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## CRIMES AND OFFENSES Offenses Against Public Health and Morals: Amend Part 2 of Article 3 of Chapter 12 of Title 16 of the Official Code of Georgia Annotated, Relating to Offenses Related to Minors Generally, so as to Provide that It Shall be Unlawful for Persons Required to Register as Sexual Offenders to Photograph a Minor Under Certain Circumstances; Provide for Penalties; Provide for Related Matters; Repeal Conflicting Laws; and for Other Purposes

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## CRIMES AND OFFENSES

***Offenses Against Public Health and Morals: Amend Part 2 of Article 3 of Chapter 12 of Title 16 of the Official Code of Georgia Annotated, Relating to Offenses Related to Minors Generally, so as to Provide that It Shall Be Unlawful for Persons Required to Register as Sexual Offenders to Photograph a Minor Under Certain Circumstances; Provide for Penalties; Provide for Related Matters; Repeal Conflicting Laws; and for Other Purposes***

CODE SECTION: O.C.G.A. § 16-12-100.4 (new)  
BILL NUMBER: SB 1  
SUMMARY: The bill would have prohibited persons qualifying as sexual offenders from photographing minors in certain situations.  
EFFECTIVE DATE: N/A

### *History*

Vickie Lewis was outraged.<sup>1</sup> A registered sex offender from Massachusetts was taking pictures of her teenage daughter and there was nothing she could do to stop him.<sup>2</sup> It started back in the summer of 2006 when her daughter was working at a coffee shop in Bryan County, Georgia.<sup>3</sup> A man came into the establishment, where Lewis's daughter was working behind the counter and took several photographs of her with his cell phone.<sup>4</sup> The man allegedly then sent these photos to friends with messages like, "[t]his is my girlfriend, isn't she beautiful?"<sup>5</sup> When Vickie Lewis approached the man, he

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1. Carlos Campos, *Bill Forbids Photos of Kids by Sex Offenders*, ATLANTA J.-CONST., Jan. 20, 2007, at A1, available at 2007 WLNR 1143519.

2. *Id.*

3. See Video Recording of House Judiciary (Non-civil) Meeting, Apr. 16, 2007 at 3 min., 15 sec. (remarks by Rep. Ron Stephens (R-164th)), [http://www.legis.state.ga.us/legis/2007\\_08/house/Committees/judiciaryNonCivil/judyncArchives.htm](http://www.legis.state.ga.us/legis/2007_08/house/Committees/judiciaryNonCivil/judyncArchives.htm) [hereinafter House Committee Video].

4. Campos, *supra* note 1.

5. *Id.*

left, but she was able to write down the license plate of his van.<sup>6</sup> Lewis contacted the local police, who informed her that the man was a convicted sexual offender in the Commonwealth of Massachusetts.<sup>7</sup> However, the police also told her that he could legally take pictures of her daughter.<sup>8</sup>

Lewis decided something needed to be done.<sup>9</sup> She called Senate President Pro Tempore Eric Johnson (R-1st) and Senate Bill 1 was born.<sup>10</sup> In 2006, the General Assembly passed new, strict laws dealing with persons convicted of certain sex crimes, which increased the minimum mandatory sentence for certain sexual offenses<sup>11</sup> and imposed strict restrictions on where registered sex offenders could live, work, and be present.<sup>12</sup> SB 1 is patterned in the same vein, restricting when and whom registered sex offenders can photograph.<sup>13</sup>

SB 1 would make it illegal under certain circumstances for persons required to register as sex offenders under Georgia law to record images of minors.<sup>14</sup> The bill addresses the concerns of many parents, like Vickie Lewis, regarding sexual offenders taking pictures of their children for ill-intentioned purposes.<sup>15</sup> Senator Johnson stated, “[w]hether it’s just dirty thoughts, or whether it could build up to some sort of obsession that could lead to a kidnapping or a rape or something else—there’s certainly a right to the person whose picture is being taken . . . .”<sup>16</sup> As a result, SB 1 is designed to support the State’s duty to protect the children of Georgia.<sup>17</sup>

6. *Id.*

7. *Id.*

8. Carlos Campos, *Legislature 2007: Senate Panel OKs Sex Offender Bill*, ATLANTA J.-CONST., Feb. 2, 2007, at D4, available at 2007 WLNR 2013977.

9. See Campos, *supra* note 1.

10. See Video Recording of Senate Proceedings, Feb. 12, 2007 at 43 min., 43 sec. (remarks by Sen. Eric Johnson (R-1st)), [http://www.georgia.gov/00/article/0,2086,4802\\_6107103\\_72682316,00.html](http://www.georgia.gov/00/article/0,2086,4802_6107103_72682316,00.html) [hereinafter Senate Video].

11. See 2006 Ga. Laws 571, §§ 13, 16 (codified at O.C.G.A. §§ 16-6-5.1, 16-6-22.2 (2007)).

12. See 2006 Ga. Laws 571, § 24 (codified at O.C.G.A. § 42-1-15 (2006)),

13. See Carlos Campos, *GOP Bills Return to '06 Issues*, ATLANTA J.-CONST., Nov. 17, 2006, at D1, available at 2006 WLNR 19952353.

14. See SB 1, as introduced, 2007 Ga. Gen. Assem.

15. See Campos, *supra* note 1.

16. *Id.* (quoting Sen. Eric Johnson (R-1st)).

17. See Campos, *supra* note 13.

*Bill Tracking**Consideration and Passage by the Senate*

Senators Eric Johnson (R-1st), Tommie Williams (R-19th), William Hamrick (R-30th), and John Wiles (R-37th) sponsored SB 1,<sup>18</sup> which was the first bill filed in the Senate for the 2007 legislative session.<sup>19</sup> On January 22, 2007, the Senate first read SB 1, and the bill was referred to the Senate Judiciary Committee.<sup>20</sup>

On February 1, 2007, the Senate Judiciary Committee considered SB 1.<sup>21</sup> As introduced, SB 1 prohibited persons who are required to register as sexual offenders from taking any type of photograph of a minor.<sup>22</sup> During the Committee meeting, several speakers testified that the bill as introduced could have possible problems.<sup>23</sup> For example, it provided no exception for sexual offenders who inadvertently took pictures with minors in them.<sup>24</sup> The bill also raised constitutional issues involving the First Amendment.<sup>25</sup> Addressing the first issue, Sandra Michaels of the Georgia Association of Criminal Defense Lawyers suggested that lawmakers amend the bill's language to add an intent requirement so that it would only be illegal for sexual offenders to photograph minors for indecent purposes.<sup>26</sup> The Committee members rejected Ms. Michaels's "indecent purposes" language, and Ms. Michaels then suggested lawmakers narrow the bill's language to outlaw sexual offenders from intentionally taking pictures of minors without the consent of a parent or guardian.<sup>27</sup> Senator Kasim Reed (D-35th) moved to amend SB 1 as

18. See SB 1, as introduced, 2007 Ga. Gen. Assem.

19. See Campos, *supra* note 1.

20. State of Georgia Final Composite Status Sheet, SB 1, June 5, 2007.

21. *Id.*

22. SB 1, as introduced, 2007 Ga. Gen. Assem.

23. See Interview with Maggie Garrett, Legislative Director, Staff Counsel, American Civil Liberties Union of Georgia (Apr. 30, 2007) [hereinafter Garrett Interview]; Telephone Interview with Sandra Michaels, Georgia Association of Criminal Defense Lawyers (May 3, 2007) [hereinafter Michaels Interview].

24. See Senate Video, *supra* note 10, at 43 min., 50 sec. (remark by Sen. Eric Johnson (R-1st) (discussing the Senate Committee meeting).

25. Garrett Interview, *supra* note 23.

26. See House Committee Video, *supra* note 3, at 19 min., 3 sec. (remarks by Sandra Michaels) (discussing the Senate Committee meeting).

27. *Id.*

introduced by changing its language from making it unlawful for a sexual offender “to take a photograph of a minor” to making it unlawful for a sexual offender “to intentionally photograph a minor without consent of the minor’s parent or guardian.”<sup>28</sup> The Senate Judiciary Committee voted in favor of Senator Reed’s motion and offered the language from his motion as a substitute to SB 1 because the language “took care of everybody’s concerns” and still retained the bill’s original purpose of prohibiting sex offenders from taking unwanted photographs of minors.<sup>29</sup>

On February 2, 2007, the Senate Judiciary Committee favorably reported its substitute to SB 1 to the Senate floor.<sup>30</sup> The Senate voted to adopt the Committee’s substitute by a vote of 34 to 0.<sup>31</sup> The Senate then unanimously passed SB 1 by Committee substitute on February 12, 2007.<sup>32</sup>

### *Consideration by the House*

The House read SB 1 for the first time on February 13, 2007.<sup>33</sup> The bill was then assigned to the House Judiciary Non-Civil Committee.<sup>34</sup> On April 16, 2007, the Committee met to consider SB 1.<sup>35</sup> After a technical amendment was made to the bill, the Committee discussed the substantive language of SB 1 as passed by the Senate.<sup>36</sup> The Committee heard testimony concerning the bill’s constitutionality and its ability to achieve its stated purpose.<sup>37</sup> Sandra Michaels proposed the House Committee adopt the “for indecent purposes” language that the Senate rejected.<sup>38</sup> In her opinion, the “indecent purposes” language would better achieve the aim of the bill because

28. Compare SB 1, as introduced, 2007 Ga. Gen. Assem., with SB 1 (SCS), 2007 Ga. Gen. Assem.

29. Senate Video, *supra* note 10, at 43 min., 43 sec. (remarks by Sen. Eric Johnson (R-1st)).

30. State of Georgia Final Composite Status Sheet, SB 1, June 5, 2007.

31. Georgia Senate Voting Record, SB 1 (Feb. 12, 2007).

32. *Id.*

33. State of Georgia Final Composite Status Sheet, SB 1, June 5, 2007.

34. *Id.*

35. *Id.*

36. See House Committee Video, *supra* note 3, at 23 min., 55 sec. (motion by Rep. Kevin Levitas (D-82nd)) (inserting the words “to take” before the word “photograph” on line 14 in order to change photograph from a noun to a verb).

37. *Id.* at 8 min., 18 sec. (remarks by Maggie Garrett); *id.* at 15 min., 31 sec. (remarks by Sandra Michaels).

38. *Id.* at 15 min., 31 sec. (remarks by Sandra Michaels).

it would make the sex offender's improper intent in taking the photo illegal, rather than make the act of taking an innocent picture without parental consent illegal.<sup>39</sup> The "indecent purpose" language was also consistent with language in other Code sections concerning sex offenders' interactions with minors.<sup>40</sup>

Representative Stacey Abrams (D-84th) moved to change the language of SB1 to incorporate "for indecent purposes."<sup>41</sup> Under her motion, the language would change from making it unlawful for a sexual offender "to intentionally photograph a minor without consent of the minor's parent or guardian" to making it unlawful for a sexual offender "to photograph a minor for indecent purposes."<sup>42</sup> Representative Abrams was concerned that the Senate's version of SB 1 would not punish a sex offender for taking an indecent photograph of a child if the child's parent consented to having the photograph taken.<sup>43</sup> In fact, Representative Abrams noted that this exact situation occurred in DeKalb County, where parents had "consent[ed] to the exploitation of their children."<sup>44</sup> There was also a concern that the Senate version was overly broad.<sup>45</sup> For example, a professional photographer, who was required to register as a sexual offender, would have to obtain the consent of every minor's parent in order to lawfully take a picture of a high school sports team, thereby potentially targeting protected speech<sup>46</sup>

Representative Ron Stephens (R-164th), who spoke on behalf of the bill and represents Bryan County, stated that he was against Representative Abrams's amendment because it may not have covered the situation in Bryan County because the man's intent in taking the pictures of Vickie Lewis's daughter was unclear.<sup>47</sup> After hearing Representative Stephens's concerns, Representative Kevin Levitas (D-82nd) made a substitute motion to add the words "or to

39. *Id.*

40. *See generally* 2006 Ga. Laws 571, § 12 (codified at O.C.G.A. § 16-6-5 (2007)).

41. *See* House Committee Video, *supra* note 3, at 24 min., 47 sec. (remarks by Stacey Abrams (D-84th)).

42. *Compare* SB 1, as passed, 2007 Ga. Gen. Assem., with SB 1 (HCS), 2007 Ga. Gen. Assem.

43. *See* House Committee Video, *supra* note 3, at 22 min., 3 sec. (remarks by Rep. Stacey Abrams (D-84th)).

44. *Id.* at 31 min., 41 sec. (remarks by Rep. Stacey Abrams (D-84th)).

45. *Id.* at 8 min., 18 sec. (remarks by Maggie Garrett).

46. *See id.* at 23 min., 0 sec. (remarks by Rep. John Lunsford (R-110th)).

47. *See id.* at 26 min., 15 sec. (remarks by Rep. Ron Stephens (R-164th)).

possess the taken photograph” to the bill’s language.<sup>48</sup> The intent of the Levitas substitute motion was to ensure the bill encompassed situations where the sexual offender did not initially take a minor’s picture for indecent purposes but later kept and used the picture for such purposes.<sup>49</sup>

The House Judiciary Non-Civil Committee voted not to adopt the Levitas substitute amendment.<sup>50</sup> The Committee did, however, vote to approve the language of SB 1 as proposed by Representative Abrams.<sup>51</sup> The Committee favorably reported the House substitute containing the language in the Abrams amendment to the House floor on April 17, 2007.<sup>52</sup> However, the House substitute did not come up for a vote on the House floor before the 2007 legislative session ended.<sup>53</sup> The bill was recommitted on April 20, 2007.<sup>54</sup>

### *The Bill*

As passed by the Senate, SB 1 would amend Code section 16-12-100, relating to offenses related to minors, by adding a new Code section, 16-12-100.4.<sup>55</sup> The new section would make it illegal for a person who is required to register as a sex offender under Georgia law to take a photograph of a minor without parental consent.<sup>56</sup> Under the substitute offered by the House Committee, the new section would make it unlawful for a person who is required to register as a sexual offender under Georgia law, “to intentionally photograph a minor for indecent purposes.”<sup>57</sup> Under both versions, any violation of the new Code section would constitute “a misdemeanor of a high and aggravated nature.”<sup>58</sup> Under the Code section, “minor” would include any person under the age of eighteen, while “photograph” would encompass pictures, digital pictures,

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48. *See id.* at 33 min., 24 sec. (remarks by Rep. Kevin Levitas (D-82nd)).

49. House Committee Video, *supra* note 3, at 40 min., 43 sec.

50. *Id.* at 46 min., 10 sec. (remarks by Rep. David Ralston (R-7th)).

51. *Id.* at 47 min., 35 sec.

52. State of Georgia Final Composite Status Sheet, SB 1, June 5, 2007.

53. *See id.*

54. *See id.*

55. *See* SB 1 (SCS), 2007 Ga. Gen. Assem.

56. *Id.*

57. SB 1 (HCS), 2007 Ga. Gen. Assem.

58. *Id.*

movies, videotapes, or any “similar visual representation or image of a person.”<sup>59</sup>

### *Analysis*

#### *First Amendment Concerns*

Should SB 1 be enacted by the Georgia General Assembly in the future, it could face a constitutional challenge on First Amendment grounds.<sup>60</sup> The Constitution of the United States and the Georgia Constitution both recognize freedom of speech as a fundamental right.<sup>61</sup> In *Kaplan v. California*, the Supreme Court of the United States recognized that pictures have First Amendment protection.<sup>62</sup> Furthermore, photography has been called one of the “plainly expressive activities that ordinarily qualify for First Amendment protection.”<sup>63</sup> As the First Amendment applies to the states through the Fourteenth Amendment, Georgia laws are subject to First Amendment scrutiny.<sup>64</sup> Because photography falls within the purview of the First Amendment, any governmental restriction of it must serve a compelling governmental interest and be narrowly tailored.<sup>65</sup>

In *New York v. Ferber*, the United States Supreme Court held that the State of New York had a compelling interest in preventing the sexual exploitation of children.<sup>66</sup> Likewise, a court would likely determine Georgia has a compelling interest in protecting children from sexual crimes and exploitation.<sup>67</sup> However, SB 1 also must be narrowly tailored to pass constitutional muster.<sup>68</sup> As passed by the

59. *Id.*

60. See Garrett Interview, *supra* note 23.

61. U.S. CONST. amend. I; GA. CONST. art. I, § I, para. V.

62. *Kaplan v. California*, 413 U.S. 115, 119-20 (1973) (explaining that pictures, films, drawings, and the written and spoken word all have First Amendment protection unless they are obscene).

63. *Massachusetts v. Oakes*, 491 U.S. 576, 591 (1989) (Brennan, J., dissenting).

64. See *Miller v. California*, 413 U.S. 15, 20 (1973); *Dep’t of Corrections v. Derry*, 510 S.E.2d 832, 834 n.2 (Ga. App. 1998).

65. *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68-69 (1981) (explaining the standard of review when the freedom of expression is involved).

66. *New York v. Ferber*, 458 U.S. 747, 757 (1982).

67. See *id.*

68. See *Gwinn v. State Ethics Comm’n*, 426 S.E.2d 890, 892 (Ga. 1993); see also House Committee Video, *supra* note 3, at 8 min., 18 sec. (remarks by Maggie Garrett).

Senate, SB 1 is not likely to be found to be narrowly tailored.<sup>69</sup> Although the Senate Committee substitute is an improvement on the bill as introduced in this regard,<sup>70</sup> courts may find that the bill is not narrowly tailored to further the state's interest in protecting children from sexual crimes because of its expansive reach over speech that may be protected.<sup>71</sup>

The Senate version applies to any photograph of a minor taken without the consent of the minor's parent or guardian.<sup>72</sup> Therefore, it would apply to a sexual offender who took a professional photograph of a high school football team without the consent of every minor's parents as equally as it would apply to a sexual offender who took a photograph of a child on a swing set with her underwear showing.<sup>73</sup> While the latter situation would clearly trigger the state's interest in protecting children from sexual exploitation, the former likely would not.<sup>74</sup> In addition, prohibiting a sexual offender from taking an innocent photograph of her niece and her friends at high school graduation does not necessarily protect a child from a sexual crime.<sup>75</sup> In such a case, the prohibition is not narrowly tailored to promote the proffered interest. Preventing sex offenders who do not present a threat to children from taking photos of children without parental consent is not narrowly tailored to the goal of protecting children from becoming victims of sexual crimes.

Moreover, SB 1 as passed by the Senate would apply to registered sexual offenders with no history of committing crimes against children.<sup>76</sup> Thus, there would be no basis to believe that preventing such an offender from taking the photograph of a child would

69. See Garrett Interview, *supra* note 23.

70. The Senate Committee Substitute did add "intentionally" to comply with *New York v. Ferber*, 458 U.S. 747, 765 (1982) (stating criminal responsibility may not be imposed without some element of scienter on the part of the defendant).

71. See House Committee Video, *supra* note 3, at 8 min., 18 sec. (remarks by Maggie Garrett).

72. See SB 1, as passed Senate, 2007 Ga. Gen. Assem.

73. See *id.*

74. *Id.* (containing no intent element which addresses the motive of the sexual offender for taking the picture).

75. Not all sex offenders are a threat to children. See generally DEP'T OF JUSTICE, RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994 30 (2003) (stating that only 2.2% of released sex offenders "were rearrested for a sex offense against a child.").

76. *Id.* (failing to distinguish between sexual offenders who have committed sexual offenses against a child from those who have committed sexual offenses against an adult); see also Campos, *supra* note 1.

necessarily protect that child from a sexual crime.<sup>77</sup> Stretched to its limit, the bill would also prohibit an eighteen-year-old, who had previously been convicted of having consensual sex with a fifteen-year-old, from taking pictures at the prom without parental consent or even from taking a picture of himself without the consent of his parents.<sup>78</sup> Such actions likely fall within the purview of First Amendment protection.

### *Vagueness and Overbreadth Concerns*

In addition to the First Amendment issues the bill raises, the language involving consent remains vague.<sup>79</sup> When asked how a sex offender could obtain the consent required by the Senate's version of SB 1, Senator Johnson responded that it would be up for the courts to decide.<sup>80</sup> Therefore, basic questions like whether oral consent would suffice or if the sex offender would have to obtain a written consent form from a parent or guardian are unresolved.<sup>81</sup> Furthermore, it is unclear whether or not the sex offender would actually have to identify himself to the parent as a registered sexual offender or simply ask for permission to take the child's photograph.<sup>82</sup> Wisconsin recently passed a statute with language similar to that of SB 1 as passed by the Georgia Senate.<sup>83</sup> Unlike the Georgia bill, however, Wisconsin's law clarifies that a sex offender must reveal to the minor's parent that he or she is required to be on Wisconsin's registry when requesting permission to photograph the minor.<sup>84</sup> Without

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77. Not all sex offenses are committed against children. See generally DEP'T OF JUSTICE, SEX OFFENSES AND OFFENDERS: AN ANALYSIS OF DATA ON RAPE AND SEXUAL ASSAULT 24 (1997) (reporting that less than 20% of victims of imprisoned rapists and sexual assaults are younger than eighteen years old) [hereinafter DEP'T OF JUSTICE].

78. See Garrett Interview, *supra* note 23.

79. See *id.*

80. E-mail from Sen. Eric Johnson (R-1st) (May 8, 2007, 16:41 EST) (on file with the Georgia State University Law Review).

81. See Garrett Interview, *supra* note 23.

82. See SB 1, as passed Senate, 2007 Ga. Gen. Assem.

83. See WIS. STAT. ANN. § 948.14 (2007), which states:

A sex offender may not intentionally capture a representation of any minor without the written consent of the minor's parent, legal custodian, or guardian. The written consent required under this paragraph shall state that the person seeking consent is required to register as a sex offender with the department of corrections.

84. *Id.*

clarification, uncertainties surrounding what constitutes adequate consent in Georgia could jeopardize prosecutions.

The Senate version may also be challenged for being unconstitutionally overbroad. As mentioned previously, because the sexual offender's motive for taking the picture is irrelevant, the bill in this form may catch unintended people.<sup>85</sup> Proponents of the Senate language seem to believe that "registered sex offenders who photograph children are probably up to no good and should be stopped."<sup>86</sup> However, that broad assumption lacks any support.<sup>87</sup> Illinois has a statute prohibiting child sex offenders from knowingly "conduct[ing] or operating[ing] any type of business in which he or she photographs, videotapes, or takes a digital image of a child."<sup>88</sup> The Illinois statute is limited to child sex offenders, unlike SB 1, which applies to all people required to register as sex offenders.<sup>89</sup>

Supporters of the Senate language, like Representative Ron Stephens (R-164th), argue that it is difficult to determine someone's mindset while they are taking a picture.<sup>90</sup> Yet, various other crimes also require a showing of intent.<sup>91</sup> Maggie Garrett, a legislative director for the American Civil Liberties Union of Georgia, points out that intent under SB 1 could be proven by examining the pictures taken by the sex offender for incriminating factors such as whether they were focused on particular body parts, and by looking at what the sex offender did with the pictures afterward, such as whether they were kept and stored away in a shoe box under the sex offender's bed or whether they were given to the minor as professional photographs.<sup>92</sup>

The substitute offered by the House may address this issue because it would prohibit registered sex offenders from taking pictures of

85. See House Committee Video, *supra* note 3, at 15 min., 31 sec. (remarks by Sandra Michaels).

86. Campos, *supra* note 1.

87. See generally Senate Video, *supra* note 10 (remarks by Sen. Eric Johnson (R-1st)) (citing no statistical evidence during the Senate debate to support his proposition).

88. 720 ILL. COMP. STAT. 5/11-24 (2005).

89. See SB 1, as passed Senate, 2007 Ga. Gen. Assem.

90. See House Committee Video, *supra* note 3, at 29 min. (remarks by Rep. Ron Stephens (R-164th)).

91. See, e.g., O.C.G.A. § 16-8-2 (2007) (defining theft by taking and requiring an intent to deprive the owner of property); O.C.G.A. § 16-6-4 (2007) (including "intent to arouse" as an element of child molestation).

92. See Garrett Interview, *supra* note 23.

minors “for indecent purposes.”<sup>93</sup> The “for indecent purposes” language focuses on the sexual offender’s lewd motive for taking the picture.<sup>94</sup> This language is more consistent with the goal of the bill as it addresses the very potential harm the bill is seeking to prevent.<sup>95</sup> The language in the House substitute is also more consistent with language found in other Code sections concerning offenses related to minors.<sup>96</sup> For example, in Code section 16-6-5, sex offenders are prohibited from enticing minors for indecent purposes.<sup>97</sup> Furthermore, “indecent purposes” is defined in the Code, which provides guidance for prosecutions under the House substitute.<sup>98</sup>

Although the SB 1 substitute offered by the House significantly narrows the bill’s application, it may still face constitutional challenges.<sup>99</sup> The Court of Appeals of Idaho ruled unconstitutional a statute prohibiting the making of photographic or electronic recordings of a child sixteen or seventeen years of age with the intent of gratifying sexual desires of any person.<sup>100</sup> The Court held that such a broad prohibition, without any relation to whether the photographs or recordings were obscene or considered child pornography, violated the First Amendment.<sup>101</sup> A similar challenge could be brought against the House substitute for being overbroad and criminalizing a sex offender’s thoughts.<sup>102</sup>

### *Other Issues*

As passed by the Senate, SB 1 also fails to address concerns like the one expressed by Representative Abrams (D-84th) in the House Judiciary Non-Civil Committee meeting.<sup>103</sup> Representative Abrams

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93. See SB 1 (HCS), 2007 Ga. Gen. Assem.

94. *Id.*

95. See Michaels Interview, *supra* note 23.

96. See House Committee Video, *supra* note 3, at 45 min., 54 sec. (remarks by Rep. Robert Mumford (R-95th)) (stating that “indecent purposes is a term of art” that has been developed in case law).

97. See O.C.G.A. § 16-6-5 (2007).

98. *Id.* (defining an indecent purpose as one for the “purpose of child molestation or indecent acts”).

99. See *State v. Bonner*, 61 P.3d 611 (Idaho Ct. App. 2002).

100. *Id.* at 613.

101. *Id.* at 615-16.

102. See generally *id.*

103. See SB 1, as passed Senate, 2007 Ga. Gen. Assem. (failing to include intent as an element).

was concerned about parents collaborating with sexual offenders taking photographs of their children.<sup>104</sup> If a sexual offender obtained the consent of a parent to photograph the parent's child, the bill would not apply to the photographer even if the photographer were taking photos of the child for indecent purposes.<sup>105</sup> Unfortunately, situations do occur where parents are not always looking out for the best interest of the child.<sup>106</sup> In addition, the law would not apply to relatives or other family friends who obtained consent from a parent that was unaware of either the sexual offender's status or the sexual offender's motives for taking the pictures.<sup>107</sup>

If enacted, SB 1 as passed by the Senate may help protect minors like Vickie Lewis's daughter from having a sexual offender take photographs of them: if the same man came back to take more pictures of her daughter, the police could arrest him for taking her picture without parental consent.<sup>108</sup> However, legal options were available to Vickie Lewis when her daughter's situation occurred.<sup>109</sup> For instance, the man's conduct most likely violated the state's harassment laws.<sup>110</sup> Furthermore, because the establishment where Mrs. Lewis's daughter worked was on private property, the man could have been liable for trespassing if he were asked and refused to leave.<sup>111</sup> However, SB 1 would eliminate the need for parents to struggle with cumbersome harassment laws and would provide additional protection of minors in public places.<sup>112</sup>

Finally, the constitutional issues surrounding either version of the bill may never materialize if SB 1 is not passed by both chambers and

104. See House Committee Video, *supra* note 3, at 22 min., 3 sec. (remarks by Rep. Stacey Abrams (D-84th)).

105. *Id.*

106. See DEP'T OF JUSTICE, *supra* note 77, at 25 ("For 1 in 4 imprisoned sexual assaulters, the victim had been their own child or stepchild.")

107. See Campos, *supra* note 1 (explaining Vickie Lewis's concern about exempting parents from the bill); DEP'T OF JUSTICE, *supra* note 77, at 10 (finding that only 7% of sexual assault victims under age eighteen were assaulted by strangers; 93% were assaulted by family members or acquaintances).

108. See Campos, *supra* note 1.

109. See Michaels Interview, *supra* note 23.

110. *Id.*; see also Christian Boone, *Photos of Kids, Women in Stores Land Man in Jail*, ATLANTA J.-CONST., May 16, 2007, at B8, available at 2007 WLNR 9211400 (detailing the arrest of a Kennesaw man on charges of stalking and child molestation for taking pictures of women and girls in department stores).

111. See Garrett Interview, *supra* note 23.

112. See SB 1, as passed Senate, 2007 Ga. Gen. Assem.

therefore does not become law. Although the bill has broad support,<sup>113</sup> the significant differences between the Senate and House versions will have to be worked out. While the House substitute may have a better chance of withstanding constitutional scrutiny,<sup>114</sup> the bill's original sponsor, Senator Johnson, has called it "unacceptable."<sup>115</sup> Regardless, if the bill is considered in future sessions, the Georgia General Assembly should focus on passing a bill which the courts will uphold, as an unconstitutional bill will do little to protect Georgia's children.<sup>116</sup>

*Tiffany M. Bartholomew*

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113. See Garrett Interview, *supra* note 23 (stating that no legislator wants to look soft on crime or weak on sex offenders).

114. See *supra* text accompanying notes 94-103.

115. E-mail from Sen. Eric Johnson (R-1st) (May 8, 2007, 16:41 EST) (on file with the Georgia State University Law Review).

116. See Garrett Interview, *supra* note 23.

