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## CRIMES AND OFFENSES Sexual Offenses: Change Provisions Relating to Sexual Offenders; Change Punishment Provisions, Registration Requirements, and Residency Requirements for Sexual Offenders; Add a Provision Relating to Statutory Aggravating Circumstances for the Imposition of the Death Penalty; Require Sexually Dangerous Predators to Wear an Electronic Monitoring System for the Balance of His or Her Life and to Pay for Such System; Provide for Employment Restrictions for Sexual Offenders; Provide for an Effective Date and Applicability; Repeal Conflicting Laws; and for Other Purposes

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## CRIMES AND OFFENSES

***Sexual Offenses: Change Provisions Relating to Sexual Offenders; Change Punishment Provisions, Registration Requirements, and Residency Requirements for Sexual Offenders; Add a Provision Relating to Statutory Aggravating Circumstances for the Imposition of the Death Penalty; Require Sexually Dangerous Predators to Wear an Electronic Monitoring System for the Balance of His or Her Life and to Pay for Such System; Provide for Employment Restrictions for Sexual Offenders; Provide for an Effective Date and Applicability; Repeal Conflicting Laws; and for Other Purposes***

CODE SECTIONS: O.C.G.A. §§ 5-6-34 (amended), 5-7-1 (amended), 16-5-21 (amended), 16-5-40 to -41 (amended), 16-5-110 (amended), 16-6-1 to -5 (amended), 16-6-22 (amended), 16-6-25 (new), 17-6-1 (amended), 17-10-1 (amended), 17-10-6 (amended), 17-10-30 (amended), 35-3-30 (amended), 42-1-1 to -13 (amended), 42-1-14 to -15 (new), 42-8-35 (amended), 42-8-60 (amended), 42-9-39 (amended), 42-9-44 (amended)

BILL NUMBER: HB 1059

ACT NUMBER: 571

GEORGIA LAWS: 2006 Ga. Laws 379

SUMMARY: The purpose of the Act is to protect the public from recidivist sexual offenders, sexual offenders who use physical violence, and sexual offenders who prey on children. The Act ensures that decisions to release sexual predators into the community are not made on the basis of inadequate space. The Act requires the registration of sexual offenders, with a requirement that complete and accurate information be

maintained and accessible for use by law enforcement authorities, communities, and the public. The Act provides for community and public notification concerning the presence of sexual offenders. The Act provides for the collection of data relative to sexual offenses and sexual offenders. The Act requires sexual predators who are released into the community to wear electronic monitoring devices for the rest of their natural life and to pay for such devices. The Act also requires those sentenced to life in prison to serve a minimum of 30 years before being granted a pardon and before becoming eligible for parole. The Act also prohibits sexual predators from working with children, either for compensation or as a volunteer.

EFFECTIVE DATE: July 1, 2006

### *History*

Jessica Lunsford, a 9-year-old Florida girl, was kidnapped, raped, and buried alive last spring.<sup>1</sup> After a convicted sex offender confessed to killing the girl, Georgia's House leaders, led by House Majority Leader Jerry Keen, promised to introduce a bill with tougher penalty and registration provisions for convicted sex offenders.<sup>2</sup>

Current Georgia law restricts registered sex offenders from living within 1,000 feet of child care centers, schools, and places where children congregate.<sup>3</sup> A more restrictive measure went into effect in Iowa last year, and now prosecutors and police are criticizing the

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1. Jill Young Miller, *Critics: Sex Offender Law Would Drive Them Underground*, ATLANTA J.-CONST., Mar. 17, 2006, at A1.

2. *See id.*

3. *Id.*

law.<sup>4</sup> Because sex offenders in Iowa were barred from living within 2,000 feet of a school or child care center, many of the offenders retreated from cities and became homeless, moved into motels, or vanished.<sup>5</sup> Since the law went into effect, about 30 sex offenders have moved from Iowa to Nebraska where a similar law does not currently exist.<sup>6</sup>

In Georgia, supporters of a tougher law claim that they seek to protect the state's children from dangerous sexual criminals and predators.<sup>7</sup> Critics respond that the proposal could force the offenders to lose jobs, housing, transportation, treatment, and other support.<sup>8</sup> Sara Totonchi, public policy director for the Southern Center for Human Rights, a nonprofit law firm that represents prisoners and death row inmates, claims that tougher laws may prevent sex offenders from successfully re-entering society.<sup>9</sup>

### *Bill Tracking of HB 1059*

#### *Consideration and Passage by the House*

Representatives Jerry Keen, David Ralston, Mark Burkhalter, Allen Freeman, Mable Thomas, and Barry Fleming of the 179th, 7th, 50th, 140th, 55th, and 117th districts respectively, sponsored HB 1059.<sup>10</sup> On January 23, 2006, the House first read HB 1059 and the Speaker of the House, Glen Richardson, assigned it to the Committee on Judiciary Non-Civil.<sup>11</sup> After six committee hearings on the bill and testimony from multiple interested parties, the House Committee on Judiciary Non-Civil favorably reported the bill to the House floor on February 1, 2006.<sup>12</sup> On February 2, 2006, Representative Jerry Keen of the 179th district introduced the bill and was joined by Committee on Judiciary Non-Civil Chairman David Ralston of the

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4. *Id.*

5. *Id.*

6. *Id.*

7. Miller, *supra* note 1.

8. *Id.*

9. *Id.*

10. See HB 1059, as introduced, 2006 Ga. Gen. Assem.

11. See State of Georgia Final Composite Status Sheet, HB 1059, Jan. 24, 2006 (Mar. 30, 2006).

12. See State of Georgia Final Composite Status Sheet, HB 1059, Feb. 1, 2006 (Mar. 30, 2006).

7th district in asking for the bill's passage.<sup>13</sup> The bill that was introduced was a substitute bill passed that morning by the Rules Committee.<sup>14</sup>

Eleven house members spoke about the bill, eight of them against passage.<sup>15</sup> The most common concerns included the lack of a financial component to pay for the increased incarceration time under the mandatory minimums and the lifetime monitoring bracelets for offenders released from prison, a possibility that teenage offenders could be convicted and sentenced to a 25-year-minimum sentence for having sex with a teenage partner more than three years younger, and the lack of a counseling or rehabilitation provision for offenders under the age of 21.<sup>16</sup> In addition, Reps. Lucas and Mangum criticized the procedure of having the Rules Committee pass the substitute bill without first presenting it to the Committee on Judiciary Non-Civil.<sup>17</sup> Those in favor of passage spoke of protecting children and ensuring that sexual predators remain incarcerated for the maximum possible period.<sup>18</sup> By a vote of 144 to 27, the House passed HB 1059 on February 2, 2006.<sup>19</sup>

### *Consideration and Passage by the Senate*

The Senate read the bill for the first time on February 3, 2006 and the Senate President, Eric Johnson, assigned it to the Senate Judiciary Committee.<sup>20</sup> The Senate Judiciary Committee amended the bill and favorably reported it to the Senate floor on March 22, 2006.<sup>21</sup> After the third reading of the bill in the Senate on March 24, 2006, a motion to engross was made and passed by a vote of 32-19, which

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13. See Audio Recording of House Proceedings, Feb. 2, 2006 (remarks by Reps. Keen and Ralston), <http://mediar1.gpb.org/ramgen/leg/2006/hv020206-2.rm?usehostname> [hereinafter House Audio, Feb. 2, 2006].

14. See State of Georgia Final Composite Status Sheet, HB 1059, Feb. 1, 2006 (Mar. 30, 2006).

15. See House Audio, Feb. 2, 2006, *supra* note 13. (remarks by Reps. Oliver, Thomas, Morgan, Lucas, Bordeaux, Bruce, Dean, Mangum, Abdul-Salaam, Cowan, Benfield).

16. See House Audio, Feb. 2, 2006, *supra* note 13 (remarks by Reps. Oliver, Morgan, Lucas, Bordeaux, Bruce, Mangum, Abdul-Salaam, and Benfield).

17. See House Audio, Feb. 2, 2006, *supra* note 13 (remarks by Reps. Lucas and Mangum).

18. See House Audio, Feb. 2, 2006, *supra* note 13 (remarks by Reps. Thomas, Dean, and Cowan).

19. See State of Georgia Final Composite Status Sheet, HB 1059, Feb. 2, 2006 (Mar. 30, 2006); Georgia House Voting Record, HB 1059, Feb. 2, 2006.

20. See State of Georgia Final Composite Status Sheet, HB 1059, Feb. 3, 2006 (Mar. 30, 2006).

21. See State of Georgia Final Composite Status Sheet, HB 1059, Mar. 22, 2006 (Mar. 30, 2006).

sent the amended bill back to the House for final passage.<sup>22</sup> On March 24, 2006, the House disagreed with the Senate Substitute and the Senate insisted on its position.<sup>23</sup> A conference committee was formed to reach agreement on the final bill.<sup>24</sup>

### *Conference Committee*

In the House, Rep. Keen moved to adopt the Conference Committee Report and pass the amended bill on March 28, 2006.<sup>25</sup> Prior to the vote, he spoke about the key changes to the bill made by the conference committees.<sup>26</sup> These included an amendment to the Romeo and Juliet provision that would charge a misdemeanor when there is less than a four-year age difference between an offender under the age of 18 and the victim.<sup>27</sup> Further changes included a differentiation between sexual offenders and sexual predators, with a restriction that predators cannot work within 1,000 feet of where children congregate.<sup>28</sup> Moreover, those convicted outside the minimum mandates are eligible to apply for removal from the sex offender registry after 10 years.<sup>29</sup> Finally, a provision was added to extend the minimum time served for life sentences to 30 years from the previous 14 years, so as to prevent a sex offender serving a longer minimum sentence than a murderer or rapist sentenced to life in prison.<sup>30</sup>

The House adopted the conference committee report on March 28, 2006 by a vote of 140-13.<sup>31</sup> The Senate adopted the conference

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22. See State of Georgia Final Composite Status Sheet, HB 1059, Mar. 24, 2006 (Mar. 30, 2006); Georgia Senate Voting Record, HB 1059, Mar. 24, 2006.

23. See State of Georgia Final Composite Status Sheet, HB 1059, Mar. 24, 2006 (Mar. 30, 2006); Georgia Senate Voting Record, HB 1059, Mar. 24, 2006.

24. See State of Georgia Final Composite Status Sheet, HB 1059, Mar. 24, 2006 (Mar. 30, 2006).

25. See Audio Recording of House Proceedings, Mar. 28, 2006 (remarks by Rep. Keen), <http://mediar1.gpb.org/ramgen/leg/2006/hv032806-P1.rm?usehostname> [hereinafter House Audio, Mar. 28, 2006].

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. See State of Georgia Final Composite Status Sheet, HB 1059, Mar. 28, 2006 (Mar. 30, 2006); Georgia House Voting Record, HB 1059, Mar. 28, 2006.

committee report on March 30, 2006 by a vote of 52-1.<sup>32</sup> The bill was sent to Governor Perdue for signature on April 7, 2006.<sup>33</sup>

### *The Act*

In the interest of public safety, the Act implements a strategy to include: “(1) incarcerating sexual offenders and maintaining adequate facilities to ensure that decisions to release sexual predators into the community are not made on the basis of inadequate space; (2) requiring the registration of sexual offenders, with a requirement that complete and accurate information be maintained and accessible for use by law enforcement authorities, communities, and the public; (3) providing for community and public notification concerning the presence of sexual offenders; (4) collecting data relative to sexual offenses and sexual offenders; (5) requiring sexual predators who are released into the community to wear electronic monitoring devices for the rest of their natural life and to pay for such device; and (6) prohibiting sexual predators from working with children, either for compensation or as a volunteer.”<sup>34</sup>

The Act replaces Code section 17-10-6.1 to implement a mandatory minimum sentence of 25 years in prison and lifetime probation for enumerated sexual offenses and kidnapping of a person under the age of 14.<sup>35</sup> The Act implements a new Code section 17-10-6.2 that provides judicial discretion to impose a shorter sentence where the offender meets certain criteria.<sup>36</sup>

The Act replaces Code section 42-1-12 that strengthens the existing registration requirements for sex offenders and allows certain released offenders who meet specific requirements to petition the court to be removed from the Sexual Offender Registry.<sup>37</sup> The Act also replaces Code section 42-1-13 outlining the qualifications and role of the Sexual Offender Registration Review Board.<sup>38</sup>

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32. See State of Georgia Final Composite Status Sheet, HB 1059, Mar. 30, 2006 (Mar. 30, 2006); Georgia Senate Voting Record, HB 1059, Mar. 30, 2006.

33. See State of Georgia Final Composite Status Sheet, HB 1059, Apr. 7, 2006 (Mar. 30, 2006).

34. See HB 1059, as passed, 2006 Ga. Gen. Assem.

35. O.C.G.A. § 17-10-6.1 (Supp. 2006).

36. O.C.G.A. § 17-10-6.2 (Supp. 2006).

37. O.C.G.A. § 42-1-12 (Supp. 2006).

38. O.C.G.A. § 42-1-13 (Supp. 2006).

The Act implements a new Code section 42-1-15, which bars sexual offenders from living, working or loitering within 1,000 feet of public or private parks, recreation centers, playgrounds, skating rinks, gymnasiums, and other places where children congregate, including school bus stops.<sup>39</sup> Those classified as merely sexual offenders may work within the restricted area, but an individual classified as a sexually dangerous predator is prohibited from working within the restricted area.<sup>40</sup> The Act also replaces Code section 42-8-35 and now requires convicted and released sex offenders to wear for life a tracking device capable of locating the probationer through global positioning systems.<sup>41</sup> Finally, the Act amends Code section 42-9-39 to increase the minimum period of incarceration for those sentenced to life in prison to 30 years.<sup>42</sup>

### *Analysis*

This Act changes the current Georgia sex offender statutory scheme in two main ways: 1) by imposing increased or mandatory minimum sentences or both for a variety of sex-related crimes or kidnapping, and imposing stricter sex offender residency and work requirements and tracking measures; and 2) by broadening the so-called “Romeo-and-Juliet” provisions<sup>43</sup> of the statute to allow for lessened penalties for certain sexual acts (such as oral sex) between teens who are close in age.<sup>44</sup> The Act affects changes in these two areas that represent opposite ends of the spectrum when it comes to treatment of sexual crimes: On the one hand, the mandatory minimum sentences and broad registered-sex-offender residency restrictions make this Act one of the “nation’s toughest sex offender laws;”<sup>45</sup> on the other hand, the broadening of the Romeo-and-Juliet

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39. O.C.G.A. § 42-1-15 (Supp. 2006).

40. *Id.*

41. O.C.G.A. § 42-8-35 (Supp. 2006).

42. O.C.G.A. § 42-9-39 (Supp. 2006).

43. A “Romeo-and-Juliet” law—such as the so-coined Kansas statute that is named in reference to the pre-teenaged, star-crossed lovers of Shakespearean lore—creates lessened penalties for certain types of sexual behavior between teens within a narrow age range. *See State v. Limon*, 83 P.3d 229, 235 (Kan. Ct. App. 2004), *overruled by State v. Limon*, 122 P.3d 22 (Kan. 2005).

44. *See generally* HB 1059; *see also* Jill Young Miller, Nancy Badertshcer, & Sonji Jacobs, *Legislature 2006: In Brief*, ATLANTA J.-CONST., Mar. 25, 2006, at E3.

45. Jill Young Miller, *Keeping Sex Offenders Away from . . . Schools/Playgrounds/Bus Stops/Churches—Is It as Practical as It Sounds?*, ATLANTA J.-CONST., March 17, 2006, at A1.



provisions softens teen sex regulations, demonstrating an almost progressive acknowledgement and acceptance of contemporary sexual practices among adolescents.<sup>46</sup>

The strict residency and work requirements have been the greatest source of controversy over the bill.<sup>47</sup> Both of these changes stem from the reality of high recidivism rates among sexual offenders and an inherent belief that sex offenders cannot readily be rehabilitated.<sup>48</sup> Specifically, the Act creates a mandatory 25-year-minimum sentence (followed by probation for life) for anyone convicted of the following crimes: kidnapping involving a victim who is less than age fourteen, rape, aggravated child molestation, aggravated sodomy, or aggravated sexual battery.<sup>49</sup> Previously the minimum sentence for rape, aggravated sodomy, aggravated sexual battery, or aggravated child molestation was ten years.<sup>50</sup> The bill also changes the sentence for incest from one-to-twenty years to ten-to-thirty years.<sup>51</sup> The bill would require criminals who are sentenced to life in prison to serve a 30-year-minimum before being eligible for parole.<sup>52</sup> According to bill sponsor and House Majority Leader Representative Keen (R- St. Simon's Island), "the main reason [for the 25 year mandatory minimum] is so [sex offenders] cannot commit the act again."<sup>53</sup> Critics of the bill predict the new 25-year minimum will cause prison overruns, force more children to testify as mandatory minimums preclude plea deals, and possibly ensnare juveniles who are prosecuted as adults for certain offenses and will subject them to 25 year minimums and lifelong sex offender registry.<sup>54</sup> Critics also argue

46. See generally HB 1059 §§ 9-11.

47. See Miller, *supra* note 1.

48. See Nancy Badertscher & Jill Young Miller, *Legislature 2006: House Revamps Sex Offender Bill*, ATLANTA J.-CONST., Mar. 29, 2006, at B1. (quoting bill sponsor Jerry Keen as saying, "One of the objectives is to prevent reoccurrences of these crimes."); see also Telephone Interview with Sara Totonchi, Public Policy Director, Southern Center for Human Rights (Mar. 23, 2006) [hereinafter Totonchi Interview] (stating, "[The notion that sex offenders can't be rehabilitated] is the sentiment being put out there."); see also Telephone Interview with House Majority Leader Jerry Keen (Mar. 23, 2006) [hereinafter Keen Interview] (stating that sexual predators have "one of the highest if not the highest rates of recidivism").

49. See O.C.G.A. § 17-10-6.1(b)(2) (Supp. 2006).

50. See O.C.G.A. §§ 16-6-1, -2, -4, -22.2 (Supp. 2005).

51. Compare O.C.G.A. § 16-6-22 (Supp. 2006) with O.C.G.A. § 16-6-22 (Supp. 2005).

52. See O.C.G.A. § 17-10-6.1(c)(1) (Supp. 2006); see also Badertscher and Miller, *supra* note 48.

53. Keen Interview, *supra* note 48.

54. See Badertscher and Miller, *supra* note 48 (quoting Sara Totonchi, public policy director for the Southern Center for Human Rights: "I'm concerned that the parole-able population of our prisons is shrinking, is consistently shrinking, and that our prisons will not be able to handle these new measures

that the mandatory minimums will deter reporting of sex crimes, particularly those committed by a victim's relative, because the victim does not want his or her relative to be subjected to the harsh sentence.<sup>55</sup>

The new residency and work requirements are more contentiously debated, and the issues here may present constitutional challenges.<sup>56</sup> Prior to this Act, Georgia law forbade sex offenders in Georgia from living within 1,000 feet of any child care facility, school, or place where children congregate.<sup>57</sup> The Act expands the definition of "area where minors congregate" to include bus stops,<sup>58</sup> and the sex offender cannot live *or* work within 1,000 feet of any area where minors congregate, or any child care facility, school, or church.<sup>59</sup>

Supporters of the Act argue that these restrictions will protect Georgia's children by placing a buffer zone between predators and their prey, even if that means driving sex offenders out of Georgia altogether.<sup>60</sup> Representative Keen, at the Senate Judiciary Committee hearing, said, "Candidly, Senators, they will in many cases have to move to another state. and that's the greatest protection I think any of us can offer our kids, because [sex offenders] are simply not here in close proximity to commit the crime."<sup>61</sup>

Critics of the Act predict that the measures will have numerous unintended consequences including driving sex offenders "underground" by forcing them to move to rural areas or the street, where law enforcement cannot effectively track and monitor sex offenders; encouraging sex offenders to use false addresses or stop

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with the mandatory minimums and with the extension of what a life sentence means."). *But see id.* (quoting Scheree Lipscomb, spokeswoman for the state Board of Pardons and Paroles saying that the change "won't have any effect on the way the current board handles its business"); *see also* Electronic Mail Interview with B.J. Bernstein, Georgia Criminal Defense Attorney (March 30, 2006) [hereinafter Bernstein Interview].

55. *See* Totonchi Interview, *supra* note 48.

56. *See* Doe v. Miller, 405 F.3d 700 (8th Cir. 2005); Miller, *supra* note 1.

57. *See* Jerry Keen, *Make Sex Offenders Keep Their Distance*, ATLANTA J.-CONST., Mar. 23, 2006, at A15.

58. O.C.G.A. § 42-1-12 (a)(3) (Supp. 2006) (defining 'areas where children congregate' as "all public and private parks and recreation facilities, playgrounds, skating rinks, neighborhood centers, gymnasiums, school bus stops, and public and community swimming pools").

59. O.C.G.A. § 42-1-15 (Supp. 2006).

60. *See* Sonji Jacobs & Jill Young Miller, *Legislature 2006: Sex Offenders: Tough Bill Gets Panel's Approval*, ATLANTA J.-CONST., Mar. 22, 2006, at B1; *see also* Editorial, *Our Opinions: Sex Offenders Won't Vanish for Good*, ATLANTA J.-CONST., Mar. 23, 2006, at A14.

61. *See* Editorial, *Our Opinions: Sex Offenders Won't Vanish for Good*, ATLANTA J.-CONST., Mar. 23, 2006, at A14.

registering altogether to avoid expulsion if their address does not meet the 1,000-foot radius; denying sex offenders access to family support systems and rehabilitative measures, thereby increasing their chance of re-offending; providing a false sense of security to the public based on the premise that 80 to 90 percent of sex offenders molest family members and acquaintances—not strangers they, for example, meet at a bus stop; and merely displacing sex offenders to other states, which undermines a national public policy of protecting *all* children.<sup>62</sup> During the progression of the bill through the General Assembly, even the Georgia Sheriff's Association lobbied against aspects of the residency and work restrictions (though, it generally supported the bill) because keeping track of who lives close to a bus stop would overwhelm police, and outlying sheriffs would not have the resources to handle sex offenders migrating from urban and suburban areas to their rural regions.<sup>63</sup> Supporters of the bill counter that for the most dangerous predators, going "underground" is impossible because the bill requires them to wear a global positioning satellite (GPS) device for the rest of their lives.<sup>64</sup>

Though opponents to the Act may undermine their cause with requisite partisan mudslinging, e.g., an editorial in the Atlanta Journal-Constitution called the measure "prepackaged from the GOP catalog of sure crowd-pleasers,"<sup>65</sup> their predictions about the unintended consequences of the Act are supported by the apparent failure of a similar act passed in Iowa in 2002.<sup>66</sup> There, the new state law barred those convicted of sex crimes involving children from living within 2,000 feet of a school or day care center.<sup>67</sup> Since the law took effect in September 2005, nearly three times as many sex offenders are considered missing than before enforcement began.<sup>68</sup> Local authorities in Iowa have said flatly that the measure "sounds

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62. See *id.*; see also Totonchi Interview, *supra* note 48.

63. See Miller, *supra* note 1.

64. See Keen, *supra* note 57.

65. See Editorial, *supra* note 61.

66. See Monica Davey, *Iowa's Residency Rules Drive Sex Offenders Underground*, N.Y. TIMES, Mar. 15, 2006, at A1.

67. *Id.*

68. *Id.* (stating that, at press time, of the more than 6,000 people on Iowa's registry of sex offenders, 400 were listed as "whereabouts unconfirmed" or living in "non-structure locations," whereas the previous summer, the number was 140).

good, but it's not really working,” and the “truth is” they are starting to “lose [track of the sex offenders].”<sup>69</sup>

Despite these problems in enforcement and administration, however, the Iowa law did withstand constitutional scrutiny.<sup>70</sup> In 2002, three registered sex offenders challenged the law on multiple constitutional grounds, claiming that the law 1) was an unconstitutional ex post facto law;<sup>71</sup> 2) violated the plaintiffs' rights to avoid self incrimination because, coupled with registration requirements elsewhere in the code, it required offenders to report their addresses even if those addresses were not in compliance with the 2,000 foot radius; 3) violated the plaintiff's procedural due process rights; 4) violated the plaintiff's substantive due process rights because it infringed fundamental rights to travel and “privately choose how they want to conduct their family affairs” and was not narrowly tailored to serve a compelling state interest; and 5) that the law imposed cruel and unusual punishment in violation of the Eighth Amendment.<sup>72</sup>

Although the district court rejected the final argument regarding cruel and unusual punishment, it agreed with the plaintiffs on the other issues and ultimately found the law unconstitutional.<sup>73</sup> On appeal, however, the Eighth Circuit reversed.<sup>74</sup>

The Georgia Act differs from the Iowa law in a few important respects—for example, the residency and work radius in the Act is less harsh (1,000 feet versus 2,000 feet in Iowa), and there is no date provision in the Act to trigger the ex post facto argument.<sup>75</sup> However, the general similarities in the purposes of the laws and the creation of a residency and work requirement at all suggest similar constitutional challenges could be made to the Georgia Act.<sup>76</sup> A constitutional challenge to Georgia's 1,000-foot residency requirement has already failed.<sup>77</sup> In *Doe v. Baker*, a sex offender sentenced to ten years probation for child molestation challenged the constitutionality of the

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69. *Id.*; see also Miller, *supra* note 1.

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

71. The law did not apply to persons who established residence prior to July 1, 2002. *Id.* at 708.

72. *Id.* at 708.

73. *Id.*

74. Miller, 405 F.3d at 704.

75. See *id.*; see generally O.C.G.A. § 42-1-15 (Supp. 2006).

76. *Id.*

77. See *Doe v. Baker*, No. Civ.A. 1:05-CV-2265, 2006 WL 905368 (N.D. Ga. Apr. 5, 2006)

residency requirement, which was originally enacted in 2003 as O.C.G.A. § 42-1-13.<sup>78</sup> The plaintiff raised arguments similar to those raised in the Iowa case: *ex post facto* clause; Eighth Amendment violation; procedural due process violation; substantive due process violation; and Fifth Amendment taking violation (not raised in the Iowa case).<sup>79</sup> The district court reasoned away each of these challenges, and swiftly granted the State's motion to dismiss, noting in a footnote that the "Eighth Circuit upheld a virtually identical Iowa statute prohibiting a sex offender from residing within 2,000 feet of a school or other place where children congregate."<sup>80</sup> That footnote also pointed out that the main difference between the Iowa law and the Georgia law was that the Georgia law did not have a grandfather clause.<sup>81</sup> Still, given the Iowa district court's findings, it is conceivable that with the expanded breadth of the restrictions in the Act, a Georgia court may rule similarly, and find aspects of the Act unconstitutional.

The second major element of the Act—expanding the Romeo-and-Juliet provisions—redefines what constitutes a crime for consensual sex acts between teenagers and softens both the regulations and the punishments therein—a progressive step that shows the Georgia Assembly's acknowledgement and acceptance of contemporary teenage sexuality.<sup>82</sup> The expansion of these provisions was sparked by two separate, highly publicized Georgia cases involving two young men who had been sentenced to mandatory minimums of ten years in prison, one for having consensual intercourse with a teenage girl three years younger than him,<sup>83</sup> and the other for having consensual oral sex<sup>84</sup> with a teenage girl two years younger than him.<sup>85</sup> Both young men were convicted under the aggravated child molestation provision in what were widely perceived as unjust

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78. *Id.* at \*1.

79. *Id.*

80. *Id.* at \*3.

81. *Id.*

82. See House Audio, Mar. 28, 2006, *supra* note 25.

83. See *Dixon v. State*, 596 S.E.2d 147 (Ga. 2004).

84. See Suzanne Margues, *Teens' Cases Recall Marcus Dixon*, 11ALIVE.COM, Apr. 5, 2005, [http://www.11alive.com/help/search/search\\_article.aspx?storyid=61336](http://www.11alive.com/help/search/search_article.aspx?storyid=61336).

85. See Bernstein Interview, *supra* note 54.

applications of a 'legal technicality' to upstanding teenage boys who did not fit the lay definition of lurid sexual predators.<sup>86</sup>

In response to the outrage and national attention paid to these two cases, the provisions of the Act soften teen sex regulations in several ways.<sup>87</sup> First, the Act increases the Romeo-and-Juliet statutory rape provision age range from three years to four years.<sup>88</sup> Second, the Act extends the Romeo-and-Juliet provision to cover sodomy, i.e., oral or anal sex, between teens where the victim is at least thirteen and the person convicted is eighteen years of age or younger and is no more than four years older than the victim.<sup>89</sup> Under previous Georgia law, an act of sodomy with anyone under the age of 16 was deemed aggravated child molestation and carried a mandatory minimum ten year sentence.<sup>90</sup> Third, the Act adds a Romeo-and-Juliet provision to the child molestation provision, such that when the victim is at least thirteen and the person convicted is eighteen years of age or younger and is no more than four years older than the victim, the crime is a misdemeanor.<sup>91</sup> Fourth, the Act extends similar age range provisions to the definition of enticing a child for indecent purposes.<sup>92</sup>

While the Act still makes sexual relations with a teen under the age of sixteen illegal, i.e., a misdemeanor not subject to the sex offender registry, the amendments are progressive when compared to the previous state of Georgia law and other states' regulations on teen sex.<sup>93</sup> Even staunch critics of other aspects of the bill agree that the new Romeo-and-Juliet provisions "improve our law for teenage consensual sex."<sup>94</sup> Criminal defense attorney B.J. Bernstein, who worked on both the Marcus Dixon and Genarlow Wilson cases, said the expansion of the age range to include thirteen-year-olds and an actor not more than four years older is to ensure all high school ages

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86. See Andrew Jacobs, *Student Sex Case in Georgia Stirs Claims of Old South Justice*, N.Y. TIMES, Jan. 22, 2004, at A14; Bill O'Reilly & Juan Williams, *Talking Points Memo and Top Story—Part 2* (FOX News broadcast, Aug. 9, 2005); Chris Cuomo, *Teen Sex Tape; Outrage after Teen Gets 10 Years for Oral Sex* (ABC News broadcast, Mar. 9, 2006).

87. See O.C.G.A. §§ 16-6-2 to -5 (Supp. 2006).

88. "If the victim is at least 14 but less than 16 years of age and the person convicted of statutory rape is 18 years of age or younger and is no more than four years older than the victim, such person shall be guilty of a misdemeanor." O.C.G.A. § 16-6-3(c) (Supp. 2006).

89. O.C.G.A. § 16-6-2 (d) (Supp. 2006).

90. See O.C.G.A. § 16-6-4 (2005).

91. See O.C.G.A. § 16-6-4 (b)(2) (Supp. 2006).

92. See O.C.G.A. § 16-6-5(c) (Supp. 2006).

93. See O.C.G.A. §§ 16-6-2 to -5 (Supp. 2006); see generally Bernstein Interview, *supra* note 54.

94. Totonchi Interview, *supra* note 48.

are included, e.g., accounting for the possibility of a senior dating a freshman.<sup>95</sup> The extension of the Romeo-and-Juliet provision to cover sodomy resulted from research about a large number of thirteen-year-olds engaging in oral sex.<sup>96</sup> That Georgia legislators—who just twenty months ago were in denial about teen sex—approved these new provisions (albeit narrowly) suggests that they and their constituents are waking up to the reality of teenage sexual experimentation.<sup>97</sup>

The breadth of the Act's Romeo-and-Juliet provisions go further than other states' Romeo-and-Juliet provisions in another meaningful way: they cover same-sex relations.<sup>98</sup> To contrast, a Romeo-and-Juliet provision in Kansas that was fought all the way to the Supreme Court (and upheld) featured a lower felony penalty when the sodomy is voluntary, the child is fourteen years old but less than sixteen years old, the defendant is less than nineteen years old, and the parties involved are members of the opposite sex.<sup>99</sup> The Act's exclusion of any express provisions regarding the sexuality of the parties suggests the Legislature's understanding that contemporary teenage sex may involve homosexual relationships.

Finally, a semantic change in the Act suggests the Legislature's less male-centered understanding of sexual contact. The Act redefines incest, sexual battery, and aggravated sexual battery to criminalize the conduct of both males *and* females who commit the

95. See Bernstein Interview, *supra* note 54.

96. See *id.*; Laura Sessions Stepp, *Study Looks at Teen Sex Levels*, WASH. POST, Sept. 15, 2005 (stating that “many young people . . . simply do not consider oral sex to be as significant as their parents’ generation does” and quoting Claire Brindis, professor of pediatrics at the University of California-San Francisco, as saying “[a]t [oral sex rates of] 50 percent, we’re talking about a major social norm.”)

97. See Associated Press, *Laws on Teen Sex Will Be Reviewed; Statutory Case Brings Spotlight*, AUGUSTA CHRON., May 5, 2004, at B5 (quoting Georgia state Senator Charlie Tanksley as saying, “The ambiguity and confusion . . . among legislators, comes when there is obviously . . . consensual sex involved and you’re dealing with teenagers who . . . are sexually active beyond our parental preferences or perhaps beyond society’s expectations.”)

98. See O.C.G.A. §§ 16-6-2 to -4 (Supp. 2006).

99. See *State v. Limon*, 83 P.3d 229, 235 (Kan. Ct. App. 2004) (quoting K.S.A. 2002 Supp. 21-3522: “(a) Unlawful voluntary sexual relations is engaging in voluntary: (1) Sexual intercourse; (2) sodomy; or (3) lewd fondling or touching with a child who is 14 years of age but less than 16 years of age and the offender is less than 19 years of age and less than four years of age older than the child and the child and the offender are the only parties involved *and are members of the opposite sex.*”) (emphasis added), *overruled by State v. Limon*, 122 P.3d 22 (Kan. 2005).

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act by changing references from “he” to “he or she” or “the person.”<sup>100</sup>

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100. See O.C.G.A. §§ 16-6-22 to -22.2 (Supp. 2006).