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The Young Sex Offender Debacle: The Continued Need for Changes to Juvenile Sex Offender Registry Requirements

Samantha Brewster-Owens

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The Young Sex Offender Debacle: The Continued Need for Changes to Juvenile Sex Offender Registry Requirements

*Samantha Brewster-Owens**

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* J.D., 2014, Washington & Lee University School of Law; B.A., 2011, Tufts University. I would like to thank my family and everyone who supported me in this endeavor. I dedicate this Note in loving memory of Eleanor Brewster.

I. Introduction

In 1996, seventeen year-old Wendy Whitaker was charged and convicted of sodomy, a crime that required her to register as a sexual offender for life according to Georgia's rules at the time.¹ The crime she committed? Performing consensual oral sex on a fifteen year-old male classmate.² In 2005, seventeen year-old Genarlow Wilson was charged and convicted of aggravated child molestation, a crime with a minimum mandatory sentence of ten years imprisonment under Georgia's state law at the time.³ His crime? Engaging in consensual oral sex with a fifteen year-old girl, just shy of Georgia's age of consent.⁴

Cases like those of Genarlow Wilson and Wendy Whitaker raise questions of privacy, consensuality, and agency among young people. However, aside from a few exceptions, these are not the cases that one often sees reported on television or in the newspaper. Instead one is more likely to see reports of sexual relationships between a teacher and student, a stepfather and stepdaughter, or a priest and a young altar boy.⁵ Those are the types of cases legislatures usually seek to punish when creating sexual offense laws—not cases of normal teenage sexual experimentation or behavior.⁶

In 2006, the Georgia legislature enacted what was referred to as “the nation’s broadest and most restrictive law regarding sex offender registration and residential restrictions for registered sex offenders.”⁷ The law, House Bill 1059 (“HB 1059”),⁸ adopted age-based exceptions to the

1. See Sarah Geraghty, *Challenging the Banishment of Registered Sex Offenders from the State of Georgia: A Practitioner's Perspective*, 42 HARV. C.R.-C.L. L. REV. 513, 518 (2007) (noting that “[t]here are still others on Georgia’s sex offender registry who are not predators by any stretch of the imagination”).

2. *Id.*

3. See Brenda Goodman, *Georgia Court Frees Man Convicted in Sex Case*, N.Y. TIMES, Oct. 27, 2007, <http://www.nytimes.com/2007/10/27/us/27georgia.html> (reporting on the early release of Genarlow Wilson—sentenced at seventeen years old to ten years in prison for consensual sex with a fifteen-year-old girl—by the Georgia Supreme Court).

4. *Id.*

5. See CAROLYN E. COCCA, *JAILBAIT: THE POLITICS OF STATUTORY RAPE LAWS IN THE UNITED STATES* 57 (2004) (evaluating common prosecutions reported in the media regarding relationships with large age gaps and/or an abuse of authority).

6. See Goodman, *supra* note 3.

7. Richard Tewksbury, *Exile at Home: The Unintended Collateral Consequences of Sex Offender Residency Restrictions*, 42 HARV. C.R.-C.L. L. REV. 531, 539 (2007) (providing an overview of the impact residency restrictions have on offenders).

8. See H.B. 1059, 148th Gen. Assemb., Reg. Sess. (Ga. 2006) available at

state's strict sexual offender and registry laws which lessened the punishment for those who fell within those exceptions. It was established, largely, in reaction to the public outcry surrounding Genarlow Wilson's nationally criticized battle with Georgia's legal system.⁹ Although initially thought to solve the problem of Georgia's youths being sent to prison for terms equal to that of criminals convicted of homicide and other heinous crimes, it quickly became evident that the new law would not be applicable to Genarlow Wilson, the same man whose case spurred the law's creation.¹⁰ Even though Wilson's and Whitaker's conduct squarely fell within the construction of the new amendment, the Georgia legislature chose not to apply the ameliorative changes retroactively.¹¹ This meant that both Wilson and Whitaker still were subject to the State's mandatory sex offender registry requirement for life even after the legislation was enacted. Unfortunately for them, HB 1059's strict residency requirements brought down the hammer on those already required to annually register as a sexual offender.¹²

The root of the problem stemmed from the fact that the laws Wilson and Whitaker were prosecuted under were too overinclusive. In both cases the laws drew no distinction between a sexual predator molesting a child and two teenagers engaging in consensual sexual activity. This Note seeks to explore the lessons states can learn from Georgia's treatment of Genarlow and Wendy.

Part II of this Note covers Wilson's harrowing experience. Part III examines the role of prosecutorial discretion and its effects on Wilson's case. Part IV of this Note examines the Romeo and Juliet laws in Georgia, comparing them to similar provisions in Florida. Part V argues that

<http://www.sorrb.org/images/hb1059.pdf> (adopting exceptions which lessened punishment for those specifically delineated by the statute).

9. See *The Georgia Success Story: Georgia Passes 'Romeo and Juliet' Law to Protect Youth from Disproportionate Sentencing for Sex Offenses* [hereinafter *Georgia Success Story*], CAMPAIGNFOR YOUTHJUSTICE.ORG, http://www.campaignforyouthjustice.org/documents/GA_HB_1059.pdf (last updated Mar. 2011) (praising the Georgia law as a "necessary first step to remedy the problem of disproportionate sentencing for juvenile sex offenders").

10. See S. David Mitchell, *In with the New, Out with the Old: Expanding the Scope of Retroactive Amelioration*, 37 AM. J. CRIM. L. 1, 4-5 (2009) (explaining the Georgia legislature's decision not to apply the ameliorative effects of the amendment retroactively).

11. See H.B. 1059, *supra* note 8.

12. See Geraghty *supra* note 1, at 515 (noting that although Georgia's original sex offender residency law—banning offenders from living within "1000 feet of a school, child care facility, park, recreation facility"—made it difficult to find a place to live, it was nonetheless more manageable than the law approved in 2006).

ambiguities exist amongst the sexual offense statutes in Georgia. Part VI discusses the negative effects of states allowing their legislatures to pass ameliorative laws that are prohibited from being used retroactively. Part VII discusses how recent legislation passed in 2010 changed the legal landscape for people in situations like Wilson and Whitaker. Finally, Part VIII presents an analysis of the current sexual offender laws in Georgia and Florida and suggests recommendations to better address the issues that arose in both the Wilson and Whitaker cases.

II. Genarlow Wilson

On New Year's Eve, 2003, seventeen year-old high school student Genarlow Wilson was filmed having consensual sex with a seventeen year-old girl and receiving consensual oral sex from a fifteen year-old girl in a motel room.¹³ The following morning the seventeen year-old girl told police she had been raped, and they subsequently searched the motel room finding the video camera with the tape of both sexual relations.¹⁴ Later, Wilson was charged and pled not guilty to charges of rape and aggravated child molestation.¹⁵ Thinking the rape was the more egregious of the two charges, a jury acquitted Wilson of the rape, but found him guilty of the aggravated child molestation.¹⁶ Unbeknownst to the jury, however, this conviction carried a mandatory minimum sentence of ten years without the possibility of parole.¹⁷ Upon his eventual release from jail, Wilson would be subject to a lifetime registration requirement as a convicted sex offender.¹⁸

Wilson's case caused a national uproar, mostly due to the fact that, under the statutory scheme in place at the time, "had Wilson engaged in sexual intercourse with [the] fifteen year-old . . . rather than oral sex," he

13. See Wendy S. Cash, *A Search For "Wisdom, Justice, and Moderation" in Wilson v. State*, 42 NEW ENG. L. REV. 225, 227 (2007) (providing a detailed account of Genarlow Wilson's journey through the Georgia court system).

14. *Id.*

15. *Id.* at 228 (citing Brief of Appellant at 2, Wilson, 631 S.E. 2d 391 (Ga. Nov. 14, 2005) (No. S06A0292)).

16. *Id.* at 228 (discussing Wilson's acquittal on the charge of rape of Morgan, and his conviction of aggravated child molestation for receiving oral sex from Cannon).

17. *Id.* at 238–239 (noting the jury forewoman stating that Wilson was guilty under the letter of the law, but not under the spirit of the law).

18. See GA. CODE ANN. § 42–1–12 (2012) (requiring lifetime registration for individuals found guilty of aggravated child molestation).

would have been guilty only of a misdemeanor rather than aggravated child molestation—a felony.¹⁹ The extreme nature of the mandatory sentence elicited a cry for change, especially in light of the fact that as the state law stood, this could have been interpreted as an “arbitrary assignment of ‘drastically different sentences for similar conduct.’”²⁰

Negative publicity surrounding the case led Georgia lawmakers “to close [the] loophole that led to the ten-year term, but they declined to apply the new law retroactively.”²¹ Because of Genarlow Wilson’s case, “the Georgia General Assembly, the state’s legislature, closed the loophole in 2006 to define most offenses involving consensual sex acts between teenagers as nothing more than misdemeanors.”²² The loophole closing took place while Wilson’s appeal was pending, and the legislature adopted a “Romeo and Juliet provision in the aggravated child molestation statute to reflect what the legislature, and society, viewed as the proper degree of culpability for such adolescent conduct.”²³ This provision, much like the one for sexual intercourse between teenagers, allowed minors to be charged with a misdemeanor rather than a felony.²⁴ However, the legislature decided to allow the amendment to pass only as a prospective measure, and not a retroactively ameliorative one.²⁵ This decision meant that Wilson would have to serve his entire ten-year sentence in jail.

Nonetheless, after more than two years in jail, well beyond the amount of time usually given those charged with similar offenses, Wilson did eventually gain his freedom.²⁶ The Georgia Supreme Court held that the mandatory minimum ten-year sentence for aggravated child molestation was “cruel and unusual punishment in light of the magnitude of the change in the penalty in the 2006 Amendment.”²⁷

19. Cash, *supra* note 13, at 229.

20. *Id.* (noting this incongruity in the law as the basis of Wilson’s appeal of his conviction on both state and federal constitutional grounds).

21. Brenda Goodman, *Day of Split Outcomes in Teenage Sex Case*, N.Y. TIMES, June 12, 2007, available at http://www.nytimes.com/2007/06/12/us/12consent.html?ref=genarlowwilson&_r=1& (reporting that on the day of Wilson’s court-ordered release, the attorney general indicated that he would appeal the decision to the Georgia Supreme Court).

22. *Id.*

23. Mitchell, *supra* note 10, at 4.

24. See *Georgia Success Story*, *supra* note 9 (explaining the impact of House Bill 1059 on juvenile offenders).

25. See Goodman, *supra* note 21 (explaining the legislature did not allow the bill to apply retroactively).

26. *Id.*

27. Mitchell, *supra* note 10, at 5 (explaining that although Wilson’s conduct fell

III. Role of Prosecutorial Discretion in Wilson's Case

Though the law did not work in Wilson's favor, prosecutorial discretion played a major role in the outcome of his conviction. Prosecutors function as the most powerful officials in the criminal justice system.²⁸ Prosecutors possess "vast, almost limitless, discretion" protected by the Supreme Court, and the Court has shielded them from meaningful scrutiny.²⁹ Because most of their decisions are made behind closed doors, there is rarely a chance to see any abuse or misconduct stemming from prosecutorial discretion.³⁰ On the rare occasions that prosecutorial misconduct is challenged in court, often "the alleged misconduct [is] ruled harmless error or not addressed by appellate judges. . . . In hundreds of additional cases, judges believed that the prosecutorial behavior was inappropriate, but affirmed the convictions under the 'harmless error' doctrine."³¹ The real question is whether or not the prosecutors' behavior in Genarlow Wilson's case amounted to misconduct and abuse of discretion.

Looking closely at both prosecutors' actions in this case, an argument can be made that "at a minimum, [they] abused their discretion, yet their actions were probably well within the bounds of the legal exercise of prosecutorial discretion as defined by the United States Supreme Court."³² Because Wilson refused to accept a plea offer of a five-year prison sentence and mandatory sex offender registration, District Attorney, David McDade took Wilson to trial.³³ After Wilson's conviction, the mother of the fifteen year-old girl described that she had received what could be perceived as a threat from the District Attorney, stating that he told her that she could "face legal trouble for 'neglect' as a parent if she did not participate in the

within the scope of the 2006 Amendment, the legislature refused to apply it retroactively to Wilson or anyone else).

28. See Angela J. Davis, *The Legal Profession's Failure to Discipline Unethical Prosecutors*, 36 HOFSTRA L. REV. 275, 276–77 (2007) (discussing "the legal profession's failure to hold prosecutors accountable for misconduct and other ethical violations"). For a more detailed discussion on the pervasiveness of prosecutorial misconduct, see the article in its entirety.

29. *Id.*

30. *Id.*

31. *Id.* at 278 (citing *Chapman v. California*, 386 U.S. 18, 22 (1967) (holding that a few constitutional errors that do not have significant bearing or harm do not require an automatic reversal of conviction)).

32. *Id.* at 276.

33. *Id.* at 303.

prosecution.”³⁴ So, the mother testified identifying her daughter as the girl who initiated the consensual oral sex even though her daughter “did not want any of this to happen,” lending weight to the idea that the victim did not necessarily willingly participate in the prosecution.³⁵ The jury acquitted Wilson of statutory rape, but found him guilty of aggravated child molestation without knowing that the penalty for the offense was a mandatory ten years in prison with no possibility of parole.³⁶

At the time of Wilson’s habeas case, Georgia’s Attorney General Thurbert E. Baker, wrote an open letter to the public explaining his view on his role in the case.³⁷ He said:

The legal issues in the case are straightforward: (1) Is Genarlow Wilson’s sentence of ten years to serve with one year on probation for aggravated child molestation, lawfully imposed when the law of Georgia required a minimum mandatory sentence of ten years, cruel and unusual punishment under the United States and Georgia Constitutions, and (2) can a habeas corpus judge legally resentence Wilson when Georgia law does not give him the authority to do so and requires instead returning to the trial court?³⁸

On their face, the legal issues are straightforward; however, Baker ignored the significant amount of prosecutorial discretion available to him in the habeas case and to the District Attorney who charged Wilson with aggravated child molestation. Neither prosecutor was required to consult with the victim,³⁹ but the American Bar Association Standards for the Prosecution Function enumerates “the interest of the victim in prosecution as an important factor to consider when making [charging decisions].”⁴⁰ It is safe to say that with the wide latitude prosecutors are given in making

34. *Id.* at 304.

35. *Id.*

36. *Id.* at 303–304 (citing Wright Thompson, *Outrageous Injustice*, ESPN E-Ticket Magazine, <http://sports.espn.go.com/espn/eticket/story?page=Wilson> (“When the jurors found out there was a 10-year mandatory minimum sentence, several were incensed The prosecution told them to write a letter, then moved on to the next case.”)).

37. Press Advisory, Open Letter from Thurbert E. Baker, Att’y General, Dept. of Law State of Ga., on Genarlow Wilson Case (June 15, 2007) [hereinafter Press Advisory], available at <http://law.ga.gov/press-releases/2007-06-15/open-letter-attorney-general-baker-gonarlow-wilson-case> (sharing his perspective on the issues raised in the case after appealing the habeas decision).

38. *Id.*

39. See Davis, *supra* note 28, at 304 (citing Angela J. Davis, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 123–41(2007)).

40. *Id.* (citing the ABA Standards for Criminal Justice Prosecution Function and Defense Function 3–3.2(h) (3d ed. 1993)).

charging decisions, it is unlikely that a judge would fault the prosecutor for taking the victim's interests into consideration. Had they done so, perhaps the world would never have known Genarlow's name.

Former Attorney General Baker also attempted to draw a distinction about his role in the Genarlow Wilson case. Baker wrote that "[b]y law, [the Attorney General's Office] represent[s] the warden, who has the duty under state law to defend a habeas corpus case."⁴¹ According to Baker, "[h]abeas corpus is a civil proceeding that starts with the presumption that the conviction and sentence are valid until and unless the petitioner, in this case Genarlow Wilson, proves by a preponderance of the evidence that his constitutional rights have been violated."⁴² Baker goes on to summarize that because Wilson's criminal case was over, the Attorney General's office is not the "prosecutor" in a habeas case,⁴³ but merely "counsel" for the Corrections warden in a civil proceeding.

Baker disclaimed all ability not to defend the habeas case, stating that the Attorney General simply cannot "start picking and choosing which laws to enforce or when to enforce them."⁴⁴ The former Attorney General outlines his belief that picking and choosing which laws to enforce will lead Georgia's system of government down a "very dangerous path," threatening the system's foundation.⁴⁵ Baker wrote that he took an oath "under the Georgia Constitution to uphold the laws of the state . . . [and] [a]s long as I serve as Attorney General I will fulfill that oath. Maintaining the rule of law demands no less."⁴⁶ Baker also suggested that it is not the role of the Attorney General to say who gets charged with what crime.⁴⁷ The Attorney General is the head prosecutor for the State of Georgia, and his duties

41. See Press Advisory, *supra* note 37 (outlining the process of a habeas corpus petition in which the incarcerated is required by law to name his custodian, the Department of Corrections warden, as the party respondent).

42. *Id.*

43. *Id.*

44. *Id.*

45. See *id.* ("Should the Attorney General, or any other law enforcement officer, start picking and choosing which laws to enforce or when to enforce them, we will be headed down a very dangerous path that threatens to undermine the very foundation of our system of government.").

46. *Id.*

47. See *id.* ("The state legislature could still retroactively reduce the mandatory ten-year sentencing requirement, or the Georgia Supreme Court could rule the sentence unconstitutionally harsh as applied to Mr. Wilson. The Attorney General can do neither.").

include “representing the State of Georgia in all civil and criminal cases before any court.”⁴⁸

While it is true that the prosecutor cannot change the punishment requirements, nor render the sentence unconstitutional, the prosecutor most certainly has the discretion to decide which charges to bring against the accused.⁴⁹ The Attorney General and the District Attorney possessed prosecutorial discretion that allowed them to charge Wilson in the first place.

By allowing Genarlow Wilson to be prosecuted for aggravated child molestation, both District Attorney McDade and then Attorney General Baker fulfilled the duties they believed came with the oath. Even though their actions in prosecuting Wilson were contrary to the legislative intent of the statute, knowing he would receive a mandatory minimum sentence of ten years, neither attorney violated any laws or ethical rules.⁵⁰ Critics of the failure to punish unethical prosecutors suggest that an ethical rule be enacted forbidding “prosecutors from bringing or pursuing charges that contradict . . . legislative intent.”⁵¹ Unfortunately, the threat received by the witness’s mother was never addressed and the Model Rules of Professional Conduct lacks an ethical rule that would hold prosecutors accountable for abuses of discretion such as those in the Wilson case.

IV. Romeo and Juliet Laws

States across the nation have enacted “Romeo and Juliet” laws to address the negative legal effects of consensual sexual relations between teenagers. These laws are designed to protect young sex offenders relatively close in age to their “victims” from mandatory sex offender registration, given the activity was consensual.⁵² Different states employ different measures, including “motion[s] or [a] petition process for registration relief, . . . age-gap provisions, . . . [and even legalizing] sexual

48. See OFFICE OF ATT’Y GEN. OF GA., ABOUT THE OFFICE: DUTIES (2013), available at <http://law.ga.gov/duties> (explaining the duty of the office of attorney general).

49. See Davis, *supra* note 28, at 275 (explaining the prosecution’s discretion regarding which crimes to charge an individual with).

50. *Id.* at 305.

51. *Id.* at 306.

52. See Committee on Criminal Justice, “Issue Brief 2012–214 Examine Florida’s ‘Romeo and Juliet Law,’” The Florida Senate, 1–5, 2 (Sept. 2011) [hereinafter Issue Brief 2012–214] (explaining the effects and changes on Section § 943.04354 of the Florida Senate’s legislation with the state’s enactment of their “Romeo and Juliet” law).

conduct between minors and/or those close in age to avoid not only the registration requirement but the criminal charge previously associated with the sexual conduct.”⁵³

A. Florida

Florida created a petition mechanism allowing this group of offenders to “petition in state court for removal of the registration requirement if they meet certain criteria.”⁵⁴ The statute, Section 943.04354,⁵⁵ applies to situations where the victim is at least 14 years-old, the offender is no more than 4 years older than the victim at the time of the offense, and where the victim consented to the sexual conduct.⁵⁶ Prior to the passage of the statute:

If a 15 year-old and an 18 year-old were engaged in a consensual sexual relationship, the 18 year-old was subject to registration as a sexual offender and could not petition the court for removal of the requirement to register for 20 years after the completion of his or her sentence, or if adjudication was withheld, 10 years after being released from all sanctions.⁵⁷

Qualifying offenses include sexual battery, “lewd or lascivious offenses committed upon or in the presence of persons less than sixteen years of age” or sexual performance by a child.⁵⁸ The legislation does not legalize any of these qualifying offenses, meaning “[t]he sexual conduct associated with these offenses is still a crime.”⁵⁹ Even though Florida’s age consent is 18, Section 943.04354 also provides an age gap provision allowing “a [sixteen] or [seventeen] year-old to legally consent to sexual conduct with a person 16-23 years of age.”⁶⁰

53. *Id.*

54. *Id.* at 1.

55. *See* FLA. STAT. ANN. § 943.04354 (West 2010) (outlining the eligibility requirements for those who can petition for removal of the requirement to register as a sexual offender or predator).

56. *Id.*

57. Issue Brief 2012–214, *supra* note 52, at 2.

58. *Id.*

59. *Id.*

60. *Id.* at 3.

B. Georgia

Georgia's "Romeo and Juliet" law takes a different approach to addressing the negative legal consequences that follow youth "sexual offenders" as a result of a consensual sexual relationship with a minor.⁶¹ Instead of creating a petition mechanism as Florida did, Georgia eliminated mandatory minimum sentences for this group of sex offenders by enacting age-gap provisions.⁶²

In 2006, Georgia's age-gap provision, HB 1059,⁶³ took the "necessary first step to remedy the problem of disproportionate sentencing for juvenile sex offenders."⁶⁴ The legislation, as previously discussed, lessened the blow to teenagers engaging in consensual sex acts.⁶⁵ HB 1059 "create[d] an exception to the mandatory minimum sentences for sex offenders in cases where the victim is [thirteen] to [fifteen] years old, the offender is [eighteen] years old or younger, and the age difference between the two is no more than four years."⁶⁶ Punishment under Georgia's "Romeo and Juliet" law is now classified as a misdemeanor and no longer carries any mandatory minimum sentences.⁶⁷

Prior to the bill's enactment, a teenager engaging in consensual oral sex with another teenager could end up in the same predicament as Wendy Whitaker. In 1996, Ms. Whitaker had just turned seventeen years old when she was arrested and charged with sodomy for engaging in consensual oral sex with another student who was a few weeks short of his sixteenth birthday.⁶⁸ Ms. Whitaker received a sentence of five years probation,

61. See The Georgia Success Story, *supra* note 9, and accompanying text (relaxing the laws for consensual sexual relations between minors).

62. *Id.*

63. See H.B. 1059, 2005–2006 Legis. Sess. (Ga. 2006), available at http://www.campaignforyouthjustice.org/documents/GA_HB_1059.pdf (amending the Official Code of Georgia "to change punishment provisions, registration requirements, and residency requirements for sexual offenders").

64. See The Georgia Success Story, *supra* note 9, and accompanying text (declaring HB 1059 as taking a necessary first step to relieving the problem).

65. *Id.*

66. *Id.* ("Under the new law, consensual acts between teenagers meeting the age criteria above are now a misdemeanor, to which no mandatory minimum sentences are attached.")

67. *Id.*

68. See Press Release, Southern Center for Human Rights, *Consensual Sex as a Teenager leads to Thanksgiving Day Eviction* (Nov. 21, 2008) [hereinafter Press Release], available at <http://www.schr.org/node/145> (reporting the filing of an injunction to protect Ms. Wendy Whitaker from eviction because of her status as a registered sex offender in

which also required her to register as a sexual offender.⁶⁹ Until 2010, Ms. Whitaker still was required to “register as a sex offender for life” because of the nature of her charge.⁷⁰ She was also required “to have her picture posted on [the] Georgia Bureau of Investigations’ website and comply with all sex offender residence restrictions and conditions.⁷¹ Basically, she was treated “as if she was a predator.”⁷² But, there was “absolutely no basis in fact for that treatment.”⁷³ The restrictions Ms. Whitaker faced included prohibitions on her “living within 1,000 feet of schools, child care centers, churches, swimming pools, school bus stops and other locations.”⁷⁴

It is startling that Whitaker, who was convicted of consensual sexual activity with a boy of like age was held to the “exact same residency restrictions . . . as adult felons convicted of violent crimes such as rape.”⁷⁵ If Ms. Whitaker committed the same act that led to her conviction today, she would not be subject to mandatory sex offender registration at all.⁷⁶ In 2006, Whitaker was forced from the home she and her husband purchased because “its proximity to a child care center violated the law.”⁷⁷ The couple was forced to rent another residence while continuing to pay the mortgage on their first home.⁷⁸ In 2008, twelve years after her conviction, Ms. Whitaker was ordered to vacate her home within seventy-two hours because it was within 1,000 feet of a church.⁷⁹ She and her husband had returned to the house believing that since they both owned the home, “she

Georgia).

69. See Complaint for Injunctive and Declaratory Relief, 1, 7, *Whitaker v. Perdue* (filed June 20, 2006) [hereinafter *Whitaker Complaint*] available at http://www.schr.org/files/whitaker_complaint_state_court.pdf (requiring Whitaker to register as a sex offender).

70. Press Release, *supra* note 69.

71. *Id.*

72. *Id.*

73. *Id.*

74. Motion for a Temporary Restraining Order and/or Preliminary Injunction at 3, Note 4, *Whitaker v. Whittle* (2008), available at http://www.schr.org/files/whitaker_tro_state_court.pdf.

75. *Whitaker Complaint*, *supra* note 69, at 27.

76. See Press Release, *supra* note 68 (ameliorating the laws for consensual sexual activity but declining to apply the law retroactively).

77. *Id.*

78. *Id.*

79. *Id.*

had a right to reside there pursuant to [a] Georgia Supreme Court decision.”⁸⁰

Unfortunately for those convicted of such crimes prior to the enactment of House Bill 1059, the legislation specifically provided under Section 30 that this provision of the Act would not apply retroactively.⁸¹ Genarlow Wilson’s release from jail was only made possible due to the Georgia Supreme Court’s finding that the ten-year mandatory sentence he was serving was unconstitutional, as it was cruel and unusual punishment.⁸² Wilson’s conviction, however, was not reversed.⁸³ Ms. Whitaker eventually was released from her obligation to annually register as a sex offender after a judge found “by a preponderance of the evidence that Ms. Whitaker does not pose a substantial risk of perpetrating any future dangerous sexual offense.”⁸⁴

80. *See* Mann v. Ga. Dep’t of Corrs., 653 S.E.2d 740 (2007) (concluding that a Georgia residency restriction was an impermissible taking without adequate compensation as applied to a sex offender who was forced to move out of their home after a child care center opened a facility within restricted zone).

81. *See* H.B. 1059 §§ 30(b)–(c), 2005–2006 Legis. Sess. (Ga. 2006) (prohibiting the retroactive application of HB 1059 to anyone already required to register on the state sex offender registry). Sections 30(b)–(c) read:

§ 30(b) Any person required to register pursuant to the provisions of Code Section 42–1–12 relating to the state sexual offender registry, and any person required not to reside within areas where minors congregate as prohibited by Code Section 42–1–13, shall not be relieved of the obligation to comply with the provisions of said Code sections by the repeal and reenactment of said Code sections.

§ 30(c) The provisions of this Act shall not affect or abate the status as a crime of any such act or omission which occurred prior to the effective date of the Act repealing, repealing and reenacting, or amending such law, nor shall the prosecution of such crime be abated as a result of such repeal and reenactment, or amendment.

82. *See* Humphrey v. Wilson, 652 S.E.2d. 501, 510 (2007) (holding that Wilson’s punishment was cruel and unusual punishment, and thus unconstitutional).

83. *See id.* (“[b]ecause . . . the present case stems from Wilson’s habeas petition, we cannot direct the trial court to set aside the judgment and to dismiss the proceedings against Wilson. Instead, the corresponding and appropriate habeas relief would be for the habeas court to set aside Wilson’s sentence and to discharge Wilson from custody.”).

84. *See* Southern Center for Human Rights, *Woman Who Had Consensual Sex as a Teenager No Longer Required to Register as a Sex Offender* (Sept. 17, 2010), http://www.schr.org/action/resources/woman_who_had_consensual_sex_as_a_teenager_no_longer_required_to_register_as_a_sex_ (reporting that Wendy Whitaker’s case highlights problems with Georgia’s Sex Offender Registry); *see also* Part VII for a more in depth discussion about the legislative change allowing Whitaker to be released from her registration obligation.

V. *Ambiguity Amongst the Sexual Offense Statutes in Georgia*

Why so much ambiguity amongst the statutes? Carolyn Cocca argues in her article *16 Will Get You 20: Adolescent Sexuality and Statutory Rape Laws*,⁸⁵ that statutory rape laws in practice are a “double-edged sword.”⁸⁶ Cocca points out that statutory rape laws “can punish someone who has taken advantage of or harmed an underage person or perhaps deter people from engaging in potentially coercive, unequal, manipulative, or predatory relationships.”⁸⁷ But they can also punish consensual sexual activity simply because one of the parties is under the legal age of consent.⁸⁸ The same is true for other sexual offense laws; they too function as a double-edged sword. Section 16–6–4 of the Code of Georgia,⁸⁹ for example, punishes persons who commit the offense of aggravated child molestation. Under § 16–6–4(c), “[a] person commits the offense of aggravated child molestation when such person commits an offense of child molestation which act physically injures the child or involves an act of sodomy.”⁹⁰

At face value, it is evident that this statute is attempting to deter people from engaging in coercive or predatory relationships as well as punishing those who take advantage of or harm underage persons. However, the statute’s exception to the usual life imprisonment or split sentence that is a term of imprisonment not less than twenty-five years, punishes sexual activity between minors simply because one of the parties is under the legal age of consent.⁹¹ The exception reads:

§ 16–6–4(d)(2) A person convicted of the offense of aggravated child molestation when: (A) The victim is at least thirteen but less than

85. Carolyn Cocca, “16 Will Get You 20”: *Adolescent Sexuality and Statutory Rape Laws*, in *ADOLESCENT SEXUALITY: A HISTORICAL HANDBOOK AND GUIDE* 15–29 (Carolyn Cocca ed., 2006) (studying the criminalization of sexual activity with an unmarried person who is under the age of consent, thus violating statutory rape laws).

86. *Id.* at 15.

87. *Id.*

88. *Id.*

89. GA. CODE ANN. § 16–6–4 (2012).

90. GA. CODE ANN. § 16–6–4(c) (2012).

91. *See* GA. CODE ANN. § 16–6–4(d)(1) (2012). The statute provision reads:

Except as provided in paragraph (2) of this subsection, a person convicted of the offense of aggravated child molestation shall be punished by imprisonment for life or by a split sentence that is a term of imprisonment for not less than 25 years and not exceeding life imprisonment, followed by probation for life, and shall be subject to the sentencing and punishment provisions of Code Sections 17–10–6.1 and 17–10–7.

sixteen years of age; (B) The person convicted of aggravated child molestation is eighteen years of age or younger and is no more than four years older than the victim; and (C) The basis of the charge of aggravated child molestation involves an act of sodomy shall be guilty of a misdemeanor and shall not be subject to the sentencing and punishment provisions of Code Section 17-10-6.1.⁹²

The punishment for those who fit within this age-gap provision is much less harsh than for those who do not fit within it, but the statute nonetheless still punishes sexual activity that falls under the category of sodomy solely because at least one of the parties is under the legal age of consent.

Cocca also notes that in the case of statutory rape laws, “concentrating resources on cases in which one of the parties is in a supervisory relationship, or in which the parties are far apart in age leaves young people closer in age, or whose ages fall within the span, unprotected.”⁹³ Cocca’s argument about the vulnerability of young people close in age or whose ages fall within the age-gap is applicable to statutes concerning sexual offenses other than rape. Again, looking at Georgia’s Code § 16-6-4(d)(2), that section creates an exception from harsh punishment for teenagers who fall within the age gap by converting their offenses to misdemeanors rather than felonies.⁹⁴ Nowhere in the statute is consensuality mentioned. The absence of consensuality in the statute leads one to believe that the legislature took a leap slightly too far in its enactment of the “Romeo and Juliet” law. Here, the legislature fell into the trap Cocca warned of in her study of statutory rape provisions—the legislature enacted a provision that is overinclusive. The provision attempts to correct the shortcomings of prior legislation by lessening the punishment a young offender receives, but fails to protect those young victims who may be coerced into the sexual activity. By omitting a requirement that the sexual activity (sodomy in this provision) be consensual in the exception, the legislature left the door wide open for young offenders who coerced their young victims to escape felony convictions. As written, § 16-6-4(d)(2) does not provide a way for young victims to prosecute their young offenders so long as the offense meets the enumerated requirements under the statute.

92. *Id.*

93. COCCA, *supra* note 5 (discussing how age-span provisions in statutory rape laws fail to punish instances of forcible rape among teenagers close in age).

94. *See* § 16-6-4(d)(2).

VI. *The 2006 Amendment Does Not Retroactively Apply to Either Wilson or Whitaker*

As previously mentioned, the 2006 Romeo and Juliet laws enacted by Georgia's legislature were not retroactively applicable to Wilson, Whitaker or anyone else in a similar situation. S. David Mitchell's article, *In with the New, Out with the Old: Expanding the Scope of Retroactive Amelioration*, questions why state legislatures are allowed to pass proscriptive-only legislation.⁹⁵ This section summarizes Mitchell's main points about Wilson's extended punishment in the face of legislation that could have set him free much earlier.

A. *What Is An Ameliorative Retroactively Applying Statute?*

Taken at face value, the decision to deny retroactive application of the law enacted on July 1, 2006 appears to be an abuse of legislative discretion or contrary to the Constitution.⁹⁶ However, Mitchell argues that it is neither under current law.⁹⁷ In fact, Mitchell argues, decisions not to apply ameliorative changes retroactively, "are in accord with the principles governing statutory retroactivity."⁹⁸ According to *Sutherland Statutes and Statutory Construction*, "[r]etrospective operation is not favored by courts, and a law is not construed as retroactive unless the act clearly, by express language or necessary implication, indicates that the legislature intended a retroactive application."⁹⁹ In House Bill 1059, Georgia's legislature included an express provision indicating proscriptive application only:

H.B. 1059 § 30(b) Any person required to register . . . to the state sexual offender registry, and *any person required not to reside within areas where minors congregate . . . shall not be relieved of the obligation to comply with the [prior] provisions . . . by the repeal and reenactment of [the prior provisions].*

H.B. 1059 § 30(c) The provisions of this Act shall not affect or abate the status as a crime of any such act or omission which occurred prior to the effective date of the Act repealing, repealing and reenacting, or

95. See Mitchell, *supra* note 10, at 5 (explaining that "statutes are presumed, generally, to operate proscriptively only").

96. See *id.*

97. See *id.*

98. *Id.*

99. 2 NORMAN J. SINGER & J.D. SHAMBIE SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 41:4 (7th ed. 2009).

amending such law, *nor shall the prosecution of such crime be abated as a result of such repeal, repeal and reenactment, or amendment.*¹⁰⁰

This clause, known as an “express saving clause,” prohibited the new legislation from being used by people in situations similar to both Wendy Whitaker and Genarlow Wilson. An express saving clause prohibits “the termination of previously commenced prosecutions” and “retain[s] the punishment in the original statute, particularly following a statutory amendment in which the penalty is increased and thus constitutionally barred.”¹⁰¹ Mitchell asserts that over time, the saving clause has been used to the contrary; now retaining the original penalty even when the legislative change decreased said penalty.¹⁰² This relatively new use does not result in a constitutional bar, but rather in a group of defendants serving sentences they would not have to serve under the new law. Georgia could have easily applied ameliorative changes to Wilson and Whitaker. Ameliorative change is a circumstance where statutory retroactivity is permissible.¹⁰³ Absent the saving clause, the Georgia courts could have relied upon the ameliorative changes to the aggravated child molestation provisions to rebut the presumption against statutory retroactivity.¹⁰⁴ However, due to the express saving clause in the amendment, the courts were prevented from applying the new law retroactively.¹⁰⁵

B. Reasons Some States Practice Judicial or Legislative Retroactive Amelioration

A number of state courts practice judicial or legislative retroactive amelioration.¹⁰⁶ States that use judicial retroactive amelioration have many justifications for their decisions to apply ameliorative legislation retroactively despite the existence of savings statutes that otherwise prohibit

100. H.B. 1059 § 30(b)–(c), 148th Gen. Assemb., Reg. Sess. (Ga. 2006) (prohibiting the retroactive application of HB 1059 to anyone already required to register on the state sex offender registry) (emphasis added).

101. Mitchell, *supra* note 10, at 7.

102. *See id.*

103. *See id.* at 5 (noting that there are three circumstances where statutory retroactivity may be justified: (1) legislative intent expressly or impliedly indicates retroactivity is desirable; (2) where the statute is ameliorative or curative in nature; or (3) where the parties’ reasonable expectations require retroactive application (citing SINGER, *supra* note 100)).

104. *See id.*

105. *See id.*

106. *See id.* at 8.

such judicial action.¹⁰⁷ One reason is the belief that the “denial of retroactive amelioration is contrary to theories of punishment.”¹⁰⁸ Another reason is that some courts rely on rules of statutory construction to permit retroactive application, or “find the language of the general saving statute to be ambiguous, thus giving the court license to not adhere to it.”¹⁰⁹ Other courts believe that the saving clause is to be used only to prevent an application of the abatement doctrine, and thus should not be used to prohibit retroactive amelioration.¹¹⁰ Under the common law doctrine of abatement, when a legislative repeal, repeal and reenactment, or amendment of a statute takes place, all pending prosecutions are terminated “unless the legislature expresses a contrary intent by the insertion of an express saving clause in the new or amended statute in the absence of an express contrary legislative intent.”¹¹¹ The express language of HB 1059’s saving clause makes it evident that it was specifically designed to prevent the termination of all pending prosecutions.

C. Retroactive Amelioration at the Federal Level

Although federal courts may not acknowledge their participation in retroactive amelioration, their actions—such as recognizing exceptions to the federal general saving statute—suggest otherwise.¹¹² The first exception relies on federal court decisions holding that “allowing the federal general savings clause to prevent the [constitutional] amendment’s application would improperly elevate legislation authority over the expressed will of the people . . . particularly when formerly proscribed conduct has been decriminalized.”¹¹³ Georgia’s courts elevated their legislative authority by refusing to recognize that a retroactive application of HB 1059 would be consistent with the will of the people. HB 1059 was created mostly in reaction to the public outcry against Wilson’s ten-year

107. *See id.*

108. *Id.* *See* Mitchell, *supra* note 10; *see also* PART V. A. for a full argument regarding denial of retroactive amelioration as contrary to theories of punishment.

109. *Id.*

110. *Id.*

111. *Id.* at 25 (noting the criticism of the common law abatement doctrine shared by jurists and scholars alike).

112. *See id.* at 8.

113. *Id.* (noting that the Supreme Court has ignored the federal saving statute and allowed retroactive application of constitutional amendments (citing *Holiday v. United States*, 683 A.2d 61, 80 (D.C. Cir. 1996))).

prison term.¹¹⁴ Because the court refused to allow an exception to the saving clause, the bill intended to save Wilson did everything but that.

The same went for Wendy Whitaker. The Southern Center for Human Rights named her the first plaintiff in its federal lawsuit against the State of Georgia, enjoining the state from removing Whitaker and others like her from their homes.¹¹⁵ The “people’s will” clearly recognized that the sodomy statutes at the time of Whitaker’s arrest were enacted to keep predators from engaging in sexual activities with young teenagers—not for school-aged experimentation between peers.

D. A Proposed Retroactive Amelioration Statute

Mitchell proposes enacting a retroactive amelioration statute that would “broaden the scope of amelioration beyond pre-final judgment defendants to include . . . post-final judgment defendants,”¹¹⁶ and be “consistent with the theories [and goals] of punishment” by adopting an approach of “attaching an ameliorative amendment exception to a general saving provision.”¹¹⁷ His proposed statute would allow post-final judgment defendants to “request either an expedited parole review or an administrative sentencing hearing following an ameliorative legislative change.”¹¹⁸

Under the proposed statute, post-final judgment defendants will be able to ask permission to be released from their duty to register.¹¹⁹ However, in cases other than sex offender registry, defendants will be able to request an early parole review so that they will not have to serve sentences deemed longer than what they ought to be upon passage of an ameliorative change. Mitchell’s proposed statute also features an exception in its general saving clause.¹²⁰ The proposed statute would give automatic effect to any retroactive amelioration and prevent abatement from being triggered, “thereby negating the necessity of the express saving clause.”¹²¹

114. See *Georgia Success Story*, *supra* note 9.

115. See Southern Center for Human Rights, *supra* note 85 (reporting the filing of an injunction to protect Ms. Wendy Whitaker from eviction because of her status as a registered sex offender in Georgia).

116. Mitchell, *supra* note 10, at 7.

117. *Id.* at 7–9.

118. *Id.* at 9.

119. *Id.*

120. *Id.*

121. *Id.* at 10.

So, for example, when HB 1059 was enacted on July 1, 2006, both Genarlow Wilson and Wendy Whitaker would have been eligible for an expedited parole review. Since the charges for both parties were reduced from felonies to misdemeanors, it is likely that Genarlow would have been released from prison much earlier because his original sentence would be much longer than the new required sentence.

It is even more likely that Wendy Whitaker would not have spent an extra four years on the sex offender registry, banned from living in a home she paid a mortgage on while renting properties more suitable for a sex offender. Fortunately for Wendy Whitaker, in 2010, Georgia recognized the benefits of permitting expedited parole review¹²² and created a provision for those offenders who are not dangerous sexual predators.¹²³

VII. How Does the 2010 Legislation Change the Legal Landscape for Young Sexual Offenders?

Although the legislature carved out age-gap provisions, exempting many would-be sex offender registrants, the 2006 legislation was specifically kept from being applied retroactively to Georgians such as Wendy Whitaker and Genarlow Wilson. Both could have benefitted immediately from the legislation. Wendy would have been able to move back into her home. Genarlow would have been released having served the requisite time in prison under the new law. Nonetheless, Wilson remained imprisoned until his punishment was overturned as cruel and unusual.¹²⁴ Whitaker continued to be barred from living in her own home.

Interestingly enough, in 2008, Whitaker attempted to move back into the home she and her husband purchased. The couple made the move after the Georgia Supreme Court handed down their ruling in *Mann v. Georgia Department of Corrections*.¹²⁵ In that case, the Court ruled that Anthony

122. *See id.* at 9 (“[N]o longer is the timing of an ameliorative legislative change determinative of who is to be eligible for such changes. Not only do benefits inure to post-final judgment defendants with a sentence reduction, but also society benefits in the reduction of incarceration costs.”).

123. GA. CODE ANN. § 42-1-19(a)(2) (West 2012) (“An individual required to register pursuant to Code § 42-1-12 may petition . . . for release from registration requirements and from any residency or employment restrictions . . . if the individual . . . (2) [w]as sentenced for a crime that became punishable as a misdemeanor on or after July 1, 2006 . . .”). *See supra* Part III.

124. *See Humphrey v. Wilson*, 652 S.E.2d 501, 511 (2007) (stating that the appropriate relief would be for the habeas court to set aside Wilson’s sentence and discharge Wilson).

125. 653 S.E.2d 740 (Ga. 2007) (holding that a Georgia residency statute permitted

Mann was required to register as a sex offender in Georgia after pleading no contest to “taking indecent liberties with a child” in North Carolina.¹²⁶ Mann was charged with exposing himself to two minors in 2002.¹²⁷ In 2003, Mann bought a home that fit within the residency restrictions—it was not within 1,000 feet of any child care, church, school, or area where minors congregated.¹²⁸ When a child care facility moved within 1,000 feet of Mann’s home, his probation officer “demanded that [Mann] remove himself from his home upon penalty of arrest and revocation of probation.”¹²⁹ Mann filed suit against the State of Georgia citing the fact that the residency restriction under the Georgia Code § 42-1-15 had no “‘move-to-the-offender’ exception to its provisions” leaving him with no option but to move.¹³⁰

Like Whitaker, Mann could not “legally reside in his home until . . . released from the registration requirement by a Superior Court, which cannot occur until a minimum period of ten years has passed after his release from probation. . . . Assuming another residence can be located, he is faced with financial burden of both . . . residences.”¹³¹ Surprisingly, even though Mann exposed himself to minors under the age of sixteen,¹³² he was granted an exception to the rule while Wendy Whitaker was not.

However, in 2010, the Georgia legislature amended the state code, adding § 42-1-19(a)(2).¹³³ This provision now allows individuals who are required to register for the sex offender registry to petition “for release from registration requirements and from any residency or employment restrictions . . . if the individual . . . [w]as sentenced for a crime that became punishable as a misdemeanor on or after July 1, 2006.”¹³⁴ The provision

“impermissible taking without adequate compensation as applied to sex offender who was forced to move out of home after child care center opened facility within restricted zone”).

126. *Id.*

127. *See Ga. Supreme Court hears challenge to sex offender law*, ACCESS NORTH GEORGIA (undated) (discussing Mann’s challenge to Georgia’s residency restrictions).

128. *See Mann*, 653 S.E.2d at 742 (finding it uncontroverted that Mann’s home and business were not within 1,000 feet of a childcare facility).

129. *Id.*

130. *Id.*

131. *Mann v. Georgia Dep’t of Corrs.*, 653 S.E.2d 740, 742 (Ga. 2007).

132. N.C. GEN. STAT. ANN. § 14-202.1(a)(1) (West 1994) (“A person is guilty of taking indecent liberties with children [if] . . . he either . . . takes of attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire.”).

133. GA. CODE ANN. § 42-1-19(a)(2) (2010).

134. *Id.*

expanded the pool of convicted sex offenders eligible to have the ameliorative sentencing change applied. As David Mitchell's proposed retroactive amelioration statute suggests, the timing of an ameliorative measure no longer depends on its timing.¹³⁵ In Whitaker's case, Wendy immediately inured the benefits of the ameliorative change once the provision was enacted with an immediate release from the sex offender registry fourteen years after her conviction. It was found "by a preponderance of the evidence that Ms. Whitaker does not pose a substantial risk of perpetrating any future dangerous offense."¹³⁶ No longer did she have to pay a mortgage on one home while paying rent in another. Wendy could rest easy knowing that a police officer would no longer knock on her door telling her that she had seventy-two hours to vacate her home because it is too close to a church. With her release from the registry, local law enforcement no longer had to police her and others like her. No longer did taxpayer money go towards evicting the Wendy Whitakers of Georgia from their homes for non-dangerous sexual activity that occurred while a minor.

So what does the legislation mean for the Genarlow Wilsons of the world? Genarlow's main concern in not taking the plea offered to him was that he would have to register as a sex offender.¹³⁷ Had he done so, upon his release he would have been prohibited from living at home with his mother because he had a younger, minor sister in the home.¹³⁸ His concerns about registering as a sex offender were real.

Before his release from prison Wilson often wondered what life would be like as a registered sex offender.¹³⁹ Wilson and his family would have been subjected to the full impact of the "collateral consequences" often overlooked by legislators when signing bills like HB1059 into law.¹⁴⁰ He

135. Mitchell, *supra* note 6, at 9.

136. See Press Release, Southern Center for Human Rights, *Woman Who Had Consensual Sex as a Teenager No Longer Required to Register as a Sex Offender* (Sept. 17, 2010), available at http://www.schr.org/action/resources/woman_who_had_consensual_sex_as_a_teenager_no_longer_required_to_register_as_a_sex_ (commenting on the 2010 changes to Georgia's laws that created "a practical process for certain individuals to apply to be released from the registry").

137. See Brenda Goodman, *Day of Split Outcomes in Teenage Sex Case*, N.Y. TIMES (June 12, 2007), available at http://www.nytimes.com/2007/06/12/us/12consent.html?ref=genarlowwilson&_r=1& (noting that Wilson refused to take a standing plea deal that would have reduced his sentence, but required him to register as a sex offender).

138. Cash, *supra* note 13, at 245.

139. *Id.* at 245.

140. See Tewksbury, *supra* note 7 (providing an overview of the impact residency

correctly guessed that as a registered sex offender he would not be able to obtain a job because “nobody will want to hire [some]one who [has been] convicted of molestation.”¹⁴¹ His dreams of going to college were dashed.¹⁴² His words sound almost despondent as he ponders the thought of never having his own children, saying, “I won’t be able to do anything . . . you can’t be around kids so that basically [means] you can’t have any of your own. That . . . really hurt[s].”¹⁴³ Continuing he said, “I can’t live with that label, you know, that’s a life sentence by itself, being labeled a child molester.”¹⁴⁴ Perhaps most jarring is the thought that he would forever be associated with people he had nothing in common with.

You know, they can get a picture of me, put it on the internet, put it on the nearest telephone pole. . . . It’s not a great feeling being . . . classified as a sex offender. I don’t feel like I . . . fit into that category. Nothing I’ve done can classify me with those people.¹⁴⁵

Wilson’s fears were dead on. At the time of his trial, had Wilson taken the plea deal, he would have been subjected to the same horrors of Wendy Whitaker and others in her situation. When first enacted, HB 1059 made it a “felony punishable by ten to thirty years in prison for a registered sex offender to reside, be employed, or loiter within 1000 feet of a school; child care facility; church; public or private park, recreation facility or playground; skating rink; neighborhood center; gymnasium; community swimming pool; or school bus stop.”¹⁴⁶ This meant that Genarlow Wilson would never attend activities at his younger sister’s school, he could not walk her to the bus, nor attend church with his family. It seems near impossible that housing meeting all that criteria would be anywhere Wilson and his family would want to live. Data shows that areas dense in registered sex offenders have higher unemployment rates, have “fewer residents [with] high school or college educations, greater proportions of families liv[ing] below the poverty line, fewer residents [who] owned their own homes,” and lower household incomes and home values.¹⁴⁷

restrictions have on offenders).

141. Cash, *supra* note 13, at 245.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. Tewksbury, *supra* note 7, at 531 (citing GA. CODE ANN. § 42–1–15 (Supp. 2006)).

147. *Id.* at 535.

Now, thanks to State of Georgia Code § 42–1–19(a)(2), permission to petition the court for removal from registry status is available to those post-conviction defendants whose sex offender registry requirement was not removed upon release, unlike Wilson’s, and whose charged crimes became punishable as a misdemeanor on July 1, 2006.¹⁴⁸

Absent the sex offender charge, Wilson has moved on in life. In May 2013, Wilson will graduate with honors from a well-known historically black college.¹⁴⁹ Touted as one of the success stories supported by a famous philanthropist, Wilson began mentoring and offering support to Atlanta-area youths while in college.¹⁵⁰ Whitaker has also moved on in the wake of her release from registry requirements. After her release from the duty to register, her name disappeared from headlines—putting an end to her rollercoaster ride and allowing her to fade into the shadows.

VIII. Conclusions and Recommendations

The laws that states such as Georgia and Florida have conjured up over the last few decades started out extreme, but have since attempted to lessen their heavy blows to young lovers over time through enactments of “Romeo and Juliet” laws. However, the legislatures in Georgia and Florida still have not completely solved the problems that surfaced during Genarlow Wilson’s and Wendy Whitaker’s cases. As Cocca points out, the question remains “how to protect the vulnerable without essentializing all young people as victims and how, at the same time, to leave those who are choosing to engage in particular activities to their privacy.”¹⁵¹ This section highlights the evidence that the current laws are still imperfect—the policy rationales behind young sexual offender registration has little effect on recidivism rates; harsh sexual offender laws for young people punish

148. GA. CODE ANN. § 42–1–19(a)(2) (2010).

149. Jackie Jones, *Graduation Delayed for Genarlow Wilson*, BLACKAMERICAWEB.COM (May 18, 2012), <http://blackamericaweb.com/5032/graduation-delayed-for-gonarlow-wilson> (explaining that Wilson will graduate a semester later than planned).

150. *Id.* (describing the group Wilson and some friends created called Young King Care with the goal of mentoring local youths).

151. Carolyn Cocca, “16 Will Get You 20”: *Adolescent Sexuality and Statutory Rape Laws*, in ADOLESCENT SEXUALITY: A HISTORICAL HANDBOOK AND GUIDE 15, 28 (Carolyn Cocca ed., 2006) (studying the criminalization of sexual activity with an unmarried person who is under the age of consent, thus violating statutory rape laws).

teenagers for normative behavior; and the harsh laws increase the number of plea bargains among young sex offenders.

A. The Laws Are Still Imperfect

These laws are still imperfect. The age-gap provisions used in both states still leave many teenaged lovers vulnerable to the heavy consequences that accompany a violation of the state's sexual offender laws. In Florida's "Romeo and Juliet" exception,¹⁵² a person will only be considered for removal of the requirement to register on the state's sexual offender registry if the person "is not more than 4 years older than the victim of th[e] violation who was 14 years of age or older but not more than 17 years of age at the time the person committed th[e] violation."¹⁵³ While the statute appears to be clear on its face, it is foreseeable that questions about calculation of time and ages will certainly come before the courts. In 2011, the Florida District Court of Appeals overturned a Circuit Court grant for petition of removal, holding that a "defendant, who was four years, three months, and eight days older than the victim, was 'more than' four years older than the victim and, thus, ineligible" for removal from the registry requirement.¹⁵⁴ The age-gap provision leaves those teenage "offenders" who fall just outside the gap's restrictions subject to the state's harsh penalty of no petition eligibility until twenty years after the completion of his or her sentence.¹⁵⁵

B. The Laws Often Punish Normative Behavior

Not only is the punishment doled out for these offenses typically cruel and unusual, many of the young people convicted under these statutes are charged with offenses for normative sexual behavior.¹⁵⁶ The U.S. Department of Labor's National Longitudinal Survey of Youth in 2000 "found that out of the 3,444 respondents (37 percent of the total) who reported having had sexual intercourse, more than half reported having intercourse by age 14 and more than 80 percent reported sexual intercourse

152. See FLA. STAT. ANN. § 943.04354(c) (West 2010) (outlining the eligibility requirements for those who can petition for removal of the requirement to register as a sexual offender or predator).

153. *Id.*

154. *State v. Marcel*, 67 So. 3d 1223 (Fla. Dist. Ct. App. 3d Dist. 2011).

155. See Issue Brief 2012214, *supra* note 52, at 2.

156. *Id.*

by age 15.”¹⁵⁷ This research “suggests that sexual behavior that is often defined as illegal is common among juveniles; nearly one third of the total group surveyed had engaged in sexual intercourse before they were of legal age to do so.”¹⁵⁸ Based on this information, it seems as though counseling may provide the result the legislature hopes to achieve by sending these offenders to jail and forcing them to register as a sex offender.

C. State Policy Rationale for Sex Offender Registration Has Little Effect on Recidivism Rates

Recently, courts have recognized that requiring young people convicted of sex offenses, such as Genarlow Wilson and Wendy Whitaker, to serve terms in jail and to register as a sex offender for life is cruel and unusual punishment.¹⁵⁹ It seems that by allowing young lovers to still be prosecuted and imprisoned under state law, legislators in these states have taken a stance that they view teenage sex in a negative light. The states’ issues with teenage sex, however, are not best dealt with mandatory sex offender registration for youth offenders.¹⁶⁰ Out of fourteen studies examining policy effects of registration and notification on recidivism, for example, ten reported “no significant effects on violent and/or sexual recidivism.”¹⁶¹

D. Harsh Penalties for Young Sex Offenders Increases the Number of Plea Bargains

157. Michael F. Caldwell, *What We Do Not Know About Juvenile Sexual Reoffense Risk*, 7 CHILD MALTREAT. 291, 292–93 (2002) (examining whether or not sexual offenders present a continuing risk of recommitting sexually violent crimes over an extended period of time).

158. *Id.*

159. *See* Humphrey v. Wilson, 652 S.E.2d. 501, 507 (2007) (concluding that the amendments made to Georgia’s state code “reflect a decision by the people of [Georgia] that the severe felony punishment and sex offender registration imposed on Wilson make no measurable contribution to acceptable goals of punishment”).

160. *See* Elizabeth J. Letourneau et al., *Sex Offender Registration and Notification Policy Increases Juvenile Plea Bargains*, 25 Sex. Abuse 189, 190 (2013) (finding that “[s]ex offender registration and notification policies aim to deter sexual offending [and] reduce sexual recidivism Despite these aims, a growing body of research generally fails to support the efficacy of these policies”).

161. *Id.*

In *Sex Offender Registration and Notification Policy Increases Juvenile Plea Bargains*,¹⁶² Elizabeth Letourneau concludes that the registration and notification requirement in South Carolina¹⁶³ “fails to deter new juvenile sex crimes, fails to deter juvenile sexual or violent recidivism, and increases the risk that youth will incur new nonsex, nonviolent misdemeanor charges.”¹⁶⁴ The researchers stress that “[n]either individual recidivism risk nor case-specific circumstances are permitted to influence registration and notification requirements and there is no mechanism for registrants to reduce the duration of requirements from life.”¹⁶⁵ Because South Carolina’s requirements for young offenders are similar to those in Florida and Georgia, the effects of South Carolina’s requirements are no less likely to occur in the other two states.¹⁶⁶ Letourneau concludes that many prosecutors in South Carolina “appear to have altered the manner in which they do business.”¹⁶⁷ The South Carolina prosecutors do so by increasingly dismissing juvenile sex offenses outright or offering plea deals

162. *Id.*

163. *Id.* at 203; *see also* S.C. CODE ANN. § 23–3–430(A) (2012) (outlining the requirements for sex offender registry in South Carolina). The statute reads:

Any person, regardless of age, residing in the State of South Carolina who in this State has been convicted of, adjudicated delinquent for, pled guilty or nolo contendere to an offense described below or who has been convicted, adjudicated delinquent, pled guilty or nolo contendere, or found not guilty by reason of insanity in any comparable court in the United States, or a foreign country, or who has been convicted, adjudicated delinquent, pled guilty or nolo contendere, or found not guilty by reason of insanity in the United States federal courts of a similar offense, or who has been convicted of, adjudicated delinquent for, pled guilty or nolo contendere, or found not guilty by reason of insanity to an offense for which the person was required to register in the state where the conviction or plea occurred, shall be required to register pursuant to the provisions of this article. . . .

164. *See* Letourneau et al., *supra* note 160, at 203 (citations omitted).

165. *Id.*

166. *See* S.C. CODE ANN. § 23–3–430(C)(5) (2012) (outlining the offenses for which a person under South Carolina statute would be considered an “offender”). The statute reads:

(C)(5) [C]riminal sexual conduct with minors, second degree (Section 16–3–655(B)). If evidence is presented at the criminal proceeding and the court makes a specific finding on the record that the conviction obtained for this offense resulted from consensual sexual conduct, as contained in Section 16–3–655(B)(2) provided the offender is eighteen years of age or less, or consensual sexual conduct between persons under sixteen years of age, the convicted person is not an offender and is not required to register pursuant to the provisions of this article.

167. *See* Letourneau et al., *supra* note 147, at 203.

to nonsex offense charges.¹⁶⁸ Though it is unlikely that dismissal of charges or amending charges will be detrimental to community safety *per se*, other potential consequences may flow from these outcomes.¹⁶⁹ Letourneau posits that “juveniles who have actually committed offenses but whose charges were dismissed or amended to nonsex offense charges might not receive appropriate clinical services or supervision. Moreover, youth age and race influenced [prosecutors] decisions to permit plea bargains, introducing the possibility of inequity.”¹⁷⁰ These potential consequences are counterproductive to society’s overall goal of rehabilitating offenders.

E. Recommendations

Critics of legislation surrounding youth sex offender registry requirements have presented recommendations aimed at lessening the harms committed by the legislation. For example, Letourneau submits that youths charged with sex offenses should be exempt from sex offender registration and notification requirements “until such time as empirically rigorous evidence emerges indicating that these policies can be crafted in such a way as to improve community safety.”¹⁷¹ This overinclusive approach would certainly eradicate the harmful effects of mandatory sex offender registration on young offenders who do not fit the category of “sexually dangerous predator.”¹⁷² However, excluding all youth means that the actual “sexually dangerous predator” youth offenders will be exempt from sex offender registration. This result is the precise issue legislators attempt to address in their catch-all statutes. Exempting all youth sex offenders from registration would negate all previous efforts of the legislature to make their community aware of predators.

If enacted, the proposed amelioration statute suggested by S. David Mitchell could be the most productive way of achieving the goals of remedying the problems presented by the ambiguities present in many states’ sex offender statutes. The likelihood of such reform taking place, however, seems slight. The states concerned with the unfair consequences of preventing retroactive amelioration already employ a way to get around

168. *Id.*

169. *Id.*

170. *Id.* at 203–04.

171. *Id.* at 204.

172. GA. CODE ANN. § 42–1–12(a)(21)(B) (West 2012) (“‘Sexually dangerous predator’ means a sexual offender . . . [w]ho is determined by the Sexual Offender Registration Review Board to be at risk of perpetrating any future dangerous sexual offense.”).

it, such as Georgia's amendment allowing for the release of Wendy Whitaker from sex offender registry. States that feel it is up to the legislation to determine who laws apply to see a need for the savings clause and are unlikely to allow exceptions to it.

Florida's legislature took a step in the right direction by enacting provisions to serve as a check on their sexual offender registration and notification systems. In 2006, Florida enacted a law requiring a triennial study to track the effectiveness of the state's sexual offender registration and notification processes.¹⁷³ The statute was most likely enacted in anticipation of the federal Adam Walsh Child Protection and Safety Act of 2006, as a step towards implementing the new federal law.¹⁷⁴ To evaluate effectiveness, under Florida Statute § 943.04353, Florida's Office of Program Policy Analysis and Government Accountability examines the practices of Florida's state agencies, and how they share offender information regarding registered sexual offenders "for the purpose of fulfilling the requirements set forth in the registration laws."¹⁷⁵

Other goals hoped to be achieved by the triennial study include "ensuring informed decisions are made at each point of the criminal justice and registration process"¹⁷⁶ and focusing on the provisions' sufficiency in apprising communities of the presence of such offenders.¹⁷⁷ The statute states that if the report finds deficiencies in the process or in the provisions, the report shall recommend options for fixing the deficiencies and include projected costs of fixing the deficiencies.¹⁷⁸ Though there is no direct evidence that the state's Romeo and Juliet laws were adopted as an outgrowth of this legislation, it would be no surprise if they were. Implementing studies and reports such as those demanded by Florida

173. See West's F. S. A. § 943.04353 (2006) (reading "[t]he Office of Program Policy Analysis and Government Accountability shall, every 3 years, perform a study of the effectiveness of Florida's sexual predator and sexual offender registration process and community and public notification provisions").

174. See Issue Brief 2012-214, *supra* note 52 (explaining that the Adam Walsh Child Protection and Safety Act establishes "minimum registry standards states have to meet" and if a state does not meet the federal requirements, they risk losing federal funding). See generally Adam Walsh Child Protection and Safety Act of 2006. Pub. L. No. 109-248.

175. See West's F. S. A. § 943.04353 (2006) (examining the current practices of state run agencies such as the Department of Children and Family Services, judges, state attorneys' offices, Department of Highway Safety and Motor Vehicles, Department of Law Enforcement, and local law enforcement agencies).

176. *Id.*

177. See *id.* (reporting goals of the triennial study of sexual predator and sexual offender registration and notification procedures).

178. *Id.*

Statute § 943.04353 seem likely to increase state legislatures' ability to catch loopholes in their laws that result in consequences like those suffered by Genarlow Wilson and Wendy Whitaker. A regular assessment of sexual offender registration and notification systems will allow state legislatures to continually tailor their laws to be consistent with the goals of the people.

Though a regular and consistent assessment of laws could produce significant results with regards to making sure the correct people are being policed, a balance needs to be struck. That balance is best struck with case-by case analysis. Case-by-case analysis is needed for youth sex offender charges. Case-by-case analysis is likely to slow down court proceedings and cause an increase in judicial costs. Contrasted with the amount of taxpayer money spent policing one-time offenders unlikely to offend again, it is logical to suggest that the cost and burden of determining mandatory registration be shifted to the courts. Using the current legislation as guidelines for analyzing registry status, rather than as mandatory punishment, will help eliminate the overinclusivity of the approach highlighted above and the overinclusivity of the current statutes. More importantly, adoption of case-by-case analysis will increase the advocacy of the rights that so often get overlooked with these mandatory schemes — the victim's rights.