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## When Yes Means No, Legally: An Eighth Amendment Challenge to Classifying Consenting Teenagers as Sex Offenders

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## WHEN YES MEANS NO, LEGALLY: AN EIGHTH AMENDMENT CHALLENGE TO CLASSIFYING CONSENTING TEENAGERS AS SEX OFFENDERS

“If our job is to protect our children, why in the heck would we want to make them sex offenders for the rest of their lives?”<sup>1</sup>

### INTRODUCTION

In late August of 2009, all other current events were overshadowed by breaking news that a young woman, who had been reported missing by her family eighteen years earlier, was found and found *alive*. In the wake of the media storm following Jaycee Lee Dugard’s rescue from nearly two decades of captivity and continued sexual abuse by a convicted sex offender,<sup>2</sup> few people appeared willing to question whether sex offender laws had gone too far.<sup>3</sup> Rather, because individual states and the federal government typically respond to the discovery of these horrific sexual abuse crimes by enacting such laws,<sup>4</sup> most are only willing to question if the laws have gone far enough.<sup>5</sup> As a *New York Times* editorial aptly put it,

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1. Timothy Magaw, *Proposals Seek ‘Sensitive Balance’ in Teen Sexting*, DAILY HERALD (Feb. 11, 2010, 10:58 PM), <http://www.dailyherald.com/story/?id=358446&src=109> (quoting Illinois police officer Richard Wistocki, who supported proposed state legislation that would no longer require teenagers convicted of sending sexually explicit text messages to register as sex offenders).

2. Dugard was only eleven years old in 1991 when Phillip Garrido abducted her near her home in South Lake Tahoe, California. Jacki Lyden, *Sex Offender Escaped Notice During Girl’s Captivity*, NAT’L PUB. RADIO (Oct. 3, 2009), <http://www.npr.org/templates/story/story.php?storyID=113408859>; see also Jay Bookman, Op-Ed., *Sex Offender Law Reduces Safety in State*, ATLANTA J.-CONST., Oct. 2, 2009, at A18. In 1977, Garrido had been sentenced to fifty years for an unrelated kidnapping and rape in Nevada. Lyden, *supra*. However, he only served eleven years before being released in 1988. *Id.* Three years later, Garrido kidnapped Dugard, and for the next eighteen years, imprisoned her, used her as his personal sex slave, and fathered two daughters with her. *Id.*

3. Neil Steinberg, Op-Ed., *Some ‘Sex Offenses’ Just Aren’t*, CHI. SUN-TIMES, Aug. 30, 2009, at 12A; but see Kelsie Tregilgas, Comment, *Sex Offender Treatment in the United States: The Current Climate and an Unexpected Opportunity for Change*, 84 TUL. L. REV. 729, 729 (2010) (“While sex-offender laws and policies have garnished unquestioning support from a sector of the population largely uneducated about the specifics of their implementation and effects, they have frequently been criticized by scholars, mental health professionals, and others familiar with the realities of contemporary sex-offender treatment.”).

4. See Jamie Fellner, Op-Ed., *The Wrong Sex Offender Laws*, L.A. TIMES, Sept. 18, 2007, at 21.

5. Michael Vitiello, *Punishing Sex Offenders: When Good Intentions Go Bad*, 40 ARIZ. ST. L.J. 651, 651 (2008).

[W]hen you consider the recent explosion of local laws designed to keep sex offenders at bay—restricting where they can live and work, forcing them to the literal fringes of society, like some human form of toxic waste—what you see is not a rational system for managing risks and rehabilitating people, but a system for managing public fear.<sup>6</sup>

And this apparent system for managing public fear creates a major dilemma for the emergence of opposing opinions because society sees “the electorate demand[ing] that legislatures enact more crimes and tougher sentences, and no interest groups or countervailing political forces [to] lobby against those preferences.”<sup>7</sup>

Moreover, with the gruesome details of these crimes stamped on the front page of every newspaper and the thought “*that could have been my child*” in every parent’s mind, society appears fully willing to turn a blind eye to precisely what these laws entail and whom they affect.<sup>8</sup> These laws tend to be far-reaching in their restrictions and over-inclusive in who qualifies as an offender.<sup>9</sup> In turn, a substantial disconnect has developed between the sexual predators that the laws were designed to monitor and the large category of offenders actually affected by the laws. The problem is that these laws are too tempting to resist—and too easy to enact. When justified by the argument that harsh sex offender laws are necessary to protect children from the violent predators potentially lurking in neighborhoods across the country, showing any opposition to such laws tends to make the individual look sympathetic to child molesters and sexual predators.<sup>10</sup>

However, amidst the legislative haste and hustle to pass a law even more draconian than its predecessor, it is important to remember that Dugard’s captor, Phillip Garrido, for the most part wholly complied with the relevant offender laws throughout the eighteen years he imprisoned Jaycee.<sup>11</sup> The United States is a society that prides itself on

6. *Wrong Turn on Sex Offenders*, N.Y. TIMES, Mar. 13, 2007, at 18A.

7. Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 223 (2007).

8. Accord Caitlin Young, Note, *Children Sex Offenders: How the Adam Walsh Child Protection and Safety Act Hurts the Same Children It Is Trying to Protect*, 34 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 459, 463–64 (2008).

9. See Sarah Tofte, *Preventing Sexual Violence: Lessons of the Jaycee Dugard Case*, S.F. CHRON., Sept. 20, 2009, at E2.

10. See Steinberg, *supra* note 3, at 12A.

11. See *id.*; Marisol Bello, *Questions Arise on Monitoring of Sex Offenders*, USA TODAY, Sept. 2, 2009, at 3A.

Every April 5 for the past 10 years, Phillip Garrido registered on his birthday . . . as a convicted sex offender.

Two to three times a month, he met his parole officer at the parole office or his Antioch, Calif., home. Since at least January, the state monitored him with a global positioning device strapped to his ankle.

teaching its citizens to admit when they are wrong and change what they can change. Thus, it is time to admit to the obvious flaw in the system: The laws are not adequately protecting society from those most likely to cause harm.<sup>12</sup> Instead, those most likely to cause harm are mixed into the whole batch of *labeled*<sup>13</sup> offenders—a batch that includes teens convicted of engaging in consensual sex with another slightly younger teen. As a result, implementing these tough laws that require all individuals convicted of a sex offense to register is counterproductive. For one, the laws are counterproductive because law enforcement agencies become overwhelmed by and unable to effectively monitor the large number of registered offenders.<sup>14</sup> In addition, these tough laws brand an individual a sex offender for life—effectively ruining any chance at normalcy—although most of society would not consider this individual to be a sexual threat.<sup>15</sup>

While one may be morally opposed to two teenagers having sexual relations with each other, “sex” is not the proper area for expansive legislation on morality. There is a fine line between immorality and criminality. As many of these state sex offender laws currently stand, this fine line is better known as the Eighth Amendment—and labeling a teenager in a consensual sexual relationship a “sex offender” constitutes cruel and unusual punishment.<sup>16</sup> In November 2009, a Michigan court of appeals agreed by ruling that it *is* a cruel and unusual punishment to require an eighteen-year-old to register as a sex offender for having a consensual sexual relationship with his nearly fifteen-year-old girlfriend, the young woman to whom he is now married.<sup>17</sup>

Admittedly, it is an uphill if not an unwinnable battle to fight for protecting the rights of convicted sex offenders—regardless of the circumstances surrounding their individual offenses. But the purpose of this Comment is not to try to do so. Rather, this Comment looks at those “offenders” who never should have been nor ever should be

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Yet police say he managed to conceal Jaycee Lee Dugard, who he is accused of kidnapping and sexually abusing, in a squalid backyard encampment for 18 years.

*Id.*

12. *Accord* Tofte, *supra* note 9, at E2.

13. I use the term “labeled” loosely because, as this Comment argues, there are clearly persons who do not fit the profile of a sex offender as set by society—yet because of their states’ laws, these persons are nonetheless labeled as sex offenders.

14. *See* Bello, *supra* note 11, at 3A.

15. *See* Susan L. Pollet, Op-Ed., *Teens and Sex Offenses: Where Should the Law Draw the Lines?*, N.Y. L.J., Aug. 14, 2009, at 4 (discussing the irreparable consequences that naturally follow from having to register as a sex offender, including employment and housing barriers, victimization from vigilantism, ostracism from society, and depression).

16. *See infra* notes 195–343 and accompanying text.

17. *See infra* notes 171–86 and accompanying text.

labeled a sex offender. “While crimes of sexual violence and abuse against children are among the most vile crimes that humans commit, a sexual act between two consenting teenagers does not logically fall into that same category.”<sup>18</sup> Accordingly, this Comment discusses the need for states to follow the approach recently taken by the federal government and amend their sex offender registration and notification laws to no longer apply to consensual sexual acts between two teenagers—close in age—but with one teenager below the state’s relevant age of consent.<sup>19</sup> This Comment also conducts an Eighth Amendment analysis, weighing the relevant factors to determine whether applying the sex offender laws to teens convicted of engaging in consensual sex with another teen below the age of consent constitutes cruel and unusual punishment.<sup>20</sup>

The latter portion of the Comment begins by assuming that there is a nationwide prohibition against requiring teens to register and abide by notification laws to ensure that they no longer fall within the scope of any sex offender laws.<sup>21</sup> In this way, the Comment is able to address a likely implication that may follow from such action. For instance, without individuals like these teenagers clogging up registries and wasting law enforcement agencies’ time and resources, which are currently being spent monitoring nondangerous offenders, the true purpose of sex offender laws—to protect the community from the most vicious and violent offenders—will be better served. Finally, this Comment explores an alternative way of dealing with consensual teenage sex.<sup>22</sup> Instead of punishing one or both of the teenagers after they have engaged in consensual sex, it may be within society’s best interests to implement some sort of mandatory sex education program that would teach teenagers the potential grave consequences that follow from having unsafe sex as well as enable them to make their own decisions about when they actually choose to have sex for the first time.

## II. BACKGROUND

This Part first explores the prevalence of sexual activity among teenagers today as compared to fifty years ago to show societal change in how teenagers view and respond to sexual acts prior to marriage. It next addresses the evolution and status of state and federal sex of-

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18. See Bookman, *supra* note 2, at A18.

19. See *infra* notes 259–79 and accompanying text.

20. See *infra* notes 195–343 and accompanying text.

21. See *infra* notes 356–79 and accompanying text.

22. See *infra* notes 380–94 and accompanying text.

fender registration and notification laws in the United States, as well as the “Romeo and Juliet” exception that protects certain teenage sex offenders. Finally, this Part concludes by providing an overview of how the Supreme Court has interpreted the Eighth Amendment’s prohibition against cruel and unusual punishment.

#### A. *Teenage Sexuality in the Twenty-First Century*

“Whether we like it or not, sexual desire is part of being a teen . . . .”<sup>23</sup>

Thanks in part to the media, societal views regarding sex and sexuality have changed dramatically since the Baby Boomer Era.<sup>24</sup> The perhaps naïve but indisputably censored days of *Dick Van Dyke* and *I Love Lucy* are over.<sup>25</sup> Now, not only are television sitcom parents no longer sleeping in separate beds, neither are children.<sup>26</sup> While it is undoubtedly an exaggeration of reality, there is more than a mere kernel of truth in shows like *Gossip Girl*<sup>27</sup> where the viewer can watch the teen characters engage in sexual rendezvous with near strangers on a weekly basis. But *Gossip Girl* is not alone in this category; and while *Gossip Girl* may be more up-front with its viewers about the sexual nature of the show’s plot, the otherwise praised show *Glee* has faced its fair share of criticism when it comes to portraying teen sex.<sup>28</sup>

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23. Laura Berman, *True Love and Teenage Hormones Won’t Wait*, CHI. SUN-TIMES, Dec. 24, 2007, at 30.

24. G.S. Abbott & D. Treboux, *Teen Sexuality*, in 23 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES 15537, 15537 (Neil J. Smelser & Paul B. Baltes eds., 2001).

25. Gail Pennington, Op-Ed., *Sex on TV: From Twin Beds to “Temptation Island,” We’ve Come a Long Way*, ST. LOUIS POST-DISPATCH, Feb. 11, 2001, at F3.

On “I Love Lucy,” the most popular TV sitcom of the 1950s, Lucy and Ricky Ricardo slept in twin beds, safely separated by a nightstand.

A decade later, Rob and Laurie Petrie of “The Dick Van Dyke Show” may have smooched regularly, but they were still stuck in those twin beds, with that nightstand in between.

*Id.*

26. See Belinda Luscombe, *The Truth About Teen Girls*, TIME, Sept. 22, 2008, at 66, 66 (noting the trend in popular television shows to capitalize on sexual promiscuity among teenagers).

27. See, e.g., Tamar Lewin, *Rethinking Sex Offender Laws for Youths Showing off Online*, N.Y. TIMES, Mar. 21, 2010, at A1 (“We’re at this cultural shift . . . because of what’s happening in terms of representation of teen sexuality as you can see on ‘Gossip Girl.’” (quoting New York University law professor Amy Adler)); Melena Ryzik, *Omigosh! ‘OC’ with Warmer Duds?*, N.Y. TIMES, Sept. 12, 2007, at E1.

The sex starts about five minutes into the premiere of “Gossip Girl,” a new series based on the best-selling young-adult books by Cecily von Ziegesar. Within 20 minutes the characters, privileged Upper East Side private schoolers, are downing martinis at the Palace Hotel. There is some pot smoking in Central Park, and more sex . . . .

Ryzik, *supra*, at E1.

28. See Robert Bianco, *‘Glee’ Loses Its Voice in the Chaos*, USA TODAY, Mar. 15, 2011, at 1D (“In some ways, Glee’s slips are typical of shows that become too hot too fast, indulging in too

Sex appears to be everywhere—at least everywhere on TV.<sup>29</sup> And at the end of the day, even seemingly innocent networks like Nickelodeon cannot completely avoid the topic of sex and teen pregnancy.<sup>30</sup>

In reality, there has been a clear, dramatic increase in the rates of sexual activity among teenagers since the 1950s.<sup>31</sup> The most recent statistics estimate that 48% of all high school students have had sexual intercourse.<sup>32</sup> This statistic jumps to nearly 65% for recent high school graduates.<sup>33</sup> Of sexually active high school students, 15% have had four or more sexual partners.<sup>34</sup> Among sexually active female teenagers, about 74% reported having a sexual partner of either the same age or one to three years older.<sup>35</sup> And only 8% of these female

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many big-name guests and too many gimmick-laden ‘very special’ episodes. Last week gave us the worst of both worlds, with an all-consuming Gwyneth Paltrow return visit that played like a *South Park* spoof on after-school specials—one designed to encourage teenage sex. Once we might have heard Artie sing a sensitive song about adolescent desire and confusion; now we get Paltrow leading the kids in *Do You Wanna Touch Me.*”); Paige Wiser, *Choir Hazard: Racy Moments on ‘Glee’ Alarm Parents Expecting Clean Entertainment*, CHI. SUN-TIMES, Oct. 19, 2010, at 28 (“This season, the salaciousness is less subtle. In the Britney Spears episode alone, the Parents Television Council complained about ‘narcotic drug abuse, public masturbation and school-sanctioned burlesque.’”).

29. For a discussion on the prevalence of sex on TV networks like MTV, see Alessandra Stanley, *Sexy Kids? O.K. But a Channel from Arabs? No.*, N.Y. TIMES, Feb. 2, 2011, at C1 (“But sex is sexier than foreign affairs, and it certainly sells better.”).

30. Lawrence Van Gelder, *Jamie Lynn Spears Is Pregnant at 16*, N.Y. TIMES, Dec. 20, 2007, at E2.

Jamie Lynn Spears . . . the 16-year-old star of the popular Nickelodeon series “Zoey 101” and the sister of the troubled singer Britney Spears . . . said she was 12 weeks pregnant . . . . In a statement, Nickelodeon said: “We respect Jamie Lynn’s decision to take responsibility in this sensitive and personal situation.”

*Id.*

31. See Abbott & Treboux, *supra* note 24, at 15538; *Teen-Age Sex Activity Is Found to Level Off*, N.Y. TIMES, Feb. 24, 1995, at A14 (“After steadily increasing since the 1950’s, the number of teen-agers who had sex has steadied . . .”).

32. *2007 Results: Ever Had Sexual Intercourse*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <http://apps.nccd.cdc.gov/youthonline> (select “Sexual Behaviors” hyperlink under “View One Question For All Locations”; then select “Ever Had Sexual Intercourse” hyperlink under “Sexual Behaviors”; then select “2007” from dropdown menu within “Choose Table Content”; then follow “GO” hyperlink) (last visited Feb. 13, 2011) [hereinafter *CDC: Students*]; see also John Santelli et al., *Trends in Sexual Risk Behaviors, by Nonsexual Risk Behavior Involvement, U.S. High School Students, 1991–2007*, 44 J. ADOLESCENT HEALTH 372, 376 (2009) (“[T]he percentage of students reporting ever having engaged in sexual intercourse declined between 1991 and 2007, 54% of all students in 1991 to 48% in 2007.”).

33. See *CDC: Students*, *supra* note 32 (select “12th Grade” radio button under “Filter Data” column).

34. U.S. DEP’T OF HEALTH AND HUMAN SERVICES CENTER FOR CHRONIC DISEASE PREVENTION AND HEALTH PROMOTION, *TRENDS IN PREVALENCE OF SEXUAL BEHAVIORS*, available at [http://cdc.gov/healthyyouth/yrbps/pdf/us\\_sexual\\_trend\\_yrbps.pdf](http://cdc.gov/healthyyouth/yrbps/pdf/us_sexual_trend_yrbps.pdf).

35. Joyce C. Abma et al., *Teenagers in the United States: Sexual Activity, Contraceptive Use, and Childbearing, 2002*, 23 VITAL HEALTH STATISTICS 1, 8 (2004).

teenagers reported having a partner more than six years older.<sup>36</sup> Moreover, 75% were in an exclusive relationship when they had sex for the first time.<sup>37</sup>

In terms of practicing safe sex, 74% of female teens used some form of contraception the first time they had sex, while 71% of males used a condom.<sup>38</sup> This is a major improvement from the statistics reported in 1980 showing that only 43% of females and 39% of males used a method of contraception during their first sexual experience.<sup>39</sup> Furthermore, of the teens that remain sexually active after their first experience, 90% continue to use some form of contraception when having sex.<sup>40</sup> This significant improvement in safe sex practices between teens has led to a considerable decrease in teen pregnancies and birth rates.<sup>41</sup> Between 1990 and 2002, female teen pregnancy rates dropped 35%, while birth rates between 1991 and 2005 dropped 34%.<sup>42</sup> Similarly, “[t]he rate of abortions among teens also plummeted, to [nearly twenty] per 1,000 women in 2004 from a high of 43.5 per 1,000 in 1988.”<sup>43</sup> However, even considering the dramatic reduction in numbers, the United States still ranks the highest among other developed nations in terms of teen pregnancies, births, and abortions.<sup>44</sup>

Likely as a result of the statistics listed above, there appears to be a growing trend in providing teens with access to contraceptives as a means to promote “safe sex”—instead of simply “no sex.” For the first time, the federal government took a non-abstinence stance when the Food and Drug Administration issued a statement that seventeen-year-olds would now be able to purchase morning-after contraceptive pills without a doctor’s prescription.<sup>45</sup> In addition, after the alleged

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36. *Id.*

37. *Id.*

38. *See id.* at 9.

39. *See id.*

40. *See* Abbott & Treboux, *supra* note 24, at 15538.

41. Santelli et al., *supra* note 32, at 372–73.

42. *Id.* (discrepancy in years is due to more recent data being available concerning birth rates).

43. *Knocked Down: Pregnancy ‘Pact’ Drew Headlines, But Teen Pregnancies Are at Lowest Level in 30 Years*, CHI. TRIB., June 30, 2008, at 6.

44. *Id.*

45. *See* Tummino v. Torti, 603 F. Supp. 2d 519, 550 (E.D.N.Y. 2009) (“The FDA is also ordered to permit Barr Pharmaceuticals, Inc., the Plan B drug sponsor, to make Plan B available to 17 year olds without a prescription, under the same conditions as Plan B is now available to women over the age of 18.”); *see also* Gardiner Harris, *Agency Agrees to Ease Access to Emergency Contraceptive for 17-Year-Olds*, N.Y. TIMES, Apr. 23, 2009, at A14 (reporting the lowering of the minimum age from eighteen to seventeen for which a person can purchase morning-after contraceptive pills without a doctor’s prescription).



“pregnancy pact” scandal at a Gloucester, Massachusetts high school led to news sources speculating that multiple teenagers had purposely become pregnant,<sup>46</sup> more towns and school boards are breaking their silence on sex and are starting to consider providing their students with some form of or access to contraceptives.<sup>47</sup>

### B. *History of Sex Offender Notification and Registration Laws*

“[W]e’re sending a clear message across the country: those who prey on our children will be caught, prosecuted and punished to the fullest extent of the law.”<sup>48</sup>

Currently, more than 700,000 sex offenders are registered nationwide.<sup>49</sup> Sex offenders are among the most feared and reviled members of society.<sup>50</sup> Because studies have shown that sex offenders are

46. Katie Zezima, *Spike in School's Pregnancies Leads to Report that Some Resulted from Girls' Pact*, N.Y. TIMES, June 20, 2008, at A15.

At least 17 girls at the public high school in the seaside town of Gloucester, Mass., are expecting babies, and a Time magazine report says nearly half became pregnant after making a pact to do so and raise the children together. Local officials . . . would not confirm the existence of such a pact but acknowledged that many of the 17 pregnancies—a total four times as many as last school year at the 1,200-student school—had been intentional.

*Id.*

47. See, e.g., Katie Zezima, *Massachusetts: Contraceptives at School*, N.Y. TIMES, Oct. 10, 2008, at A20 (noting that, made famous by the alleged “pregnancy pact,” Gloucester’s school board voted “to allow birth control pills and condoms to be made available at the town’s high school”); see also DeeDee Correll, *6 Denver High Schools May Offer Birth Control*, L.A. TIMES, Nov. 24, 2007, at A11 (“Denver school officials are considering a proposal to dispense contraceptives in its six high-school-based health clinics . . .”); Neil Gonzales, *Daly City School May Offer Condoms to Students*, OAKLAND TRIB. (Jan. 10, 2009), <http://www.highbeam.com/doc/1P2-19726997.html> (commenting that after announcing the possibility that the high school would follow the trends of neighboring schools in making condoms available, the superintendent responded, “The school board is faced with the reality that a lot of young people are having sex . . . While most adults like to believe kids are not doing this, the reality is they are . . .”); Steven Rosenberg, *Birth Control Battle in Reverse—Vote Is Sought to Halt Distribution at School*, BOSTON GLOBE (Sept. 6, 2009), [http://www.boston.com/news/education/k\\_12/articles/2009/09/06/birth\\_control\\_battle\\_in\\_revere/](http://www.boston.com/news/education/k_12/articles/2009/09/06/birth_control_battle_in_revere/) (“Currently, Revere High School students who have parental approval can receive free condoms and prescriptions for birth control pills.”).

48. Press Release, White House, President George W. Bush, President Signs H.R. 4472, the Adam Walsh Child Protection and Safety Act of 2006 (July 27, 2006) [hereinafter White House Press Release], available at <http://georgewbush-whitehouse.archives.gov/news/releases/2006/07/20060727-6.html> (reporting President Bush’s explanation of the intent behind sex offender registration and notification laws).

49. Alan Greenblatt, *States Struggle to Control Sex Offender Costs*, NAT’L PUB. RADIO (May 28, 2010), <http://www.npr.org/templates/story/story.php?storyId=127220896>.

50. See FRANKLIN E. ZIMRING, AN AMERICAN TRAVESTY: LEGAL RESPONSES TO ADOLESCENT SEXUAL OFFENDING 26 (2004).

The rapist and child molester historically have been sources of public outrage and fear throughout Western nations . . . The child molester . . . is so detested among prisoners that he is at high risk of attack by them and often must be held in protective

much more likely to reoffend than other violent criminals,<sup>51</sup> it makes sense that society teaches children to stay away from strangers before teaching them how to tie a shoe, make their bed, or read a book. As a result, over the course of the past fifteen years, every state and the federal government has enacted some form of sex offender registration and notification law.<sup>52</sup>

### 1. *The Jacob Wetterling Program and the Birth of Federal Sex Offender Legislation*

In 1994, Congress enacted the first major piece of federal legislation in this area.<sup>53</sup> The law was in response to the abduction of eleven-year-old Jacob Wetterling from near his Minnesota home in 1989.<sup>54</sup> Family and friends of Jacob lobbied for child safety, and with the enactment of the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Act<sup>55</sup> (the Jacob Wetterling Program) came the requirement that states implement a sex offender registry program or risk losing up to 10% of federal funds otherwise to be directed toward state and local law enforcement.<sup>56</sup> Specifically, the Jacob Wetterling Program “[e]stablished guidelines for states to track sex offenders”<sup>57</sup> and “[r]equired states to track sex offenders by confirming their place of residence annually for ten years after their release into the community or quarterly for the rest of their lives if the sex offender was con-

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segregation from the rest of the general prison population, sometimes in separate facilities.

*Id.*

51. See *McKune v. Lile*, 536 U.S. 24, 33 (2002) (citing Recidivism Statistics from a U.S. Dep’t of Justice report) (“When convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault.”); Todd S. Purdum, *Clinton Backs Plan to Track Sex Offenders Nationwide*, N.Y. TIMES, June 23, 1996, at 17 (“A 15-year study by the California Department of Justice of 1,300 sex offenders arrested in 1973, found that . . . sex offenders were five times more likely than other violent offenders and more than six times more likely than all types of offenders to commit another sex offense.”).

52. Joanna S. Markman, *Community Notification and the Perils of Mandatory Juvenile Sex Offender Registration: The Dangers Faced by Children and Their Families*, 32 SETON HALL LEGIS. J. 261, 276 (2008).

53. Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, Pub. L. No. 103-322, 108 Stat. 2038 (1994) (codified as amended at 42 U.S.C. § 14071 (2006)).

54. See *Jacob’s Story*, JACOB WETTERLING RESOURCE CENTER, <http://jwrc.org/WhoWeAre/History/JacobsStory/tabid/108/Default.aspx> (last visited Feb. 13, 2011) [hereinafter *Jacob’s Story*].

55. 42 U.S.C. § 14071.

56. Richard Meryhew, *Jacob’s Legacy: Ten Years of Heartache Haven’t Weakened Patty Wetterling’s Tireless Resolve to Protect Children*, STAR TRIB., Oct. 17, 1999, at 1A.

57. *Federal Sex Offender Legislation*, U.S. DEP’T OF JUSTICE: OFFICE OF SEX OFFENDER SENTENCING, MONITORING, APPREHENDING, REGISTERING, & TRACKING (SMART), <http://www.ojp.usdoj.gov/smart/legislation.htm> (last visited Feb. 25, 2011) [hereinafter SMART].

victed of a violent sex crime.”<sup>58</sup> Although considered to be the catalyst for the fifteen years of sex offender legislation to follow, the Jacob Wetterling Program did not require the dissemination of registered offenders’ personal information.<sup>59</sup> Just short of two months prior to President Clinton signing the Jacob Wetterling Program into law, a heinous crime ripped through a quaint New Jersey town, exposing a need for public dissemination of the most dangerous registered sex offenders’ personal information.<sup>60</sup>

## 2. *Megan’s Law and the Public’s Right to Know*

On an otherwise typical summer evening in late July of 1994, Maureen Kanka realized something was wrong when her seven-year-old daughter Megan never returned from supposedly playing with a friend.<sup>61</sup> Hoping a neighbor had recently seen Megan or knew of her whereabouts, Maureen went door to door until she came upon two middle-aged men casually talking in a driveway across the street.<sup>62</sup> One of the men calmly admitted he had indeed seen Megan but that it had been much earlier that afternoon.<sup>63</sup> Maureen had no idea that this man was “twice-convicted sex offender” Jesse Timmendequas.<sup>64</sup> But more importantly, Maureen had no idea that earlier Jesse had lured her daughter into his home with the promise of seeing his puppy and then “slapped, strangled and sexually assaulted her before . . . wrapp[ing] two plastic bags around her head.”<sup>65</sup> Jesse then took the

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58. *Id.*

59. See 42 U.S.C. § 14071; see also Brittney M. Bowater, Comment, *Adam Walsh Child Protection and Safety Act of 2006: Is There a Better Way to Tailor the Sentence for Juvenile Sex Offenders?*, 57 CATH. U. L. REV. 817, 822 (2008).

60. See David M. Heger, *Jacob, Megan, and Pam: Federal Sex Offender Registration Legislation*, NATIONAL VIOLENCE AGAINST WOMEN PREVENTION RES. CENTER (Sept. 25, 2000), <http://www.musc.edu/vawprevention/policy/fedoffender.shtml>.

61. William Glaberson, *Mother of Slain Girl Takes the Stand as Trial Begins*, N.Y. TIMES, May 6, 1997, at B4.

62. *Id.*

63. *Id.*

64. *Id.*; see also William Glaberson, *At Center of ‘Megan’s’ Case, a Man No One Could Reach*, N.Y. TIMES, May 28, 1996, at 1.

[Jesse] had pleaded guilty twice before to sexually assaulting small children. In 1981, a judge had labeled him a “compulsive, repetitive sexual offender.” Then, after he had served more than seven years for his two crimes, he and two other convicted child molesters quietly moved here, into a neighborhood of split-level homes where people tend their gardens and their children well. Not long afterward, Megan Kanka was killed.

*Id.*

65. See Glaberson, *supra* note 61, at B4.

girl's tiny, lifeless body, forced it into an old toy chest, and disposed of it among high weeds in a nearby park.<sup>66</sup>

Just months after gruesome details of Megan's rape and murder captured headlines across the nation, her home state of New Jersey enacted a law in her name that "required notification to [a] community when a convicted sex offender was a resident."<sup>67</sup> Two years later, Congress federalized New Jersey's Megan's Law, thereby amending the Jacob Wetterling Program by requiring not just private registration but also public registration and notification.<sup>68</sup> Thus, "[t]he enactment of this legislation marked the birth of federally mandated community notification."<sup>69</sup> As a result, by the turn of the century, all fifty states had enacted some form of sex offender registration and notification laws.<sup>70</sup>

### 3. *The Adam Walsh Act's Expansion to the Sex Offender National Registry*

The most recent piece of sex offender legislation, signed into law in the summer of 2006, was arguably twenty-five years in the making.<sup>71</sup> The historical underpinnings of the Adam Walsh Child Protection and Safety Act of 2006 (the Adam Walsh Act) began long before Megan's and Jacob's disappearances. In July 1981, years before Megan was even born and when Jacob was only a toddler, six-year-old Adam Walsh vanished from a Florida department store.<sup>72</sup> Two weeks later and 120 miles away, fishermen discovered Adam's severed head in a canal.<sup>73</sup> The rest of his body was never found.<sup>74</sup> For the next twenty-five years, Adam Walsh became synonymous with the national cru-

66. *Id.*

67. Markman, *supra* note 52, at 277; *see also* N.J. STAT. ANN. § 2C:7-6 (West 2009).

68. Kevin Coyne, *For Megan's Dad, A Way to Make an Impact, Again*, N.Y. TIMES, Mar. 15, 2009, at 1; *see* 42 U.S.C. § 14071(e)(2) (2006).

The State or any agency authorized by the State shall release relevant information that is necessary to protect the public concerning a specific person required to register . . . .

The release of information under this paragraph shall include the maintenance of an Internet site containing such information that is available to the public . . . .

*Id.*

69. Bowater, *supra* note 59, at 823.

70. Lori McPherson, *Update: Practitioner's Guide to the Adam Walsh Act*, 20 NAT'L CENTER FOR PROSECUTION OF CHILD ABUSE 1, 1 (2007).

71. *See* White House Press Release, *supra* note 48 (President Bush chose to sign the Act on the twenty-fifth anniversary of Adam's abduction from a department store); *see also* Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587.

72. Yolanne Almanzar, *27 Years Later, Case Is Closed in Slaying of Abducted Child*, N.Y. TIMES, Dec. 17, 2008, at A18.

73. Yolanne Almanzar, *An Answer, Finally, for Walsh Family*, CHI. TRIB., Dec. 17, 2008, at 6 (noting that in December of 2008, Hollywood, Florida police named Ottis Toole, a serial killer who died in prison in 1996, as Adam's killer—thereby finally closing the twenty-seven year old

sade for better laws protecting children against sex offenders. In effect, the Adam Walsh Act entirely replaced the Jacob Wetterling Program, including the provision concerning Megan's Law.<sup>75</sup> The congressional intent behind the Adam Walsh Act was to correct the inadvertent loopholes caused by both the Jacob Wetterling Program and Megan's Law, which had allowed for some of the most dangerous sex offenders to completely evade the system and live within a community without its knowledge.<sup>76</sup> President George W. Bush stated that the Adam Walsh Act would execute this objective by "expand[ing] the National Sex Offender Registry by integrating the information in State sex offender registry systems and ensuring that law enforcement has access to the same information across the United States."<sup>77</sup>

Including a total of seven titles, Title I of the Adam Walsh Act—better known as the Sex Offender Registration and Notification Act<sup>78</sup>

cold case: police admitted Toole was their prime suspect all along but due to "flaws in the department's investigation" they were unable to conclusively link him to the murder sooner).

74. *Id.*

75. See 42 U.S.C. § 16902 (2006) ("This chapter establishes the Jacob Wetterling, Megan Nicole Kanka, and Pam Lychner Sex Offender Registration and Notification Program."); see also The National Guidelines for Sex Offender Registration and Notification, 72 Fed. Reg. 30,210, 30,211 (Office of the Attorney Gen. May 30, 2007).

Following the enactment of the Wetterling Act in 1994, that Act was amended a number of times, in part reflecting and in part promoting trends in the development of the State registration and notification programs. Ultimately, Congress concluded that the patchwork of standards that had resulted from piecemeal amendments should be replaced with a comprehensive new set of standards . . . .

*Id.*

76. See *Sex-Offenders: History*, NAT'L CENTER FOR MISSING & EXPLOITED CHILDREN, [http://www.missingkids.com/missingkids/servlet/PageServlet?LanguageCountry=en\\_US&PageId=3032](http://www.missingkids.com/missingkids/servlet/PageServlet?LanguageCountry=en_US&PageId=3032) (last visited Feb. 5, 2011).

Megan's Law . . . requires all states to conduct community notification but does not set out specific forms and methods, other than requiring the creation of internet sites containing state sex-offender information. Beyond that requirement, states are given broad discretion in creating their own policies.

. . . .

Despite states' implementation of the Jacob Wetterling Act, the increased mobility of our society has led to "lost" sex offenders. The "lost" are those who fail to comply with registration duties yet remain undetected due to the inconsistencies among state laws, coupled with the burden faced by authorities to keep track of the increasing number of offenders.

*Id.*

77. Remarks on Signing the Adam Walsh Child Protection and Safety Act of 2006, 42 WEEKLY COMP. PRES. DOC. 1395, 1396 (July 26, 2006).

78. 42 U.S.C. § 16924(a)(1) (giving states three years from the date of enactment—July 27, 2006—to implement the requisite provisions of a national registry in compliance with SORNA); but see Editorial, *The Problem of Sex Offenders*, N.Y. TIMES, Sept. 12, 2009, at A20 (reporting the extension of the deadline for states to comply with SORNA until July 2010); Wendy Koch, *Changes Would Give Sex-Offender Law Flexibility*, USA TODAY, May 18, 2010, at 2A (explain-

(SORNA)—has by far generated the most attention among the titles.<sup>79</sup> Because SORNA mandates only a minimum set of national standards for registration and community notification,<sup>80</sup> it does not prohibit states from going beyond these standards by enacting their own more restrictive set of requirements.<sup>81</sup> Therefore, although SORNA excludes from registration “offense[s] involving consensual sexual conduct . . . if the victim was at least [thirteen] years old and the offender was not more than four years older than the victim,”<sup>82</sup> states are free to impose their own requirements and mandate disclosure for offenses involving consensual sex between teenagers of similar ages.<sup>83</sup> In addition, unlike prior federal legislation, SORNA expressly requires both adults *and* juveniles to register as sex offenders.<sup>84</sup>

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ing that states must either “implement the law by July 27 or receive a one-year extension (as many have) [or] risk losing 10% in federal crime-fighting funds”); Emanuela Grinberg, *No Longer a Registered Sex Offender, But the Stigma Remains*, CNN.COM (Feb. 11, 2010), <http://www.cnn.com/2010/CRIME/02/11/oklahoma.teen.sex.offender/index.html?iref=allsearch> (noting that Ohio is the only state to have complied with SORNA).

79. See, e.g., Stephanie Gaylord Forbes, Note, *Sex, Cells, and SORNA: Applying Sex Offender Registration Laws to Sexting Cases*, 52 WM. & MARY L. REV. 1717, 1729–39 (2011) (discussing the controversy surrounding the ambiguity of SORNA provisions as applied to juvenile offenders); Tara L. Merrill, *United States v. Juvenile Male: Evaluation of the Retroactive Application of Sex Offender Registration Laws to Former Juvenile Offenders*, 12 J. L. & FAM. STUD. 261, 262 (2010) (discussing the “considerable debate in the Senate regarding whether SORNA should apply to juveniles at all, and if so, to what extent”); Terra R. Lord, *Closing Loopholes or Creating More? Why a Narrow Application of SORNA Threatens to Defeat the Statute’s Purpose*, 62 OKLA. L. REV. 273, 291–92, 305 (2010) (discussing the various debates over and criticism of SORNA’s requirements).

80. See The National Guidelines for Sex Offender Registration and Notification, 72 Fed. Reg. 30,210, 30,210 (Office of the Attorney Gen. May 30, 2007).

81. See *id.* at 30,212.

This is so because the general purpose of SORNA is to protect the public from sex offenders and offenders against children through effective sex offender registration and notification, and it is not intended to preclude or limit jurisdictions’ discretion to adopt more extensive or additional registration and notification requirements to that end.

*Id.*

82. See *id.* at 30,217 (quoting 42 U.S.C. § 16911(5)(C): “An offense involving consensual sexual conduct is not a sex offense for the purposes of this subchapter if . . . the victim was at least 13 years old and the offender was not more than 4 years older than the victim.”).

83. Mary Graw Leary, *Sexting or Self-Produced Child Pornography? The Dialogue Continues—Structured Prosecutorial Discretion Within a Multidisciplinary Response*, 17 VA. J. SOC. POL’Y & L. 486, 517 (2010); see also Koch, *supra* note 78, at 2A (quoting Linda Baldwin, the head of the Justice Department’s compliance office, as remarking that “[t]he handling of juvenile sex offenders has been one of the most contentious issues for states trying to implement the Adam Walsh Child Protection and Safety Act of 2006”).

84. See Bowater, *supra* note 59, at 828; see also 42 U.S.C. § 16911(8).

The term “convicted” . . . used with respect to a sex offense, includes adjudicated delinquent as a juvenile for that offense, but only if the offender is 14 years of age or older at the time of the offense and the offense adjudicated was comparable to or more severe than aggravated sexual abuse . . . .

Another significant change from prior sex offender legislation is that the Adam Walsh Act establishes standards to promote greater uniformity across public sex offender Web sites.<sup>85</sup> Previously, such legislation only required the establishment of state sex offender Web sites but left discretion to the states over which registrants and what information would be posted.<sup>86</sup> Furthermore, states are supposed to apply the Adam Walsh Act retroactively, meaning that jurisdictions are required to register all sex offenders, even those offenders who were convicted at a time when their offenses did not require registration.<sup>87</sup>

#### 4. *Brief Overview of Sex Offender Residency Restrictions*

In addition to the federal registration and notification laws previously mentioned, society's increased fear of sexual predators has led to more than twenty states and hundreds of municipalities enacting their own legislation further restricting where convicted sex offenders can live.<sup>88</sup> Known as "residency restrictions," these laws impose heavy burdens on offenders and their families by prohibiting the registered offender from living within a certain distance from a place where children congregate—typically 1,000 to 2,500 feet.<sup>89</sup> Many of the laws also prohibit an offender from either "loitering" or "working" in those same areas.<sup>90</sup>

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*Id.*

85. See 42 U.S.C. § 16918(a).

[E]ach jurisdiction shall make available on the Internet, in a manner that is readily accessible to all jurisdictions and to the public, all information about each sex offender in the registry. The jurisdiction shall maintain the Internet site in a manner that will permit the public to obtain relevant information for each sex offender by a single query for any given zip code or geographic radius set by the user.

*Id.*

86. Stacey Stowe, *Talks Set to Begin on Sex Offender Site*, N.Y. TIMES, Apr. 8, 2001, at 6. See Adam Doeringer, Comment, *Rehabilitating Juvenile Sex Offenders with a Life Sentence*, 42 J. MARSHALL L. REV. 187, 189 (2008); see also Press Release, Laura L. Rogers, U.S. Dep't of Justice, *Sex Offender Registry Laws: From Jacob Wetterling to Adam Walsh* (July 2007).

87. See The National Guidelines for Sex Offender Registration and Notification, 72 Fed. Reg. 30,210, 30,228 (Office of the Attorney Gen. May 30, 2007).

88. See *No Easy Answers: Sex Offender Laws in the US*, 19 HUM. RTS. WATCH 1, 139–41 (2007) [hereinafter *No Easy Answers*], available at <http://www.hrw.org/sites/default/files/reports/us0907webwcover.pdf> (listing sex offender registry restriction statutes by state); see also Kari White, Note, *Where Will They Go? Sex Offender Residency Restrictions as Modern-Day Banishment*, 59 CASE W. RES. L. REV. 161, 170 (2008) ("New Jersey remains without a statewide residency restriction, but over 110 towns have passed [such] restrictions.").

89. See *No Easy Answers*, *supra* note 88, at 100.

90. See White, *supra* note 88, at 166–67.

The rationale behind the “[n]ot in [m]y [b]ackyard”<sup>91</sup> mentality in restricting where a sex offender can live, loiter, or work is that it should help to decrease “the likelihood of reoffense by limiting the offender’s temptation and reducing the opportunity to commit a new crime.”<sup>92</sup> However, because many of these individual residency restrictions have the practical effect of prohibiting an offender from legally residing in any large area of a state,<sup>93</sup> some scholars argue that these laws tend to force offenders “to go underground by either not registering or by providing fake addresses.”<sup>94</sup> These same scholars further believe that by “[t]aking away housing, employment, and treatment options” that help keep sex offenders’ lives stable, certain types of residency restrictions and their progeny are actually counter-productive in preventing cases of recidivism.<sup>95</sup>

C. *“Romeo and Juliet” Exceptions and the Creation of Age Gaps to Prevent Close-in-Age and Consenting Teens from Classification as Status Offenders*

Every state in the United States criminalizes sexual activity with someone below the “age of consent,” a crime typically referred to as “statutory rape.”<sup>96</sup> By definition, statutory rape consists of “[u]nlawful sexual intercourse with a person under the age of consent (as defined by statute), regardless of whether it is against that person’s will.”<sup>97</sup> Proponents of these laws claim that regardless of the closeness in age between the two parties, sex with a person below a certain age can never be consensual because below a certain age, one lacks the “capacity to consent.”<sup>98</sup> In contrast, opponents argue that because

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91. Cassie Dallas, Comment, *Not in My Backyard: The Implications of Sex Offender Residency Ordinances in Texas and Beyond*, 41 TEX. TECH L. REV. 1235 (2009).

92. *Doe v. Miller*, 405 F.3d 700, 720 (8th Cir. 2005).

93. See Dallas, *supra* note 91, at 1246.

94. Rhiannon K. Thoreson, Comment, *Sex Offender Residency Restrictions Are Not “OK”*: *Why Oklahoma Needs to Amend the Sex Offenders Registration Act*, 44 TULSA L. REV. 617, 617 (2009) (noting that “[a]fter expanding residenc[y] restrictions in 2006, many Oklahoma jurisdictions saw an increase in the number of lost offenders”—meaning many convicted sex offenders chose to face the consequences of not registering instead of the consequences of the residency restrictions).

95. *Id.* at 638.

96. See *No Easy Answers*, *supra* note 88, at 72.

97. BLACK’S LAW DICTIONARY 1374 (9th ed. 2009).

98. Kate Sutherland, *From Jailbird to Jailbait: Age of Consent Laws and the Construction of Teenage Sexualities*, 9 WM. & MARY J. WOMEN & L. 313, 315 (2003) (“The justification usually put forward for age of consent laws is the protection of young persons from sexual exploitation by adults.”); see also ZIMRING, *supra* note 50, at 17.

The law prohibits a wide range of predatory sexual contact with persons considered incapable of giving what is deemed legitimate consent to sexual participation. . . . While the sexual use of immature victims was often classified as a “statutory rape” because of



statutory rape is a strict liability offense,<sup>99</sup> situations often arise where a statutory rape law actually penalizes two teenagers for engaging in what would otherwise be deemed “wholly consensual” sex.<sup>100</sup>

Society designates these teenagers as sexual “status offenders” because it is solely the status of their alleged victim falling below the age of consent that criminalizes the offender’s sexual behavior.<sup>101</sup> However, over the course of the past decade, many states, as well as the federal government, have implemented “age-gap” provisions exempting certain teenagers from the unyielding scope of statutory rape and sex offender registration and notification laws where their partner is below the age of consent but within a certain range to the “offender’s” age.<sup>102</sup> “[R]ecogniz[ing] that sex between two young people is in some way less punishable than sex between a young person and an adult,” legislators created these “Romeo and Juliet” exceptions so as to lessen or eliminate penalties for young people.<sup>103</sup>

Over the past few years, there appeared to be a trend emerging; more states and municipalities seemed willing to discuss implementing “Romeo and Juliet” exceptions to their state sex offender laws. In the summer of 2007, governors in seven states signed legislation excluding teens from either prosecution or registration for engaging in consensual sex with another teen.<sup>104</sup> However, the Adam Walsh Act “establishes minimum requirements regarding which [category of] sex

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the inability of the young to give legal consent, the more appropriate theory of penal liability for this class of sexual conduct is predation without force, in which the wrongfulness of the sexual contact stems from exploitation of the vulnerability and incapacity of the victim.

ZIMRING, *supra* note 50, at 17.

99. See BLACK’S LAW DICTIONARY 998 (9th ed. 2009) (defining strict liability as “[l]iability that does not depend on actual negligence or intent to harm, but that is based on the breach of an absolute duty to make something safe”); see also Phoebe Geer, *Justice Served? The High Cost of Juvenile Sex Offender Registration*, 27 DEV. MENTAL HEALTH L. 33, 44 (2008) (“A person who has participated in a sexual interaction with the underage person has committed a sexual offense even though the underage person was a willing participant.”).

100. Michelle Oberman, *Regulating Consensual Sex with Minors: Defining a Role for Statutory Rape*, 48 BUFF. L. REV. 703, 707 (2000).

101. See Young, *supra* note 8, at 465.

102. The Adam Walsh Act now excludes a teen convicted of engaging in consensual sex with another teen below the relevant age of consent from having to register as a sex offender. 42 U.S.C. § 16911(5)(C) (2006) (“An offense involving consensual sexual conduct is not a sex offense for the purposes of this subchapter if . . . the victim was at least 13 years old and the offender was not more than 4 years older than the victim.”); see also Markman, *supra* note 52, at 273–75.

103. Sabrina A. Perelman, *A Step in the Right Direction: How Kansas v. Limon Indicates a Brighter Future for Gay Rights Under Lawrence v. Texas*, 7 GEO. J. GENDER & L. 217, 240 (2006).

104. Wendy Koch, *States Ease Laws That Punish Teens for Sex with Underage Partners*, USA TODAY, July 25, 2007, at A1.

offenders [an individual offender falls under] and what information [regarding these offenders] must be made available to the public.”<sup>105</sup> It does not affect the state’s authority to criminalize status offenders.<sup>106</sup> Therefore, states are still free to maintain their existing registration and notification requirements, even if they do not exempt teen status offenders. Currently, at least twenty-nine states require registration in certain situations for consensual sex between teenagers.<sup>107</sup> In addition, twenty states still lack any sort of age-gap provision in their sex offender laws.<sup>108</sup> In five of those twenty states, the age of consent is eighteen; thus, sex with anyone below eighteen constitutes a criminal offense even if it was consensual.<sup>109</sup>

In the states that still criminalize consensual sexual activity between teenagers, the statutory rape laws are not uniformly enforced against such teens.<sup>110</sup> Given the statistics showing the prevalence of sexual activity among teens today,<sup>111</sup> only a small fraction of these teens will

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105. See Rogers, *supra* note 86, at 1; see also 42 U.S.C. § 16911(5)(C).

106. See Young, *supra* note 8, at 465.

107. See *No Easy Answers*, *supra* note 88, at 39–40 (noting that the twenty-nine states that require teenagers to register as sex offenders for engaging in consensual sex are Alabama, ALA. CODE § 13A-6-63, -11-200 (2008); Alaska, ALASKA STAT. §§ 11.41.434, 12.63.010 (2010); Arizona, ARIZ. REV. STAT. § 13-1405 (2007); Arkansas, ARK. CODE ANN. §§ 12-12-903, 5-14-110 (2006); Colorado, COLO. REV. STAT. §§ 16-22-03, 18-3-402 (2006 & 2008); Connecticut, CONN. GEN. STAT. §§ 54-250, 54-251, 53a-70 (2007 & 2009); Florida, FLA. STAT. ANN. §§ 775.21, 794.011 (2010); Indiana, IND. CODE §§ 11-8-8-7, 11-8-8-5 (2003); Louisiana, LA. REV. STAT. ANN. §§ 15:542, 15:541, 14:92(A)(7) (2001 & 2004); Maine, ME. REV. STAT. ANN. tit. 34-A, §§ 11222, 11203 (2006); ME. REV. STAT. ANN. tit. 17-A, § 254 (2010); Maryland, MD. CODE ANN., CRIM. PROC. §§ 11-704, 11-701, 3-308 (LexisNexis 2008); Massachusetts, MASS. GEN. LAWS ANN. ch. 6, § 178C, 178D (2006), GEN. LAWS ch. 272, § 35A (2000); Michigan, MICH. COMP. LAWS §§ 28.723, 28.722, 750.520e (2004); Minnesota, MINN. STAT. ANN. §§ 243.166, 609.345 (2009 & 2010); Missouri, MO. REV. STAT. §§ 589.400, 566.032 (1999 & 2003); New Hampshire, N.H. REV. STAT. ANN. §§ 651-B:1, 651-B:2, 632-A:2 (2007); New Jersey, N.J. REV. STAT. ANN. §§ 2C:14-2, 2C:7-2, 2C:14-3b (West 2005); North Carolina, N.C. GEN. STAT. §§ 14-208.7, 14-208.6, 14-27.7A (2000); North Dakota, N.D. CENT. CODE § 12.1-32-15, 12.1-20-07 (1997); Oklahoma, OKLA. STAT. tit. 57, § 582 (2002), OKLA. STAT. tit. 21, § 1123 (2004); Rhode Island, R.I. GEN. LAWS §§ 11-37.1-3, 11-37.1-2 (2002); South Carolina, S.C. CODE ANN. § 23-3-430 (2007 & Supp. 2010), §16-3-655 (2003); South Dakota, S.D. CODIFIED LAWS §§ 22-24B-2, 22-24B-1, 22-22-7 (1998); Tennessee, TENN. CODE ANN. §§ 40-39-202, 40-39-203, 39-13-506 (2010); Texas, TEX. CRIM. PROC. CODE ANN. art. 62.002, 62.001 (Vernon 2010); Utah, UTAH CODE ANN. §§ 77-27-21.5, 76-5-401, 76-5-401.2 (2008); Washington, WASH. REV. CODE § 9A.44.130, 9A.44.096 (2009); West Virginia, W. VA. CODE §§ 15-12-2, 61-8B-9 (2009 & 2010); Wisconsin, WIS. STAT. §§ 301.45, 948.02 (2005)).

108. As of 2009, twenty states still had yet to implement age-gap provisions in their sex offender laws, which would no longer classify consensual sex between two teens close in age as criminal. AGE OF CONSENT CHART FOR THE U.S.—2010, <http://ageofconsent.us/> (last visited Feb. 12, 2011); see also Pollet, *supra* note 15, at 4 (explaining that eleven states still lack any form of Romeo and Juliet exception for consensual teenage sex).

109. See AGE OF CONSENT CHART, *supra* note 108.

110. See Pollet, *supra* note 15, at 4.

111. See TRENDS IN PREVALENCE OF SEXUAL BEHAVIORS, *supra* note 34 (finding that as of 2009 46% of high school students had sexual intercourse).

ever actually face prosecution due to lack of time and resources in the criminal justice system.<sup>112</sup> Determining which teens to prosecute often revolves around who brings these cases to the attention of law enforcement agencies—typically parents and welfare officials.<sup>113</sup> Thus, scholars fear that the lack of uniformity in enforcement subjects those teens who are targeted to disproportionate treatment.<sup>114</sup>

#### D. Past Supreme Court Constitutional Challenges to Sex Offender Laws

In the decade-and-a-half following the advent and subsequent explosion of sex offender legislation in the United States, the Supreme Court has only granted certiorari in two cases regarding constitutional challenges to aspects of such legislation.<sup>115</sup> Most notable of these is the 2003 case *Smith v. Doe*.<sup>116</sup> In *Smith*, the two male respondents were convicted of sexual abuse of a minor—an aggravated sex offense—and entered *nolo contendere* pleas.<sup>117</sup> Although both men were convicted prior to the passage of Alaska's Sex Offender Registration Act (the Alaska Act), the provisions of the Alaska Act retroactively applied to them—requiring initial registration as a sex offender, quarterly verifications of the men's locations, and notification of any changes.<sup>118</sup> The two men challenged the Alaska Act under the Ex Post Facto Clause<sup>119</sup> and the Due Process Clause.<sup>120</sup> The Su-

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112. Meredith Cohen, Comment, *No Child Left Behind Bars: The Need to Combat Cruel and Unusual Punishment of State Statutory Rape Laws*, 16 J.L. & POL'Y 717, 732–33 (2008); see also Kay L. Levine, *The New Prosecution*, 40 WAKE FOREST L. REV. 1125, 1183 (2005) (noting that “handling statutory rape cases is not prized or valued within the district attorney's office or by the criminal bar generally” and “[t]ime and resources spent on problem-solving approaches to an unimportant crime do not make a prosecutor look like a real prosecutor to her colleagues”).

113. See Sutherland, *supra* note 98, at 322; see also SHARON G. ELSTEIN & NOY DAVIS, *SEXUAL RELATIONSHIPS BETWEEN ADULT MALES AND YOUNG TEEN GIRLS: EXPLORING THE LEGAL AND SOCIAL RESPONSES* 26 (1997).

114. See, e.g., Cohen, *supra* note 112, at 733.

115. Corey Rayburn Yung, *One of These Laws Is Not Like the Others: Why the Federal Sex Offender Registration and Notification Act Raises New Constitutional Questions*, 46 HARV. J. ON LEGIS. 369, 373 (2009); see *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 3–6 (2003) (rejecting a Due Process Clause challenge arguing that an alleged sex offender was not afforded a predeprivation hearing under Connecticut's sex offender registry restrictions and holding that there was no procedural due process violation because the alleged offender would receive the proper procedural protections at the time of his actual trial and sentencing).

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

117. *Id.* at 91.

118. *Id.*

119. *Id.*; see also U.S. CONST. art. I, § 10, cl. 1; *Weaver v. Graham*, 450 U.S. 24, 28 (1981) (“The *ex post facto* prohibition forbids the Congress and the States to enact any law ‘which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed.’” (quoting *Cummings v. Meeks*, 71 U.S. 277, 278 (1867))).

preme Court granted certiorari to resolve a disagreement between the U.S. District Court for the District of Alaska and the Ninth Circuit Court of Appeals concerning whether “the effects of the Act were punitive despite the legislature’s intent”—and thus, violative of the Ex Post Facto Clause.<sup>121</sup>

Noting that prior to this case, the Court had never “considered a claim that a sex offender registration and notification law constitut[ed] retroactive punishment forbidden by the *Ex Post Facto* Clause,” the Court began by determining whether the Alaska Act was civil or criminal in nature.<sup>122</sup> Dispelling the importance of the fact that part of the Alaska Act was codified in the state’s criminal code, the Court sided with the district court and concluded that “[b]y contemplating ‘distinctly civil procedures,’ the legislature ‘indicat[ed] clearly that it intended a civil, not a criminal sanction.’”<sup>123</sup> It is worth mentioning that in 2003 when the *Smith* decision was released, sex offender laws, both state and federal, were indisputably less severe than they are today—in both force and scope. But with the creation of federally mandated minimum standards for state registries, the passage of the Adam Walsh Act in 2006 began the new era of sex offender laws.

Consequently, in the almost seven years that have passed since the *Smith* decision, states have not sat idle, blindly accepting the Supreme Court’s reasoning. Instead, state and federal courts alike have begun to not just call into question the validity of such reasoning, but some have outright ruled against it. In October 2007, the U.S. District Court for the District of Utah held that “SORNA [had] increased the federal punishment for failing to register as a sex offender” and that “[t]he Ex Post Facto Clause does not permit such increased criminal penalties to be applied retroactively.”<sup>124</sup> Similarly, in June 2008, the U.S. District Court for the Western District of Texas noted that in *Smith*, the “Supreme Court did not determine whether prosecution of retroactively applied registration requirements, which impose criminal penalties, violate the ex post facto clause.”<sup>125</sup> The court continued by finding that the provision of SORNA that has the potential to subject a defendant to criminal punishment for his actions that were legal at the time the defendant performed them is in violation of “the *ex post facto* clause because it results in enhanced punishment for conduct

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120. *Smith*, 538 U.S. at 91; see also U.S. CONST. amend. XIV, § 1.

121. *Smith*, 538 U.S. at 92.

122. *Id.*

123. *Id.* at 96 (second alteration in original) (quoting *United States v. Ursery*, 518 U.S. 267, 289 (1996)).

124. *United States v. Gill*, 520 F. Supp. 2d 1341, 1349 (D. Utah 2007).

125. *United States v. Natividad-Garcia*, 560 F. Supp. 2d 561, 569 (W.D. Tex. 2008).

that predates the time SORNA was applied to [the defendant].”<sup>126</sup> Finally, in August 2009, the Indiana Supreme Court held that “the Indiana Sex Offender Registration Act . . . violates the prohibition on ex post facto laws . . . because it imposes burdens that have the effect of adding punishment beyond that which could have been imposed when [the] crime was committed.”<sup>127</sup>

The three previous cases mentioned all have one thing in common. Each opinion recognized that, unlike the Supreme Court’s holding in *Smith*, registering as a sex offender—and the criminal consequences that may follow—is a form of punishment.<sup>128</sup> In addition, in November 2009, a Michigan appellate court indirectly answered the question of whether sex offender registration and notification laws could be considered a form of punishment by holding that its application to a teenager convicted of engaging in consensual sex with his below-the-age-of-consent girlfriend violated the Eighth Amendment’s prohibition against cruel and unusual punishment.<sup>129</sup>

*E. Evolution of the Supreme Court’s Interpretation of the Eighth Amendment’s Prohibition Against Cruel and Unusual Punishment*

“The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.”<sup>130</sup>

The protective intent behind the Eighth Amendment to the U.S. Constitution existed over a century before the formal adoption of the Bill of Rights.<sup>131</sup> In general, the Eighth Amendment provides that, “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”<sup>132</sup> This prohibition applies through the Fourteenth Amendment to the states.<sup>133</sup> This right to protection against excessive punishments derives from the idea that

126. *Id.* at 570.

127. *Wallace v. State*, 905 N.E.2d 371, 384 (Ind. 2009).

128. See *Natividad-Garcia*, 560 F. Supp. 2d at 569–70; *Gill*, 520 F. Supp. 2d at 1349; *Wallace*, 905 N.E.2d at 384.

129. *People v. Dipiazza*, 778 N.W.2d 264, 274 (Mich. Ct. App. 2009); see *infra* notes 171–87 and accompanying text.

130. *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion).

131. See *Harmelin v. Michigan*, 501 U.S. 957, 966 (1991) (“[T]he entire text of the Eighth Amendment is taken almost verbatim from the English Declaration of Rights, which provided ‘[t]hat excessive Baile ought not to be required nor excessive Fines imposed nor cruell and unusuall Punishments inflicted.’” (second alteration in original)).

132. U.S. CONST. amend. VIII (emphasis added).

133. *Furman v. Georgia*, 408 U.S. 238, 241 (1972) (Douglas, J., concurring) (“[T]he privileges or immunities of citizens of the United States’ as protected by the Fourteenth Amendment included protection against ‘cruel and unusual punishments . . .’” (quoting U.S. CONST. amend. XIV)).

punishment should be proportional to the offense.<sup>134</sup> However, the Court does not often recognize “successful proportionality challenges outside the context of capital punishment.”<sup>135</sup> In fact, in *Harmelin v. Michigan*,<sup>136</sup> the Court found that the use of the Eighth Amendment to find non-capital punishment unconstitutional is “exceedingly rare.”<sup>137</sup>

Nonetheless, in 2003, the U.S. Supreme Court in *Ewing v. California*<sup>138</sup> extended the proportionality principle to a non-capital case involving California’s “three strikes” statute that carried with it a mandatory sentence of twenty-five years to life.<sup>139</sup> The Supreme Court weighs the following factors—to be discussed in greater detail in this Comment’s analysis<sup>140</sup>—when determining whether a particular penalty is disproportionate: (1) the gravity of the offense, (2) the harshness of the penalty in comparison to the offense, (3) the penalties for other criminals in the state, and (4) the penalties in other states for the same offense.<sup>141</sup> In addition, for the past half-century, the Supreme Court has recognized that “the laws of other countries . . . [are] instructive for its interpretation of the Eighth amendment’s prohibition of ‘cruel and unusual punishments.’”<sup>142</sup> Thus, while a comparison of the laws of other countries may not receive equal

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134. See *Weems v. United States*, 217 U.S. 349, 367 (1910).

135. *Harmelin*, 501 U.S. at 963.

136. *Id.* at 957.

137. *Id.* at 963 (quoting *Rummel v. Estelle*, 445 U.S. 263, 272 (1980)).

138. *Ewing v. California*, 538 U.S. 11 (2003).

139. *Id.* at 28–31.

140. See *infra* notes 192–279 and accompanying text.

141. *Ewing*, 538 U.S. at 22 (citing *Solem v. Helm*, 463 U.S. 277, 292 (1983)).

142. *Roper v. Simmons*, 543 U.S. 551, 575, 576 (2005) (citing *Trop v. Dulles*, 356 U.S. 86, 102–03 (1958)) (conceding the significance of “Article 37 of the United Nations Convention on the Rights of the Child, which every country in the world has ratified save for the United States and Somalia” because it “contains an express prohibition on capital punishment for crimes committed by juveniles under 18”); see also *Atkins v. Virginia*, 536 U.S. 304, 316–17 n.21 (2002) (“[W]ithin the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.”); *Thompson v. Oklahoma*, 487 U.S. 815, 830–31 & n.31 (1988) (noting the abolition of the juvenile death penalty “by other nations that share our Anglo-American heritage, and by the leading members of the Western European community,” and observing that “[w]e have previously recognized the relevance of the views of the international community in determining whether a punishment is cruel and unusual”); *Enmund v. Florida*, 458 U.S. 782, 796–97 n.22 (1982) (“[T]he doctrine of felony murder has been abolished in England and India, severely restricted in Canada and a number of other Commonwealth countries, and is unknown in continental Europe.”); *Coker v. Georgia*, 433 U.S. 584, 596 n.10 (1977) (“It is . . . not irrelevant here that out of 60 major nations in the world surveyed in 1965, only 3 retained the death penalty for rape where death did not ensue.”); *Trop*, 356 U.S. at 102–03 (“The civilized nations of the world [were] in virtual unanimity that statelessness is not to be imposed as punishment for crime.”).

weight to the individual factors, the Court does look to such laws—or lack thereof—for confirmation in its intended decision.<sup>143</sup>

While weighing the factors, the Court accepted the rationale behind Justice Kennedy's concurrence in *Harmelin*<sup>144</sup>—finding that “in determining unconstitutional disproportionality, ‘no one factor [is] dispositive in a given case’” and “one factor may be sufficient to determine the constitutionality of a particular sentence.”<sup>145</sup> Thus, “[a] better reading . . . leads to the conclusion that intrajurisdictional and interjurisdictional analyses are appropriate . . . [after] a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality.”<sup>146</sup>

In instances where a comparative analysis is necessary, the Court has looked to the public's current attitude toward a given offense in order to inform their application of the Eighth Amendment.<sup>147</sup> The Court has continuously recognized that what may qualify as “cruel and unusual punishment” under the Eighth Amendment changes with the times.<sup>148</sup> Since 1910,<sup>149</sup> the Supreme Court has recognized that, in regards to the Eighth Amendment, the words shall be construed illustratively, not precisely, and the scope shall be adaptable to the current times, not static.<sup>150</sup> In addition, the Eighth Amendment “must be interpreted according to its text, by considering history, tradition, and precedent.”<sup>151</sup> The Court has found that “an assessment of contemporary values concerning the infliction of a challenged punishment is relevant to the application of the Eighth Amendment.”<sup>152</sup> Thus, the amendment “draw[s] its meaning from the *evolving standards of decency* that mark the progress of a maturing society.”<sup>153</sup>

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143. See *Roper*, 543 U.S. at 575.

144. *Harmelin*, 501 U.S. at 1004 (Kennedy, J., concurring).

145. *Id.* (quoting *Solem*, 463 U.S. at 291 n.17); see also *Ewing*, 538 U.S. at 24.

146. *Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring) (noting that only after first finding an inference of gross disproportionality between the offense committed and the penalty imposed does it become important to conduct a comparative analysis to determine if the penalty is in fact grossly excessive for the offense committed); see also *id.* (“The proper role for comparative analysis of [penalties], then, is to validate an initial judgment that a [penalty] is grossly disproportionate to [the offense].” (emphasis added)).

147. See *Stanford v. Kentucky*, 492 U.S. 361, 370 (1989).

148. See Bruce J. Winick, *The Supreme Court's Evolving Death Penalty Jurisprudence: Severe Mental Illness as the Next Frontier*, 50 B.C. L. REV. 785, 795 (2009).

149. See *Weems v. United States*, 217 U.S. 349, 378 (1910) (“The clause of the Constitution . . . may be therefore progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.”).

150. *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) (plurality opinion).

151. *Roper v. Simmons*, 543 U.S. 551, 560 (2005).

152. *Gregg v. Georgia*, 428 U.S. 153, 173 (1976).

153. *Trop*, 356 U.S. at 101 (emphasis added).

The Court's inquiry into our society's "evolving standards of decency"<sup>154</sup> takes into account "objective indicia of consensus, as expressed in particular by the enactments of legislatures that have addressed the question."<sup>155</sup> Therefore, to determine whether there is a national consensus, the Supreme Court looks to the number of states that have already rejected a certain punishment or sanction, the consistency of the direction of change, and the infrequency of its use in states where the punishment remains permissible.<sup>156</sup> In situations where society has spoken and an apparent consensus exists, the Supreme Court stresses that it merely asks "whether there is a reason to disagree with the judgment reached by [society] and its legislators"<sup>157</sup> because under the Eighth Amendment, society's views cannot be substituted for those of the Court.<sup>158</sup>

Finally, and in addition to the analysis of whether a punishment is cruel and unusual, the Eighth Amendment demands more than simply weighing factors to determine if "a challenged punishment [is] accept-

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154. *Id.*

155. *Roper*, 543 U.S. at 563–64.

156. *See Kennedy v. Louisiana*, 554 U.S. 407, 426 (2008) (finding that because only six of the thirty-seven jurisdictions that authorize the death penalty permit the execution of child rapists, a national consensus existed to bar the use of child rape as a capital offense under the Eighth Amendment); *Roper*, 543 U.S. at 551 (concluding that there was enough evidence to support a national consensus against juvenile executions because a majority of states rejected the imposition of capital punishment on juveniles and in those states still lacking a formal prohibition on the matter, the practice was so infrequent that in the previous ten years only three juveniles had been executed); *Atkins v. Virginia*, 536 U.S. 304, 313–16 (2002) (finding that a national consensus against executing mentally retarded persons could be found from the large number of states already prohibiting such executions, the complete absence of states passing legislation to reinstate the power to conduct such executions, and the state legislatures that have recently addressed this issue voting overwhelmingly in favor of the prohibition); *Penry v. Lynaugh*, 492 U.S. 302, 332–35 (1989) (finding that the existence of only two states prohibiting the execution of the mentally retarded, even including the fourteen states that prohibit the death penalty outright, did not provide sufficient evidence of national consensus against executing mentally retarded defendants); *Stanford v. Kentucky*, 492 U.S. 361, 370–71 (1989) (concluding that a national consensus could not be found to set a minimum age of eighteen for executions when only fifteen out of the thirty-seven states permitting capital punishment declined to impose it on sixteen year olds and only twelve declined to impose it on seventeen year olds); *Thompson v. Oklahoma*, 487 U.S. 815, 826–30 (1988) (concluding that evidence of fourteen states not authorizing capital punishment at all and eighteen of the states that allow it setting a minimum age of at least sixteen created the presumption that there was a national consensus against executing juveniles below the age of sixteen); *Ford v. Wainwright*, 477 U.S. 399, 408–10 (1986) (finding that because twenty-six out of the forty-one states that had death penalty statutes explicitly prohibited the execution of persons meeting the test for legal incompetence demonstrated a national consensus that the Eighth Amendment prohibits executing the insane); *Coker v. Georgia*, 433 U.S. 584, 593 (1977) (finding that because at no time in the previous fifty years had a majority of states authorized the death penalty as a punishment for rape without murder resulting, there was a national consensus against executions for the crime of rape of an adult woman).

157. *Atkins*, 536 U.S. at 313.

158. *Stanford*, 492 U.S. at 378.



able to contemporary society.”<sup>159</sup> The punishment must also serve one of the penological justifications in order to prevent the “gratuitous infliction of suffering.”<sup>160</sup> A specific punishment will be deemed constitutional so long as it advances the goal of deterrence, retribution, or rehabilitation.<sup>161</sup> The goal of deterrence revolves around whether a particular punishment is proportional to the extent that fear of the punishment will “deter” individuals from committing such an offense.<sup>162</sup> Unlike deterrence, for retribution the focus is not on the individual offender but rather on society.<sup>163</sup> In fashioning a punishment, the Court addresses “society’s moral outrage at particularly offensive conduct”<sup>164</sup> and punishes based on the notion that the individual therefore *deserves* it.<sup>165</sup> Finally, with the goal of rehabilitation, the Court “presupposes a degree of free will, in that people must be able to reform their behavior so as to conform to the criminal law and quash recidivistic tendencies.”<sup>166</sup> Rehabilitation serves dual goals: preventing the offender from re-offending and protecting the public against such offenses.<sup>167</sup>

As a result of the entire proportionality analysis, the Court admits that it often defers to the judgments of the state legislatures that have already spoken on the matter.<sup>168</sup> However, in *Solem v. Helm*,<sup>169</sup> the Court made clear that “no penalty is *per se* constitutional.”<sup>170</sup>

#### F. *People v. Dipiazza and the Eighth Amendment*

In November 2009, a Michigan appellate court rendered a decision that will likely have a major impact on the constitutionality of sex offender laws as applied to consenting teenagers<sup>171</sup>—a decision that the young defendant’s lawyer hailed to be “a victory for common

159. *Gregg v. Georgia*, 428 U.S. 153, 182 (1976).

160. *Id.* at 183.

161. See Russell G. Murphy & Eric J. Carlson, “*Like Snow [Falling] on a Branch . . .*”: *International Law Influences on Death Penalty Decisions and Debates in the United States*, 38 *DENV. J. INT’L L. & POL’Y* 115, 116–17 (2009).

162. *Roper v. Simmons*, 543 U.S. 551, 571–72 (2005).

163. See *Harris v. Alabama*, 513 U.S. 504, 517–18 (1995) (Stevens, J., dissenting).

164. *Gregg*, 428 U.S. at 183 (plurality opinion).

165. *Baze v. Rees*, 553 U.S. 35, 80 (2008) (Stevens, J., concurring).

166. Stephen O’Hanlon, *Towards a More Reasonable Approach to Free Will in Criminal Law*, 7 *CARDOZO PUB. L. POL’Y & ETHICS J.* 395, 419 (2008).

167. See *United States v. Gementera*, 379 F.3d 596, 601–03 (9th Cir. 2004).

168. See *Solem v. Helm*, 463 U.S. 277, 290 (1983).

169. *Id.*

170. *Id.*

171. See Dawson Bell, *Court: Sex Offender Registry Law Is Cruel to Young Lovers*, *DETROIT FREE PRESS*, Nov. 5, 2009, at A6; see also *People v. Dipiazza*, 778 N.W.2d 264, 274 (Mich. Ct. App. 2009).

sense.”<sup>172</sup> The story originated as an unremarkable high school love story: senior boy falls for freshman girl.<sup>173</sup> However, unlike most high school relationships, this story differs in two major respects. For one, the relationship surpassed the typical expiration date that plagues most young relationships.<sup>174</sup> After over five years together, the couple is now happily married with a child.<sup>175</sup> Second, and more importantly, the actions of this otherwise devoted husband and father during his senior year landed him on the Michigan sex offender registry.<sup>176</sup>

Robert Dipiazza began dating Nanette Trowbridge in 2004.<sup>177</sup> Nanette’s parents knew of the relationship and condoned it.<sup>178</sup> All appeared normal until Nanette’s teacher discovered a photograph of her and Robert in bed together with his hand placed on her breast.<sup>179</sup> The age of consent in Michigan is sixteen.<sup>180</sup> Thus, because at the time Robert was eighteen and Nanette was weeks shy of her fifteenth birthday, the teacher notified the prosecuting attorney.<sup>181</sup> In August of 2004, Robert “was adjudicated under the Holmes Youthful Trainee Act . . . for attempted third-degree criminal sexual conduct” and was sentenced to probation—in addition to being required to register as a sex offender.<sup>182</sup> After successfully completing his probation the following year, the trial court effectively dismissed Robert’s case—leav-

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172. Troy Reimink, *Are Sex-Offender Laws in Need of Reform?*, GRAND RAPIDS PRESS ONLINE (Nov. 6, 2009, 12:25 PM), [http://www.mlive.com/news/grand-rapids/index.ssf/2009/11/are-sex-offender-laws\\_in\\_need.html](http://www.mlive.com/news/grand-rapids/index.ssf/2009/11/are-sex-offender-laws_in_need.html) (quoting the defendant’s attorney).

173. *Man Wins Appeal; Name off Sex Registry*, WOOD TV (Nov. 4, 2009, 8:09 PM), [http://www.woodtv.com/dpp/news/local/muskegon\\_county/Man\\_wins\\_appeal\\_to\\_have\\_name\\_off\\_sex\\_registry](http://www.woodtv.com/dpp/news/local/muskegon_county/Man_wins_appeal_to_have_name_off_sex_registry).

174. *See Dipiazza*, 778 N.W.2d at 273.

175. *Id.*; Brian Dickerson, Op-Ed., *Don’t Count Romeo as a Sex Offender*, DETROIT FREE PRESS, Nov. 5, 2009, at A2.

176. *Dipiazza*, 778 N.W.2d at 266.

177. *Id.*

178. *Id.* at 273.

179. *Id.* at 266.

180. *See* Doug Guthrie, *Ruling Could Shorten Sex Offender List*, DETROIT NEWS, Nov. 5, 2009, at 4A.

181. *Dipiazza*, 778 N.W.2d at 266.

182. *Id.*

[The Holmes Youthful Trainee Act] is essentially a juvenile diversion program for criminal defendants under the age of 21. . . . An assignment to the youthful trainee status does not constitute a conviction of a crime unless the court revokes the defendant’s status as a youthful trainee. If the defendant’s status is not revoked and the defendant successfully completes his or her status as youthful trainee, the court “shall discharge the individual and dismiss the proceedings.”

*Id.* at 266–67 (citations omitted).

ing no record of conviction.<sup>183</sup> Michigan still required Robert to register as an offender.<sup>184</sup>

On appeal, Robert's attorney argued that "the financial and emotional consequences of requiring him to register [had] been devastating and thus requiring him to register as a sex offender, under the circumstances of this case, should be deemed [cruel and unusual] punishment."<sup>185</sup> The appellate court, "after considering the gravity of the offense, the harshness of the penalty, a comparison of the penalty to penalties imposed for the same offense in other states, and the goal of rehabilitation," agreed with Robert's attorney and concluded that requiring Robert to register as a sex offender was a form of cruel and unusual punishment.<sup>186</sup> Then, in April 2011, Michigan's Governor Rick Snyder signed into law a provision that will "allow some older offenders—especially those who can satisfy the court that their underage sex partners were not coerced—to be removed from the list, or escape registration altogether."<sup>187</sup>

Though Robert's five-year plight in search of justice is only one of thousands across the country, it still exposes the inadvertent "catch-all" effect that sex offender laws have and the resulting need for reform.<sup>188</sup> In reality, considering the statistics surrounding the high levels of sexual activity among teenagers—no matter how idealistic statutory mandates that bar certain circumstances of teenage sexual intimacy are—they are inevitably impractical.<sup>189</sup> Nonetheless, that is exactly what occurs when a state's sex offender law applies to teenagers engaging in consensual sex with one another.<sup>190</sup> Moreover, across

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183. *Id.* at 266.

184. *Id.*

185. *Id.* at 273 (noting that because of Robert's status as a registered sex offender, he was unable to hold a job for more than a few days, forced to live on food stamps, and fell into a serious depression).

186. *Id.* at 274; *see also Bill Gives Break to Consenting Teens*, DETROIT NEWS, Mar. 25, 2011, at A15 (noting that the Michigan House and Senate recently passed a "new law [that] will prevent kids from ending up on the sex offender registry if they had consensual sex with a partner between 13 and 16 years old, provided there is no more than four years between their ages").

187. Brian Dickerson, *Sex Law Change Too Late for Some*, DETROIT FREE PRESS, Apr. 17, 2011, at A1.

188. Reimink, *supra* note 172; *see also* Don Corbett, *Let's Talk About Sext: The Challenge of Finding the Right Legal Response to the Teenage Practice of "Sexting"*, 13 J. INTERNET L. 3, 3–4 (2009) (discussing the recent phenomenon of teenagers sending nude or partially nude photos of themselves via text messaging—"sexting"—and how there are states actively charging these teenagers with transmitting child pornography and requiring them to register as sex offenders).

189. *Accord* Cohen, *supra* note 112, at 723.

190. *See id.* at 733.

the states and at the federal level, there is still no uniform approach to addressing this issue.<sup>191</sup>

### III. ANALYSIS

When someone hears the word “pedophile,” pictures of past convicted rapists and murderers come to mind.<sup>192</sup> Thanks in part to devoted media attention, the ability to immediately conjure up images of men similar to Elizabeth Smart’s and Jaycee Lee Dugard’s captors has become an inherent reflex of society.<sup>193</sup> Society has a justifiable disdain for rapists and pedophiles.<sup>194</sup> But what are society’s thoughts about a senior boy dating a freshman girl? Most probably would not bat an eye—rather, the notion that “they’re teens and they’re in love!” might dictate their reactions. Alternatively, consider a slightly different scenario: the senior boy is still dating the freshman girl, but now the two are engaging in consensual sex with one another. This fact might change people’s feelings. Regardless of whether people morally disagree with two teenagers having premarital sex, would they maintain it is worth classifying the older teenager as a sex offender on par with pedophiles and aggravated rapists?

Thus, this Part analyzes not simply whether applying the sex offender laws to a teenager convicted of engaging in consensual sex with another teenager below the age of consent is wrong, but also whether such application violates the Eighth Amendment’s prohibition against cruel and unusual punishment.

#### A. *Sex Offender Registration and Notification Laws as Applied to Teens Engaging in Consensual Sex Violates the Eighth Amendment*

In agreement with the Michigan appellate court,<sup>195</sup> the classification as sex offenders of teenagers who engaged in consensual sex with other teenagers close in age violates the Eighth Amendment’s prohibition against cruel and unusual punishments. To be discussed in further detail below, determining whether a punishment is cruel or

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191. See *id.* (“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.”).

192. See JUDITH LEVINE, HARMFUL TO MINORS: THE PERILS OF PROTECTING CHILDREN FROM SEX 22 (2002).

193. See *id.* at 21–23 (discussing the role the media has played in fueling societal fear of and revulsion to pedophiles).

194. *Id.* at 26 (noting that “there may be nothing fundamental about a person that makes him a ‘pedophile’” and that “[o]ur culture fears the pedophile . . . not because he is a deviant, but because he is ordinary”).

195. See *supra* notes 171–86 and accompanying text.

unusual requires consideration of (1) the gravity of the offense in question; (2) the harshness of the penalty imposed for such offense; (3) a comparison of the penalty imposed in the instant case versus penalties imposed for other crimes in the state; and (4) a comparison of the penalty imposed in the instant case versus penalties imposed for the same offense in other states.<sup>196</sup> In addition, courts historically are willing to look for guidance to the approaches other nations are taking concerning the same matter.<sup>197</sup> The outcome of each of these factors as applied to requiring a teenager to register as a sex offender then will be weighed to determine if the punishment (registering as a sex offender) is grossly disproportionate to the offense (having consensual sex with another teenager).<sup>198</sup> Therefore, the remainder of this Section will look at each factor individually and its application to the teen sex offender, as well as whether the punishment of registering as a sex offender serves any of the three penological justifications, including deterrence, retribution, or rehabilitation.

1. *Because the Offense of Consensual Sex Among Teenagers Is Not Grave, Classifying Such Teenagers as "Sex Offenders" Violates the Eighth Amendment's Prohibition Against Cruel and Unusual Punishments*

"Minors' premarital sexual experimentation . . . is not a new phenomenon . . . ." <sup>199</sup>

In the Eighth Amendment analysis, the first factor to be considered is the gravity of the offense compared to the punishment imposed for the offense. When it comes to consensual sex, "the circumstances of the offense are not very grave."<sup>200</sup> While people may not agree with the idea of an eighteen-year-old photographing himself in bed with a near fifteen-year-old, the circumstances underlying the photograph—sexual acts among teenagers—are by no means unique or unprecedented.<sup>201</sup> No matter how taboo the topic of sex may be, it is generally a very recognized aspect of life,<sup>202</sup> including teenage life.<sup>203</sup>

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196. See *Harmelin v. Michigan*, 501 U.S. 957, 962 (1991).

197. See *Thompson v. Oklahoma*, 487 U.S. 815, 830–31 & n.31 (1988).

198. See *Harmelin*, 501 U.S. at 962–64.

199. Dana M. Northcraft, *A Nation Scared: Children, Sex, and the Denial of Humanity*, 12 AM. U. J. GENDER SOC. POL'Y & L. 483, 489 (2004) (reviewing LEVINE, *supra* note 192).

200. *People v. Dipiazza*, 778 N.W.2d 264, 273 (Mich. Ct. App. 2009).

201. See Sharon Jayson, *In Tech Flirting, Decorum Optional*, USA TODAY, Dec. 10, 2008, at 1A; see also Cohen, *supra* note 112, at 723 ("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.").

202. Seventy percent of television shows involve some form of sexual content. Dianne Lu, Op-Ed., *Getting Real with Sex Education*, BOSTON GLOBE, Dec. 27, 2007, at 11A.

There is an evident difference between attempts to protect minors—or those under the relevant age of consent—from exploitive and predatory sexual relationships, and attempts to prevent teenagers from engaging in sex at all. Thus, in cases involving consensual sex among teenagers relatively close in age, it is difficult to classify the actual act of sex as rape and the elder teen as a “sex offender.”<sup>204</sup> For instance, as the appellate court reasoned in *Dipiazza*, the “[d]efendant was 18 years old and in a consensual sexual relationship with another teen who was almost 15 years old. The other teen’s parents knew of the relationship and condoned it. This other teen is the same person [the] defendant married five years later.”<sup>205</sup> Granted, this is not always the case—and in fact in most situations, it is the exact opposite. For the more common scenario, replace the parents’ blessing with the parents informing local law enforcement of the relationship, as well as the “happily ever after” marital bliss with the relationship ending quickly in typical teenage fashion. However, it is not the parents’ blessing or the happily-ever-after, fairy-tale image that lessens the gravity of the offense. It is the nature of the offense itself: *consensual sex*.

For the rest of society falling above the age of consent and engaging in intimate relations with another also above the age of consent, consensual sex is not only *not* criminalized, it is a cornerstone of our culture.<sup>206</sup> Sex is celebrated and embraced.<sup>207</sup> Society itself is changing and thus society’s views on sex have also changed as a result.<sup>208</sup> In

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203. Susan Salter Reynolds, *Sex, Sex, Sex, Sex, Sex . . . Perplexed*, L.A. TIMES, Feb. 17, 2008, at R10 (“Bottom line: Sex is a good thing, and worth fighting for.”).

204. See *Dipiazza*, 778 N.W.2d at 273.

205. *Id.*

206. See Peter Tatchell, *Don’t Criminalise Young Sex*, GUARDIAN.CO.UK (Sept. 24, 2009, 9:00 PM), <http://www.guardian.co.uk/commentisfree/libertycentral/2009/sep/24/sex-under-16-under-age>.

Providing it is safe and with consent, sex is good. It is not dirty, shameful or damaging. It is an immensely pleasurable and profound human bond, which involves intense shared fulfillment and happiness. Consensual sex should not be stigmatiz[ed] or criminaliz[ed], not for young people, not for adults, not for anyone.

*Id.*

207. See Alexandra Jacobs, *Campus Exposure*, N.Y. TIMES, Mar. 4, 2007 (Magazine), at 44, 44 (“Sex is everywhere, and it’s always been everywhere for this generation.” (internal quotations omitted)).

208. See Heather D. Boonstra, *Young People Need Help in Preventing Pregnancy and HIV: How Will the World Respond?*, 10 GUTTMACHER POL’Y REV. 2, 2 (2007). For further evidence that society’s views on sex have changed, see Jacques Steinberg, *Extracurricular Sex Toy Lesson Draws Rebuke at Northwestern*, N.Y. TIMES, Mar. 4, 2011, at A13 (discussing a Northwestern University “psychology professor’s decision to present his students . . . with a demonstration outside class that featured a couple engaging in a live sex act using a prop” as part of a Human Sexuality course).

reality, women are much more likely to go into the workforce and have a career today than they were twenty, thirty, or forty-plus years ago.<sup>209</sup> With the majority of women choosing to have a career outside of the home, these same women also choose to get married and start a family later in life than in prior decades.<sup>210</sup> What this means is that “inevitably, postponing marriage has meant that sex before marriage has become more common.”<sup>211</sup> In addition, the very definition of adolescence involves recognized “physiological and psychological maturation.”<sup>212</sup> At this stage in teenagers’ lives, sexual expression towards one another is not only a natural response, but also a “developmentally appropriate” response.<sup>213</sup>

In sum, if sex among teenagers is not only a common part of our society but also something that is recognized as being natural and developmentally appropriate for these teenagers, it is clear that the nature of the offense is greatly lacking in gravity. While admittedly capital punishment or a harsh prison sentence are two of the gravest punishments the government can impose on an individual, requiring someone to register as a sex offender still carries with it gravity unlike most other forms of punishment. Therefore, the gravity of the offense is grossly disproportional to the punishment imposed.

2. *Because the Stigma Following One’s Designation as a Sex Offender Lasts a Lifetime, the Harshness of the Penalty Violates the Eighth Amendment’s Prohibition Against Cruel and Unusual Punishments*

“[T]hose labeled ‘sex offenders’ are ‘marked for life.’”<sup>214</sup>

The second fact to be considered in Eighth Amendment analysis is the harshness of the penalty. The harshness of the penalty looks at the negative effects that result from the penalty to determine whether the penalty is grossly disproportional—and thus violative of the Eighth Amendment—to the charged offense. Here, the effects of the punishment last a lifetime. As one writer so cleverly put it:

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209. See Boonstra, *supra* note 208, at 2.

210. *Id.*

211. *Id.*

212. Cynthia Dailard, *Legislating Against Arousal: The Growing Divide Between Federal Policy and Teenage Sexual Behavior*, 9 GUTTMACHER POL’Y REV. 12, 13 (2006).

213. *Id.*; see also Oberman, *supra* note 100, at 704 (“[T]o a certain extent adolescent sexual behavior is usual and expected, and perhaps even part of healthy growth and development.”).

214. Shawndra Jones, Note, *Setting Their Record Straight: Granting Wrongly Branded Individuals Relief from Sex Offender Registration*, 41 COLUM. J.L. & SOC. PROBS. 479, 499 (2008) (quoting *Megan’s Law: A Scarlet Letter*, ECONOMIST, Nov. 14, 2002).

If Romeo and Juliet survived Act V, they would have been wrong to think they'd reached a happy ending. Romeo wouldn't have been able to take his kids to school or parks—including Bears games, forest preserves and the lakefront—and other parents might well tell their children to shun the Montague household, knowing a registered sex offender lived there.<sup>215</sup>

The reality is, the label “sex offender” “carr[ies] with it shame, humiliation, ostracism, loss of employment and decreased opportunities for employment, perhaps even physical violence, and a multitude of other adverse consequences.”<sup>216</sup> Nonetheless, the overarching rationale behind sex offender registration does not constitute an excessive penalty.<sup>217</sup> However, when one considers the circumstances of the offense for which the penalty is being imposed—it may become excessive. Requiring a teenager to register as a sex offender forever brands the teenager as a member of the same group as horrific rapists and pedophiles. The metaphoric “scum of the earth”<sup>218</sup> thus includes this otherwise law-abiding, innocent teen.

Considering the legal consequences that attach to sex offender registration, the harshness of such requirements drastically restricts where an offender can live, work, and travel. To begin, the penalty of requiring a teenager to register as a sex offender is harsh because the registration requirements last forever. This means that the legal consequences simply do not end when the teenager is forced to register as an offender—if anything, they have just begun.<sup>219</sup> He must continue to abide by the relevant state's sex offender laws and re-register whenever he travels to other states.<sup>220</sup> In addition, over twenty states and hundreds of cities and towns have already enacted residency restriction laws.<sup>221</sup> Of these individual residency restrictions, the majorities of ordinances “do not require or ensure the individualized assessment of offenders to determine their likelihood to reoffend and their true

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215. *Take Romeo off Sex Offender List*, CHI. SUN-TIMES, Feb. 28, 2011, at 21.

216. *Doe v. Pataki*, 3 F. Supp. 2d 456, 467–68 (S.D.N.Y. 1998).

217. See *Dallas*, *supra* note 91, at 1238 (commenting that “[b]ecause of the significant interest in protecting children from the perpetrators of sexual crime, [sex offender laws] are viewed as a legitimate means of effecting important public policy” and “[t]o argue that all sex offender legislation should be wholly repealed is, at the very least, imprudent”).

218. Sandra Pedicini, *Spotlight: Clustered Lives of Sex Offenders*, ORLANDO SENTINEL, NOV. 29, 2008, at B1 (discussing a documentary film in which “[t]he title [Scum of the Earth], meant as irony, sums up society's view of sex offenders”).

219. See *Cohen*, *supra* note 112, at 740–42. “One consequence of community notification is that as these teenagers become adults, ‘they may struggle to stay in the mainstream’” and “they ‘find themselves subject to the shame and stigma of being identified as sex offenders . . . for the rest of their lives.’” *Id.* (quoting *No Easy Answers*, *supra* note 88, at 66).

220. Catherine L. Carpenter, *The Constitutionality of Strict Liability in Sex Offender Registration Laws*, 86 B.U. L. REV. 295, 332–33 (2006).

221. Catherine Elton, *Behind the Picket*, BOSTON GLOBE, May 6, 2007, at 34.



danger to the public.”<sup>222</sup> Thus, this seemingly harmless teenager offender is drastically limited in the area in which he can live, work, and travel.<sup>223</sup>

In addition, many residency restrictions prevent these teenagers from finishing high school. Take for example the case of Ricky Blackman.<sup>224</sup> When Ricky was sixteen, he met a girl at an Iowa nightclub for teenagers.<sup>225</sup> After hitting it off and believing her to be fifteen, Ricky and the girl began dating.<sup>226</sup> However, police later determined the girl was only thirteen.<sup>227</sup> After pleading guilty to the crime of sexual abuse, Ricky had to register as a sex offender.<sup>228</sup> And because of his recently acquired status as a sex offender, the high school denied Ricky enrollment because “he was considered a danger to the rest of the students.”<sup>229</sup> In addition, “[h]e couldn’t take GED classes at the vocational school in town because of an on-campus day care center” that would have put Ricky in direct violation of local residency restrictions that prevented him from being within a certain distance of children.<sup>230</sup>

Considering all the barriers that prevent these teenagers from receiving a high school education—the scope of jobs that these teenagers would be qualified for is greatly diminished.<sup>231</sup> Moreover, with job opportunities already severely limited, the teenager will continue to find it nearly impossible to acquire and maintain suitable employment once his employer discovers his sex offender status.<sup>232</sup> Thus, any work that can be found and maintained will likely be low-end, minimum wage work with no future prospects.<sup>233</sup>

In addition to the legal consequences that drastically restrict the offender’s ability to live, work, and travel, the penalty of requiring a

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222. Asmara Tekle-Johnson, *In the Zone: Sex Offenders and the Ten-Percent Solutions*, 94 IOWA L. REV. 607, 619–20 (2009).

223. Sarah E. Agudo, Comment, *Irregular Passion: The Unconstitutionality and Inefficacy of Sex Offender Residency Laws*, 102 Nw. U. L. REV. 307, 313 (2008) (“[W]hen the residency laws are so severe that they force the offender to move to destitute or remote locations . . . [it] threatens or eliminates the offender’s ability to maintain a family, uphold a job, and [freely] move about the state and country.”).

224. See Grinberg, *supra* note 78.

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

231. See Cohen, *supra* note 112, at 740–41.

232. *Id.*; see also Jones, *supra* note 214, at 499 (“[E]mployers are often not barred from refusing employment ‘solely on the basis’ of a sex crime conviction.”).

233. See Cohen, *supra* note 112, at 740.

teenager to register as a sex offender is disproportionately harsh because of the stigmatization that follows the offender for the remainder of his life. While residency restrictions physically ostracize an offender, the stigma of being branded a “sex offender” psychologically ostracizes that person from the rest of society.<sup>234</sup> While not endorsing the view himself, one commentator referred to convicted sex offenders as a form of “human waste” and explained residency restrictions as “waste management”—a reference different legislators have adopted.<sup>235</sup> Thus, it is clear that the psychological and emotional harm that results from legislation branding someone a sex offender is irreparable. Sex offenders often attest to incidents involving vigilante attacks against them based solely on their publicly known status as an offender. Vigilantism should never be promoted. However, when vigilante acts are directed at these teenagers—teenagers who are not offenders and not threats or dangers to society—they seem particularly egregious.

An excellent example of such an unwarranted and misguided attack occurred on Easter Sunday 2006, when twenty-year-old Stephen Marshall showed up at the home of twenty-four-year-old William Elliot, a convicted sex offender, and executed him in cold blood.<sup>236</sup> Prior to the killing, Marshall had logged on to the Maine Sex Offender Registry Web site to search for registered sex offenders in the area.<sup>237</sup> Although access to the Web site’s data required users to register, registration was free.<sup>238</sup> Once registered, users like Marshall were privy to “photos, names, ages, addresses and conviction histories of about 2,200 registered sex offenders in the state.”<sup>239</sup> The months following Elliot’s murder drew widespread commentary because of the circumstances surrounding why Elliot originally had to register as a sex offender.<sup>240</sup> When Elliot was nineteen, a Massachusetts trial court convicted him of having sex with a girl below sixteen—the state’s age

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234. See *id.* at 742; see also Kristin K. Zinsmaster, Note, *In Re the Welfare of Due Process*, 94 MINN. L. REV. 168, 178–79 (2009) (noting that “[r]egardless of the policy rationale, placing a juvenile’s name on this public [sex] offender list is highly stigmatic” and that “the ramifications of registration may be felt by the offender well into adulthood”).

235. Tekle-Johnson, *supra* note 222, at 610.

236. Kimberly Atkins, *Slayings Re-Ignite Debate over Posting Sex Offender Information Online*, BOSTON HERALD, Apr. 18, 2006, at 4 (reporting that Marshall also murdered registered sex offender Joseph Lewis Gray that same day prior to shooting himself on a bus later that evening); Emily Bazar, *Website Led Shooter to Sex Offenders’ Homes*, USA TODAY, Apr. 18, 2006, at 5A.

237. Bazar, *supra* note 236, at 5A.

238. *Id.*

239. *Id.*

240. Editorial, *Sex Offender Registry Policies Deserve Review*, PORTLAND PRESS HERALD, Apr. 29, 2006, at A11.

of consent.<sup>241</sup> However, the girl happened to be Elliot's girlfriend and was only weeks shy of her sixteenth birthday.<sup>242</sup>

Elliot's harassment is no anomaly. Rather, it is common for registered sex offenders to face harassment due to their status.<sup>243</sup> Though limited to the state of Kentucky, a recent study found that 47% of registered sex offenders in that state experienced harassment in person.<sup>244</sup> And this sort of persecution has also been directed at sex offenders' families via menacing "letters, phone calls, and in-person visits telling them to move and/or threatening their lives."<sup>245</sup>

In sum, the legal consequences of sex offender registration drastically limit these teenagers' ability to live, work, and travel. In addition, the emotional and psychological consequences that follow from society's abhorrence of sex offenders leave these teenagers feeling ostracized and alone. Therefore, the harshness of sex offender registration for teenagers in these situations violates the Eighth Amendment.

3. *Unlike Predetermined Sentences that Attach to Other Crimes, Requiring a Person to Register as a Sex Offender Results in Indeterminate Consequences that Follow and Limit the Offender Throughout His Life*

The third factor to be considered in the Eighth Amendment analysis is the excessiveness of the penalty of registering as a sex offender compared to the excessiveness of penalties imposed for other crimes in the state. First, by simply comparing the penalty imposed for sex between consenting teenagers and the penalties that follow from the more vicious sex offenses such as child rape and molestations—it is evident that most state statutes do not differentiate between the "teenagers" and the "pedophiles" when it comes to the scope of sex offender registration and notification laws.<sup>246</sup> As far as the public's perception of a sex offender is concerned, a teenager convicted of having consensual sex with his underage girlfriend may just as well

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241. *Id.*

242. *Id.*

243. Wayne A. Logan, *Megan's Law as a Case Study in Political Stasis*, 61 SYRACUSE L. REV. 371, 403 (2011); see also Joseph J. Fischel, *Transcendent Homosexuals and Dangerous Sex Offenders: Sexual Harm and Freedom in the Judicial Imaginary*, 17 DUKE J. GENDER L. & POL'Y 277, 286 (2010) ("As a result of online notification, offenders are routinely harassed, publicly humiliated, and assaulted, and homes of offenders have been burned down or otherwise vandalized.").

244. Richard Tewksbury, *Exile at Home: The Unintended Collateral Consequences of Sex Offender Residency Restrictions*, 42 HARV. C.R.-C.L. L. REV. 531, 532 (2007).

245. Tregilgas, *supra* note 3, at 735–36.

246. See Geer, *supra* note 99, at 45 (noting that "many states do not differentiate the dangerousness of registered juvenile sex offenders" from adults).

have viciously raped a defenseless child because the public sees the “sex offender”—not the specifics of the individual offenses.<sup>247</sup> With requiring a teenager to register as an offender, the punishment will effectively haunt him throughout his adulthood.<sup>248</sup>

For instance, residency restrictions as a form of punishment are unique to sex offenders.<sup>249</sup> Unlike punishments for other crimes, the legal scope of residency restrictions permits law enforcement agencies to require a registered offender “to move to comply with the residency requirements” regardless of whether “the offender had established residency prior to the enactment of the prohibition.”<sup>250</sup> In addition, while any sort of criminal record will affect an individual’s chance at employment where background checks are performed, sex offender laws take it a step further.<sup>251</sup> Because residency restrictions can limit where an offender can work, “several states have laws that prohibit . . . working within a certain distance from ‘schools, daycare facilities, playgrounds, public swimming pools . . . recreation centers, or public athletic fields.’”<sup>252</sup> The problem is that laws such as this have the added effect of prohibiting an offender from working a long list of other jobs merely because they are located near a prohibited place of employment.<sup>253</sup>

In addition to residency restrictions, many states are considering implementing laws that would prevent all registered sex offenders—irrespective of their individual offenses—from having access to the

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247. See *Talk of the Nation with Neal Conan: Report Finds Fault in Sex Offender Laws* (NPR radio broadcast Sept. 18, 2007), available at <http://www.wbur.org/npr/14505044/report-finds-fault-in-sex-offender-laws> (discussing how our current registry “is not limited to individuals that have been individually assessed to actually pose a risk to the community,” and thus society is left to assume that all on the registry are violent pedophiles who pose serious risks).

248. See *No Easy Answers*, *supra* note 88, at 78–79 (“Registered sex offenders face ostracism, job loss, eviction or expulsion from their homes, and the dissolution of personal relationships. They confront harassment, threats, and property damage. Some have endured vigilantism and violence. A few have been killed. Many experience ‘despair and hopelessness;’ some have committed suicide.”).

249. See Elton, *supra* note 221, at 34 (“[R]esidency laws bring up serious civil liberties concerns, including that these measures apply to convicts *after* they have been punished . . . .” (emphasis added)).

250. Carpenter, *supra* note 220, at 335.

251. See Geer, *supra* note 99, at 48.

252. *Id.* (quoting Joseph L. Lester, *Off to Elba! The Legitimacy of Sex Offender Residence and Employment Restrictions*, 40 AKRON L. REV. 339, 354 (2007)).

253. See *id.* (recognizing that because sex offender restrictions set distances from where an offender can legally work, the offender often must forgo taking certain jobs that may require him to travel to numerous locations for fear that he will “inadvertently enter[] the restricted zones”).

Internet, specifically social networking sites.<sup>254</sup> For instance, in 2009, the popular social networking site, MySpace, removed and then subsequently banned 90,000 of its users after finding out they were registered sex offenders.<sup>255</sup> Because of the KIDS Act of 2008,<sup>256</sup> sites like MySpace are immunized “from suits for banning persons registered with the national sex offender database.”<sup>257</sup> The effect that this law and the subsequent actions taken by social networking sites will inevitably have on these teenage sex offenders is overly drastic. Once again, a law with seemingly good intentions is given an over-inclusive reach, banning all registered offenders and not merely the most dangerous ones. Therefore, in a society that revolves around the use of technology to communicate—where e-mail is “in” and lettered mail is archaic—a ban on the use of such technology permanently disadvantages the teenage offender. And for a teenager who has yet to even break into the career world, he now is not only limited from what types of jobs he may hold and where he can legally live, but he is also limited in his means of communicating.

So what other options does this teenage offender have? If the teenager opts to not register—hoping he will be able to find suitable employment and residency—he subjects himself to severe criminal penalties, including prison time, if he is caught.<sup>258</sup> But what about, for instance, drug dealers who face none of these restrictions? Does society not care about where they are living and working or who they have access to on the Internet? Therefore, unlike the punishments imposed on the majority of other crimes, requiring these teenagers to register as sex offenders disproportionately and unconstitutionally punishes them for the remainder of their lives—severing ties to their family, friends, and their overall community.

4. *The Emerging National Trend Against Requiring These Teenagers to Register as Sex Offenders Is Further Evidence That the States Still Requiring Registration Are Violating the Eighth Amendment*

The fourth factor in the Eighth Amendment analysis requires an examination of how all the states and the federal government address

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254. See Jenna Wortham, *MySpace Turns over 90,000 Names of Registered Sex Offenders*, N.Y. TIMES, Feb. 4, 2009, at B4.

255. Robin Fretwell Wilson, *Sex Play in Virtual Worlds*, 66 WASH. & LEE L. REV. 1127, 1128–29 (2009).

256. 42 U.S.C. § 16915(a)–(b) (Supp. 2008).

257. Wilson, *supra* note 255, at 1129 (citing 42 U.S.C. § 16915b(c)(5)(A)).

258. Richard G. Wright, *Sex Offender Post-Incarceration Sanctions: Are There Any Limits?*, 34 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 17, 29 (2008).

the same scenario—consensual sex between teenagers where one teenager is below the age of consent. When ruling on whether a certain punishment constitutes 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>259</sup> The Court reviews “legislative enactments and state practice[s]” related to the specific punishment as evidence of the “[o]bjective indicia’ of society’s standards.”<sup>260</sup> Thus, while to a certain extent every state criminalizes sexual activity with someone below the relevant “age of consent”—a crime known as statutory rape<sup>261</sup>—a majority of states have either decriminalized consensual teenage sex or created an age-gap exemption.<sup>262</sup> The idea is that “the risk of coercion is substantially decreased when partners are close in age.”<sup>263</sup>

Taking into consideration the trend among many of the states and the federal government to decriminalize consensual sex between teenagers, there now appears to be a national consensus against making teenage sex a crime. Evidence of this trend can be found in the fact that thirty states currently have some form of age-gap provision in place to decriminalize consensual sexual acts between two teenagers close in age.<sup>264</sup> Therefore, although twenty states still lack age-gap provisions, nine of these states have at least implemented their “age of consent” at sixteen—meaning these states are able to counteract the amount of cases of consensual sex that would otherwise be criminal absent an age-gap provision.<sup>265</sup> In addition, in 1962, drafters of the Model Penal Code (the MPC) took a stance against criminalizing sex between teenagers close in age.<sup>266</sup> The MPC makes clear that “willing oral or vaginal sex by a person under sixteen years old with a person within four years of the minor should not be the basis of criminal liability.”<sup>267</sup>

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259. Cohen, *supra* note 112, at 745.

260. *Id.*

261. See *No Easy Answers*, *supra* note 88, at 72–73.

262. See *supra* notes 96–114 and accompanying text; see also Daryl J. Olszewski, Comment, *Statutory Rape in Wisconsin: History, Rationale, and the Need for Reform*, 89 MARQ. L. REV. 693, 706–07 (2006).

263. Olszewski, *supra* note 262, at 706.

264. See AGE OF CONSENT CHART, *supra* note 108 and accompanying text.

265. See *id.* (noting that Arkansas, Indiana, Kansas, Massachusetts, Michigan, Nevada, Ohio, Rhode Island, and South Dakota do not have age-gap provisions but have set their minimum age of consent at sixteen).

266. See MODEL PENAL CODE § 213.3(1)(a) (1980).

267. Siji A. Moore, Comment, *Out of the Fire and into the Frying Pan: Georgia Legislature's Attempt to Regulate Teen Sex Through the Criminal Justice System*, 52 HOWARD L.J. 197, 224 (2008) (citing MODEL PENAL CODE § 213.3(1)(a)) (noting that “[t]he commentary to the Model Penal Code reasons that criminal law should not target” teenagers close in age because it is rare

Following the enactment of the Adam Walsh Act in July of 2006, a trend appeared to be forming among states in an attempt to mirror the “close in age” exemption of the federal act.<sup>268</sup> While noting that “[s]tates vary widely in how they prosecute consensual teen sex,” an article from USA Today discussing the effect of the Adam Walsh Act on individual state laws reported,

More states are bucking the national crackdown on sex offenders by paring back punishment for teens who have consensual sex with underage partners.

Governors in seven states have signed bills in the past two months that mean no prosecution for some teens or no requirement to register as a sex offender.<sup>269</sup>

Moreover, in 2007, the Oregon legislature passed a law that would permit a teenager as young as fourteen to consent to sex with another teen so long as the other teen is no more than five years older.<sup>270</sup> In the same year in Florida, lawmakers set a minimum age of consent at fourteen so long as the “offender” is no more than four years older than the “victim.”<sup>271</sup> Similarly, in Indiana, a teen is exempted from registering so long as he or she is no more than four years older than the victim and the “offender” and the “victim” were either in a dating relationship or an ongoing personal relationship.<sup>272</sup> Although there was already an age-gap provision in place, Connecticut amended its sex offender legislation to extend the age gap from two years to three years such that no crime exists if the “victim” is under sixteen years of age but at least thirteen and the “offender” is no more than three

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that an individual so close in age to his or her partner will be subject to exploitation due to immaturity).

268. See Koch, *supra* note 104, at A1.

269. *Id.*

270. Wendy Koch, *Defining a Sex Predator, for Life*, USA TODAY, July 25, 2007, at 3A; see also OR. REV. STAT. § 181.830(2) (Supp. 2010). Under the law, a person is no longer required to register as a sex offender if

[t]he person is less than five years older than the victim . . . [t]he victim’s lack of consent was due solely to incapacity to consent by reason of being less than a specified age . . . [and the] victim was at least 14 years of age at the time of the offense or act . . .

OR. REV. STAT. § 181.830(2).

271. Koch, *supra* note 104, at A1; see also FLA. STAT. ANN. § 943.04354(1)(c) (Supp. 2010).

[A] person shall be considered for removal of the requirement to register as a sexual offender or sexual predator only if the person: . . . [i]s not more than 4 years older than the victim of this violation who was 14 years of age or older but not more than 17 years of age at the time the person committed this violation.

FLA. STAT. ANN. § 943.04354(1)(c).

272. FLA. STAT. ANN. § 943.04354(1)(c); see also IND. CODE ANN. § 35-42-4-9(e) (Supp. 2009) (exempting from registration situations where “[t]he person is not more than four years older than the victim . . . [and] [t]he relationship between the person and the victim was a dating relationship or an ongoing personal relationship”).

years older.<sup>273</sup> Even Texas—often considered a conservative state—has had an age-gap provision in place since 2001.<sup>274</sup> In Texas, “judges have . . . discretion to grant an exemption from registration in cases involving teens with an age difference of [four] years or less”<sup>275</sup>—presuming the offender is below the age of nineteen and the victim is at least thirteen.<sup>276</sup>

In 2010 alone, there was much activity within state legislatures actively debating the issue. In early 2010, South Dakota legislators were feverishly attempting to change their current sex offender registry in order to make the overall registry more effective at monitoring the most dangerous offenders.<sup>277</sup> Part of the proposed plan would permit the removal of teenage offenders who found themselves on the registry solely because they engaged in consensual sex with another teenager below the state’s age of consent.<sup>278</sup> As recently as March 2010, the Georgia House of Representatives passed a bill that “would let certain inmates petition the courts to remove them from the state sex offender registry after completing their sentences, like . . . so-called Romeo and Juliet statutory rape cases, in which the teens are close in age.”<sup>279</sup>

Therefore, because of this apparent trend towards a national consensus against criminalizing consensual sex between teenagers, the state laws that still criminalize such acts by requiring the teenagers to register as sex offenders are violative of the Eighth Amendment’s prohibition against cruel and unusual punishments.

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273. Colin Poitras, *Harsher Predator Bill Advances*, HARTFORD COURANT, May 30, 2007, at B1; see also CONN. GEN. STAT. ANN. § 53a-71(a)(1) (West 2007) (exempting certain consensual relationships unless “[s]uch other person is thirteen years of age or older but under sixteen years of age and the actor is more than three years older than such other person”).

274. Editorial, *Texas Rep. Todd Smith’s Sex Offender Registration Bill Is a Common-Sense Revision*, FORT WORTH STAR-TELEGRAM, May 14, 2009, at A8.

275. *Id.*

276. *Id.*

277. Eryn Clement, *Sex Offender Legislation Moves Through Capitol*, SOUTH DAKOTA PUB. BROADCASTING (Feb. 23, 2010), <http://www.sdpb.org/tv/shows.aspx?MediaID=57899&ParmAccessLevel=sdpb-all&Parmtype=TV>.

278. See Ben Dunsmoor, *SD Sex Offender Registry May See Tiered System*, KELOLAND.COM (Jan. 28, 2010, 9:07 PM), <http://www.keloland.com/News/NewsDetail6375cfm?Id=95841> (noting that the proposed changes to South Dakota’s sex offender registry would not entirely remove teenagers forced to register based solely on their engagement in sex acts with other teenagers below the age of consent but rather these teenagers would only be required to register for ten years and then could petition the court for removal).

279. Jim Wallace, *Low Risk Sex Offenders May Get a Break*, WALB NEWS (Mar. 21, 2010, 11:31 AM), <http://www.walb.com/Global/story.asp?S=12157971>.



5. *A Comparative Look at How Other Nations Address Age of Consent Issues Further Demonstrates a Global Consensus Against Criminalizing Consensual Sex between Teenagers*

As discussed earlier, an analysis of other countries is relevant here to determine if there is an international consensus against criminalizing consensual sex among teenagers. First, because of the large number of foreign countries with ages of consent drastically lower than many of the individual states, there is a clear global consensus against criminalizing otherwise consensual teenage sex where one teenager is slightly younger. Second, in addition to the overall lower ages of consent, there also appears to be a global consensus advocating for considerably less stringent sex offender laws.

Currently, there is a clear majority among foreign countries to advocate for considerably lower ages of consent than in the United States. If we were to review merely countries within the Western Hemisphere, “38% of the population [here] lives in countries with the age of consent set at [fifteen] or less.”<sup>280</sup> To date, twenty European nations have set their age of consent below sixteen.<sup>281</sup> France’s age of consent is fifteen;<sup>282</sup> Austria, Bulgaria, Croatia, Germany, Italy, and Portugal all set their minimum age of consent at fourteen.<sup>283</sup> In Spain, a teenager as young as thirteen is deemed capable of consenting to sexual relations with anyone of his or her choice.<sup>284</sup> Although Canada raised its age of consent from fourteen to sixteen in 2008, the legislature made sure to include a “close in age” exemption for teen partners’ ages that are within five or fewer years of one another.<sup>285</sup> Thus, the Canadian government deems a boy or girl as young as twelve capable of giving consent to sex presuming his or her partner is not older than seventeen.<sup>286</sup>

Moreover, the U.S. Supreme Court has always paid particular attention to the laws of the United Kingdom because of the “historic

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280. Eugene Volokh, “Statutory Rape” in The Reader, *VOLOKH CONSPIRACY* (Dec. 25, 2008, 1:24 PM), <http://volokh.com/2008/12/25/statutory-rape-in-the-reader/>.

281. Tatchell, *supra* note 206.

282. *Id.*

283. Kirsty Walker & Sarah Harris, *Age of Consent Storm over BBC Debate About Making Sex Legal for Girls Under 16*, *DAILY MAIL* (Sept. 22, 2009, 8:45 AM), <http://www.dailymail.co.uk/news/article-1215164/BBC-Radio-4-host-debate-letting-girls-16-sex.html>; *see also* Tatchell, *supra* note 206.

284. Tatchell, *supra* note 206.

285. Eleanor Maticka-Tyndale, *Sexuality and Sexual Health of Canadian Adolescents: Yesterday, Today and Tomorrow*, 17 *CAN. J. HUM. SEXUALITY* 85, 88 (2008).

286. *See id.*

ties between our countries and in light of the Eighth Amendment's own origins."<sup>287</sup> As it stands, the Sexual Offences Act of 2003 sets the United Kingdom's national age of consent at sixteen.<sup>288</sup> However, over the past few years there has been a growing movement by legal scholars to reduce the age of consent to account for and essentially decriminalize the drastic number of teenagers who have their first sexual experience at that age.<sup>289</sup> Like the United Kingdom, Ireland has recently seen a movement to lower the age of consent from seventeen to sixteen.<sup>290</sup> Even with Ireland's current age of consent, almost 85% of cases that have been prosecuted since 2006 where someone was below the age of consent had an age gap of six years or more.<sup>291</sup> Thus, Ireland is at least arguably making indirect attempts towards decriminalizing consensual sex between teenagers close in age.<sup>292</sup>

Not only do a majority of countries advocate for lower ages of consent as a means to decriminalize consensual teenage sex, but with the exception of the United Kingdom,<sup>293</sup> most of these countries either do not have any sex offender laws, or if they do, they are remarkably less stringent than those in the United States—both federally and at the individual state or province level.<sup>294</sup> For instance, despite the global impact felt by the rest of the world following the heinous murders and sexual abuse of Jacob, Megan, and Adam,<sup>295</sup> fewer than ten other nations have enacted sex offender legislation.<sup>296</sup>

In Canada, there is no community notification requirement for registered sex offenders; rather, only law enforcement agencies have ac-

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287. *Roper v. Simmons*, 543 U.S. 551, 577 (2005).

288. Walker & Harris, *supra* note 283.

289. See, e.g., Tatchell, *supra* note 206; see also Rebecca McQuillan, *Teenage Sex Prosecution Move Has Split Opinion*, HERALD SCOTLAND (May 10, 2008), <http://www.heraldscotland.com/teenage-sex-prosecution-move-has-split-opinion-1.880261>; Miranda Sawyer, *Sex Is Not Just for Grown-Ups*, GUARDIAN UK (Nov. 2, 2003), <http://www.guardian.co.uk/education/2003/nov/02/schools.uk>.

290. Marie O'Halloran, *Sexuality, Information Reproductive Health and Rights*, IR. TIMES ONLINE (Dec. 23, 2009), <http://www.irishtimes.com/newspaper/ireland/2009/1223/1224261160508.html>.

291. Carol Coulter, *Lifelong Stigma over Having Non-Coercive Sex with Girl*, IR. TIMES, Oct. 21, 2009, at 14.

292. See *id.*

293. See Jacob Frumkin, Comment, *Perennial Punishment? Why the Sex Offender Registration and Notification Act Needs Reconsideration*, 17 J. L. & POL'Y 313, 353 (2008) (noting "Great Britain uses a scheme most similar to that of SORNA" and that like SORNA, the intended purpose of the Sexual Offences Act of 2003 is "to strengthen and modernise the law on sexual offences, whilst improving preventative measures and the protection of individuals from sexual offenders" (citations omitted)).

294. *Id.* at 351–52.

295. See *supra* notes 53–87 and accompanying text.

296. Frumkin, *supra* note 293, at 352 (citing *No Easy Answers*, *supra* note 88, at 118).

cess to the database.<sup>297</sup> Thus, in comparison to the United States, Canada provides much greater protection to the offender against civilian abuse, discrimination, and vigilantism.<sup>298</sup> Similarly, in Australia, “[t]he information in the [sex offender] registry is ‘restricted to the greatest extent that is possible . . .’ and can generally only be accessed by police officers.”<sup>299</sup> In addition, even more unlike the draconian scope of those required to register in the United States, Australia limits which offenders must register to only “those convicted of sexual or other serious offenses against children.”<sup>300</sup> Finally, even in the United Kingdom—the nation that arguably has the most similar sex offender legislation to that of the United States—there is less enforcement for those offenders who must register.<sup>301</sup> The United Kingdom, like Australia and Canada, also denies the public access to the registry and limits it to government officials.<sup>302</sup> The United Kingdom also rejected the idea of imposing any sort of residency restriction.<sup>303</sup>

In sum, the lack of any global acceptance of harsh sex offender laws that allow registry access to the public, combined with evidence that there is an international consensus against criminalizing sexual behavior among teenagers, supports the argument that continuing to criminalize such behavior in the United States violates the Eighth Amendment’s prohibition against cruel and unusual punishments.

6. *Requiring Teenagers Who Engaged in Consensual Sex with Other Teenagers to Register as Sex Offenders Serves No Measurable Contribution to the Acceptable Goals of Punishment*

“The heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender.”<sup>304</sup>

Finally, after weighing the factors and looking to the approaches taken by other nations, it is essential to determine whether the penalty imposed—registering as a sex offender—serves any measurable contribution to the acceptable goals of punishment.<sup>305</sup> The rationale behind punishing someone for his wrongful actions originates from the

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297. *Id.* at 354.

298. *See id.*

299. *Id.* at 355 (quoting Child Sex Offenders Registration Act, 2006, § 44 (Austl.)).

300. *Id.*

301. *See id.* at 353.

302. *Id.*

303. Autumn Long, Note, *Sex Offender Laws of the United Kingdom and the United States: Flawed Systems and Needed Reform*, 18 *TRANSNAT’L L. & CONTEMP. PROBS.* 145, 159 (2009).

304. *Tison v. Arizona*, 481 U.S. 137, 138, 149 (1987).

305. *See supra* notes 159–67 and accompanying text.

notion that we all must be held accountable for what we have chosen to do.<sup>306</sup> The Supreme Court has stated that in order for a punishment to not be deemed cruel and unusual, “the punishment imposed upon an individual ‘cannot be so totally without penological justification that it results in the gratuitous infliction of suffering.’”<sup>307</sup> To that end, the Eighth Amendment requires courts to consider “whether the penological goals of [a specific] penalty can be achieved through” the imposition of such penalty.<sup>308</sup>

Society justifies imposing penalties upon those who choose to break the law under the guise of promoting deterrence, retribution, and rehabilitation.<sup>309</sup> As will be discussed below, requiring teenagers to register as sex offenders promotes none of the three intended penological goals.<sup>310</sup> First, because of the commonality of teenage sex and the sparse, inconsistent prosecution of such cases, teenagers are not deterred from continuing to have sexual relations with one another.<sup>311</sup> Second, requiring teenagers to register does not serve the goal of retribution because it is difficult to make the argument that teenagers deserve to be so severely punished for engaging in such a common, generally accepted act.<sup>312</sup> Third, because of the consensual nature of the act, the goal of rehabilitation is ineffective and completely lost on teenagers who are not sexual predators and cannot be changed.<sup>313</sup>

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306. See O’Hanlon, *supra* note 166, at 418.

307. Bethany C. Bryant, Comment, *Expanding Atkins and Roper: A Diagnostic Approach to Excluding the Death Penalty as Punishment for Schizophrenic Offenders*, 78 Miss. L.J. 905, 908 (2009) (quoting *Gregg v. Georgia*, 428 U.S. 153, 183 (1976)).

308. *Id.*

309. See Wendy S. Cash, *A Search for “Wisdom, Justice, and Moderation” in Wilson v. State*, 42 NEW ENG. L. REV. 225, 237 (2007) (citing JAMES RACHELS, *THE ELEMENTS OF MORAL PHILOSOPHY* 131–32 (2d ed. 1993)); see also *Ewing v. California*, 538 U.S. 11, 25 (2003) (“A sentence can have a variety of justifications, such as . . . deterrence, retribution, or rehabilitation.”); O’Hanlon, *supra* note 166, at 420 (recognizing the “incapacitation” justification for punishment where society believes that detaining a high-risk offender is in its best interests). However, because this Comment deals with the effects of sex offender laws and not sentences this justification will not be addressed in further detail.

310. See *infra* notes 314–43 and accompanying text.

311. See *infra* notes 314–28 and accompanying text.

312. See *infra* notes 329–33 and accompanying text.

313. See *infra* notes 334–43 and accompanying text.

- a. Because Statistics Show that the Majority of Teenagers Are Sexually Active Combined with the Reality that Such Cases Are Selectively Prosecuted, Sex Offender Laws Do Not Deter Teenagers from Having Sex with One Another

To begin, the “deterrence” justification is unconvincing because very few teenagers who have sex are prosecuted—and thus teenagers are left undeterred in their actions. In a perfect world, forms of punishment should be designed to deter prospective offenders from committing the offense under the premise that “[d]eterrence presupposes free will to the extent that people will be able to alter their actions so as to comply with the law and avoid punishment.”<sup>314</sup> However, most sex offender laws “are premised more on emotional sentiments such as disgust, morality, and fear, than on rational assessments of crime reduction.”<sup>315</sup> Therefore, a teenager debating whether to have what he thinks to be consensual sex with his slightly younger girlfriend is unlikely to perceive the risks and repercussions that follow if caught and convicted in order to “correctly” conform his behavior to the relevant state law. As bioethicist and medical historian Jacob M. Appel observed, “Teenagers are smart. They understand that sex can be pleasurable and that it can enhance the intimacy of their relationships. Telling them otherwise—by insisting, for example, that ‘sex is for adults only’—defies their lived reality.”<sup>316</sup>

Though taken from the context of a capital-offense case, the Supreme Court in *Thompson v. Oklahoma*<sup>317</sup> observed that “[t]he likelihood that the teenage offender has made the kind of cost-benefit analysis” that takes the penalty into consideration is unlikely.<sup>318</sup> In addition, “[g]iven current patterns of teenage sexual activity, it is probably safe to say that efforts to prevent teenagers . . . from engaging in anything potentially sexually stimulating are at best unrealistic.”<sup>319</sup> Therefore, combining the Supreme Court’s rationale on deterrence and teenage offenders and Appel’s realistic view on how teenagers view sex, a teenager contemplating sex with another teen-

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314. O’Hanlon, *supra* note 166, at 418; see also *Roper v. Simmons*, 543 U.S. 551, 571 (2005).

315. Elizabeth Garfinkle, *Coming of Age in America: The Misapplication of Sex-Offender Registration and Community-Notification Laws to Juveniles*, 91 CALIF. L. REV. 163, 168 (2003).

316. Jacob M. Appel, *Embracing Teenage Sexuality: Let’s Rethink the Age of Consent*, HUFFINGTON POST (Jan. 1, 2010, 5:45 PM), [http://www.huffingtonpost.com/jacob-m-appel/embracing-teenage-sexuali\\_b\\_409136.html](http://www.huffingtonpost.com/jacob-m-appel/embracing-teenage-sexuali_b_409136.html).

317. *Thompson v. Oklahoma*, 487 U.S. 815 (1988).

318. *Id.* at 837.

319. Dailard, *supra* note 212, at 14.

ager is more likely to think of the act's pleasurable effects than how the law may judge him.<sup>320</sup>

Separately, the selective prosecution of "statutory rape" cases that must precede labeling a teenager as a sex offender also counteracts the deterrence principle. First, if half of the teenage population in the United States is sexually active, it would seem impossible to prosecute all occurrences of statutory rape between two consenting teenagers.<sup>321</sup> The resources are simply not there.<sup>322</sup> One commentator points out that "reporting and proving all these violations [is] difficult as many of the consenting victims would not report the crime or assist in the prosecution."<sup>323</sup> Second, 43% of such cases that are successfully prosecuted involve teenage pregnancy—the pregnancy making the appearance and subsequent proof of the crime of statutory rape irrefutable.<sup>324</sup> With proper use of contraceptives, it would seem highly unlikely that a regular case of two teenagers having consensual sex will ever face prosecution.

Therefore, the sporadic and unpredictable rate at which these types of cases are prosecuted leads teenagers to believe that they will not be caught if they have sex with someone below the age of consent.<sup>325</sup> Admittedly, we could solve the problem of selective prosecution by attempting to increase the overall rates of statutory rape prosecutions. However, is that something society truly wants to do?

Hypothetically speaking, law enforcement agencies and prosecutors handle their limited resources by targeting the cases that involve violent acts of rape and child sexual abuse.<sup>326</sup> Without providing enough resources to fund this sort of statutory rape "witch-hunt," an agenda must be set to determine which types of cases deserve prosecutorial priority.<sup>327</sup> Most of society would sleep better at night knowing that some of its tax dollars are going towards prosecuting pedophiles and child molesters—and not toward otherwise voluntary, consensual ac-

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320. See Appel, *supra* note 316.

321. See Steve James, Comment, *Romeo and Juliet Were Sex Offenders: An Analysis of the Age of Consent and a Call for Reform*, 78 UMKC L. REV. 241, 249 (2009).

322. See *id.*

323. *Id.*

324. Elizabeth Hollenberg, Note, *The Criminalization of Teenage Sex: Statutory Rape and the Politics of Teenage Motherhood*, 10 STAN. L. & POL'Y REV. 267, 275 (1999).

325. See Moore, *supra* note 267, at 227 (noting that because selective prosecutorial discretion decreases teenagers' perceived risks in actually being prosecuted for their actions, teenagers are in actuality not deterred from choosing to have sex with other teenagers).

326. See Charles A. Phipps, *Misdirected Reform: On Regulating Consensual Sexual Activity Between Teenagers*, 12 CORNELL J. L. & PUB. POL'Y 373, 437–38 (2003).

327. *Id.* at 438 (noting that with respect to child sexual abuse cases, "few jurisdictions would have the desire or the ability to aggressively pursue [voluntary sexual activity] cases").

tivity among teenagers.<sup>328</sup> Thus, the laws as applied to such teenagers cannot be justified by a deterrence rationale.

b. Sex Offender Laws as Applied to Teenagers Do Not Serve the Goal of Retribution Because a Teenager Does Not Deserve to Be Punished for Engaging in a Consensual Act

Like the deterrence theory, the second justification for an acceptable form of punishment—retribution—also fails to advance any penal interest because teenagers cannot be held culpable for an act so common for their age. To begin, the goal of retribution stems from the theory that offenders “deserve” to be punished.<sup>329</sup> Moreover, in *Atkins v. Virginia*,<sup>330</sup> the Court held that “the severity of the appropriate punishment necessarily depends on the *culpability* of the offender.”<sup>331</sup> Unlike a rapist or pedophile, a teen convicted of engaging in consensual sex with another slightly younger teen hardly possesses even a shred of culpability. Looking at the high levels of sexual activity among teenagers, it becomes difficult to hold the ones who happen to engage in consensual sex with another teen slightly below the age of consent more culpable for an act that more than half of his peers are also engaging in.<sup>332</sup> Moreover, the Supreme Court stated in *Thompson v. Oklahoma*,

Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult. The 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>333</sup>

It is clear that sex among teenagers is not a new trend, but rather for the past half century, more and more teenagers are engaging in consensual sex with one another. As discussed earlier, this type of behavior is natural and developmentally appropriate. Therefore, their behavior does not *deserve* punishment. However, according to the laws that still criminalize such behavior, these teenagers allegedly deserve to be considered sex offenders. Are we prepared as a society to

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328. *Id.* at 437 (“Societal forces appear to be moving irreversibly against the trend to criminalize voluntary sexual activity between teenagers.”).

329. O’Hanlon, *supra* note 166, at 420.

330. *Atkins v. Virginia*, 536 U.S. 304 (2002).

331. *Id.* at 319 (emphasis added).

332. *See Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988).

333. *Id.*

label the millions of teens falling into this category sex offenders under the premise that they truly deserve it?

c. The Penal Goal of Rehabilitation Is Ineffective Because the Consequences of Sex Offender Legislation Make the Offender a Societal Outcast

Finally, if these teenagers never posed a danger to themselves or society in general, then the third justification for an acceptable form of punishment—rehabilitation—is without merit. Admittedly, rehabilitation of an offender is a primary goal of any form of punishment—especially in the context of teenage offenders.<sup>334</sup> However, in cases involving teenage offenders who only acquired the status of being offenders because of the age of their partners, the goal of rehabilitation can never succeed.<sup>335</sup> This is not the case of a sexual predator. The teen never posed a danger to the public at large, nor did he pose a danger of re-offending.<sup>336</sup> In addition, it can hardly be argued that these teenagers need to register as sex offenders for life in order to fulfill the rehabilitative punishment goal because likely within a few years the slightly younger teenager—who at the time was deemed unable to consent—will have reached the relevant age of consent. Thus, the actions are now *legally* consensual. And if the goal of rehabilitating an “offender” is due to the idea that once rehabilitated, the individual will seamlessly fit right in with the rest of society, then requiring a teenager to register and abide by notification laws works against this goal. Instead of fitting in, the teenager is forcefully left out. How can the teenager be a contributing member of society if no employer is willing to hire him? If towns and cities put restrictive limits barring almost all places where he can live, the teenager finds himself effectively banished.<sup>337</sup>

Moreover, the confidentiality of cases tried in juvenile courts has historically been based on the premise that an adolescent’s ability to

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334. See O’Hanlon, *supra* note 166, at 419; see also Kristin Henning, *What’s Wrong with Victims’ Rights in Juvenile Court?: Retributive Versus Rehabilitative Systems of Justice*, 97 CALIF. L. REV. 1107, 1118–19 (2009) (“Legislative action across the country, appellate court and Supreme Court jurisprudence, and recent psychological and neurological studies in adolescent development all demonstrate that juvenile courts can and should continue their efforts to rehabilitate young offenders.”).

335. See Young, *supra* note 8, at 480 (suggesting that applying adult standards of punishment to juveniles replaces the rehabilitative intention with punitive results).

336. See Doeringer, *supra* note 86, at 201 (noting that sexual behavior among teenagers “is not dangerous, deviant or even unusual”).

337. See White, *supra* note 88, at 161 (“As these laws become more widespread, the concern is that, eventually, these convicted criminals might have nowhere left to live [and thus] these sex offender residency restrictions appear to be a modern-day version of banishment . . .”).



rehabilitate is greatly dependent on privacy.<sup>338</sup> It is believed that the stigma created from making the conviction of an adolescent publicly known hinders the success of the adolescent's rehabilitative efforts—thus, it reduces the “impetus to become a productive citizen.”<sup>339</sup> If criminals are already viewed in some respect as societal outcasts, notifying others about an adolescent's juvenile “missteps” further separates them and breaks “relations with those in the community, such as school administrators and teachers, friends, classmates, and prospective employers.”<sup>340</sup> The goal of rehabilitating the offender to the extent that he is able to blend in with other members of society is lost the moment his name hits the registry, permanently associating him with sex offenders—the group with which society least wants to associate.<sup>341</sup>

Furthermore, requiring teenagers to register as sex offenders based solely on their actions in having sex with other, slightly younger teenagers is treating the symptom and not the disease. For instance, an age of consent provision is based on the idea that a person, usually a young teenage girl below a certain age, will not fully comprehend the repercussions and unintended consequences of her sexual decisions.<sup>342</sup> Here, the repercussions and unintended consequences of such decisions are cases of teen pregnancy and the contraction of sexually transmitted diseases.<sup>343</sup> However, if the purpose of rehabilitative punishments is to prevent an undesirable *future* event from occurring then labeling a teenager as a sex offender will not rehabilitate him or her *per se* if the “undesired future event”—like an unwanted pregnancy or the contraction of a sexually transmitted disease—has already occurred. In essence, instead of developing means to mitigate “immature” actions, society is instead penalizing such actions. What public good is being served when the dreaded “damage” has already been done?

*B. Sex Offender Registration and Notification Laws Applied to Teenagers Engaging in Consensual Sex Is an Unfortunate Attempt to Enforce Morality*

“Our obligation is . . . not to mandate our own moral code.”<sup>344</sup>

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338. See Markman, *supra* note 52, at 281.

339. *Id.*

340. *Id.*

341. See *id.*

342. See Oberman, *supra* note 100, at 704.

343. See *id.*

344. Planned Parenthood v. Casey, 505 U.S. 833, 850 (1992).

Sex offender registration and notification laws applied to teenagers engaging in consensual sex with one another is an unfortunate and misguided attempt to enforce morality through legislation. To begin, it would be fruitless to argue that we live in a society that does not inject its moral views into the legislative agenda.<sup>345</sup> From the late nineteenth century until the mid-twentieth century, the Supreme Court repeatedly acknowledged the potential moral threats and dangers posed by alcohol and gambling and upheld various state laws that permitted government regulation of these industries.<sup>346</sup> Regardless of our present-day culture, there will always be groups who “believe that any sexual conduct outside of marriage is inherently immoral.”<sup>347</sup>

However, there is a significant difference between legislation that may have the effect of regulating some form of an activity deemed immoral by a sector of society, and a blatant attempt to ban such activity because of its alleged immorality—especially in the context of an individual’s sexuality.<sup>348</sup> It seems irrational to presume that when teenagers fall slightly below that the age of consent it is as if they magically lose all capability to determine whether they can or cannot have consensual sex with other teenagers close in age.<sup>349</sup> It is true that there are significant risks that attach to teenage sexual conduct because their age and inexperience make them more susceptible to compulsion and abuse by others—especially those who are older.<sup>350</sup> But this is true of any potential harm that teenagers face.<sup>351</sup>

Instead, society, via legislation, imposes its views—views that in reality are just *moral* views.<sup>352</sup> But it is improper for society to criminalize an act or practice simply because there is a moral objection to it.

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345. Moore, *supra* note 267, at 226 (“Laws that encourage sexual relations to be contained to marriage are prevalent throughout United States’ history.”).

346. Suzanne B. Goldberg, *Morals-Based Justifications for Lawmaking: Before and After Lawrence v. Texas*, 88 MINN. L. REV. 1233, 1262 (2004).

347. Olszewski, *supra* note 262, at 699; *see also* Moore, *supra* note 267, at 226 n.233 (listing laws in twenty-three states that continue to echo the immorality of sexual acts outside of marriage).

348. *See, e.g.*, Goldberg, *supra* note 346, at 1273–76 (discussing the premise behind a number of recent cases in which the Court rejected moral justification and noting the Court’s movement “away from embracing morals-based arguments as independently sufficient to justify other restrictions related to sexuality”).

349. *See* Moore, *supra* note 267, at 225 (“Some commentators have suggested that because of their immaturity, [teenagers] are incapable of giving meaningful consent and therefore any conduct involving [a teenager] is inherently nonconsensual.”).

350. Oberman, *supra* note 100, at 704.

351. *See* Moore, *supra* note 267, at 225 (“Concerns over a minor’s ability to protect [himself] from the influences of opportune adults permeate the law. Minors may disaffirm contracts, are prohibited from drinking alcohol, and are not allowed to vote.”).

352. *See* Cohen, *supra* note 112, at 753 (noting that sex offender laws as applied to these teens regulate conduct that “while frowned upon, does not suggest a danger to the community”).

The Supreme Court found that “the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting [such] practice.”<sup>353</sup> In addition, “the right to make certain decisions regarding sexual conduct extends beyond the marital relationship.”<sup>354</sup> Though it has not been formally recognized, in extending this right beyond the marital relationship, it should extend to cover consensual relationships among teenagers. In addition to such rights against governmental intrusion into moral matters, there is a generally recognized right to privacy.<sup>355</sup> Therefore, not only should teenagers have a right to be protected against the government’s criminalization of their allegedly “immoral behavior,” but teenagers’ decisions to have sex with one another should be protected under their general right to privacy.

In sum, when weighing the gravity of consensual teenage sex against the harshness of registering as a sex offender, it is clear that the punishment is grossly disproportionate to the offense. In addition to similar evidence of most foreign nations, considering the recent trend among many states and the federal government to decriminalize consensual sex between teenagers, there is a national consensus against requiring teenagers to register as sex offenders. Finally, since alleged immorality is not an acceptable justification for punishment, forever branding teenagers as sex offenders serves none of the penological goals of deterrence, retribution, or rehabilitation. Therefore, requiring teenagers to register as sex offenders for having sex with slightly younger teenagers violates the Eighth Amendment’s prohibition against cruel and unusual punishments.

#### IV. IMPACT

“[R]egistration for sex offenders appears reasonable, until one considers what a ‘sex crime’ is and who ‘sex offenders’ are.”<sup>356</sup>

Assuming *arguendo* that states repeal their respective legislation criminalizing consensual sex among teenagers, this Comment’s final Part addresses the predicted consequences that removing these teenagers’ names would have on the effectiveness of current registries. First, when considering equitable principles, it is important to balance

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353. *Id.* (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

354. *Lawrence v. Texas*, 539 U.S. 558, 565 (2003).

355. *See, e.g.*, *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (recognizing that although the Constitution does not explicitly state there is a general right to privacy, the various guarantees within the Bill of Rights have penumbras and thereby establish an implicit right to privacy).

356. Kelsey Meeks Duncan, Comment, *A Crime Against Common Sense: How Louisiana’s Implementation of the Adam Walsh Act Exposes the Law’s Most Significant Flaw*, 84 TUL. L. REV. 429, 437 (2009).

the public and private interests involved. The preceding Part of this Comment dealt specifically with the private interests involved—the interests of these teenagers in being free from the unconstitutional burdens of registering as sex offenders.<sup>357</sup> Now, however, it is important to consider the public interests at stake. While people may disagree over the precise methods to monitor and protect against sex offenders, most are willing to at least agree that there are dangerous sexual predators out there—living openly among us but with their identities hidden—and that it is in the *public's* interest to implement ways to ensure the *public's* safety.

Finally, it is time to address the eight-hundred-pound gorilla in the room: teenagers having sex. Admittedly, teenage sex is a topic on which society's opinion is greatly split. Nonetheless—when two teenagers are contemplating having sex with one another—the only opinions that matter are those of the two teenagers. Regardless of the potential for punishment and public stigma, the ultimate decision rests solely with them. Thus, instead of labeling the teenager a sex offender, it is worth considering the benefits of early sex education. That is, whether society should, society will never be able to prevent teenage sex from occurring. Nonetheless, at least there is the chance—and a chance worth taking—to teach and encourage safe and responsible sexual decisions.

A. *After Decriminalizing Consensual Teenage Sex and Removing These Teenagers from the Sex Offender Registries, Society Will Be Able to Better Identify, Monitor, and Protect Against the Most Dangerous Sexual Predators*

When discussing whether teenagers should register as sex offenders for consensual acts with other teenagers, it must be noted that the private interests of the teenage “offenders” are not the only interests at stake. The public has an equal interest in being free from violent offenses committed by unmonitored sexual predators. What makes the public's interest even more difficult to fulfill is that, unlike the severe sentences imposed for murder convictions, in reality most sex offenders, if incarcerated, will be released within their lifetime.<sup>358</sup> Therefore, considering the number of offenders released into communities across the nation each year and society's fear of sex offender recidivism, laws are consistently being passed or amended to develop

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357. See *supra* notes 192–355 and accompanying text.

358. See Brian K. Payne & Matthew DeMichele, *Warning: Sex Offenders Need to Be Supervised in the Community*, 72 *FED. PROBATION* 37, 37 (2008).

measures to further protect against reoffending.<sup>359</sup> Both state and federal registration and community notification requirements “have traditionally been justified as deterring sex offenders from reoffending [by] providing law enforcement with an invaluable starting point when a sex crime is committed [in addition to] facilitating the public’s ability to protect itself.”<sup>360</sup> In addition, “[i]t is anticipated that such registries will increase community awareness, making sex offenders feel more susceptible to the risks associated with offending.”<sup>361</sup>

However, in recent years following the expansion of the multiple categories of sex offenders required to register, the validity of such justifications has been called into question. For one, many state registry requirements are overbroad and over-inclusive, including many individuals who quite evidently pose no real threat to the public at large or to their alleged victims.<sup>362</sup> But it is not simply the rights of those individuals mentioned above that are being violated; rather, these overly broad laws do a disservice to the rights of all members of society to have laws that actively monitor the most dangerous sexual predators out there—those most likely to reoffend. Society is not protected by laws that require such a large group of individuals to register and carry the stigmatic label of a sex offender without truly weeding out the actual predators from the unfortunate teenagers who maybe—for a myriad of other reasons—should have waited another year to have sex with their girlfriends.

At this point, there should be an agreement among lawmakers that “[t]he right people to be identified [and thus required to register] are sexual predators who prey on young children instead of teenagers engaging in consensual sex” with other teenagers close in age.<sup>363</sup> And as it follows, by removing these teenagers from the scope of sex offender laws, law enforcement agencies and society at large will be in a better position to protect against the threats of real sexual predators.<sup>364</sup> However, “due to the uninformative, offense-based classification of sex offenders on registries, law enforcement is often powerless to assess which offenders are most likely to re-offend, preventing concen-

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359. *See id.* (“The sheer number of sex offenders released into the community, and the importance of community supervision of sex offenders, demonstrates the need for adequately preparing probation and parole officers in their roles as sex offender ‘monitors.’”).

360. Tregilgas, *supra* note 3, at 731–32.

361. Richard Tewksbury & Matthew B. Lees, *Sex Offenders on Campus: University-Based Sex Offender Registries and the Collateral Consequences of Registration*, 70 *FED. PROBATION* 50, 50 (2006).

362. Tregilgas, *supra* note 3, at 732.

363. Cohen, *supra* note 112, at 751.

364. *See id.* at 753–54.

tration on those who present the biggest threat to the surrounding community.”<sup>365</sup> The consequences of law enforcement’s weakening ability to adequately monitor the sex offenders on their registries endanger all of society.<sup>366</sup>

As mentioned at the beginning of the Comment, the discovery of Jaycee Dugard after nearly two decades of captivity by a convicted sex offender<sup>367</sup> should have been the wake-up call for sex offender law reform that society desperately needs. Along with Jaycee’s discovery came the exposure of the obvious weaknesses of California’s sex offender registration and notification laws that allowed convicted offender Phillip Garrido to spend eighteen years heinously raping and fathering children with a girl (now a woman) against her will.<sup>368</sup> Offered as a defense for the law enforcement agencies’ actions—or in this case, inaction—some commentators argue that the large number of offenders required to register depletes the availability of resources necessary to effectively monitor each offender.<sup>369</sup> As one scholar noted, “[T]hese lengthy registration periods and widespread overbreadth in registration scope tend to overburden law enforcement agencies, both fiscally and practically.”<sup>370</sup> Ernie Allen, of the National Center for Missing and Exploited Children, alleges that while local law enforcement agencies are required by law to monitor sex offenders upon their release from prison, “[t]he system . . . to do monitoring and supervision follow-up once they return to the community is just overwhelmed.”<sup>371</sup> Moreover, with the economy in its current,

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365. Tregilgas, *supra* note 3, at 733.

366. See Lara Geer Farley, Note, *The Adam Walsh Act: The Scarlet Letter of the Twenty-First Century*, 47 WASHBURN L.J. 471, 487 (2008) (“Not only are law enforcement officials unable to identify which sex offenders pose the greatest risk to the public, but law enforcement is also unable to keep track of the vast amount of offenders required to register.”).

367. See *supra* note 2 and accompanying text.

368. See Malia Wollan, *Report Faults Parole System in Abduction*, N.Y. TIMES, Nov. 5, 2009, at A16.

369. See Jesse McKinley, *Kidnap Victim Wins Settlement*, N.Y. TIMES, July 2, 2010, at A17; Solomon Moore, *Struggling to Keep Tabs on Paroled Sex Offenders*, N.Y. TIMES, Sept. 27, 2009, at 14; see also Peter Dujardin, *Tough Task Tracking Sex Offenders*, DAILY PRESS, Jan. 24, 2010, at A1 (reporting that the Virginia State Police troopers who are assigned to monitor registered sex offenders are drastically understaffed and their resources are ill-equipped to effectively monitor such offenders); see also Editorial, *Arrests up, Monitoring down*, LAS VEGAS SUN, Nov. 27, 2009, at 4 (reporting that the “[l]aw enforcement agencies [in Nevada] charged with tracking the increasing number of offenders who are paroled or sentenced to probation are severely understaffed” and arguing that “Congress and the states should devise new funding plans so parole and probation officers are proportionate to the number of offenders they must supervise”).

370. Tregilgas, *supra* note 3, at 733.

371. Ian Urbina & Christopher Maag, *After Gruesome Find, Anger at Cleveland Police*, N.Y. TIMES, Nov. 6, 2009, at A1 (quoting Ernie Allen, Nat’l Center for Missing and Exploited Children).

fragile condition, states simply do not have the budgets necessary for their respective law enforcement agencies to make any sort of concerted effort to monitor *every* offender.<sup>372</sup>

Due to the excessive number of individuals required to register as sex offenders and the limited resources available to law enforcement agencies, everyone is suffering.<sup>373</sup> However, lawmakers protect their political self-interest by either (1) remaining silent on the issue of whether sex offender laws need reform or (2) advocating reform—but reform in the sense of stricter provisions.<sup>374</sup> It is time for lawmakers to relinquish their fears of appearing soft on crime. It is time for lawmakers to stop “calling for a host of radical measures without rationally evaluating them.”<sup>375</sup>

In addition, state governments have yet to embrace the Adam Walsh Act due to fear that compliance with “the registry [requirement] would create an overwhelming monitoring burden and [because] it uses crude means of assessing the likelihood that offenders might repeat their crimes.”<sup>376</sup> Perhaps states would be less apprehensive about implementing the Adam Walsh Act if they could be reasonably reassured that state dollars would not be wasted on monitoring the non-predatory offender—like the teenager who currently must register for having had consensual sex with his girlfriend.<sup>377</sup> Instead, Congress was more or less forced to extend the deadline for compliance to July 2010 after all other states aside from Ohio failed to comply with the Act.<sup>378</sup> The states are never going to develop enough faith in the system to comply until they believe the system is actually designed to further the goals of its preamble. And if protecting the public from the most dangerous offenders is its goal, then removing these *harmless* teenagers is definitely the first step. Because these teenagers were never dangerous, removing them would not require a separate assessment of their level of risk for future offenses. Rather,

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372. See Greenblatt, *supra* note 49 (“[A]s many states face persistent budget shortfalls, it’s become a real question how well law enforcement can keep track of such a large caseload.”).

373. See Urbina & Maag, *supra* note 371, at A1.

374. See Tregilgas, *supra* note 3, at 748.

375. *Id.*

376. *The Problem of Sex Offenders*, *supra* note 78.

377. See James Hart, *Do Sex-Offender Laws Really Protect the Public?*, KANSAS CITY STAR ONLINE (Feb. 24, 2010, 3:53 PM), [http://blogs.kansascity.com/crime\\_scene/2010/02/do-sex-offender-laws-really-protect-the-public.html](http://blogs.kansascity.com/crime_scene/2010/02/do-sex-offender-laws-really-protect-the-public.html) (noting that since major sex offender legislation was passed in Florida following the murder of Jessica Lunsford in 2005, the state now spends thirty-six million dollars a year more on monitoring sex offenders yet the rate of sex offenses has yet to decline).

378. See Wendy Koch, *Many Sex Offenders Are Kids Themselves*, USA TODAY, Jan. 4, 2010, at 3A; *The Problem of Sex Offenders*, *supra* note 78.

these teenagers were merely on the list to begin with due to lawmakers' moral discontent with premarital sex.

Human Rights Watch—the organization responsible for the near 200-page 2007 report detailing the need for sex offender legislation reform—argues that “pouring scarce resources into monitoring *all* convicted offenders means there is less money for program[s] to prevent sexual violence and counsel victims and for the rape investigation units, rape evidence testing and other tools that could bring justice in these cases.”<sup>379</sup> Human Rights Watch advocates for sex offender legislation to shift from mere monitoring to actual prevention-based programs. This would lessen the need for constant surveillance of offenders by offering actual treatment to those in need, such that they no longer felt the urge to reoffend.

Admittedly, most of this is a mere and overly optimistic hypothetical. But, while there may be little proof to offer that any of these alternative systems would in reality turn out to be our “knight in shining armor” as a legislative answer, there is proof that our current system is flawed. It is flawed to the extent that many states are fine with grouping an eighteen-year-old average high school senior who happened to be caught in a sexual act with his younger—yet still teenage—girlfriend under the same name as child molesters and pedophiles.

In sum, the abundance of information available on sex offender registries has had destructive consequences—including vigilante murders of men labeled as sex offenders simply because they had sex years ago with their slightly younger teenage girlfriends while actual convicted predators like Garrido spend almost two decades eluding law enforcement officials.

#### *B. Education as an Effective Alternative to the Sex Offender Registry*

“Let’s talk about sex, baby. Let’s talk about you and me. Let’s talk about all the good things and the bad things that may be.”<sup>380</sup>

Perhaps it is time for a serious discussion about mandatory sex education and not just abstinence-only programs. As one author described it:

Teens receive conflicting messages about adolescent sexuality from the adult world. Adults can create works that seem to portray adolescent sexuality by using younger looking actors; in fact, doing

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379. Sarah Tofte, *America's Flawed Sex Offender Laws*, HUM. RTS. WATCH (Sept. 5, 2009), <http://www.hrw.org/en/news/2009/09/05/americas-flawed-sex-offender-laws> (emphasis added).

380. SALT-N-PEPA, *Let's Talk About Sex*, on BLACKS' MAGIC (Next Plateau Music 1990).



so is within their First Amendment rights. Many popular television shows and mainstream films portray teenage characters who are sexually active and even sometimes sex-obsessed. Yet at the same time many school districts limit teens' sex education to the abstinence-only framework.<sup>381</sup>

As discussed earlier, requiring teenagers to register as sex offenders based solely on their actions in having sex with other slightly younger teenagers is treating the symptom, not the disease—that is, with teenage sex being the metaphorical “disease.”<sup>382</sup> For starters, the United Kingdom passed a law enforcing compulsory sex education for the year prior to the teenager turning sixteen—the age of consent.<sup>383</sup> In addition, it is clear from the statistics on the prevalence of sex among teenagers that promoting abstinence only is not suddenly going to catch on. Since “[t]he advent of the AIDS epidemic in the 1980s spurred states to reevaluate their sex education policies,”<sup>384</sup> there has been a remarkable decline in sex education and the past twenty-five years have been more or less filled with an empty silence on continuing sex education in the classroom. Currently, twenty-one states and the District of Columbia “mandate that public schools teach sex education.”<sup>385</sup> However, this means that the majority of states have abstained from requiring sex education in their public schools.<sup>386</sup>

Part of the reasoning behind statutory rape laws and punishing an individual for having sex with someone below the age of consent is drawn from the need to deter such actions that may lead to unwanted pregnancies and sexually transmitted diseases (STDs). Therefore, instead of punishing teenagers for having sex with other teenagers, legislatures should consider teaching these teenagers the potential negative consequences of having unprotected sex. If part of the goal of branding an eighteen-year-old a sex offender for having consensual sex with his younger girlfriend is to prevent the girl—who is presumed unable to consent—from getting pregnant or contracting an STD, it serves no purpose to punish him after the fact. If the girl is already

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381. Amy F. Kimpel, *Using Laws Designed to Protect as a Weapon: Prosecuting Minors Under Child Pornography Laws*, 34 N.Y.U. REV. L. & SOC. CHANGE 299, 328–29 (2010).

382. See *supra* notes 341–42 and accompanying text.

383. Laura Clark, *Parents to Be Fined if They Take Their Children out of Sex Lessons*, MAIL ONLINE (Nov. 6, 2009, 9:49 AM), <http://www.dailymail.co.uk/news/article-1225452/Parents-fined-children-sex-lessons.html> (noting that following the eventual imposition of mandatory sex education classes as part of the national curriculum, British parents will face severe fines if they attempt to remove their fifteen-year-olds from such classes).

384. Guttmacher Institute, *State Policies in Brief: Sex and STI/HIV Education 1* (2010).

385. *Id.*

386. Jesse R. Merriam, *Why Don't More Public Schools Teach Sex Education? A Constitutional Explanation and Critique*, 13 WM. & MARY J. WOMEN & L. 539, 540 (2007).

pregnant or infected, who is made any better by the draconian consequences of this law? Rather, sex education gives both the teenage boy and teenage girl options before any decision is made.

Research conducted by NARAL Pro-Choice America (NARAL) found that “[t]he public overwhelmingly supports age-appropriate, comprehensive sex education, [however] anti-choice policymakers have increasingly promoted restrictive abstinence-only programs that censor information about contraception and STD/HIV prevention strategies.”<sup>387</sup> But choosing between abstinence-only sex education and no education is really no choice. Further research showed that the “assessment of the impact of formal sex education programs on teen sexual health using . . . abstinence-only programs had no significant effect in delaying the initiation of sexual activity or in reducing the risk for teen pregnancy and STD[s].”<sup>388</sup>

Instead, NARAL takes the approach that “[t]eens must be given the information necessary to protect themselves against unintended pregnancy and STDs—and that begins with honest, age-appropriate, and medically accurate sex education.”<sup>389</sup> Here, research has shown a correlation between individuals who received some form of formal safe-sex education and a delay in when these same individuals chose to engage in sexual intercourse for the first time.<sup>390</sup> In addition, not only did these individuals delay their first sexual experience, but there was also an increase in the use of contraception for the first time.<sup>391</sup>

In sum, there is a difference between advocating for teenagers to have sex—in general—and advocating for responsible behavior among teenagers concerning *all* major life decisions. For starters, the act of sex itself is not shameful—nor are the teenagers who are engaging in it. As *New York Times* columnist Charles Blow wrote,

If there is a shame here, it’s a national shame—a failure of our puritanical society to accept and deal with the facts. Teenagers have sex. How often and how safely depends on how much knowledge and support they have. Crossing our fingers that they won’t cross the line is not an intelligent strategy.<sup>392</sup>

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387. NARAL Pro-Choice America Foundation, *Americans Support Responsible Sex Education* 1 (2009).

388. Pamela K. Kohler, Lisa E. Manhart & William E. Lafferty, *Abstinence-Only and Comprehensive Sex Education and the Initiation of Sexual Activity and Teen Pregnancy*, 42 *J. ADOLESCENT HEALTH* 344, 349 (2008).

389. NARAL Pro-Choice America Foundation, *supra* note 387, at 3.

390. Trisha E. Mueller, Lorrie E. Gavin & Aniket Kulkarni, *The Association Between Sex Education and Youth’s Engagement in Sexual Intercourse, Age at First Intercourse, and Birth Control Use at First Sex*, 42 *J. ADOLESCENT HEALTH* 89, 93 (2008).

391. *Id.*

392. Charles M. Blow, Op-Ed., *Let’s Talk About Sex*, *N.Y. TIMES*, Sept. 6, 2008, at A17.

Thus, it is a hard argument to make that “abstinence until marriage” is still a policy worth fighting for when the fact of the matter is that the war on preventing teenage sex has long been lost.<sup>393</sup> It is a reality that must be faced: the majority of Americans do not make it out of their adolescence without having had sex, let alone wait until marriage.<sup>394</sup>

## V. CONCLUSION

“Sex offender laws do have their place in providing a general sense of public safety . . . . However, public safety should not come at the cost of others’ rights.”<sup>395</sup>

The state of sex offender laws in the United States is rather unstable and evidently defective. Society is likely still reeling from the shock suffered after Phillip Garrido, a convicted and *registered* sex offender, held captive and sexually abused the young Jaycee Lee Dugard for eighteen years, fooling law enforcement agencies and making a mockery of the sex offender laws that were designed to prevent a crime like this from ever happening.<sup>396</sup> Perhaps enacted with good intentions, these laws and their far-reaching scope have spun utterly out of control, dragging into their ambit teenagers who were caught having consensual sex with other teenagers. Regardless of moral differences, “even proponents of harsher penalties increasingly say there’s value in laws that recognize some sex offenders require more oversight than others.”<sup>397</sup>

With the fifty states and federal government unable to come to a uniform agreement on how to address this issue of consensual teenage sex where one partner is slightly younger, it is clear that reform is necessary, and this inconsistency cannot stand. In a perfect world, sex offender laws would identify to the public and law enforcement agencies the most dangerous offenders, providing adequate means and resources to monitor such offenders. But most importantly, sex offender laws should only apply to actual offenders. Sex offender laws should not apply to consensual sex between two teenagers. Personal morals aside, sex is all too common for American society’s teenagers to ignore. In *Lawrence v. Texas*,<sup>398</sup> the Supreme Court arguably indicated a reluctance to allow states to legislate morality.<sup>399</sup> Here we

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393. John Santelli et al., *Abstinence and Abstinence-Only Education: A Review of U.S. Policies and Programs*, 38 J. ADOLESCENT HEALTH 72, 73 (2006).

394. *See id.*

395. Long, *supra* note 303, at 167.

396. *See supra* note 2 and accompanying text.

397. Greenblatt, *supra* note 49.

398. *Lawrence v. Texas*, 539 U.S. 558 (2003).

399. *Id.* at 577.

are faced with a remarkably similar scenario—there are without a doubt members of society that are morally opposed to teenagers engaging in consensual sex with one another. However, that alone is not enough to brand their conduct illegal and deserving of the label “sex offender.”

If there is even a miniscule amount of truth to the argument that “sex offenders [are] a population enjoying the least amount of sympathy from the media and the public,”<sup>400</sup> then our lawmakers owe society nothing less than ensuring that every labeled sex offender is truly worthy of such a designation.

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400. Hadar Aviram, *Dangerousness, Risk, and Release*, 7 HASTINGS RACE & POVERTY L.J. 175, 179 (2010).

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