, *supra* note 1.

<sup>7</sup> *Wilson v. The State*, 279 Ga. App. 459 (Ga. Ct. App. 2006).

<sup>8</sup> *Id.*

<sup>9</sup> Pitts, *supra* note 2. Wilson characterized the sexual activity between himself and the girl as "consensual" or "voluntary." *Wilson*, 279 Ga. App. at 461.

<sup>10</sup> *Wilson*, 279 Ga. App. at 459. At the time of conviction, the minimum sentence was ten years in prison with no possibility of probation or parole and the maximum sentence was thirty years in prison. *Humphrey*, 282 Ga. at 521.

<sup>11</sup> Pitts, *supra* note 2. GA. CODE ANN. §42-1-12 (2006) would require Wilson to register as a sex offender. *Humphrey*, 282 Ga. at 521. GA. CODE ANN. §42-1-15 (2006) would prevent Wilson from living in the same house as his sister because it prohibits convicted sex offenders from living within "1,000 feet of any child care facility, church, or area where minors congregate." *Id.*

<sup>12</sup> *Wilson*, 279 Ga. App. at 459. GA. CODE ANN § 16-6-4(a) (2006) provides, "[a] person commits the offense of child molestation when he or she does any immoral or indecent act to or in the presence of or with any child under the age of 16 years with the intent to arouse or satisfy the sexual desires of either the child or the person." *Id.* at 460. GA. CODE ANN § 16-6-4(c) (2006), the statute under which Wilson was convicted, provides that "[a] person commits the offense of aggravated child molestation when such person commits an offense of child molestation which act physically injures the child or involves an act of

According to his sentence, before his release from prison Wilson would have to provide prison officials with information, including his residence and his photograph.<sup>13</sup> That information, along with the nature of his offense, would be forwarded to the sheriff's office<sup>14</sup> who would post the content around the county in which he lived and on the Internet.<sup>15</sup> Further, under Georgia's residency restriction laws, when Wilson was released, he would not be able to live or work within 1,000 feet of any child care facility, church, or other area where minors congregate.<sup>16</sup>

The year after Wilson was sentenced, the Georgia state legislature enacted a law that made consensual oral sex between adolescents only a misdemeanor punishable by a one year sentence with no sex offender registration requirements.<sup>17</sup> Thus, if the two had instead engaged in sexual intercourse, Wilson's crime would have been a misdemeanor with only a one-year sentence.<sup>18</sup> However, because the legislature decided not to make the law retroactive,<sup>19</sup> it left Wilson in prison for over two years until the

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sodomy." *Id.* And under GA. CODE ANN. § 17-10-6.1 (2006), aggravated child molestation is a "serious violent felony" carrying a mandatory minimum sentence of ten years without possibility of parole. *Id.*

<sup>13</sup> *Humphrey*, 282 Ga. at 521.

<sup>14</sup> *Id.* (noting that upon release, Wilson would have had to provide his new address, his fingerprints, his social security number, his date of birth, and his photograph).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*; see also Brenda Goodman, *Georgia Justices Overturn Curb on Sex Offenders*, N.Y. TIMES, Nov. 22, 2007, at A26 (noting that although the amendment dealing with residency has been overturned by the Georgia Supreme Court, the provisions regarding employment and loitering are still in effect).

<sup>17</sup> Gilbert, *supra* note 1; see also *Humphrey*, 282 Ga. at 522.

<sup>18</sup> Sanford Brickner, *Know Your Rights: Punishment For Sexual Activity May Sometimes Be Excessive*, SANTA FE NEW MEXICAN, Aug. 10, 2007, at D2.

<sup>19</sup> The legislature expressed the intent that "[t]he provisions of this Act shall not affect or abate the status as a crime of any such act or omission which occurred prior to the effective date of the Act repealing, repealing and reenacting, or amending such law, nor shall the prosecution of such crime be abated as a result of such repeal, repeal and reenactment, or amendment." H.B. 1059, 148th Gen. Assem., Reg. Sess. (Ga. 2006). The reasoning behind the law is that

recidivist sexual offenders, sexual offenders who use physical violence, and sexual offenders who prey on children are sexual predators who

Georgia Supreme Court ended his sentence.<sup>20</sup>

Wilson is not the only teen who has suffered legal repercussions for his sexual activity.<sup>21</sup> In 1996, Michael Peterson became a convicted sex offender in New Hampshire at age nineteen. Peterson was arrested and convicted for having sex at a party with a fifteen-year-old.<sup>22</sup> Although he received a suspended sentence, he has had to register as a sex offender for the past eleven years.<sup>23</sup> As a result of the state law governing sex offenders, Peterson, who is now married with children, cannot coach his three children's teams or chaperone their school trips.<sup>24</sup> Further, as a carpenter, Peterson is not allowed to work at sites near children because of residency restrictions.<sup>25</sup> Laurie Peterson, Michael's wife, acknowledges that her husband's behavior at the time was not admirable, but nevertheless urged the New Hampshire Legislature to pass a bill that would prosecute fewer teenagers for consensual sex.<sup>26</sup> The bill would also permit some people who were younger than twenty-one at the time they were arrested for consensual teenage sex acts to petition a judge to be removed from the state's sex offender

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present an extreme threat to the public safety. Many sexual offenders are extremely likely to use physical violence and to repeat their offenses; and some sexual offenders commit many offenses, have many more victims than are ever reported, and are prosecuted for only a fraction of their crimes . . . [and] this makes the cost of sexual offender victimization to society at large, while incalculable, clearly exorbitant.

*Id.*

<sup>20</sup> Goodman, *supra* note 5. The Court noted that the "severe felony punishment and sex offender registration imposed on Wilson make no measurable contribution to acceptable goals of punishment." *Id.* The decision by the Court was not unanimous. The dissenters argued that the decision represented a disregard for the legislature's authority and claimed that "it would open the door for other felony offenders convicted of aggravated child molestation to be 'discharged from lawful custody.'" *Id.*

<sup>21</sup> Wendy Koch, *Defining A Sex Predator, For Life*, USA TODAY, July 25, 2007, at 3A.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

registry.<sup>27</sup> Although the bill passed the House, it did not receive enough votes in the Senate to become law.<sup>28</sup>

There are many individuals throughout the country with stories similar to those of Wilson and Peterson.<sup>29</sup> In Connecticut, Jeff Davis, now twenty-two, was charged with a sex crime when he was eighteen years old for engaging in sexual acts with his serious girlfriend.<sup>30</sup> Davis was a junior in high school when he met the fifteen-year-old girl in study hall at school.<sup>31</sup> They started out as friends, then began to date, and fell in love.<sup>32</sup> Davis says that they often talked about their plans for the future—how they planned to get married, buy a house, and create a life together.<sup>33</sup> However, when the girl started paying less attention to her schoolwork, her father blamed Davis and Davis's relationship with his daughter, and he reported Davis to the Newington police.<sup>34</sup> Davis was arrested and convicted of second-degree sexual assault, even though his girlfriend told investigators that she and Davis were dating and

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<sup>27</sup> Lauren R. Dorgan, *Wife: 'He's Not a Predator'*, CONCORD MONITOR, May 24, 2007, available at <http://www.concordmonitor.com/apps/pbcs.dll/article?AID=/20070524/REPOSITORY/705240323>. Similar laws were enacted in Oregon in 2007. See 2007 Or. Laws Ch. 609 (“No sooner than two years, but no later than five years, after the termination of juvenile court jurisdiction over a person required to report . . . , the person may file a petition for relief from the duty to report.”).

<sup>28</sup> Koch, *supra* note 21. HB 504, which some have called the “Laurie Peterson” bill, passed a State House committee 18-0 in March, 2007. Dorgan, *supra* note 27. It cleared a State Senate committee in May, 2007 on a 4-1 vote. *Id.* On May 24, 2007, an amendment was rejected on the State Senate floor and the bill was laid on the table. H. 504, 2007 Gen. Court, 116th Sess. (N.H. 2007). State Senator Joe Foster, who chairs the Senate committee that approved the bill, said that he had new concerns about it and thinks it needs more work. Dorgan, *supra* note 27. Other Senators said that they have heard concerns from prosecutors and police that the bill does not comply with the Adam Walsh Act, a federal law regarding sex offender registration. *Id.*

<sup>29</sup> Hilda Munoz, *A Plan to Redefine Teen Sex Offenders*, HARTFORD COURANT, May 3, 2007, at A1.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

that she was a willing partner.<sup>35</sup> If the age gap between the two teenagers had been less than two years, Davis would not have been arrested under the state's second-degree sexual assault statute, known in Connecticut as the "Romeo and Juliet" law.<sup>36</sup> Although he never served time in prison because his sentence was suspended,<sup>37</sup> Davis is now serving ten years of probation.<sup>38</sup>

As a result of his conviction, Davis was forced to register as a sex offender,<sup>39</sup> which has made moving on with his life quite difficult.<sup>40</sup> For instance, he has experienced harassment<sup>41</sup> and has had problems finding work. Davis, who wants to become a firefighter, can only find work in warehouses or construction.<sup>42</sup> Yet even in those areas, his search is often futile and hopeless.<sup>43</sup> He

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<sup>35</sup> Munoz, *supra* note 29.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* Senior Assistant State's Attorney Louis Luba, who prosecuted Davis' case, said defense attorneys usually try bargaining for sentences that will keep their clients out of prison. *Id.* He also said that he tries to find a just resolution and considers a variety of factors including the age difference, whether there was an ongoing relationship that the victim's parents consented to, and whether the younger teen lied about his or her age. *Id.*

<sup>38</sup> *Id.* Probation conditions can restrict where a sex offender works and lives as well as the people with whom he or she socializes. Munoz, *supra* note 29. The conditions are often different for each offender, but many offenders are ordered to attend sex offender treatment and most must have their pictures on the state sex offender registry. *Id.* Davis is not the only teen convicted for having sex in Connecticut under the second-degree sexual assault statute. *Id.* Between 1999 and February 2007 in Connecticut, teenagers over the age of sixteen were convicted of 195 counts of the specific subsection that addresses teen sex. *Id.* The average sentence for each conviction was slightly less than two years spent behind bars, in addition to probation and required registration on Connecticut's sex offender registry. *Id.*

<sup>39</sup> Munoz, *supra* note 29. He moved in with his uncle in February of 2007, and almost immediately after he settled in, police officers arrived at the house requesting information for the sex offender registry. *Id.* They asked for pictures of him, his car, and his new home, and also knocked on his neighbors' doors to warn them that a sex offender lived in the neighborhood. *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* On one occasion, someone printed out dozens of copies of Davis' page from the sex offender registry and left them in front of his home. *Id.*

<sup>42</sup> Munoz, *supra* note 29.

<sup>43</sup> *Id.*

explains that even in his search for work in warehouses and construction, if he is able to get his foot in the door and secure an interview, employers almost always cut the interview short when they hear about his conviction as a sex offender.<sup>44</sup>

These are merely three stories among the myriad of cases in which teenagers who engaged in consensual sexual acts with other teenagers have been arrested, prosecuted, convicted, and punished. The stories of Wilson, Peterson, and Davis elucidate the need to reform state statutory rape laws. These men had their lives altered because they engaged in activity as teenagers in which more than half of teenagers across the country participate.<sup>45</sup> However, because the law criminalizes their actions, they went from being normal teenagers, with hopes of living fulfilling lives and pursuing their dreams, to being convicted sex offenders, with disappointment and despair clouding their existence. While statutory rape laws are absolutely imperative to protect minors from sexual predators and “those who would prey upon their vulnerability,”<sup>46</sup> it is problematic for those same laws to criminalize consensual teenage sex<sup>47</sup> because the harsh consequences that often result from convictions under these laws may lead to cruel and unusual punishment.<sup>48</sup>

Although some people believe that teenage sex is immoral, the public’s view on morality should not be a component in determining the scope of the laws.<sup>49</sup> As the Supreme Court held in *Lawrence v. Texas*, “[t]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is

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<sup>44</sup> *Id.*

<sup>45</sup> A 1995 study revealed that, by the age of sixteen, 50% of U.S. teenagers have had sexual intercourse. Michelle Oberman, *Regulating Consensual Sex With Minors: Defining A Role For Statutory Rape*, 48 *BUFF. L. REV.* 703, 703 (2000).

<sup>46</sup> *Id.* at 710; see also Munoz, *supra* note 29 (“Sex offender laws were designed to protect people from predators—pedophiles, rapists and the like.”).

<sup>47</sup> This term is used by the author to refer to sexual acts between teenagers who are at least 15 years old and with an age difference of four years or less between them.

<sup>48</sup> Brickner, *supra* note 18.

<sup>49</sup> *Lawrence v. Texas*, 539 U.S. 558, 577 (2003).



not a sufficient reason for upholding a law prohibiting the practice . . . .”<sup>50</sup> Opponents of criminalizing consensual teenage sex in statutory rape laws have averred that teenage sex seems to be “more of a health or social issue than a crime.”<sup>51</sup> Widespread reform of statutory rape laws is essential because of the injustices endured by then-teenagers such as Wilson, Peterson, and Davis.<sup>52</sup>

As many laws stand now, the punishment for consensual teenage sex is disproportionate to the crime, and in fact may result in cruel and unusual punishment in violation of the Eighth Amendment.<sup>53</sup> As such, statutory rape laws should be revised to address the problem of harsh consequences that result from convictions. Specifically, all states should implement age gap provisions in their laws.<sup>54</sup> If jurisdictions insist on criminalizing acts of consensual teenage sex, the laws should be changed to classify the activity as a misdemeanor.<sup>55</sup> In addition, the punishment for such a misdemeanor conviction should not include jail time or sex offender registration, as they constitute cruel and unusual punishment for engaging in consensual sexual activity.<sup>56</sup>

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<sup>50</sup> *Id.* at 577.

<sup>51</sup> Munoz, *supra* note 29.

<sup>52</sup> Maureen Downey, *Genarlow Wilson is Free . . . But Other Victim's of Georgia's Sweeping Sex Offender Laws Are Not*, ATLANTA J. & CONST., Oct. 28, 2007, at B6 (“But Wilson is not the only young offender caught in a maze of draconian sex laws . . . . Lawmakers must amend the sex offender registry law so that it distinguishes between two immature high school kids hooking up at a party to a pedophile molesting the toddler next door.”).

<sup>53</sup> *See* Brickner, *supra* note 18 (“And while torture, drawing and quartering, public dissecting, burning alive and disemboweling have since been ruled by courts to be prohibited, in the area of sexual conduct, punishments that most would consider cruel and unusual continue to be supported by state legislators.”).

<sup>54</sup> As of 2008, only 30 states have age-gap provisions that do not classify consensual teenage sex as criminal. *See* Age of Consent Chart for the US—2008, <http://www.ageofconsent.us/> (last visited Jan. 17, 2008).

<sup>55</sup> *See* Koch, *supra* note 21 (noting that seven states eased punishments for teenagers convicted of consensual sex in 2007).

<sup>56</sup> *See* Gilbert, *supra* note 1 (classifying Genarlow Wilson’s sentence of ten years in prison with required sex offender registration upon release as “harsh” and noting that “[t]he Georgia court system must not be familiar with the eighth amendment.”).

Finally, such laws should be applied retroactively because many of the old laws require registration on sex offender registries for life, and there may be other individuals who are serving sentences for crimes which are no longer felonies.<sup>57</sup>

This Note will address the flaws in current state statutory rape laws and the legislative remedies needed to prevent the unfairness and cruel and unusual punishment already endured by teenagers like Genarlow Wilson. Part I will provide a brief history of statutory rape laws and the rationales behind the laws. Part II will address the current status of consensual teenage sex and statutory rape laws. This part will consider whether consensual teenage sex is detrimental, the lack of uniform enforcement of sex offense laws, and the consequences of a conviction for acts of consensual teenage sex. Part III will discuss the Eighth Amendment and what constitutes cruel and unusual punishment. This part will argue that all acts of consensual teenage sex should not be legally sanctioned and that many state laws lead to cruel and unusual punishment under the Eighth Amendment. Finally, Part IV will discuss various reform ideas that would eradicate the problems caused by the current laws while preserving statutory rape laws for cases in which there is true sexual coercion or exploitation.

## I. HISTORY OF STATUTORY RAPE LAWS

Statutory rape laws originated in thirteenth century England, and were first codified in English law in 1275.<sup>58</sup> These early laws prohibited sexual relations between adult males and young females under the age of twelve.<sup>59</sup> In the late sixteenth century, lawmakers

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<sup>57</sup> See R. Robin McDonald, *Ga. Attorney General to Defend Sex Offender Law on Two Legal Fronts*, FULTON COUNTY DAILY REP., Aug. 7, 2007, available at <http://www.law.com/jsp/article.jsp?id=1186412330969> (arguing that it is unfair that registration laws apply retroactively when sex offense laws do not apply retroactively).

<sup>58</sup> Michelle Oberman, *Girls in the Master's House: Of Protection, Patriarchy and the Potential for Using the Master's Tools to Reconfigure Statutory Rape Law*, 50 DEPAUL L. REV. 799, 800 (2001).

<sup>59</sup> Daryl J. Olszewski, *Statutory Rape in Wisconsin: History, Rationale, and The Need For Reform*, 89 MARQ. L. REV. 693, 694 (2006). The "initial prohibitions . . . restrict[ed] only a male's sexual relations with young females,

in England lowered the age of consent to ten.<sup>60</sup> The laws were consistent with other laws in Europe and with other common law efforts to protect children from exploitation.<sup>61</sup>

The United States adopted England's statutory rape laws when it adopted the English common law,<sup>62</sup> and initially did not change the age of consent.<sup>63</sup> However, in the late nineteenth century, "campaigns were launched to increase the age of consent in an effort to further protect girls from male sexual aggression."<sup>64</sup> Accordingly, states increased the age of consent.<sup>65</sup> In a further attempt to protect young, naïve girls from predators, "[s]ome states provided increased penalties for adult men who had sex with pre-pubescent girls, and [provided] lesser penalties when the male

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and sought to 'protect a father's interest in his daughter's chastity.'" *Id.* at 694–95. The apparent reasoning behind the laws was that a non-virgin traditionally was not as desirable for marriage, and she was "therefore less likely to bring financial reward to her father upon marriage." Oberman, *supra* note 58, at 802. Thus, historically, statutory rape laws "aimed to protect the father's property interest in his daughter, and were an embodiment of the legal perception of women and girls as 'special property in need of special protection.'" *Id.* at 802. The states extended legal protection only to virgins, causing statutory rape law to serve "as a tool through which to preserve the common morality rather than to penalize men for violating the law." Michelle Oberman, *Turning Girls Into Women: Re-Evaluating Modern Statutory Rape Law*, 8 DePaul J. Health Care L. 109, 121 (2004).

<sup>60</sup> Oberman, *supra* note 59, at 119.

<sup>61</sup> Oberman, *supra* note 58, at 801.

<sup>62</sup> Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387, 403 (1984) (citing Rita Eidson, Comment, *The Constitutionality of Statutory Rape Laws*, 27 UCLA L. REV. 757, 762 (1980)).

<sup>63</sup> Olszewski, *supra* note 59, at 695. See also Oberman, *supra* note 59, at 119 ("Early American lawmakers set the age of consent at ten.").

<sup>64</sup> Olszewski, *supra* note 59, at 695. The campaigns were led by the Women's Christian Temperance Union and various other feminist leaders who wanted to protect females from laws and cultural values that threatened their health and prosperity and made them subordinate in society. Oberman, *supra* note 58, at 803 (citing Jane E. Larson, *Even a Worm Will Turn at Last: Rape Reform in Late Nineteenth-Century America*, 9 YALE J.L. & HUMAN. 1, 3–4 (1997)).

<sup>65</sup> Olszewski, *supra* note 59, at 695. Some states raised the age of consent as high as twenty-one. *Id.* However, the average age of consent was sixteen. Oberman, *supra* note 58, at 803.

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was younger than the female.”<sup>66</sup>

In the 1970s, feminists began to express concerns that statutory rape laws “perpetuated offensive gender stereotypes and restricted the sexual autonomy of young women.”<sup>67</sup> The reformers “saw sexuality as a vehicle of power that in complex ways kept women subordinated in society . . . .”<sup>68</sup> The feminists called for reforms to “make the laws gender neutral and thus remove the implication that only females are inherently vulnerable.”<sup>69</sup>

Notably, while feminists called for reform of the statutory rape laws, they did not call for their complete abolition because they understood the importance of the laws in protecting young people from sexual coercion and exploitation.<sup>70</sup> As Professor Fran Olsen noted:

On the one hand, [statutory rape laws] protect females; . . . statutory rape laws are a statement of social disapproval of certain forms of exploitation . . . . On the other hand, statutory rape laws restrict the sexual activity of young women and reinforce the double standard of sexual morality.<sup>71</sup>

These concerns show that there is a tension between the impulses underlying statutory rape laws.<sup>72</sup> Despite this tension, states have continued to enforce statutory rape laws.<sup>73</sup>

Today, while chastity concerns are no longer as prominent, states provide various other reasons to justify statutory rape laws. For instance, these laws are said to protect young people from

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<sup>66</sup> Oberman, *supra* note 59, at 119.

<sup>67</sup> Oberman, *supra* note 58, at 807.

<sup>68</sup> *Id.* at 803.

<sup>69</sup> Olszewski, *supra* note 59, at 695.

<sup>70</sup> *Id.* (“However, rather than seeking the abolition of statutory rape laws, those feminists generally called for reforms to make the laws gender neutral and thus remove the implication that only females are inherently vulnerable, but rather all juveniles are in need of protection.”).

<sup>71</sup> Oberman, *supra* note 58, at 807.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 809 (“[T]hese vestiges of concern over securing male control over girls’ sexuality and protecting girls from harm are overshadowed by . . . powerful new functions driving the enforcement of statutory rape laws.”).

coerced sexual activity,<sup>74</sup> enforce morality,<sup>75</sup> prevent teenage pregnancy,<sup>76</sup> and reduce welfare dependence.<sup>77</sup> Although states may see these as valid reasons for enforcing statutory rape laws, the goals these rationales aim to achieve can still be reached with revised laws.<sup>78</sup>

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<sup>74</sup> Olszewski, *supra* note 59, at 698–99. This reason is most often cited as a rationale for enforcing statutory rape laws because lawmakers think that the power disparity in a relationship between a child and an adult means that the child will be unable to resist the adult’s coercive influence. *Id.* (citing Oberman, *supra* note 45, at 757). Proponents of this rationale also argue that a teenager is incapable of meaningful consent and therefore any sexual conduct is nonconsensual and that a person who engages in sexual conduct with a teenager takes advantage of the teenager’s vulnerability. *Id.*

<sup>75</sup> Olszewski, *supra* note 59, at 699. “Some people believe that any sexual conduct outside of marriage is inherently immoral. Juveniles, in nearly every situation, are prohibited from marrying and thus all sexual activity involving juveniles can be seen as immoral.” *Id.*

<sup>76</sup> *Id.* Some people argue that prohibitions on sexual activities other than sexual intercourse are necessary because they may lead to sexual intercourse, and prohibitions on sexual intercourse that do not result in pregnancy are appropriate because there is an inherent risk of pregnancy. *Id.* at 700. In the 1990s, studies indicated that adult men were the fathers of a high number of babies born to teenage mothers, and this fact created concern because girls who have babies as teenagers are less likely to be productive members of society—they are “less likely to complete high school, less likely to marry, less likely to be able to support their families, and more likely to require public assistance at various points in their lives.” Oberman, *supra* note 58, at 808–09.

<sup>77</sup> Olszewski, *supra* note 59, at 699–700. In The Personal Responsibility and Work Opportunity Reconciliation Act (“PRWORA”), Congress concluded that the rise of teenage pregnancies is severe and linked to predatory sexual practices, and that an effective strategy to combat teenage pregnancy is enforcement of statutory rape laws. Pub. L. No. 104-193, 110 Stat. 2105 (1996).

<sup>78</sup> Olszewski, *supra* note 59, at 700–01.

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## II. THE STATUS OF CONSENSUAL TEENAGE SEX AND STATUTORY RAPE LAWS

### A. Consensual Teenage Sex—Is it Really So Detrimental?

Consensual teenage sex in the United States is astoundingly common.<sup>79</sup> A 1995 study revealed that, by the age of sixteen, 50% of U.S. teenagers have had sexual intercourse.<sup>80</sup> Another study shows that in the U.S., about 60% of unmarried eighteen-year-olds are sexually active.<sup>81</sup> In fact, it is estimated that there are more than 7 million incidents of statutory rape every year.<sup>82</sup> However, it is clear that most incidents are not prosecuted and do not lead to arrests and convictions.<sup>83</sup>

Even though “rates of sexual intercourse are higher today than they were forty years ago, there is little reason to believe that the high rates of adolescent sexual activity reflect a new trend.”<sup>84</sup> Instead, for many years, a large number of teenagers have engaged in sexual activity which is technically illicit, likely unaware of the illegality of their actions, and the criminal justice system has turned a blind eye.<sup>85</sup> Prior to the 1990s, statutory rape laws were rarely enforced and often ignored.<sup>86</sup> In the last years of the twentieth century, studies revealed that a majority of teen pregnancies were the result of sexual relations with adult men.<sup>87</sup> As a result, interest

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<sup>79</sup> See Oberman, *supra* note 45, at 703.

<sup>80</sup> See *id.*

<sup>81</sup> Heidi Kitrosser, *Meaningful Consent: Toward a New Generation of Statutory Rape Laws*, 4 VA. J. SOC. POL’Y & L. 287, 322 (1997).

<sup>82</sup> Oberman, *supra* note 45, at 703–04. Because the current age of consent under most state statutes is sixteen or older, “each incident of sexual intercourse among that population is illicit—each constitutes a separate instance of statutory rape.” *Id.*

<sup>83</sup> See *id.* at 704 (“For any number of reasons, it would be unimaginable to attempt to prosecute every instance of sexual contact with minors.”).

<sup>84</sup> *Id.* at 704.

<sup>85</sup> *Id.*

<sup>86</sup> Oberman, *supra* note 58, at 808.

<sup>87</sup> Oberman, *supra* note 45, at 705.

in statutory rape legislation was reignited,<sup>88</sup> and both federal and state governments created policies encouraging the prosecution of statutory rape.<sup>89</sup> However, statutory rape laws should not be universally applied to all cases of teenage sexual activity because adolescent sexual activity is not inherently problematic.<sup>90</sup>

In fact, there is ample support for the position that adolescent sexual activity may actually be beneficial.<sup>91</sup> “[L]iterature on adolescent sexuality suggests that adolescent sex can play a positive role in young people’s lives, both through the nature of the sexual experience itself, and through the potential for the experience to serve as a growth tool.”<sup>92</sup> Researchers have argued that adolescent sexual experimentation “is one way in today’s society for young people to gain a sense of independence from parents, to begin the process of growing up and taking on adult roles.”<sup>93</sup> These positive aspects of adolescent sexuality support the argument that adolescent sexual activity as a whole is not *per se* detrimental.<sup>94</sup>

Despite these arguments that sexual activity may be beneficial to young people, the issue of consent is a point of contention among supporters of existing statutory rape laws because many people believe that adolescents do not have the capacity to consent.<sup>95</sup> However, there are many adults that might also fall into this category, “and the decision to treat intercourse as distinctive in this way may simply represent a revival of the old view that

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<sup>88</sup> *Id.*

<sup>89</sup> Oberman, *supra* note 58, at 809.

<sup>90</sup> Kitrosser, *supra* note 81, at 322–23.

<sup>91</sup> *Id.*

<sup>92</sup> Kitrosser, *supra* note 81, at 322. Some have suggested that adolescent sex may adequately “prepare an adolescent to deal with future relationships.” *Id.*

<sup>93</sup> *Id.* at 323 (quoting SUSAN MOORE & DOREEN ROSENTHAL, SEXUALITY IN ADOLESCENCE 65 (1993)).

<sup>94</sup> *Id.* at 323.

<sup>95</sup> Sherry F. Colb, *A Ten Year Sentence for Marcus Dwayne Dixon: The Pros and Cons of Statutory Rape Laws*, FINDLAW’S WRIT, Feb. 11, 2004, <http://writ.news.findlaw.com/colb/20040211.html>. (“[A]t some level, we might have doubts about the competence of a minor to ‘consent,’ in a meaningful way, to sexual activity. Because of her youth, the minor might not fully appreciate the full physical and emotional implications of her decision.”).

‘maidens should be protected from the corruption of their virtue.’”<sup>96</sup> Also, recent studies show that adolescents often “make meaningful choices through rational thinking about possible social behaviors.”<sup>97</sup> In fact, studies from the 1970s and 1980s show that “fourteen-year-olds demonstrate adult levels of competency on various measures when making decisions about medical treatment, and that fifteen- and sixteen-year-olds generally have a great capacity for abstract and ideological political thought.”<sup>98</sup> Further, and significantly, “[t]his reasoning capability often extends to decision-making about sexual activity.”<sup>99</sup> Overall, it is too simplistic to propose that adolescents typically cannot make reasoned decisions regarding consensual sexual activity in all instances.<sup>100</sup>

However, even in the face of this evidence, many members of the government and society still believe that statutory rape laws are necessary to regulate adolescent sexual activity.<sup>101</sup> Due to the recent concerns regarding teen pregnancy, there has been a noticeable governmental effort to “reinvigorate the enforcement of statutory rape laws.”<sup>102</sup> This push has led lawmakers to consider whether the criminal law should regulate adolescent sexual behavior

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<sup>96</sup> *Id.*

<sup>97</sup> Lewis Bossing, *Now Sixteen Could Get You Life: Statutory Rape, Meaningful Consent, and the Implications for Federal Sentence Enhancement*, 73 N.Y.U. L. REV. 1205, 1227 (1998).

<sup>98</sup> *Id.* at 1227–28.

<sup>99</sup> *Id.* at 1228. Other studies and evidence also show that many teenagers make voluntary choices to engage in sexual activity. *Id.* at 1228–29 (citing GAIL ELIZABETH WYATT ET AL., SEXUAL ABUSE AND CONSENSUAL SEX 23 (1993)).

<sup>100</sup> Kitrosser, *supra* note 81, at 289 (“[T]o place all sexual activity in certain age-based categories under the statutory umbrella of ‘assault’ or ‘rape’ misses the real issue, because it fails to isolate, name, and target those instances of sex that are coercive and that should, for that reason, be subject to criminal punishment.”).

<sup>101</sup> *See, e.g.*, Koch, *supra* note 21 (noting that Senator Eric Johnson, a Republican in Georgia, believes Genarlow Wilson was fairly punished); *see also* Munoz, *supra* note 29 (stating that Rep. Arthur O’Neill, a Republican in Kansas, agreed that current laws “have resulted in gut-wrenching stories,” but the legislature should not change the law so these teenagers do not get arrested).

<sup>102</sup> Oberman, *supra* note 45, at 706.



and if so, how the law can regulate such behavior.<sup>103</sup> When considering the relationship between the criminal law and adolescent sexual behavior, lawmakers should bear in mind that “the laws also shape attitudes and are, in turn, shaped by prevailing social mores.”<sup>104</sup> Laws which are “too out of step with current thinking” are less likely to be obeyed or to significantly influence whether teenagers decide to engage in sexual activity.<sup>105</sup> The prevailing modern view among lawmakers, judges, attorneys, scholars, and members of society is that adolescent sexual behavior is not completely destructive and should not be punished as a serious criminal offense.<sup>106</sup>

*B. Lack of Uniform Enforcement*

Another issue with applying statutory rape laws to consensual teenage sex is that the laws are not currently enforced uniformly throughout the states and even within the states.<sup>107</sup> For example, in the same courthouse where Genarlow Wilson was fighting for his innocence in his trial, a twenty-seven-year-old teacher was convicted for having sex with a seventeen-year-old student, which is the type of crime statutory rape laws are intended to prevent.<sup>108</sup> However, in contrast to Wilson’s ten year sentence, the teacher received just three years’ probation and 90 days in jail.<sup>109</sup> Similarly, Wendy Whitaker, a woman in Georgia who had been convicted for the same crime as Wilson when she was seventeen, was convicted for engaging in consensual oral sex with a fifteen-year-old classmate

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<sup>103</sup> *Id.*

<sup>104</sup> Kitrosser, *supra* note 81, at 326 (quoting SUSAN MOORE & DOREEN ROSENTHAL, *SEXUALITY IN ADOLESCENCE* 77–78 (1993)).

<sup>105</sup> *Id.*

<sup>106</sup> See Kitrosser, *supra* note 81 (arguing that the laws should focus on the destructive norms of adolescent sexuality rather than adolescent sexuality as a whole); Gilbert, *supra* note 1 (noting that Judge Thomas Wilson said that the fact that Genarlow Wilson was sentenced to spend ten years in prison was a “grave miscarriage of justice”).

<sup>107</sup> See Oberman, *supra* note 45, at 706 (noting that statutory rape laws are currently “being selectively enforced in the absence of any coherent rationale”).

<sup>108</sup> Pitts, *supra* note 2.

<sup>109</sup> *Id.*

while on school property, but her sentence was for five years of probation.<sup>110</sup> This lack of uniformity in enforcement of the current laws is problematic because innocent teenagers may be subject to harsh treatment due to poor displays of prosecutorial discretion.<sup>111</sup>

There are various reasons why states selectively enforce the laws.<sup>112</sup> Regardless of their rationales, this Note argues that such selective enforcement is unreasonable, because it makes it difficult for teenagers to know the scope of the laws.

### *C. Consequences of Conviction for Acts of Consensual Teenage Sex*

#### *1. Strong Labels and Classifications*

Just as the enforcement of statutory rape laws differs among states, so too does the label for the crime that is attached to acts of consensual teenage sex.<sup>113</sup> In Georgia, an act of consensual teenage sex may be prosecuted as statutory rape, child molestation, or aggravated child molestation depending on certain factors.<sup>114</sup> In

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<sup>110</sup> McDonald, *supra* note 57. Wendy Whitaker pleaded guilty to sodomy and was sentenced to five years probation. *Id.*

<sup>111</sup> See Colb, *supra* note 95 (“A remaining concern is the worry about racism specifically, and discrimination more generally, that arises whenever officials are vested with a large amount of discretion.”).

<sup>112</sup> Oberman, *supra* note 45, at 735 (noting that states choose certain cases to prosecute in pursuit of their fiscal self-interest); see also Pitts, *supra* note 2 (“[T]here are major disparities in the treatment of black kids and white ones facing Georgia justice . . . . [T]he [27 year old] teacher who got off with a wrist slap [for having sex with a 17 year old student] was—big surprise—white.”).

<sup>113</sup> See Act of Apr. 26, 2006, secs. 10–11, 2006 Ga. Laws 571 (codified as amended at GA. CODE ANN. §§ 16-6-3, 16-6-4 (2007) (teenage sex may be prosecuted as statutory rape, child molestation, or aggravated child molestation); Munoz, *supra* note 29 (teenage sex may be prosecuted as sexual assault).

<sup>114</sup> GA CODE ANN. §§ 16-6-3, 16-6-4 (2007). A person commits the offense of statutory rape when he or she engages in sexual intercourse with anyone under the age of 16 who is not his or her spouse. §16-6-3. A person commits the offense of child molestation when he or she does any immoral or indecent act to or in the presence of or with any child under the age of 16 years with the intent to arouse or satisfy the sexual desires of themselves or the child. § 16-6-4. A

other states, such as Wisconsin, consensual teenage sex may be prosecuted as sexual assault.<sup>115</sup> In Massachusetts, a person may be prosecuted for rape if the other individual is less than sixteen years old.<sup>116</sup> These labels are accompanied by stigma that can cause immense psychological damage to teenagers who engage in consensual teenage sex, and such disgrace is an additional punishment which is not proportional to the crime.<sup>117</sup>

## 2. *Lack of Retroactivity*

Many states have revised their laws to include age-gap provisions<sup>118</sup> and to classify statutory rape as a misdemeanor.<sup>119</sup>

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person commits the offense of aggravated child molestation when he or she commits an offense of child molestation which physically injures the child or involves sodomy. § 16-6-4.

<sup>115</sup> WIS. STAT. ANN. § 948.02(2) (West 2007) (“Second degree sexual assault. Whoever has sexual contact or sexual intercourse with a person who has not attained the age of 16 years is guilty of a Class C felony.”).

<sup>116</sup> See MASS. GEN. LAWS ch. 265, § 23 (2007) (“Whoever unlawfully has sexual intercourse or unnatural sexual intercourse, and abuses a child under sixteen years of age shall, for the first offense, be punished by imprisonment in the state prison . . .”).

<sup>117</sup> Laurie Peterson, *A Lifetime of Shame for Consensual Sex*, MORALOUTGAGE.NET, July 27, 2007, <http://www.moraloutrage.net/article.php?story=20070727101752747>.

<sup>118</sup> Age-gap provisions provide that sexual conduct involving persons who are close in age is either not criminal or punished at a lower level. See Olszewski, *supra* note 59, at 706.

<sup>119</sup> Olszewski, *supra* note 59, at 706. The states are: Alabama, ALA. CODE § 13A-6-62(a)(1) (2007); Alaska, ALASKA STAT. §§ 11.41.434(a), 11.41.436(a), 11.41.438(a), 11.41.440(a)(1) (2008); Arizona, ARIZ. REV. STAT. ANN. § 13-1407F (2007); Arkansas, ARK. CODE ANN. §§ 5-14-110(a)(2)(B), 5-14-125(5)(B)(i), 5-14-126(2)(B), 5-14-127(a) (2008); California, CAL. PENAL CODE § 261.5 (2008); Colorado, COLO. REV. STAT. ANN. § 18-3-402(1)(d) (West 2008); Connecticut, CONN. GEN. STAT. §§ 53a-70(a)(2), 53a-71(a)(1) (2008); Delaware, DEL. CODE ANN. tit. 11, §§ 770(a)(2), 771(a)(1), 772(a)(2)g, 773(a)(5) (2008); Washington D.C., D.C. CODE §§ 22-3008, 22-3009 (2008); Florida, FLA. STAT. ANN. § 794.05(1) (West 2008); Georgia, GA. CODE ANN. § 16-6-3(b) (2007); Hawaii, HAW. REV. STAT. ANN. §§ 707-730(1)(c)(i), 707-732(1)(c)(i) (LexisNexis 2007); Idaho, IDAHO CODE ANN. § 18-1508A(1) (2008); Illinois, 720 ILL. COMP. STAT. ANN. 5/12-14.1(2)(c) (West 2007);

For example, Georgia amended its law to provide that if the victim is at least fourteen but less than sixteen years old and the person convicted of statutory rape is eighteen years old or younger and is no more than four years older than the victim, the person will be guilty of a misdemeanor, rather than felony statutory rape.<sup>120</sup> While these amendments and revisions reducing convictions for consensual teenage sexual acts are a step in the right direction, the laws still leave many people either in prison or forced to register as sex offenders if they were convicted and sentenced before the laws took effect.

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Indiana, IND. CODE ANN. § 35-42-4-9 (LexisNexis 2008); Iowa, IOWA CODE ANN. §§ 709.4(2)(c), 709.12(4) (West 2008); Kentucky, KY. REV. STAT. ANN. §§ 510.050(1)(a), 510.060(1)(b), 510.130(1)(b) (Lexis Nexis 2007); Louisiana, LA. REV. STAT. ANN. § 14:43.1(A) (West 2007); Maine, ME. REV. STAT. ANN. tit. 17-A, §§ 254, 255-A, 260 (2007); Maryland, MD. CODE ANN., CRIM. LAW §§ 3-304(a)(3), 3-306(a)(3), 3-307(a)(3)-(5), 3-308(a) (Lexis Nexis 2007); Michigan, MICH. COMP. LAWS ANN. § 750.520e(1)(a) (West 2008); Minnesota, MINN. STAT. ANN. §§ 609.342-345 (West 2008); Mississippi, MISS. CODE ANN. § 97-3-65(1) (2007); Missouri, MO. ANN. STAT. §§ 566.034, 566.064 (West 2007); Montana, MONT. CODE ANN. §§ 45-5-502(3), (5)(b), 45-5-503(3)(a) (2007); Nebraska, NEB. REV. STAT. § 28-320.01(1) (2007); Nevada, NEV. REV. STAT. ANN. §§ 200.368, 200.364 3.(b) (LexisNexis 2007); New Hampshire, N.H. REV. STAT. ANN. §§ 632-A:4 (I) (2008); New Jersey, N.J. STAT. ANN. § 2C:14-2 (West 2007); New Mexico, N.M. STAT. ANN. § 30-9-11(F) (LexisNexis 2008); New York, N.Y. PENAL LAW §§ 130.25, 130.30, 130.35, 130.40, 130.45, 130.50 (McKinney 2008); North Carolina, N.C. GEN. STAT. §§ 14-27.2(a)(1), 14-27.4(a)(1), 14-27.7A (2007); North Dakota, N.D. CENT. CODE §§ 12.1-20-03, 12.1-20-07 (2007); Ohio, OHIO REV. CODE ANN. § 2907.04 (LexisNexis 2008); Oklahoma, OKLA. STAT. ANN. tit. 21, § 1112 (West 2007); Oregon, OR. REV. STAT. § 163.345 (2007); Pennsylvania, 18 PA. CONS. STAT. ANN. §§ 3122.1, 3126(a)(8) (West 2007); Rhode Island, R.I. GEN. LAWS § 11-37-6 (2007); South Dakota, S.D. CODIFIED LAWS § 22-22-7 (2007); Tennessee, TENN. CODE ANN. § 39-13-506(a) (2007); Texas, TEX. PENAL CODE ANN. §§ 21.11(b), 22.011(d) (Vernon 2007); Utah, UTAH CODE ANN. §§ 76-5-401(3), 76-5-401.1(2), 76-5-402.2(2) (2007); Virginia, VA. CODE ANN. § 18.2-63 (2007); Washington, WASH. REV. CODE §§ 9A.44.073(1), 9A.44.076(1), 9A.44.079(1), 9A.44.083(1), 9A.44.086(1), 9A.44.089(1) (West 2008); West Virginia, W. VA. CODE ANN. §§ 61-8B-3(a)(2), 61-8B-5(a)(2), 61-8B-7(a)(3), 61-8B-9(b) (LexisNexis 2008); Wyoming, WYO. STAT. ANN. §§ 6-2-303(a)(v), 6-2-304(a)(i) (2008).

<sup>120</sup> Act of Apr. 26, 2006, sec. 10, 2006 Ga. Laws 571 (codified as amended at GA. CODE ANN. § 16-6-3 (2007)).

This is especially unfair in light of the fact that other laws, including laws relating to sex offenses, are applied retroactively.<sup>121</sup> For example, in Georgia, a 2006 amendment “retroactively bar[red] anyone on the state’s sex offender registry from living, working or loitering within 1,000 feet of a school bus stop or church.”<sup>122</sup> As a result of the amendment, people who were in compliance with the law had to completely uproot themselves and their families.<sup>123</sup> While the Georgia Supreme Court struck down the law in November of 2007,<sup>124</sup> legislators noted that they would likely amend the statute and reintroduce the legislation in January.<sup>125</sup> Legislators are unable to justify the retroactive application of laws that provide for further punishment for sex offenders who have already served their sentence in light of the fact that the current statutes for “sex offenders”—including teenagers who engage in consensual sex—provide for less severe penalties which may not include sex offender registration.

<sup>121</sup> See McDonald, *supra* note 57. In Florida, a sex offender whose victim is under eighteen years old cannot live where children congregate or within 1,000 feet of schools, parks, playgrounds, and public school bus stops. FLA. STAT. §947.1405(7)(a)(2) (2007). In California, voters passed Proposition 83 in 2006, which prohibits any registered sex offender from living within 2,000 feet of any school, daycare facility, or place where children gather. HUMAN RIGHTS WATCH, NO EASY ANSWERS: SEX OFFENDER LAWS IN THE US 112 (2007). The law applies to all registered sex offenders. *Id.*

<sup>122</sup> McDonald, *supra* note 57.

<sup>123</sup> *Id.*

<sup>124</sup> Goodman, *supra* note 16.

<sup>125</sup> *Id.* Notably, the ruling only applies to the residency restrictions of the law. The provisions that bar sex offenders from working or loitering in places where children gather are still in effect. *Id.* In fact, in January of 2008, Georgia legislators introduced HB 908, in order

to repeal certain provisions relating to residency and employment restrictions for certain sexual offenders; to provide for restrictions on where sexual offenders and sexually dangerous predators may reside, work, volunteer, or loiter; to provide for a definition; to provide for punishment; to provide for exemptions from certain residency and employment restrictions; to provide for civil causes of action; to provide for applicability; to provide for related matters; to repeal conflicting laws; and for other purposes.

H.B. 908, 149th Gen. Assem., Reg. Sess. (Ga. 2008).

### 3. Sex Offender Registration Requirements

Teenagers who are convicted of sexual assault, child molestation, or statutory rape must register as sex offenders under both state law<sup>126</sup> (in states where the offenses were and are still felonies) and federal law.<sup>127</sup> The Adam Walsh Act, which became effective on July 27, 2006, requires each jurisdiction to maintain a jurisdiction-wide sex offender registry conforming to the requirements laid out in the Act.<sup>128</sup> Although there is a provision for consensual teenage sex,<sup>129</sup> the law applies retroactively.<sup>130</sup> Therefore, those people who were convicted before 2006 must continue to register according to the requirements.<sup>131</sup> Under the Act, a teenager convicted of any sex offense<sup>132</sup> will remain on the

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<sup>126</sup> Koch, *supra* note 21 (noting that Matthew Shettles, a teenager convicted for having sex with his high school girlfriend when he was 18 and she was weeks away from turning 15, “has had to register in Oregon whenever he moved, got a new job, or made other life changes”); Munoz, *supra* note 29 (noting that in Connecticut, Jeff Davis is forced to provide information on the state’s sex offender registry).

<sup>127</sup> HUMAN RIGHTS WATCH, *supra* note 121, at 2.

<sup>128</sup> 42 U.S.C.A. § 16912 (West 2007). States will probably adhere to the provisions of the Act, because it compels them to “either dramatically increase their registration and community restrictions or lose federal law enforcement grant money.” HUMAN RIGHTS WATCH, *supra* note 121, at 12. Another significant fact is that federal law is only a floor, and states may increase their registration and notification requirements if they chose to do so. *Id.*

<sup>129</sup> 42 U.S.C.A. § 16911(5)(C) (West 2007) (“An offense involving consensual sexual conduct is not a sex offense for the purposes of this subchapter if the victim was an adult . . . or if the victim was at least 13 years old and the offender was not more than 4 years older than the victim.”).

<sup>130</sup> Maggie Jones, *How Can You Distinguish a Budding Pedophile From a Kid With Real Boundary Problems*, N.Y. TIMES, July 22, 2007, at A1.

<sup>131</sup> *Id.*

<sup>132</sup> “Sex offense” is defined as

(i) a criminal offense that has an element involving a sexual act or sexual contact with another; (ii) a criminal offense that is a specified offense against a minor; (iii) a Federal offense . . . (iv) a military offense . . . ; or (v) an attempt or conspiracy to commit an offense described in clauses (i) through (iv).

42 U.S.C.A. §16911(5)(A) (West 2007).

national registry for life, and will have to register with authorities every three months, every six months, or every year, depending on the classification of the crime.<sup>133</sup> Jurisdictions are instructed to make all the information readily accessible on the Internet,<sup>134</sup> and in order to be in compliance with the law to receive federal funding, they must provide extensive information.<sup>135</sup> This Note argues that these requirements are extremely burdensome and constitute an additional, unreasonable punishment for teenagers who engage in consensual sex.

Currently, at least twenty-nine states require individuals to register as sex offenders for engaging in consensual teenage sex.<sup>136</sup>

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<sup>133</sup> Jones, *supra* note 130, at A1.

Tier III registrants are those who committed a sex crime punishable by more than one year in prison and comparable or more severe than aggravated sexual abuse, abusive sexual contact with a child under 13, kidnapping of a child by someone other than the guardian, any sex crime occurring after the offender was a Tier II offender or an attempt or conspiracy to commit such an offense. Tier II registrants are those who are not a Tier III offender and whose offense is against a minor, is punishable by imprisonment of more than one year, and is comparable to or more severe than sex trafficking, coercion and enticement, transportation with intent to engage in criminal sexual activity, abusive sexual contact, involves the use of a minor in a sexual performance . . . or if the sex offense occurs after the offender becomes a Tier I sex offender. A Tier I sex offender is defined as a sex offender other than a Tier II or Tier III sex offender.

42 U.S.C.A. § 16911(2)-(4) (West 2007)

<sup>134</sup> 42 U.S.C.A. § 16918 (West 2007).

<sup>135</sup> 42 U.S.C.A. § 16914 (West 2007). This section requires the offender to provide his or her name, social security number, address of each residence at which he or she will reside, the name and address of any place where the offender is or will be an employee, the name and address of any place where the offender is or will be a student, and the license plate number and a description of any vehicle owned or operated. *Id.* The section also requires the jurisdiction to provide a physical description of the offender, the text of the provision of law defining the criminal offense for which the offender is registered, the criminal history of the offender, a current photograph of the offender, a set of fingerprints and palm prints, a DNA sample, and a photocopy of a valid driver's license or identification card. *Id.*

<sup>136</sup> The states are: Alabama, ALA. CODE §§ 13A-6-63, 13A-11-200 (2008); Alaska, ALASKA STAT. §§ 11.41.434, 12.63.010 (2008); Arizona, ARIZ. REV.

Further, in eleven states, there are no “Romeo and Juliet exceptions” for consensual teenage sex.<sup>137</sup> Thus, in those states, any teenager who has sex with a person below the age of consent could be convicted and required to register as a sex offender, regardless of whether it was consensual.<sup>138</sup>

Proponents of community notification argue that sex offender registries make people feel protected by having knowledge which purportedly will equip them to take more safety precautions.<sup>139</sup> In fact, the original policy underlying the need for registries was concern for public safety. In *Smith v. Doe*, the Supreme Court explained that sex offender registration was not intended as an additional punishment for someone convicted of a sexual offense,

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STAT. §13-1405 (2007); Arkansas, ARK. CODE ANN. §§ 12-12-903, 5-14-110 (2007); Colorado, COLO. REV. STAT. §§ 16-22-03, 18-3-402 (2007); Connecticut, CONN. GEN. STAT. §§ 54-250, 54-251, 53a-70 (2008); Florida, FLA. STAT. ANN. §§ 775.21, 794.011 (2008); Indiana, IND. CODE ANN. §§ 11-8-8-7, 11-8-8-5 (2008); Louisiana, LA. REV. STAT. ANN. §§ 15:542, 15: 541, 14:92(A)(7) (2007); Maine, ME. REV. STAT. ANN. tit. 34-A, §§ 11222, 11203 (2007) ME. REV. STAT. ANN. tit. 17-A, § 254 (2007); Maryland, MD. CRIM. PROC. CODE ANN. §§ 11-704, 11-701, 3-308 (2007); Massachusetts, MASS. GEN. LAWS ANN. ch. 6, § 178C, 178D (2008), MASS. ANN. LAWS ch. 272, § 35A (2008); Michigan, MICH. COMP. LAWS SERV. §§ 28.723, 28.722, 750.520e (2008); Minnesota, MINN. STAT. § 243.166, Subd. 1b(a)(1)(iii), 609.345 (2008); Missouri, MO. REV. STAT. §§ 589.400, 566.032 (2007).; New Hampshire, N.H. REV. STAT. ANN. §§ 651-B:1, 651-B:2, 632-A:2 (2008); New Jersey, N.J. STAT. ANN. §§ 2C:14-2, 2C:7-2, 2C:14-3b (2007); North Carolina, N.C. GEN. STAT. §§ 14-208.7, 14-208.6, 14-27.7A (2007); North Dakota, N.D. CENT. CODE §§ 12.1-32-15, 12.1-20-07 (2007); Oklahoma, OKLA. ST. tit. 57 § 582 (2007), OKL. ST. tit. 21 § 1123 (2007); Rhode Island, R.I. GEN. LAWS §§ 11-37.1-3, 11-37.1-2; South Carolina, S.C. CODE ANN. § 23-3-430, § 16-3-655; South Dakota, S.D. CODIFIED LAWS § 22-24B-2, 22-24B-1, 22-22-7 (2007); Tennessee, TENN. CODE ANN. §§ 40-39-202, 40-39-203, 39-13-506 (2007); Texas, TEX. CODE CRIM. PROC. arts. 62.002, 62.001 (2007); Utah, UTAH CODE ANN. §§ 77-27-21.5, 76-5-401, 76-5-401.2 (2007); Washington, WASH. REV. CODE §§ 9A.44.130, 9A.44.096 (2008); West Virginia, W.VA. CODE §§ 15-12-2, 61-8B-9 (2008); Wisconsin, WIS. STAT. §301.45, §948.02 (2007). HUMAN RIGHTS WATCH, *supra* note 121, at 39–40, n.110.

<sup>137</sup> HUMAN RIGHTS WATCH, *supra* note 121, at 73.

<sup>138</sup> *Id.*

<sup>139</sup> Jones, *supra* note 130.



but rather as a civil regulation imposed for the narrowly defined interest in protecting the public safety.<sup>140</sup>

However, “proponents of these laws are not able to point to convincing evidence of public safety gains from them.”<sup>141</sup> In a recent report on sex offender laws in the United States, Human Rights Watch has reported that there “is little public safety purpose served by imposing registration requirements on those who pose a minimal risk to the community.”<sup>142</sup> There are no persuasive arguments for why these teenagers should be forced to register because there are no public safety gains, yet there are harsh consequences for those teenagers who are placed on the registries for engaging in acts of consensual sex.

For individuals convicted of a sex offense for engaging in consensual teenage sexual acts, the registration requirements are another form of punishment with grave repercussions.<sup>143</sup> One consequence of community notification is that as these teenagers become adults, “they may struggle to stay in the mainstream because they have a hard time finding and holding jobs.”<sup>144</sup> Not only do they have difficulty finding jobs in the professional arena, but the prospect of securing a job at any business that performs background checks is bleak.<sup>145</sup> Thus, convictions for sexual offenses “equate directly with job loss and [loss of] employment opportunities, . . . and a general inability to provide for a future family through gainful employment and parental involvement (volunteering, coaching, and chaperoning) in the lives of future

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<sup>140</sup> 538 U.S. 84 (2003).

<sup>141</sup> HUMAN RIGHTS WATCH, *supra* note 121, at 3.

<sup>142</sup> *Id.* at 46.

<sup>143</sup> See Catherine L. Carpenter, *The Constitutionality of Strict Liability in Sex Offender Registration Laws*, 86 B.U. L. REV. 295, 369–70 (2006) (“In the case of the strict liability offender, who has never been judged dangerous to the community and who has never had the opportunity to meaningfully contest inclusion in the registry, the punitive impact outweighs the civil nonpunitive purpose of the registration statute.”).

<sup>144</sup> Jones, *supra* note 130; see also Munoz, *supra* note 29 (Defense attorney Fanol Bojka said “I’ve seen one too many kids lose their futures because of these [probation and registration] conditions. You label a kid a sex offender at 18 and you’ve limited what the kid can do with his life.”).

<sup>145</sup> Jones, *supra* note 130.

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children.”<sup>146</sup>

In addition to these difficulties that registered sex offenders might experience, they might also be subject to legal residency restrictions.<sup>147</sup> States and municipalities have increasingly been passing laws “that expressly forbid [registered sex offenders] from living near places where children gather.”<sup>148</sup> Approximately 400 municipalities across the country have enacted local zoning ordinances restricting where sex offenders can live.<sup>149</sup> Georgia is one state that has applied residency restrictions. Ironically, the Attorney General who argued that the state’s “Romeo and Juliet” provision should not be applied retroactively simultaneously argued that the Legislature should retroactively bar “anyone on the state’s sex offender registry from living, working or loitering within 1,000 feet of a school bus stop or church.”<sup>150</sup>

Representatives in Georgia have not been shy about the reasons behind these laws. Georgia State House Majority Leader Jerry Keen, co-sponsor of the bill providing for residency restrictions, stated, “[m]y intent personally is to make it so onerous on those that are convicted of these offenses . . . they will want to move to another state.”<sup>151</sup> Although part of the law has been struck down by the Georgia Supreme Court, legislators intend to redraft the law and continue implementing residency restrictions.<sup>152</sup> As a result of

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<sup>146</sup> Peterson, *supra* note 117. In a recent report on sex offender registration, Human Rights Watch found that “private employers are reluctant to hire sex offenders even if their offense has no bearing on the nature of the job.” HUMAN RIGHTS WATCH, *supra* note 121, at 81. “Those who tell prospective employers that they are registered sex offenders cannot get hired, and those who do not tell their employers are eventually fired if and when employers find out.” *Id.*

<sup>147</sup> HUMAN RIGHTS WATCH, *supra* note 121, at 100. (“At least 20 states have enacted laws that prohibit certain sex offenders from living within specified distances of places where children congregate.”).

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 114. As of September 2007, at least twenty states had enacted laws that restrict where registered sex offenders may live. *See id.* at 100.

<sup>150</sup> McDonald, *supra* note 57.

<sup>151</sup> HUMAN RIGHTS WATCH, *supra* note 121, at 100 (citing Dick Pettys, *Republicans Unveil First Draft of Proposed Sex Offender Law*, ASSOCIATED PRESS, Sept. 28, 2005).

<sup>152</sup> Goodman, *supra* note 16.

residency restriction laws, individuals listed on state registries for engaging in consensual teenage sex will be forced to move to another area of the state or out of the state in which they reside.<sup>153</sup> If they do not relocate, they may face arrest or prosecution.<sup>154</sup> For those individuals who are convicted for acts of consensual teenage sex and serve what is already a harsh sentence for their conviction, such additional punishment seems extremely harsh and disproportionate to the crime.<sup>155</sup>

Another consequence of registration for these individuals is that they “find themselves subject to the shame and stigma of being identified as sex offenders on online registries, in some cases for the rest of their lives.”<sup>156</sup> As a result of the label and the requirement to register as a sex offender, many of these individuals experience “despair and hopelessness”<sup>157</sup> and some have even committed suicide.<sup>158</sup> They are often ostracized from their communities.<sup>159</sup>

Sometimes, individuals or communities resort to vigilante violence against those who are registered sex offenders, even if they are on the registries for acts of consensual teenage sex.<sup>160</sup> Registrants reported a range of vigilantism to authorities, including “having glass bottles thrown through their windows, being . . . physically assaulted while the assailants yelled ‘You like little children, right?’, . . . people repeatedly ringing the doorbell and pounding on the sides of the house late at night,” and threats of

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<sup>153</sup> McDonald, *supra* note 57.

<sup>154</sup> *Id.*

<sup>155</sup> See Downey, *supra* note 52 (“The registry is a prison sentence in its own right.”); see also Alex B. Eyssen, *Does Community Notification for Sex Offenders Violate the Eighth Amendment’s Prohibition Against Cruel and Unusual Punishment? A Focus on Vigilantism Resulting from “Megan’s Law,”* 33 ST. MARY’S L.J. 101, 135 (2001) (“Thorough analysis of community notification laws . . . demonstrate that such programs are indeed punishment, regardless of any supposed regulatory intent.”).

<sup>156</sup> HUMAN RIGHTS WATCH, *supra* note 121, at 66.

<sup>157</sup> *Id.* at 78 (citing Jill Levenson & Leo Cotter, *The Effects of Megan’s Law on Sex Offender Reintegration*, 21 J. CONTEMP. CRIM. JUST. 298–300 (2005)).

<sup>158</sup> HUMAN RIGHTS WATCH, *supra* note 121, at 78–79.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 87–88.

imminent death.<sup>161</sup> Some vigilantism has been extreme. For example, individuals listed on sex offender registries have been killed because their information was accessed on the Internet.<sup>162</sup>

Many registered sex offenders “have been targets of violence from strangers who take it upon themselves to ‘eliminate’ sex offenders from communities.”<sup>163</sup> In New Hampshire, Lawrence Trant set fire to the homes of several registered sex offenders and stabbed another registrant outside of his home.<sup>164</sup> Donald Keegan was arrested in New York for plotting to blow up a home where four convicted sex offenders were living.<sup>165</sup> In Bellingham, Washington, Anthony Mullen killed two convicted sex offenders he found on the state’s online registry.<sup>166</sup> Mullen posed as an FBI agent to enter the victims’ homes, “under the guise of warning them that they were on a ‘hit list’ on the internet.”<sup>167</sup> Once inside, he then shot both of them in the head.<sup>168</sup>

Only fourteen states and the District of Columbia have statutes that “specifically prohibit the misuse of registry information for purposes of harassment, discrimination, or acts of vigilantism.”<sup>169</sup>

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<sup>161</sup> *Id.*

<sup>162</sup> Jeff Tuttle, *Vigilante Understands Marshall*, BANGOR DAILY NEWS, May 20, 2006, at 1. For example, in 2006, a 20-year-old Canadian man with a list of 29 names and addresses from the Maine Sex Offender Registry went to the homes of two convicted sex offenders, shooting and killing both of them. *Id.* Both of the men were strangers to the killer, Stephen Marshall. He found their names on the state’s website. One of the men was on the website because he was convicted for statutory rape for having sex with his girlfriend two weeks before her sixteenth birthday when he was nineteen. Jones, *supra* note 130.

<sup>163</sup> HUMAN RIGHTS WATCH, *supra* note 121, at 89.

<sup>164</sup> Tuttle, *supra* note 162.

<sup>165</sup> HUMAN RIGHTS WATCH, *supra* note 121, at 89.

<sup>166</sup> Tuttle, *supra* note 162.

<sup>167</sup> HUMAN RIGHTS WATCH, *supra* note 121, at 89.

<sup>168</sup> Tuttle, *supra* note 162.

<sup>169</sup> HUMAN RIGHTS WATCH, *supra* note 121, at 90. States with prohibitions include: California, CAL. PENAL CODE §290.4(c) (2008); Connecticut, CONN. GEN. STAT. §54-258a (2008); Idaho, IDAHO CODE §18-8326 (2008); Hawaii, HAW. REV. STAT. §846E-3(g) (2007); Kentucky, KY. REV. STAT. §17.580(3) (2007); Massachusetts, MASS. GEN. LAWS. ch.6, §178N (2008); Mississippi, MISS. CODE ANN. §45-33-51 (2007); New Jersey, N.J. STAT. §2C:7-16(b) (2007); New York, NY CORRECT. LAW §168-q(2)

The Adam Walsh Act has a provision that requires states to include a “warning that information should not be used to unlawfully injure, harass, or commit a crime against any individual named in the registry or residing or working at any reported address.”<sup>170</sup> However, it does not require that states specifically prohibit the misuse of the information and make it illegal.<sup>171</sup> Since there is nothing that specifically prohibits people from harassing and attacking individuals on the sex offender registries, individuals whose names appear on the registries for engaging in consensual teenage sex may easily become targets.<sup>172</sup>

### III. STATUTORY RAPE LAWS AND THE EIGHTH AMENDMENT

The Eighth Amendment to the United States Constitution provides, “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”<sup>173</sup> The amendment is applicable to the states through the Fourteenth Amendment,<sup>174</sup> and it affirms the rights of individuals not to be subject to excessive punishments.<sup>175</sup> This right derives from the idea that punishment for a crime should be proportional to the offense.<sup>176</sup> Punishment is considered cruel and unusual if it “subjects the individual to a fate of ever-increasing fear and

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(2008); Pennsylvania, 42 PA. CONS. STAT. ANN. §9798.1(b)(2); South Carolina, S.C. CODE ANN. §23-3-510 (2007); Utah, UTAH CODE ANN. §77-27-21.5(22) (2007); Vermont, VT. STAT. ANN. TIT. 13, §5411a(h) (2008); Virginia, VA. CODE ANN. §9.1- 919 (2008); and Washington D.C., D.C. CODE §22-4011(d) (2008). HUMAN RIGHTS WATCH, *supra* note 121, at 90, n.308.

<sup>170</sup> 42 U.S.C.A. § 16918 (West 2007).

<sup>171</sup> *Id.* (“The warning shall note that any such action *could* result in civil or criminal penalties.”) (emphasis added).

<sup>172</sup> HUMAN RIGHTS WATCH, *supra* note 121, at 93 (noting that community members have used notification information to keep registered sex offenders from moving into their neighborhoods and pushing them to leave if they already live there).

<sup>173</sup> U.S. CONST. amend. VIII.

<sup>174</sup> *Furman v. Georgia*, 408 U.S. 238, 239 (1972) (per curiam).

<sup>175</sup> *Roper v. Simmons*, 543 U.S. 551, 560 (2005).

<sup>176</sup> *Weems v. United States*, 217 U.S. 349, 367 (1910).

distress.”<sup>177</sup> However, the Supreme Court has recognized that the words of the amendment “are not precise, and that their scope is not static. Thus, the Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”<sup>178</sup>

In *Thompson v. Oklahoma*, a plurality of the Court held that execution of any offender under the age of sixteen at the time of the crime is unconstitutional.<sup>179</sup> Significantly, the Court stressed that “[t]he reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult.”<sup>180</sup>

Throughout all of the cases regarding cruel and unusual punishment, the Supreme Court has looked to the number of states that reject certain punishments to determine whether there is a national consensus.<sup>181</sup> “Objective indicia” of society’s standards may be found in legislative enactments and state practice.<sup>182</sup> With respect to finding a national consensus, “[i]t is not so much the number of these States that is significant, but the consistency of the direction of change.”<sup>183</sup> A majority of states have either decriminalized consensual teenage sex or reduced the crime to a

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<sup>177</sup> *Trop v. Dulles*, 356 U.S. 86, 102 (1958) (“He knows not what discriminations may be established against him, what proscriptions may be directed against him.”).

<sup>178</sup> *Id.* (internal citations omitted).

<sup>179</sup> 487 U.S. 815, 818–38 (1988).

<sup>180</sup> *Id.* at 835.

<sup>181</sup> *See, e.g., Stanford v. Kentucky*, 492 U.S. 361 (1989) (concluding that the Eighth and Fourteenth Amendments did not proscribe the execution of juvenile offenders over fifteen but under eighteen when 22 of the 37 death penalty states permitted the death penalty for sixteen-year-old offenders and 25 of the 37 states permitted the death penalty for seventeen-year-old offenders); *Penry v. Lynaugh*, 492 U.S. 302 (1989) (holding that the Eighth Amendment did not mandate a categorical exemption from the death penalty for the mentally retarded because only two states had enacted laws on the subject); *Atkins v. Virginia*, 536 U.S. 304 (2002) (holding that the execution of the mentally retarded is cruel and unusual punishment after finding that only a minority of states permitted the practice).

<sup>182</sup> *Roper v. Simmons*, 543 U.S. 551, 563 (2005).

<sup>183</sup> *Id.* at 565 (citing *Penry*, 492 U.S. at 315).

misdemeanor.<sup>184</sup> Thus, the states are moving toward reducing the punishment for such acts.<sup>185</sup>

As noted in *Roper v. Simmons*, there is “sufficient evidence that today our society views juveniles, . . . as ‘categorically less culpable than the average criminal.’”<sup>186</sup> Recently, the Supreme Court articulated that the Eighth Amendment “contains a ‘narrow proportionality principle’ that ‘applies to noncapital sentences.’”<sup>187</sup> Therefore, the punishment meted out to juveniles should not be as harsh as those given to adults who are more culpable, especially to adults who prey on children.

The Supreme Court maintains that deference should be paid to state legislatures in determining punishments.<sup>188</sup> States may impose sentences with a variety of justifications, such as incapacitation, deterrence, retribution, or rehabilitation.<sup>189</sup> However, punishments imposed by certain states for acts of consensual teenage sex are too harsh to serve any of those justifications. “[W]hile torture, drawing and quartering, public dissecting, burning alive and disemboweling have since been ruled by courts to be prohibited, in the area of sexual conduct, punishments that most would consider cruel and unusual continue to be supported by state legislators.”<sup>190</sup>

The current statutory rape laws in Kansas,<sup>191</sup>

<sup>184</sup> See Olzsweski, *supra* note 59, at 706–07.

<sup>185</sup> See Age of Consent Chart for the US—2008, *supra* note 54; see also John Gramlich, *States Revising Penalties for Young ‘Romeos’*, PITT. POST-GAZETTE, July 22, 2007, at A6.

<sup>186</sup> 534 U.S. at 567 (citing *Atkins*, 536 U.S. at 316).

<sup>187</sup> *Ewing v. California*, 538 U.S. 11, 20 (2003) (citing *Harmelin v. Michigan*, 501 U.S. 957, 996–97 (1991) (Kennedy, J. concurring in part and concurring in judgment)).

<sup>188</sup> *Ewing*, 538 U.S. at 25.

<sup>189</sup> *Id.* (citing 1 W. LAFAVE & A. SCOTT, SUBSTANTIVE CRIMINAL LAW §1.5, at 30–36 (1986)).

<sup>190</sup> Brickner, *supra* note 18.

<sup>191</sup> “Aggravated indecent liberties with a child is: (1) sexual intercourse with who is more than 14 years of age but less than 16 years of age . . . Aggravated indecent liberties with a child . . . is a severity level 3, person felony.” KAN. STAT. ANN. § 21-3504 (2007).

Unlawful voluntary sexual relations is engaging in voluntary: (1) Sexual intercourse; (2) sodomy; or (3) lewd fondling or touching with a

Massachusetts,<sup>192</sup> Michigan,<sup>193</sup> South Carolina,<sup>194</sup> and Wisconsin<sup>195</sup>

child who is 14 years of age but less than 16 years of age and the offender is less than 19 years of age and less than four years of age older than the child and the child and the offender are the only parties involved and are members of the opposite sex.

KAN. STAT. ANN. § 21-3522 (2007). Unlawful voluntary sexual relations is a felony. § 21-3522; *see also* 2007 KANSAS LAWS CH. 183 (amending the 2006 laws providing requirements for sex offender registration).

<sup>192</sup> MASS. GEN. LAWS ch. 265, § 23 (2007) (“Whoever unlawfully has sexual intercourse or unnatural sexual intercourse, and abuses a child under sixteen years of age shall, for the first offense, be punished by imprisonment in the state prison for life or for any term of years, or, except as otherwise provided, for any term in a jail or house of correction, and for the second or subsequent offense by imprisonment in the state prison for life or for any term of years, but not less than five years; provided, however, that a prosecution commenced under the provisions of this section shall not be placed on file or continued without a finding.”); *see also* MASS. GEN. LAWS ch. 272, § 4 (2007) (“Whoever induces any person under 18 years of age of chaste life to have unlawful sexual intercourse shall be punished by imprisonment in the state prison for not more than three years or in a jail or house of correction for not more than two and one-half years or by a fine of not more than \$1,000 or by both such fine and imprisonment.”); *see also* MASS. GEN. LAWS ch. 6 §§ 178C-Q (2007) (providing requirements for sex offender registration).

<sup>193</sup> “A person is guilty of criminal sexual conduct in the third degree if the person engages in sexual penetration with another person and if any of the following circumstances exist: (a) That other person is at least 13 years of age and under 16 years of age.” MICH. COMP. LAWS ANN. § 750.520d (West 2007). Criminal Sexual conduct in the third degree is a felony punishable by imprisonment for not more than 15 years. *Id.* In addition, “Any man who shall seduce and debauch any unmarried woman shall be guilty of a felony, punishable by imprisonment in the state prison not more than 5 years.” MICH. COMP. LAWS ANN. § 750.532 (West 2007); *see also* MICH. COMP. LAWS ANN. 28.722 (West 2007) (providing requirements for sex offender registration).

<sup>194</sup> S.C. CODE ANN. § 16-15-140 (2007) (“It is unlawful for a person over the age of fourteen years to willfully and lewdly commit or attempt a lewd or lascivious act upon or with the body, or its parts, of a child under the age of sixteen years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of the person or of the child. A person violating the provisions of this section is guilty of a felony and, upon conviction, must be fined in the discretion of the court or imprisoned not more than fifteen years, or both.”). “A person is guilty of criminal sexual conduct in the second degree if the actor engages in sexual battery with a victim who is at least fourteen years of age but who is less than sixteen years of age and . . . is older than the victim.”



violate the Eighth Amendment prohibition on cruel and unusual punishment because the statutes punish consensual teenage sex as felonies, impose lengthy prison sentences, and require convicted individuals to register as sex offenders. The large number of states that have revised their laws to include age-gap provisions and to decriminalize consensual teenage sexual acts shows a national consensus that punishing these acts as a felony with required sex offender registration is cruel and unusual punishment.<sup>196</sup> In addition, the international community has recognized that many laws created cruel and unusual punishments for engaging in consensual teenage sex.<sup>197</sup> Not only is the original punishment of jail time or probation disproportionate to the crime of consensual teenage sex, but these states also have laws that require these individuals to register as sex offenders upon release.<sup>198</sup>

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S.C. CODE ANN. § 16-3-655(3) (2007); see also S.C. CODE ANN. § 23-3-430 (2007) (providing requirements for sex offender registration).

<sup>195</sup> “Whoever has sexual contact or sexual intercourse with a person who has not attained the age of 16 years is guilty of a Class C felony.” WIS. STAT. ANN. §948.02 (West 2007). See also WIS. STAT. ANN. § 301.45 (West 2007) (providing requirements for sex offender registration).

<sup>196</sup> Currently, 47 states include age-gap provisions, but amongst those states with such provisions, some states still make consensual teenage sex a crime, albeit less of a crime. See Age of Consent Chart for the US—2008, *supra* note 54.

<sup>197</sup> In June of 2007, the Congress of Peru reformed the statutory rape laws to declare that having consensual sexual relations with a person fourteen years old or older is legal. *Statutory Rape Law Reformed in Peru*, LIVINGINPERU.COM, <http://www.livinginperu.com/news-4116-politics-statutory-rape-law-reformed-peru> (last visited Jan. 24, 2008). Before this reform, a person could be charged with statutory rape and be sentenced to up to thirty years in prison for having sexual relations with a person under the age of sixteen. *Id.* In Canada, “the Criminal Code provides that any person who, for sexual purposes, touches any part of the body of a person under the age of 14 is guilty of the offense of *sexual interference* . . . . However, if the accused person is between the ages of 12 and 16 and the victim is less than two years younger than the accused and consented to the activity, it is not considered a crime.” Susan A. Herman, *Rape Law*, Microsoft Encarta Online Encyclopedia 2007, [http://encarta.msn.com/text\\_761564013\\_\\_2/Rape\\_\(law\).html](http://encarta.msn.com/text_761564013__2/Rape_(law).html) (last visited Mar. 12, 2008).

<sup>198</sup> See 2007 Kan. Sess. Laws Ch. 183 (amending the 2006 laws providing requirements for sex offender registration); MASS. GEN. LAWS ch. 6 §§ 178C-Q (2007) (providing requirements for sex offender registration); MICH. COMP.

The registration laws “subject[] the individual to a fate of ever-increasing fear and distress.”<sup>199</sup> As discussed earlier, registration laws not only subject individuals to ostracism and depression, but also to vigilante violence—all are additional forms of punishment.<sup>200</sup> In addition, states that refuse to apply their new laws retroactively also violate the Eighth Amendment since individuals convicted before the laws are amended will have to serve their sentences and then suffer an additional punishment by being forced to register upon release.<sup>201</sup> However, if states consider necessary reforms, the laws can conform to the requirements of the Eighth Amendment.

#### IV. NECESSARY REFORMS

##### A. *Apply New Laws Retroactively*

Some states modified their laws to reflect the view that adolescent consensual sex is not a serious crime and should not be punished as a felony with extensive sentences and forced registration requirements.<sup>202</sup> However, the new laws leave many

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LAWS. ANN. §28.722 (West 2007) (providing requirements for sex offender registration); S.C. CODE ANN. § 23-3-430 (2007) (providing requirements for sex offender registration); WIS. STAT. ANN. § 301.45 (West 2007) (providing requirements for sex offender registration).

<sup>199</sup> *Trop v. Dulles*, 356 U.S. 86, 102 (1958) (internal citations omitted).

<sup>200</sup> HUMAN RIGHTS WATCH, *supra* note 121, at 79, 87–88. *See also* Carpenter, *supra* note 143, at 369–70.

<sup>201</sup> *See* Downey, *supra* note 52 (writing that in Georgia, the Legislature changed the statutory rape law so that consensual teenage sex is only a misdemeanor, but “the Legislature did nothing to help the teenagers tripped up by the old law.”).

<sup>202</sup> *See* Gramlich, *supra* note 185. A new law in Florida allows teenagers involved in consensual sexual activity with no more than four years between them to petition to have their names removed from both state and national sex offender registries. *Id.* In Indiana, lawmakers changed the law to decriminalize consensual sex between adolescents if a court determines they are in a “dating relationship” and are within four years of age. *Id.* In Georgia, H.B. 1059, enacted in 2006, reduces the classification of statutory rape from a felony to a misdemeanor by including an age-gap provision. 2006 Ga. Laws 571.

individuals who were previously convicted without any remedy.<sup>203</sup> Therefore, it is important to apply the new laws retroactively. If the laws are not applied retroactively, many individuals who were convicted for engaging in consensual teenage sex will still be subject to punishment that is disproportionate to the crime.

In its report on sex offender registration, Human Rights Watch makes some appropriate suggestions.<sup>204</sup> The report recommends that “[s]tates should institute mechanisms by which offenders are removed from registries if they are exonerated; their convictions have been overturned, set aside, or otherwise vitiated; or if their conduct is no longer considered criminal.”<sup>205</sup> As for residency restrictions, the report proposes that the laws should not apply to entire classes of former offenders.<sup>206</sup> In Georgia, the Attorney General has argued that the law changing consensual teenage sex to a misdemeanor with no registration requirement cannot be applied retroactively, but that the retroactive residency restrictions are legal.<sup>207</sup> If laws regarding residency restrictions for sex offenders may be applied retroactively, it is only fair that the laws concerning their convictions and sentences should also have retroactive application.

*B. Change the Laws to Make Explicit Distinctions Between Sexual Predators and Adolescents Engaging in Consensual Sex*

One of the most feasible and appropriate potential reforms of statutory rape laws is for states to differentiate between dangerous offenders and adolescents engaging in consensual acts. Such distinctions are important because “[a] teenager could have a

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<sup>203</sup> See, e.g., Goodman, *supra* note 5. Since the Georgia legislature refused to apply its new statutory rape laws retroactively, Genarlow Wilson spent over two years in prison until the Georgia Supreme Court ruled that his sentence constituted cruel and unusual punishment and released him on October 26, 2007. *Id.*

<sup>204</sup> HUMAN RIGHTS WATCH, *supra* note 121.

<sup>205</sup> *Id.* at 15–16.

<sup>206</sup> *Id.* at 19.

<sup>207</sup> McDonald, *supra* note 57.

lifetime of hell because of a misplaced tag [as a sex offender]. On the other hand, society could have a hellish situation if we don't identify the right people."<sup>208</sup> The right people to be identified are sexual predators who prey on young children instead of teenagers engaging in consensual sex with their classmates.<sup>209</sup>

This year, laws enacted "in Connecticut, Florida, Indiana and Texas, along with a bill waiting for the governor's approval in Illinois, try to draw clearer distinctions between sexual predators and adolescents who pose less of a risk, such as those caught in so-called 'Romeo and Juliet' relationships."<sup>210</sup> These state policies "take different approaches but share a goal of preventing low-risk adolescents from facing the same penalties as serious predators."<sup>211</sup>

Florida's new policy permits individuals to petition to have their names removed from state and national sex offender registries if they engaged in consensual sexual acts with a person no more than four years younger than them.<sup>212</sup> This law is similar to the law proposed by Laurie Peterson in New Hampshire and defeated by legislators in the Senate. The Illinois bill would ensure that juvenile sex offenders are not added to the state's adult registry."<sup>213</sup> In Indiana, the law calls for the courts to take a more involved and detailed approach in each case because the law "decriminalizes consensual sex between adolescents if they are found by a court to be in a 'dating relationship' with an age difference of four years or less."<sup>214</sup> Under that law, "[c]ourts will also have discretion to determine whether violators should be included in the state's sex

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<sup>208</sup> Gramlich, *supra* note 185 (internal citation omitted).

<sup>209</sup> Koch, *supra* note 21 (quoting Oklahoma state Rep. Gus Blackwell as saying, "[w]e're trying to get pedophiles, not teenagers in a consensual relationship.").

<sup>210</sup> Gramlich, *supra* note 185 (in Connecticut, lawmakers widened the age gap from two years to three, and Texas revamped its risk-assessment system that previously allowed some teenagers who had consensual sex with a younger person to receive a higher risk rating than serious sexual predators).

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

offender registry.”<sup>215</sup> These reforms allow states to use their statutory rape laws to catch sexual predators without leaving a permanent taint on the lives of adolescents who engage in consensual teenage sex, and therefore, all states should revise their laws similarly.

In reforming the laws to create clear distinctions between sexual predators and teenagers, states should look to a new program that was adopted in Dane County, Wisconsin.<sup>216</sup> The program considered the opinions of the community and the goals that are served by punishment. The Dane County State’s Attorney office began by looking into the community’s values and opinions on statutory rape cases.<sup>217</sup> Members of an advisory group told prosecutors that first-time young offenders should be educated and efforts should be made to focus on prevention rather than mere punishment.<sup>218</sup> The members of the community were worried that prosecutors were not distinguishing young statutory rape offenders from predatory rapists and child molesters.<sup>219</sup>

As a result of their meetings and discussions with the community members, the prosecutors developed an “alternative disposition program for younger offenders.”<sup>220</sup> An integral aspect of the program is that individuals convicted of statutory rape offenses may choose to attend a nine-week class in sex education in lieu of a prison sentence or probation.<sup>221</sup> Significantly, if they successfully complete the course, their conviction will not become part of their criminal record.<sup>222</sup> The program “reflects a balance between the law’s capacity to set an exceedingly harsh punishment for this crime, and the law’s obligation to take seriously the harm that it is designed to remedy.”<sup>223</sup>

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<sup>215</sup> *Id.*

<sup>216</sup> Oberman, *supra* note 45, at 773.

<sup>217</sup> *Id.* at 774.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> Oberman, *supra* note 45, at 774.

<sup>223</sup> *Id.*

*C. Change the Laws on Sex Offender Registration*

In addition to changing the penalties for consensual teenage sex, states should also amend their sex offender registration laws so that the lists only include sexual predators. Currently, teenagers in many states are subjected to sex offender laws “for conduct that, while frowned upon, does not suggest a danger to the community, including consensual sex.”<sup>224</sup> Teresa Younger, executive director of the Connecticut Civil Liberties Union, argues that the public should only receive information that they need to know, and that a list of names and addresses and pictures does not necessarily provide such information.<sup>225</sup> The state should screen the information that goes on to the website because

individuals listed are not just the dangerous scary rapists. This is a situation potentially of a 19-year-old who has consensual sex with a 15-year-old, then is prosecuted for statutory rape, serves nine months in jail, and is now a registered sex offender. That doesn’t help the citizens of Connecticut know if he is violent or not violent.<sup>226</sup>

States should model sex offender registration laws after the laws enacted in Minnesota, which provide for community notification only on a need-to-know basis.<sup>227</sup> The law states that “[t]he extent of the information disclosed and the community to whom disclosure is made must be related to the level of danger posed by the offender . . . and to the need of community members for information to enhance their individual and collective safety.”<sup>228</sup> Public safety will still be protected if states utilize community notification on a need-to-know basis.<sup>229</sup>

Sex offender registries are intended to make the public aware of

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<sup>224</sup> HUMAN RIGHTS WATCH, *supra* note 121, at 8.

<sup>225</sup> Jane Gordon, *Ruling Opens Door to List Sex Offenders*, N.Y. TIMES, Mar. 9, 2003, at 6.

<sup>226</sup> *Id.* Ms. Younger’s group advocated for hearings for convicted sex offenders so they could be assessed for levels of “dangerousness.” *Id.*

<sup>227</sup> HUMAN RIGHTS WATCH, *supra* note 121, at 11.

<sup>228</sup> *Id.*

<sup>229</sup> *Id.* at 12.

sexual predators, not teenagers who engage in adolescent sex.<sup>230</sup> Unfortunately, as many child safety and rape prevention advocates believe, states are pouring money into “registration and community notification programs that do not deal with the real causes of sexual abuse and violence.”<sup>231</sup> Unlimited online access to registry information encourages people to ostracize former offenders, making it less likely that they will be able to reintegrate into communities.<sup>232</sup> This community response “subjects the individual to a fate of ever-increasing fear and distress,” and is therefore cruel and unusual punishment.<sup>233</sup>

In order to address some of these problems, states should reform their laws regarding sex offender registries. Offenders who have committed minor, non-violent offenses, such as consensual teenage sexual activity, should not be required to register.<sup>234</sup> If individuals have previously been required to register, states should remove them from the registry if they are exonerated, if their convictions are overturned or set aside, or if their conduct is no longer considered criminal.<sup>235</sup> If individuals convicted of a crime for engaging in consensual teenage sex are not required to register, they will not be subject to additionally harsh punishment.

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<sup>230</sup> See Koch, *supra* note 21.

<sup>231</sup> HUMAN RIGHTS WATCH, *supra* note 121, at 10.

<sup>232</sup> *Id.* at 9.

<sup>233</sup> Trop v. Dulles, 356 U.S. 86, 102 (1958).

<sup>234</sup> HUMAN RIGHTS WATCH, *supra* note 121, at 15; see also Downey, *supra* note 52 (“Lawmakers must amend the sex offender registry law so that it distinguishes between two immature high school kids hooking up at a party to a pedophile molesting the toddler next door.”).

<sup>235</sup> HUMAN RIGHTS WATCH, *supra* note 121, at 15; see also Goodman, *supra* note 5 (The Georgia Supreme Court noted that “[t]he severe felony punishment and sex offender registration imposed on Wilson make no measurable contribution to acceptable goals of punishment.”).

## CONCLUSION

Consensual teenage sex should not be criminalized because, in contrast to what many proponents of statutory rape laws argue, adolescent sexual activity may be beneficial to teenagers.<sup>236</sup> However, if states insist on regulating such acts, they must craft the laws so that they do not subject teenagers to cruel and unusual punishment for their actions. Currently, the laws of at least five states appear to subject teenagers to cruel and unusual punishment because the statutes carry a felony conviction with a prison sentence. While it might be argued that a prison sentence alone cannot constitute cruel and unusual punishment, a conviction for statutory rape, child molestation, or sexual assault carries an additional component. The convictions often require these teenagers to register as sex offenders for a period of years or for the rest of their lives, thus subjecting them to further punishment. States must change their laws in order to protect teenagers from receiving harsh punishments such as jail sentences for engaging in consensual sex.

These states should follow suit with other states that have revised the laws in order to completely decriminalize such acts or to classify consensual teenage sex as a misdemeanor with less severe punishment. Subjecting teenagers to such punishment simply because legislators believe that teenage sex is immoral is not justified by any theory of punishment. “Although juvenile sexual conduct is not to be encouraged, the current prohibitions and punishments are unnecessarily harsh and overreaching and fail to take into account contemporary reality.”<sup>237</sup>

Revising the laws does not necessarily mean that the states will be condoning sex between teenagers. Instead, the states will be using the laws to prosecute the true targets of the laws—sexual predators. States that have revised their laws to provide for lesser penalties should apply the new laws retroactively so individuals who were convicted under old laws are not subject to registration

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<sup>236</sup> See Kitrosser, *supra* note 81, at 322.

<sup>237</sup> Olszewski, *supra* note 59, at 710.



requirements and residency restrictions.<sup>238</sup> Those states that have not yet revised their laws should change the laws to make explicit distinctions between sexual predators who pose a threat to children and adolescents engaging in consensual sex.<sup>239</sup> In addition, states should change their laws on sex offender registration to guarantee that adolescents who engaged in consensual teenage sex are not included and therefore not subject to lifelong stigma and vigilante violence.<sup>240</sup> It is imperative that states employ these reforms so they can eliminate injustice and ensure that their laws do not violate the Eighth Amendment ban on cruel and unusual punishment.

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<sup>238</sup> See *supra* notes 202–07 and accompanying text.

<sup>239</sup> See *supra* notes 208–23 and accompanying text.

<sup>240</sup> See *supra* notes 224–35 and accompanying text.