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## Where Art Thou, Privacy: Expanding Privacy Rights of Minors in Regard to Consensual Sex: Statutory Rape Laws and the Need for a Romeo and Juliet Exception in Illinois, 46 J. Marshall L. Rev. 309 (2012)

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WHERE ART THOU, PRIVACY?:  
EXPANDING PRIVACY RIGHTS OF MINORS  
IN REGARD TO CONSENSUAL SEX:  
STATUTORY RAPE LAWS AND THE NEED  
FOR A “ROMEO AND JULIET” EXCEPTION  
IN ILLINOIS

JORDAN FRANKLIN\*

I. INTRODUCTION

Shane Sandborg cannot drop his daughter off for her first day of school.<sup>1</sup> He cannot coach his son’s little league team.<sup>2</sup> He cannot

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1. Kristy Mergenthal, *Proposed Illinois Law May Take East Moline Man Off Sex Registry*, (WQAD television broadcast Mar. 2, 2011), <http://eastrockislandcounty.wqad.com/news/crime/proposed-illinois-law-may-take-east-moline-man-sex-offender-registry/48124>; see 720 ILL. COMP. STAT. 5/11-9.3 (2011) (explaining the Illinois child sex offender laws). Under Illinois law, it is illegal for a child sex offender to be present on or within 500 feet of school grounds without the permission of a school administrator. *Id.* Even then, the offender can only enter the school grounds for limited purposes, such as parent-teacher conferences or other child evaluations. *Id.* “Child sex offender” refers to any person who has been charged with a violation of any of the following crimes:

[A]iding or abetting child abduction, child luring, predatory criminal sexual assault of a child, indecent solicitation of a child, indecent solicitation of an adult, sexual exploitation of a child, promoting juvenile prostitution, patronizing a juvenile prostitute, child pornography, aggravated child pornography, harmful material, ritualized abuse of a child, obscenity committed in any school zone or public park, criminal sexual assault, aggravated criminal sexual assault, criminal sexual abuse, aggravated criminal sexual abuse.

*Id.*

2. 720 ILL. COMP. STAT. 5/11-9.3. Under subsection (b-20), a child sex offender cannot participate or associate with any activity that is solely designated for children. *Id.* The law prohibited a child sex offender convicted of criminal sexual abuse from entering into a public park until January 1, 2011. Compare 720 ILL. COMP. STAT. 5/11-9.4 (2000), with 720 ILL. COMP. STAT. 5/11-9.4-1 (2011) (showing the difference of the restrictions between the 2000 statute and the updated 2011 statute). Although the restriction still applies, offenders that are convicted of criminal sexual abuse or sexual abuse are ex-

attend any of his children's birthday parties.<sup>3</sup> Due to his oldest daughter's birth, Shane cannot do any of these things.<sup>4</sup> After Shane's sixteen-year-old fiancée gave birth to their now seven-year-old daughter, Shane was investigated, charged, and convicted of criminal sexual abuse.<sup>5</sup> He was just fifteen months older than his fiancée.<sup>6</sup> Shane was required to register on the Illinois Sex Offender Registry,<sup>7</sup> and the label "sex offender" has haunted him ever since.<sup>8</sup>

While the statutory rape laws were drafted with good intentions and purpose,<sup>9</sup> in Illinois and other states that have not

empt from the law and therefore now permitted to enter a public park. *Id.*

3. In local news station WQAD's interview of Sandborg, he expressed his frustrations with the registry's restrictions in cases like his: "we can't go to the park, Chuck E. Cheese's, any type of places kids would go that's ridiculous . . . Kids like to do those kinds of things and that's what parents are supposed to do." Mergenthal, *supra* note 1 (citation omitted).

4. *Id.* His daughter's birth was the evidence that the investigators needed to convict Shane of criminal sexual abuse. *Id.*

5. Generally, authorities get involved and charge an offender with statutory rape when a parent - usually the young female's parent - files a report with local authorities. See Sharon G. Elstein & Noy Davis, *Sexual Relationships Between Adult Males and Young Teen Girls: Exploring the Legal and Social Responses*, A.B.A. CTR. ON CHILDREN AND THE LAW 22 (1997), [http://www.americanbar.org/content/dam/aba/migrated/child/PublicDocuments/statutory\\_rape.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/child/PublicDocuments/statutory_rape.authcheckdam.pdf) (reporting statistics from a case study indicating that almost seventy-five percent of statutory rape cases are reported by the victims' parents); see also Richard Delgado, *Statutory Rape Laws: Does it make sense to enforce them in an increasingly permissive society? NO: Selective enforcement targets 'unpopular men'*, A.B.A. J., Aug. 1996, at 87 (suggesting that the majority of cases are being reported by parents and involve males of minority or underprivileged groups). Shane, however, was arrested for another crime unrelated to the criminal sexual assault crime in which he was convicted. Mergenthal, *supra* note 1. The officers asked Shane about his sexual relationship with his fiancé. *Id.* Shane did not discover that he was being charged with a crime until he arrived at court and the judge informed him that he was being charged.

6. Mergenthal, *supra* note 1.

7. 730 ILL. COMP. STAT. 150/3 (2011). Under the Sex Offender Registration Act, persons convicted of criminal sexual abuse have a duty to register and provide the community with notice of their criminal status. *Id.*

8. Shane was convicted of criminal sexual abuse seven years ago, a crime that requires registration on the sex-offenders list for ten years. Mergenthal, *supra* note 1. Shane petitioned the court twice for executive clemency, an official pardon from his crime, but has had no response. *Id.*

9. The purpose of statutory rape laws, when first created, was to protect a man's property interest in the woman. James McCollum, *Case Developments*, 25 HOW. L.J. 341, 355 (1982) (providing the social backdrop that classified statutory rape laws initially as property laws). The historical belief was that women were "special property in need of special protection." *Id.* When California adopted the English statutory rape law, the purpose announced was to protect the "virtue of young and unsophisticated girls[.]" *The People v. Verdegren*, 106 Cal. 211, 214 (1895).

The laws eventually adopted gender-neutral language to meet "societal

adopted a close in age exception, the laws can create an absurd result when applied to consensual sex by minors. Such laws also have the power to destroy families whose parents conceived at a young age.<sup>10</sup> The shifting cultural beliefs about minors' sexuality<sup>11</sup> indicate a willingness to expand the privacy rights of minors in some circumstances and require a reformation of Illinois statutory rape laws to allow for this expansion.

Part II of this Comment discusses the legal background and protective purpose of age of consent and statutory rape laws with a focus on the historical views of minors' right to sexual privacy and the formation of statutory rape laws. Part II also focuses on the protective purpose of statutory rape laws and the compelling interest a state has in protecting minors contrasted with minors' interest in sexual privacy. Part III analyzes the societal changes regarding teenage sexuality and privacy rights in response to shifting cultural norms. Here, the Comment compares competing arguments regarding the expansion of minors' privacy rights and examines how our transformed culture warrants a reform to Illinois statutory rape laws. This part also argues that "Romeo and Juliet"<sup>12</sup> exceptions to statutory rape laws can successfully reduce

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view[s] that minors of both sexes need protection from abuses[.]” Kelly C. Connerton, *The Resurgence of the Marital Rape Exemption: The Victimization of Teens by their Statutory Rapists*, 61 ALB. L. REV. 237, 254 (1997) (reflecting on the societal view that women were the weaker sex and in need of protection laws where men would not need such protection). The purpose of statutory rape laws was later understood as a protection for minors incapable of consenting to sexual conduct. *Id.*; see also Michelle Oberman, *Turning Girls into Women: Re-Evaluating Modern Statutory Rape Law*, 85 J. CRIM. L. & CRIMINOLOGY 15, 25 (1994) (affirming that statutory rape laws formed in response to a need to protect a female's innocence and purity before marriage, but were later modified to protect both boys and girls from sexual exploitation).

10. See generally Mergenthal, *supra* note 1 (reporting the story of Shane Sandborg, who was convicted of criminal sexual abuse for having an intimate sexual relationship with his fiancé).

11. See generally G.S. Abbott & D. Treboux, *Teen Sexuality*, 23 INT'L ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES 15537 (Neil J. Smelser & Paul B. Bates eds., 2001) (examining the changing societal views regarding sexuality since the Baby Boomer era); Gail Pennington, *Sex on TV: From Twin Beds to "Temptation Island," We've Come a Long Way*, ST. LOUIS POST-DISPATCH, Feb. 11, 2001, at 3 (discussing the media impact on sexuality); Belinda Luscombe, *The Truth About Teen Girls*, TIME, Sept. 11, 2008, at 66 (discussing the trend in television shows to highlight sexuality in teenagers).

12. Exceptions are coined "Romeo and Juliet" after the famous William Shakespeare play because they create an accepted circumstance for young lovers. In the play, "Juliet is only thirteen and Romeo is an older teen . . . their romance would face serious problems regarding the age of consent for sexual activity. In many states, Romeo, and perhaps Juliet, could be arrested and face prosecution because of their ages." Steve James, *Romeo and Juliet Were Sex Offenders: An Analysis of the Age of Consent and a Call for Reform*, 78

the illogical results<sup>13</sup> of statutory rape in Illinois by expanding minors' sexual privacy rights, and continuing to promote the accepted values of minor sexuality. Lastly, Part IV examines the Illinois statutory rape law<sup>14</sup> and develops an amendment that carefully expands minors' privacy rights concentrating on the practical applications and ramifications of the law.

## II. BACKGROUND

### A. Historical Interpretation of a Child's Right to Privacy

The Supreme Court in *Griswold v. Connecticut*<sup>15</sup> held that a married couple had a sexual privacy right even when their sexual conduct was without procreative intent.<sup>16</sup> This privacy right was extended to unmarried couples consenting to sexual activity in *Eisenstadt v. Baird*.<sup>17</sup> Courts, however, have yet to extend *Eisenstadt* to minors. While it is well settled that minors do have some constitutionally protected privacy rights,<sup>18</sup> these rights are subject to

UMKC L. REV. 241, 241 (2009) (applying current day laws to Romeo and Juliet to argue that the laws, as applied, can result in absurd outcome).

13. See, e.g., Mergenthal, *supra* note 1 (reporting a case in which a seventeen-year-old male had sexual intercourse with his sixteen-year-old fiancée whom he later married); *Humphrey v. Wilson*, 282 Ga. 520, 533 (2007) (sentencing a seventeen-year-old male to ten years in prison for engaging in consensual oral sex with a fifteen-year-old).

14. 720 ILL. COMP. STAT. 5/11-1.50 (2011). This Comment focuses primarily on the accused under sections (b) and (c), which state that:

The accused commits criminal sexual abuse if the accused was under 17 years of age and commits an act of sexual penetration or sexual conduct with a victim who was at least 9 years of age but under 17 years of age when the act was committed . . . [or] if he or she commits an act of sexual penetration or sexual conduct with a victim who was at least 13 years of age but under 17 years of age and the accused was less than 5 years older than the victim.

*Id.*

15. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

16. *Id.* This landmark decision overruled a Connecticut prohibition on contraceptives. The Supreme Court held that the prohibition violated the plaintiff's privacy rights. *Id.* Although the Court did not find a right to privacy explicitly stated in the Constitution, it held that the plaintiff's privacy right emerged from the "penumbras" and "emanations" of the constitutional protections. *Id.* at 484-85.

17. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1979). The Supreme Court held that unmarried couples also deserved equal protection under the law in regards to sexual privacy rights and access to contraception. *Id.*

18. In *Bellotti v. Baird*, the Supreme Court held that a Massachusetts law requiring minors to get parental consent before having an abortion "would impose an undue burden on the exercise by minors of the right to seek an abortion . . . and young pregnant minors, especially those living at home, are particularly vulnerable to their parents' efforts to obstruct both an abortion and their access to court." Kathleen Fultz, *Griswold for Kids: Should the Privacy Right of Sexual Autonomy Extend to Minors?*, 21 J. JUV. L. 40, 49 (2000) (citing

state regulation<sup>19</sup> and are frequently more restricted than the privacy rights of adults. Under the doctrine of *parens patriae*, a state can regulate the activity of minors when that same regulation of adults would be an unconstitutional violation.<sup>20</sup>

Courts agree that it is constitutional for a state to regulate the sexual activity of minors under this doctrine and the rights afforded to minors do not include a “privacy right to engage in consensual sexual intercourse.”<sup>21</sup> States restrict minors’ privacy rights by establishing an “age of consent,”<sup>22</sup> which specifies the age a mi-

*Bellotti v. Baird*, 443 U.S. 622, 647 (1979)).

Some states also find that minors have a privacy right to confidentiality when interacting with a family planning physician. In *Planned Parenthood Affiliates of California et al. v. Van De Kamp*, California held a mandatory reporting requirement to be too much of an infringement on a minor’s privacy rights. *Planned Parenthood Affiliates of California et al. v. Van De Kamp*, 181 Cal. App. 3d 245, 261 (Cal. Ct. App. 1986). The court held that “not all cases where such a minor patient is known to have sexual conduct (typically by the services they are seeking, viz., abortion prenatal care, etc.) should give rise to the reporting requirement.” Fultz, *supra*, at 51 (citing *Planned Parenthood*, 181 Cal. App. 3d at 261). While recognizing the mandated reporting’s purpose was to protect minor victims of sexual abuse, “the court concluded that not all such minors engaged in sexual activity are being abused.” *Id.*

Other states have given minors a message that they enjoy other sexual privacy rights by creating counseling and sex educational programs in the public schools. Fultz, *supra*, at 52. There are an estimated fifty school districts across the U.S. that have created such programs. *Id.* at 54. The Supreme Court holds that these educational programs, promoting and distributing contraceptives to minors, were constitutional. *Carey v. Population Servs. Int’l*, 431 U.S. 678, 694 (1977). While the *Carey* Court found that a minor’s right to contraceptives focused more on the right to choose whether or not to bear a child, the Court extended the privacy rights discussed in *Eisenstadt* to minors. Fultz, *supra*, at 53 (citing *Carey*, 431 U.S. at 685).

19. States can restrict constitutional rights when there is a compelling government interest in doing so, and courts have determined that “. . . safeguarding the physical and psychological well-being of a minor” is no doubt a compelling interest. *Globe Newspaper Co. v. Superior Court for the Cnty. of Norfolk*, 457 U.S. 596, 607 (1982). In so holding, the Supreme Court has reasoned that “[a] democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens[.]” *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944). Therefore, courts have upheld legislation “aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights.” *Ferris v. Santa Clara Co.*, 891 F.2d 715, 717 (9th Cir. 1989).

20. DOUGLAS E. ABRAMS & SARAH H. RAMSEY, *CHILDREN AND THE LAW: DOCTRINE, POLICY AND PRACTICE* 14-16 (3d ed. 2007). The Supreme Court has justified this doctrine because of the particular vulnerability of minors, minors’ inability to make mature, important decisions, and parents’ role in childrearing. *Bellotti*, 443 U.S. at 634.

21. *In re T.A.J.*, 62 Cal. App. 4th 1350, 1361 (Cal. Ct. App. 1st Dist. 1998).

22. “Age of consent” refers to the “age at which a person may engage in any sexual conduct permitted to adults within that state.” RICHARD A. POSNER & KATHERINE B. SILBAUGH, *A GUIDE TO AMERICA’S SEX LAWS* 44 (1996).

nor is legally capable of consenting to sexual activity.<sup>23</sup> Because those under the age of consent do not have the *ability* to consent, they, logically, cannot have the *right* to consent.

Courts have determined that less scrutiny<sup>24</sup> of privacy regulations for minors is appropriate because the State has greater latitude to regulate the conduct of children compared to adults.<sup>25</sup> Since 1994, when the Prince Court held that minors are not yet capable of making this kind of important decision,<sup>26</sup> other courts have agreed. Instead, states have great deference in reserving this independence for adults.<sup>27</sup>

While courts make it clear that minors have no right to privacy pertaining to sexual activity,<sup>28</sup> other decisions relating to sexual autonomy seem to contradict this intent. For example, courts have held that a minor's sexual privacy rights do extend to the right to an abortion without parental consent,<sup>29</sup> the right to contraception,<sup>30</sup> and the right to confidentiality when interacting with a family-planning clinician.<sup>31</sup> Many states also decriminalize sexual activity between two minors close in age.<sup>32</sup> In each of these holdings, courts are carefully extending the privacy rights to minors in a way that continues to reflect the cultural beliefs on the proper behavior for children.

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23. CAROLYN E. COCCA, *JAILBAIT: THE POLITICS OF STATUTORY RAPE LAWS IN THE UNITED STATES* 1 (2004) (noting that individuals below the age of consent are "deemed incapable of giving valid consent to [sexual] activity."); *see also* POSNER & SILBAUGH, *supra* note 22, at 44-64 (reporting a fifty-state survey of states' age-of-consent laws with Illinois age of consent being seventeen).

24. Courts often apply less scrutiny when examining the constitutionality of laws prohibiting minors' rights because the state has greater latitude over children than adults. *Prince*, 321 U.S. at 170.

25. *Id.* at 168.

26. *Id.*

27. The Supreme Court has held that "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults." *Id.*

28. *See, e.g., In re T.A.J.*, 62 Cal. App. 4th at 1360 (holding that minors have no "privacy right to engage in consensual sexual intercourse").

29. *See Bellotti*, 443 U.S. at 647 (holding that minors may obtain an abortion without the consent of a parent or guardian).

30. *See Carey*, 431 U.S. at 679 (finding that the state's policy of guarding against sexual intercourse among the young and "legitimiz[ing] sexual activity of young people" were not justified as permissible for the intrusion on minors' privacy rights).

31. *Planned Parenthood*, 181 Cal. App. 3d at 269.

32. *See, e.g., NEB. REV. STAT. § 28-319(1)(c)* (2012) (criminalizing sexual contact between persons age nineteen and over and minors under age sixteen); *see also NEB. REV. STAT. §§ 200.364(3), 200.368* (1995) (prohibiting contact between persons eighteen years or older with a minor under the age of sixteen); *see also KY. REV. STAT. ANN. § 510.060* (2010) (forbidding sexual contact between adults over age twenty-one and minors under eighteen).

### B. Teenage Sexuality

Teenage sexuality is best described by journalist Laura Berman's quote: "whether we like it or not, sexual desire is part of being a teen."<sup>33</sup> While American culture continues to value the purity, innocence, and chastity of childhood, these values are shifting as society adapts to the increased sexual activity of American teenagers, which has steadily increased since the 1950's.<sup>34</sup> Today, almost fifty percent of high school students are sexually active.<sup>35</sup> This number jumps another fifteen percent shortly after graduation.<sup>36</sup> On average, teenage boys become sexually active at age 16.9 and teenage girls at 17.4.<sup>37</sup>

Furthermore, our social and cultural practices clearly indicate that we are willing to extend the sexual privacy rights of minors in certain circumstances. Many sex education programs for teens now focus on practicing safe sex rather than abstaining completely.<sup>38</sup> Some public schools pass out condoms and pamphlets on dis-

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

34. See Emily J. Stine, *When Yes Means No, Legally: An Eighth Amendment Challenge to Classifying Consenting Teenagers as Sex Offenders*, 60 DEPAUL L. REV. 1169, 1174 (2011) (describing the increase in sexual activity, which began in the 1950's as an effect of the media's portrayals of sexual conduct). "[N]ot only are television sitcom parents no longer sleeping in separate beds, neither are children." *Id.* (citing *Luscombe*, *supra* note 11, at 66); see Abbott & Treboux, *supra* note 11, at 15538; *Teen-Age Sex Activity is Found to Level Off*, N.Y. TIMES, Feb. 24, 1995, at A14 (finding that after a steady increase in sexually active teens since the 1950's, the number has leveled off). The increase, which began in the 1950s is due in part because of the media portrayals of sexual conduct. Stine, *supra*, at 1173. "[N]ot only are television sitcom parents no longer sleeping in separate beds, neither are children." *Id.* (citing *Luscombe*, *supra* note 11, at 66); see also Alessandra Stanley, *Sexy Kids? O.K. But a Channel from Arabs? No.*, N.Y. TIMES, Feb. 2, 2011, at C1 (discussing the popularity of the show "Skins," a show where the youngest teenager is fifteen-years-old and one episode included a screenshot of a teenager with a cloth covering a pill-enhanced erection); Pennington, *supra* note 11, at F3 (highlighting the emergence of sex in the media, and its prevalence in the media today).

35. Danice K. Eaton et al., Youth Risk Behavior Surveillance—United States 2009, *Centers for Disease Control and Prevention*, MORBIDITY AND MORTALITY WEEKLY REPORT (June 4, 2010) <http://www.cdc.gov/mmwr/pdf/ss/ss5905/pdf> (reporting that 46% of teenagers have had intercourse while 34.2% of teenagers surveyed were sexually active, which was defined as having had sexual intercourse with at least one person in the last three months).

36. *Id.*

37. *In Brief: Fact Sheet, Sexual and Reproductive Health: Women and Men*, ALAN GUTTMACHER INST. (Oct. 2002), <http://www.guttmacher.org/pubs/fb10-02.html>.

38. Research indicates that comprehensive sex education programs are more effective than their abstinence-only counterparts. See Debra Hauser, *Five Years of Abstinence-Only-Until-Marriage Education: Assessing the Im-*



ease prevention,<sup>39</sup> and while parents may advocate for abstinence, they alternatively educate their minors in safe ways to engage.<sup>40</sup> Family planning clinics make contraception available to minors without the consent or notification of a guardian.<sup>41</sup> Even the media reveals the societal views of teenage sexuality.<sup>42</sup> Furthermore, many states have now passed legislation that allows exceptions to statutory rape.<sup>43</sup>

Each of these examples indicates that the statutory rape laws, as drafted, are not entirely representative of cultural values. The laws are out of date and support a paternalistic view of minors, which requires revision. While there is no question that minors require extra protections, states can achieve protections in a

*pact*, ADVOCATES FOR YOUTH (2004), <http://www.advocatesforyouth.org/publications/623?task=view> (last visited Nov. 19, 2012). None of the abstinence-only programs in this study found longer-term success in delaying first time sex among its participants. *Id.* In fact, a third of the surveyed programs in the study found an *increase* in sexual activity from the onset of the program to its end. *Id.*

39. Of the sixty-nine percent of schools that teach some kind of sex education, sixty-five percent employ a program that incorporates information about safe sex practice. *The Media Project*, SEX ED 101 (Nov. 2002), <http://www.themediaproject.com/topics/sexeducation.htm>.

40. *Public Support for Sexuality Education reaches Highest Level Sexuality Information and Education Council of the United States (SIECUS)*, HICKMAN-BROWN PUBLIC OPINION RESEARCH SURVEY (Mar. 1999), [www.siecus.org/parent/pare0003/html](http://www.siecus.org/parent/pare0003/html) (last visited Nov. 19, 2012) (indicating that eighty-nine percent of American adults support sex education that informs youth both about abstinence as well as safe sex practices).

41. *See State Policies in Brief, Minors' Access to Contraceptive Services*, GUTTMACHER INST. (Oct. 1, 2012), [http://www.guttmacher.org/statecenter/spibs/spib\\_MACS.pdf](http://www.guttmacher.org/statecenter/spibs/spib_MACS.pdf) (explaining that twenty-one states allow minors to receive contraceptives from family planning centers without parental consent).

42. Popular shows such as “Gossip Girl,” “The O.C.,” and “Glee” are designed to promote or encourage teenage sexuality. *See, e.g.*, Tamar Lewin, *Rethinking Sex Offender Laws for Youths Texting*, N.Y. TIMES, Mar. 20, 2010, at A1 (describing how culture is shifting partly due to how teen sexuality is represented on television). *See* Paige Wiser, *Choir Hazard: Racy Moments on ‘Glee’ Alarm Parents Expecting Clean Entertainment*, CHI. SUN-TIMES, Oct. 19, 2010, at 28 (noting the unexpected source for a sex-packed television show).

43. Currently, there are only twenty states that do not have any age exception for their statutory rape laws otherwise referred to as an “age-gap” provision. AOC Chart for the States & D.C., THE AGE OF CONSENT, <http://ageofconsent.us/> (last visited Nov. 19, 2012) [hereinafter AOC Chart]. For example, Iowa’s Romeo and Juliet exception decriminalizes sexual conduct between persons over the age of fourteen and anyone three years younger or less. IOWA CODE ANN. §§ 702.17, 709.1, 709.3, 709.4(2)(c) (2008); *see also* MINN. STAT. §§ 609.342-345 (1997) (allowing sexual activity between individuals within twenty-four months in age regardless of whether both have reached the age of consent); TEX. PENAL CODE ANN. §§ 21.11(b)(1), 22.011(e) (1997) (creating a Romeo and Juliet exception for individuals within three years age difference).

more precise manner.

### C. U.S. Statutory Rape Laws

In the United States, each state has a statutory rape law that sets the age of consent, making it illegal to engage in sexual activity with a person below that age of consent.<sup>44</sup> The legislative intent behind these laws is to protect the innocence of children who cannot legally consent.<sup>45</sup> In Illinois, a person under the age of seventeen commits criminal sexual abuse by engaging in sex with a partner between the ages of nine and seventeen, even if that partner willingly consents.<sup>46</sup> A person over seventeen commits criminal sexual abuse by having sex with a partner who is between the ages of thirteen and seventeen, and within five years of the offender.<sup>47</sup>

While many states make sexual conduct with a minor a strict liability crime,<sup>48</sup> meaning the mere act of sexual conduct constitutes the crime,<sup>49</sup> a shift in the trend illustrates how states are expanding the privacy rights of minors by implementing “Romeo and Juliet” laws.<sup>50</sup>

### D. Romeo and Juliet Exemptions

Shakespeare’s tale of two young lovers torn apart because of a long-standing feud between their families is the “ultimate tale of

44. See AOC Chart, *supra* note 43 (listing each state’s age of consent).

45. Connerton, *supra* note 9, at 254; see also Kate Sutherland, *From Jailbird to Jailbait: Age of Consent Laws and the Construction of Teenage Sexualities*, 9 WM. & MARY J. WOMEN & L. 313, 319 (2003) (citing Michael M. v. Superior Court of Sonoma County, 450 U.S. 464, 470 (1981)) (stating that sex-specific statutes can be upheld because the primary goal of statutory rape laws is to prevent teenage pregnancy); See generally, Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109, 137 (1999) (stating that the criminalization of sexual conduct with a minor has been justified as preventing harm as opposed to providing guidance by moral values alone).

46. 720 ILL. COMP. STAT. 5/11-1.50 (2011).

47. *Id.*

48. For an interesting discussion on whether statutory rape requires a strict liability standard, see Catherine L. Carpenter, *Articles on Statutory Rape, Strict Liability, and the Public Welfare Offense Model*, 53 AM. U. L. REV. 313, 380 (2003) (outlining the public welfare offense model and the recently developed victim rights’ movement); see also Stephen F. Smith, *Jail for Juvenile Child Pornographers?: A Reply to Professor Leary*, 15 VA. J. SOC. POL’Y & L. 505, 507-508 (2008) (arguing that “in a society that rightly insists that punishment imposed on criminals must ‘fit’ the crime they committed, we need to decide . . . whether penalties . . . are likely to be excessive in light of the moral culpability of the relevant offender population.”).

49. Strict liability is the legal responsibility for the damages resulting from a crime regardless of whether guilt is established. BLACK’S LAW DICTIONARY 429 (9th ed. 2009).

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

young love.”<sup>51</sup> As the story goes, Romeo and Juliet were two teenagers madly in love who were forced to choose between their love and the family ties that kept them separate.<sup>52</sup> Modern day may present yet another obstacle to their love since Juliet, only thirteen, would be unable to consent to sexual conduct with her love, Romeo, an older teen.<sup>53</sup> In most states, Romeo and possibly Juliet would be subject to prosecution for violating the rape statute against sexual conduct with minors.<sup>54</sup> Clearly, the laws afford no room for this modern-day fairy tale.

Currently, there are twenty states that do not have any form of Romeo and Juliet laws.<sup>55</sup> Some states allow the offender to mitigate his or her crime to a lower sentence or fine. Other states allow for the offender to completely remove his or her name from the registry.<sup>56</sup> Still others require that a Romeo and Juliet circumstance be transferred to juvenile court.<sup>57</sup> The proposed Romeo and Juliet law in Illinois would allow such a person, convicted or found delinquent by the court and required to register on the sex registry, to petition the court to remove his or her name from the sex registry if guilty of criminal sexual abuse without force.<sup>58</sup>

Romeo and Juliet exceptions, when adopted, fundamentally impact a minor’s right to privacy in choosing to consent to sex. The exception allows for those charged with statutory rape to remove their information from the sex registry when their victims are consenting minors within a specified age gap.<sup>59</sup>

While many states have adopted these exemptions, Illinois recently rejected a proposed Romeo and Juliet exception by a 36-73 vote.<sup>60</sup> This bill would have allowed individuals, like Shane, that had consensual sexual conduct with a minor within a close age range an opportunity for a normal life.<sup>61</sup> While the bill had many

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51. James, *supra* note 12, at 241.

52. WILLIAM SHAKESPEARE, *Romeo and Juliet*, in THE NORTON SHAKESPEARE (Stephen Greenblatt et al. eds., 1997).

53. The play does not indicate exactly what is Romeo’s age but only that he is older than Juliet. *Id.*

54. *Id.*

55. AOC Chart, *supra* note 43.

56. See FLA. STAT. ANN. § 943.04354 (2011) (allowing offenders to remove their name from the sex registry if in a Romeo and Juliet situation).

57. See IOWA CODE § 709.12 (2011).

58. Sex Offender Reg-Removal, H.R. 1139, 97th Gen. Assy. (Ill. 2011).

59. Illinois proposed age gap would allow an exception for individuals whose consenting partners were less than four years age difference. *Id.* “While the exact age range and details of the close-in-age exemption vary state by state, most allow for all people within 3-4 years of age of each other to legally engage in consensual sexual acts.” *Age Of Consent By State, CLOSE-IN-AGE-EXEMPTIONS TO THE AGE OF CONSENT*, [http://www.age-of-consent.info/?page\\_id=25](http://www.age-of-consent.info/?page_id=25). (last visited Nov. 19, 2012).

60. Sex Offender Reg-Removal, H.R. 1139, 97th Gen. Assy. (Ill. 2011).

61. Mergenthal, *supra* note 1.

supporters advocating for individuals like Shane, in March 2011, legislators turned down the bill.<sup>62</sup>

Instead of completely giving up on the new bill, the legislation should be drafted in a way that reflects the cultural beliefs of teenage sexuality, allowing some expansions in areas where consensual sexual conduct should be accepted and de-criminalized. The ever-changing area of teenage sexuality requires reform in Illinois statutory rape laws that would continue to further the state's interest in protecting vulnerable minors but also provide "a safe environment . . . for [them] to explore their sexuality."<sup>63</sup>

### III. ANALYSIS

In the following part, this Comment analyzes the competing arguments for the expansion of minor's privacy rights. First, it discusses the different purposes behind statutory rape laws and whether these goals are relevant in today's society. Next, it examines how and who the statutory rape law affects and whether its application is fair. Lastly, this part addresses the arguments for and against introducing a close-age exception for Illinois statutory rape law.

#### A. Legislative Intent of Statutory Rape Laws

In adopting statutory rape laws from England, the American legal system criminalized sexual activity with females under ten years old.<sup>64</sup> This low age of consent, and gender specific language, reflected the historical ideology of women, as in need of male protection and possessions.<sup>65</sup> These laws also highly valued the chastity of women and in some instances, although statutory rape was a strict liability offense, men could avoid conviction when the girl whom he had sexual contact had previously lost her virginity.<sup>66</sup> Therefore, sex with a nonvirgin was legal because the act had not resulted in any damage.<sup>67</sup> While a victim's lack of virginity was a

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62. Sex Offender Reg-Removal, H.R. 1139, 97th Gen. Assy. (Ill. 2011).

63. Michelle Oberman, *Girls in the Master's House: of Protection, Patriarchy and the Potential for Using the Master's Tools to Reconfigure Statutory Rape Law*, 50 DEPAUL L. REV. 799, 825 (2001).

64. Connerton, *supra* note 9, at 252. The English common law prohibited sexual intercourse with girls under age ten; however, this age was eventually raised in the United States to either eighteen or twenty-one for most states. Oberman, *supra* note 9, at 24-25.

65. *Id.* at 25; McCollum, *supra* note 9.

66. Connerton, *supra* note 9, at 253 (explaining how social values impacted the construction of and defenses to a statutory rape charge).

67. This defense was known as the "promiscuity defense" and "implicates the ownership theory of women; if a woman is damaged or blemished property she is no longer in need of protection," regardless of if the woman was under the age of consent. Connerton, *supra* note 9, at 253.

defense to statutory rape, mistake of fact was not.<sup>68</sup>

Allowing the promiscuity defense and outlawing the mistake-of-fact defense, it furthered the belief that a virgin woman was a man's property to be protected.<sup>69</sup> In essence, courts "extend[ed] legal protection only to virgins, [and] early statutory rape law served as a tool through which to preserve the common morality rather than to penalize men for violating the law."<sup>70</sup>

Some argue that changes to statutory rape laws, such as the shift from gender-specific to gender-neutral statutes,<sup>71</sup> reflect society's interest in protecting both young males and young females from abuse and exploitation.<sup>72</sup> However, the traditional value of protecting the chastity of young, unmarried women from sexually aggressive males continues to be the driving force behind statutory rape laws. These values are often used to justify rejecting constitutional challenges to the statutes.<sup>73</sup>

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68. Mistake of fact means that "[i]t did not matter whether the victim looked older than the age of consent, that she consented, or even that she initiated sexual contact." Oberman, *supra* note 9, at 25. Courts have traditionally held that statutory rape requires no mens rea and therefore, the "mistake-of-fact" defense is not available. See *State of Idaho v. Stiffler*, 117 Idaho 405, 410 (1990) (applying common law and rejected defendant's claim that he reasonably believed that the victim was not over the age of consent). *But see* *People v. Hernandez*, 61 Cal.2d 529, 535 (1964) (adjusting rule to allow the mistake-of-fact defense where defendant held "reasonable belief" when the female had represented herself to have reached the age of consent); see also Robert R. Strang, *She Was Just Seventeen . . . and the Way She Looked Was Way Beyond (Her Years): Child Pornography and Overbreadth*, 90 COLUM. L. REV. 1779, 1783 (1990) (discussing the courts' evolution in removing mistake of fact as a defense to crimes of statutory rape and bigamy); Laurie L. Levenson, *Good Faith Defenses: Reshaping Strict Liability Crimes*, 78 CORNELL L. REV. 401, 469 n.329 (1993) (noting that courts allowed the mistake-of-fact defense in *Perez v. State*, 803 P.2d 249 (N.M. 1990)), which held that a defendant should be allowed to present the defense, particularly when the victim affirmatively represents that she is of age, as in *People v. Hernandez*, 61 Cal.2d 529, 530 (1964).

69. Connerton, *supra* note 9, at 252-53.

70. Oberman, *supra* note 9 at 26.

71. Connerton, *supra* note 9, at 254; see also Michelle Oberman, *Statutory Rape Laws: Does it Make Sense to Enforce Them in an Increasingly Permissive Society?*, A.B.A. J., Aug. 1996, at 86 (illustrating the mass replacement of gender-specific language to gender neutral); Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387, 403 (1984) (indicating that the gender-neutral revisions were in response to feminist critiques of the statutory rape laws).

72. Connerton, *supra* note 9, at 254; see also Tamar R. Birckhead, *The "Youngest Profession": Consent, Autonomy, and Prostituted Children*, 88 WASH. U. L. REV. 1055, 1096 (2011) (asserting that "age-of-consent laws are intended to protect children from the coercion and manipulation of adults, while also establishing that youth below a certain age or involved in a certain power dynamic cannot voluntarily choose or agree to sexual activity.").

73. See, e.g., *Michael M.*, 450 U.S. at 470 (validating a sex-specific holding that the primary goal for statutory rape laws is to protect young women and

### B. Prosecution

Courts often apply the legislative goals of statutory rape laws and conclude that they “preclude[] the application of the privacy rights of minors given the state’s compelling interest in ‘preventing sexual exploitation early in life.’”<sup>74</sup> Undoubtedly, preventing sexual exploitation of minors and protecting the well-being of minors is a compelling government interest.<sup>75</sup> However, looking at the majority of cases prosecuted indicates that preventing sexual exploitation is not the only goal advanced through statutory rape laws, especially those that do not include a close-in-age exception for minors who are approaching the age of consent.

Instead, statutory rape laws without a Romeo and Juliet exemption, such as the laws in Illinois, support gender stereotypes that view males as sexually aggressive and women as submissive, weak,<sup>76</sup> and in need of protection from male’s sexually aggressive nature. Of the estimated 7.5 million<sup>77</sup> incidents of statutory rape, ninety-six percent of reported cases had male offenders.<sup>78</sup> While it may be possible that men commit more statutory rapes than women, it is not likely.<sup>79</sup> In fact, this number is quite misleading when analyzed under historical views of sexuality and the traditional purpose behind statutory rape laws. If the laws truly intended to protect minors from sexual exploitation, one could expect the

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decrease teenage pregnancy). *See also* *Hodgson v. Minnesota*, 497 U.S. 417, 449 n.35 (referring to a state’s “legitimate interest in protecting minor women from their own immaturity”) (emphasis added); *Connerton*, *supra* note 9, at 255 (arguing that some defenses to statutory rape, such as the marital exception, contain relics of female oppression).

74. *Sutherland*, *supra* note 45, at 315 (quoting *Jones v. State*, 640 So. 2d 1084, 1086 (Fla. 1994)).

75. *Davis v. Reynolds*, 890 F.2d 1105, 1110 (10th Cir. 1989) (deciding that “safeguarding the physical and psychological well-being of a minor” is a compelling state interest) (quoting *Globe Newspaper Co.*, 457 U.S. at 607); *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (holding “[t]he State, of course, has a duty of the highest order to protect the interests of minor children, particularly those of tender years.”); *Pesce v. J. Sterling Morton High Sch. Dist.*, 201, Cook County, IL., 830 F.2d 789, 797-98 (7th Cir. 1987) (concluding that Illinois’ interest in protecting children from abuse surpasses a minor’s privacy rights).

76. *See Connerton*, *supra* note 9, at 254 (exposing the traditional view of a woman as a “‘weak’ little girl” and noting that the modern perspective has shifted to not only include girls, but also young males capable of being exploited by older adults).

77. Michelle Oberman, *Regulating Consensual Sex With Minors: Defining a Role for Statutory Rape*, 48 BUFF. L. REV. 703, 703-04 (2000).

78. Howard N. Snyder, *Sexual Assault of Young Children as Reported to Law Enforcement: Victim, Incident, and Offender Characteristics*, U.S. DEPT OF JUSTICE 8 (2000), <http://bjs.ojp.usdoj.gov/content/pub/pdf/saycrle.pdf>.

79. *See James*, *supra* note 12, at 250 (arguing that gender stereotypes that are embedded in the law create a more reasonable explanation for the disproportionate number of male offenders).

number of male and female offenders to be more balanced.<sup>80</sup>

In addition to males being prosecuted more than females for statutory rape, the sentences imposed in their convictions are astonishingly more severe.<sup>81</sup> Statutory rape laws attempt to categorize minors as incapable of consent under a certain age.<sup>82</sup> However, the enforcement of these laws indicate that it will be tolerated when consent with a certain type of partner.<sup>83</sup> Through enforcement, age-of-consent laws extend sexual privacy rights to only those minors who comport with cultural and societal values.<sup>84</sup>

### C. Sex Offender Laws and Registration Requirements

When convicted of criminal sexual abuse in Illinois, the individual must register on the sex offender registry and provide law enforcement officials with extensive personal information.<sup>85</sup> Criminal sexual abuse is the crime an individual would be convicted under when engaging in the typical Romeo and Juliet relationship.<sup>86</sup>

This registry requirement came in response to the abduction of Jacob, an eleven-year-old boy, taken from his home by a repeat

80. *See id.* (maintaining that “[t]he laws were set up to make older males the offenders and to ignore older females who had sex with younger males.”). The historical goals behind statutory rape laws emerge while selective prosecution overlooks male victims and unfairly targets male offenders. *Id.* at 251.

81. The same court that sentenced a seventeen-year-old high school student to ten years in prison when a female classmate performed fellatio on him handed down a sentence of three months in prison and three years probation to a twenty-seven year old teacher who engaged in sexual intercourse with a seventeen year-old student. Leonard Pitts Jr., *Georgia’s Twisted Sense of Justice*, VIRGINIA PILOT & LEDGER-STAR, Apr. 4, 2007, at B9.

82. *See* Sutherland, *supra* note 45, at 332 (noting that age-of-consent laws are formulated on the premise that minors are legally incapable of consenting to sexual activity); *see also* Connerton, *supra* note 9, at 254 (acknowledging that age-of-consent laws were supported by the societal understanding that children under a certain age have not developed the maturity to make serious adult decisions such as consenting to sexual activity).

83. *See* Sutherland, *supra* note 45, at 332 (suggesting that sexual rights will be afforded and accepted, through lack of enforcement, to those minors who engage in “[h]eterosexual sex between white middle class peers.”).

84. *Id.*

85. 730 ILL. COMP. STAT. 150/3. A sex offender has a duty to register and provide information including:

[A] current photograph, current address, current place of employment, the sex offender’s or sexual predator’s telephone number, including cellular telephone number, the employer’s telephone number, school attended, all e-mail addresses, instant messaging identities, chat room identities, and other Internet communications identities . . . .

*Id.*

86. *See* 720 ILL. COMP. STAT. 5/11-1.50 (prohibiting sexual conduct between minors and adults regardless of whether the contact was consensual and regardless of how close in age the parties were at the time of the contact).

sex offender.<sup>87</sup> In 1994, Congress enacted legislation that required states to trace the location of violent sexual offenders.<sup>88</sup> This kind of heinous crime is exactly what statutory laws are meant to protect against and are appropriate for sex offenders like the one who abducted Jacob.

Not long after the enactment of Jacob's law, Congress expanded the registration requirements to include a public disclosure of the sex offender's information.<sup>89</sup> This expansion came in reaction to the abduction, torture, and murder of a seven-year-old girl in New Jersey.<sup>90</sup> The girl's mother came in contact with her daughter's murderer just hours after the abduction took place.<sup>91</sup> However, because of the lack of knowledge, she had no idea that a twice-convicted sex offender was living just doors away.<sup>92</sup> This is the kind of person that comes to mind when hearing the term "sex offender"—not the recent high school graduate and his high school sweetheart who was a year younger.

As discussed earlier, Illinois has further restricted sex offenders to live, work, or interact with or near young children.<sup>93</sup> While these restrictions are essential in protecting young children from dangerous sexual predators, they work in opposition against modern-day Romeos who engaged in truly consensual sexual activity with minors just shy of the legally consenting age.

The foundation of criminal law rests on the rationale that "a criminal sentence must be directly related to the personal culpability of the criminal offender."<sup>94</sup> Teenagers having sex with their slightly younger boyfriend or girlfriend is unlikely to have the same culpability as a forty-year-old sex offender molesting a seven-year-old girl.<sup>95</sup> Although sexual activity involving close-in-age

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87. *Jacob's Story*, JACOB WETTERLING RESOURCE CENTER, <http://www.jwrc.org/WhoWeAre/History/JacobsStory/tabid/108/Default.aspx> (last visited Nov. 19, 2012).

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

89. 42 U.S.C. § 14071 (2006) (expanding the former registration requirements to include a sex offender's public disclosure of all relevant information to the community).

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

91. *Id.*

92. *Id.*

93. 720 ILL. COMP. STAT. 5/11-9.3 (2011); *see also No Easy Answers: Sex Offender Laws in the US*, 19 HUM. RTS. WATCH 1, 139-41 (2007), <http://hrw.org/sites/default/files/reports/us0907webwcover.pdf> (listing additional state imposed restrictions).

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

95. *See Birkhead*, *supra* note 72, at 1098-99 (explaining that adults who have fantasies about sexual conduct with children of very young ages are more dangerous than adults who prefer older adolescents).



consensual partners mitigates the crime charged, the repercussions<sup>96</sup> of sex registry requirements does not match the crime.<sup>97</sup> The punishment associated with being dubbed a “sex offender” follows an individual far beyond the courtroom walls. Without a Romeo and Juliet exception, the laws “applied to teenagers engaging in consensual sex with one another is an unfortunate and misguided attempt to enforce morality through legislation.”<sup>98</sup>

#### D. Expanding Minors Sexual Rights

On the flip side of this coin is the consenting minor whose privacy rights are being restricted. Ninety-five percent of statutory rape victims are female,<sup>99</sup> and in statutory rape enforcement, the state is essentially restricting the privacy rights of females while advancing traditional notions of women as sexually submissive. Instead, states should tailor their regulations to meet the declared goals in preventing abuse and exploitation of the most vulnerable youth. Given that younger children are more susceptible to exploitation than older children, states should narrowly tailor laws to match the needs of different aged children.<sup>100</sup> Furthermore, Romeo and Juliet exceptions can adequately safeguard the most exposed minors while also preserving society’s judgments of maturity.<sup>101</sup>

The “Rule of Sevens”, a theory that factors in the age of a child when determining his or her culpability, can be a useful tool in determining the acceptable level of maturity.<sup>102</sup> While the rule is often applied in cases of incompetency, it can also be used to show that a minor above a certain age is instead competent of making important decisions.<sup>103</sup> Additionally, there is little re-

96. See, e.g., Mergenthal, *supra* note 1 (recalling the story of Shane Sandborg who cannot live life as a “normal” family man because of his status on the registry).

97. See *id.* (arguing that consensual sexual activity between close-in-age individuals is not deserving of the severe criminal punishment associated with being labeled a “sex offender”).

98. Stine, *supra* note 34, at 1217.

99. Karyl Troup-Leasure & Howard N. Snyder, *Statutory Rape Known to Law Enforcement*, JUVENILE JUSTICE BULLETIN (2005) <https://www.ncjrs.gov/pdffiles1/ojjdp/208803.pdf> (reporting on a twenty-one state survey from law enforcement officials).

100. Birkhead, *supra* note 72, at 1098.

101. See *id.* at 1098-99 (indicating that “adults with desires and fantasies that culminate in sexual acts with pre-pubescent children are arguably more dangerous than those with sexual preferences for older, pubescent children”).

102. Suzanne Meiners-Levy, *Challenging the Prosecution of Young “Sex Offenders”*: How Developmental Psychology and the Lessons of Roper Should Inform Daily Practice, 79 TEMP. L. REV. 499, 511 (2006).

103. *Id.* The common law principle behind the “rule of sevens” indicates that a child under the age of seven does not have the mental capacity of forming intent to commit a tort. *Id.* Those children between the age of seven and fourteen can form intent, but may not be competent to rationalize and make im-

search indicating that consensual sexual activity between close-in-age peers above this age is dangerous to the child or society.<sup>104</sup> In fact, there is evidence to support the opposite.<sup>105</sup> Teenage sexuality can be viewed as a shift toward independence, and adolescent sexuality can play an important positive role in a minor's growth.<sup>106</sup>

While courts seem reluctant in extending sexual privacy rights to all minors, a gradual lessening of the restrictions to increase privacy rights as minors approach the age of consent can create a healthier transition from adolescence to adulthood and allow minors to be active participants.<sup>107</sup> Although the law maintains that until a minor reaches the age of consent privacy rights do not extend to sexual activity, the truth is that minors are not "simply pawns of the state, schools or parents."<sup>108</sup> They are already bending and stretching the social and legal boundaries to explore and shape their own teenage sexuality, and often a minor's self-regulation also reflects state legitimate interests.<sup>109</sup>

Some argue that statutory rape laws should be held completely unconstitutional as an infringement on the privacy rights of minors.<sup>110</sup> Others compromise and contend that minors should be allowed a learning period to which the consequences for mistakes made while experimenting with sexual conduct will not be as harsh as when they are adults.<sup>111</sup> On the other hand, some insist

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portant decisions. *Id.* Logically, a child over the age of fourteen should be competent under the "rule of sevens" and would be considered legally competent. *Id.*

104. *Id.* at 512.

105. Heidi Kitrosser, *Meaningful Consent: Toward a New Generation of Statutory Rape Laws*, 4 VA. J. SOC. POL'Y & L. 287, 322-23 (1997).

106. *Id.* at 322; see also John S. Santelli et al., *Adolescent Sexual Behavior: Estimates and Trends from Four Nationally Representative Surveys*, 32 FAM. PLAN. PERSP. 156, 160-61 (charting high school students' sexual activity to show that teen sexuality is quite normal within society).

107. See Sutherland, *supra* note 45, at 343-44 (articulating teenage sexuality as a process rather than an immediate change occurring upon emancipation).

108. *Id.* at 343.

109. *Id.* at 345 (recognizing the way that many teenagers are regulating themselves is essentially the same way that the state would. However, when the state may disagree, the topic is also debated in the adolescent community).

110. Connerton, *supra* note 9, at 275-76 (arguing that "in an increasingly permissive society, it is no longer sensible to continue the enforcement of statutory rape laws"); see Alan Abrahamson, *Court Denies Liability of Parents in Teen Sex*, L.A. TIMES, Apr. 10, 1991, at 1, available at <http://articles.latimes.com/1991-04-10/local/me-821district-court-> (reporting on a California court that held statutory rape laws to be "outdated legal fictions" that were no longer applicable for modern day youth).

111. Bruce C. Hafen & Jonathan O. Hafen, *Abandoning Children to Their Autonomy: The United Nations Convention on the Rights of the Child*, 37 HARV. INT'L L. J. 449, 456 (1996); FRANKLIN E. ZIMRING, *THE CHANGING LEGAL WORLD OF ADOLESCENCE* 90 (Free Press ed., 1985) (illustrating sexual

that statutory rape prosecution is a necessary element in empowering women and decreasing teenage pregnancies.<sup>112</sup> Frances Olsen, legal professor at UCLA, argues that statutory rape laws should be amended to allow minor victims more control over the prosecution, by perhaps allowing the prosecution to proceed only upon the victim's complaint and must cease at her request.<sup>113</sup> While this may present some issues with coercion, Olsen maintains that it may offer a victim empowerment opportunities.<sup>114</sup>

While there are endless competing views, without some reform, Illinois statutory rape laws do not promote a compelling state interest in the protection of minors. Instead, the laws, in substance and unequal enforcement, perpetuate traditional gender stereotypes, leading to the subordination of female minors. Additionally, they ignore the exploitation of male minors, and subject recently turned adult men to harsh and unwarranted penalties.

#### IV. PROPOSAL

Of the nearly twenty-five thousand registered sex offenders in Illinois, approximately seven hundred are cases of consensual sex between a minor and an individual within a four-year age range.<sup>115</sup> In Illinois, about three-fourths of the sexually active female teenagers<sup>116</sup> report having a partner who was the same age or up to three years older.<sup>117</sup> For statutory rape laws to be effective and advance the goal of eliminating child exploitation, legislators must craft laws to expand the sexual rights of minors and decriminalize consensual sex between individuals who have recently reached the age of consent and individuals approaching it.

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experimentation as a "learner's permit" situation); Barbara B. Woodhouse, *Who Owns the Child?: Meyer and Peirce and the Child as Property*, 33 WM. & MARY L. REV. 995, 1050-59 (1992) (discussing a child's right to own themselves).

112. Oberman, *supra* note 9 (advocating for expanding statutory rape laws to protect primarily young women targeted for coercion and exploitation).

113. Olsen, *supra* note 71, at 408 (expanding the idea that victim's should control the prosecution of her offender and arguing that for a law to actually empower women there should be no age limits and all the power is left to the victim).

114. *Id.*

115. *Romeo and Juliet Laws—What They Mean for Our Teens*, ILLINOIS VOICE FOR REFORM (Nov. 2010), <http://ilvoices.com/media/90977fd13b5ccabcffff8441ffffe417.pdf>.

116. Danice K. Eaton et al., *supra* note 35, at 99. In Illinois, 48.1% of teenagers are sexually active. *Id.* Of those having sex, 43.8% are female and 52.3% are male. *Id.*

117. Stine, *supra* note 34, at 1174; Joyce C. Abma et al., *Teenagers in the United States: Sexual Activity, Contraceptive Use, and Childbearing*, 23 VITAL HEALTH STATISTICS 1, 8 (2004), <http://www.cdc.gov/nchs/data/series/sr23/sr23024.pdf>.

The truth is that many minors are engaging in sexual conduct with partners within a close age range to them, and some of those partners have recently attained majority.<sup>118</sup> Developmental research indicates that this particular conduct is neither dangerous to society nor the minors consensually engaging in it.<sup>119</sup> In fact, sexual activity among teenagers is quite common,<sup>120</sup> and as social commentator Jacob Appel points out, often times “criminal law is neither an effective nor an ethical means of deterring [teenagers’] sexual desires.”<sup>121</sup>

So what are we promoting with statutory rape laws that penalize teenagers or young adults that express their sexuality with a fully consenting partner? The argument that these laws are preventing teenage pregnancy and deterring minors from prematurely engaging in sex holds no weight against the statistics of teenage sexual activity.<sup>122</sup> Furthermore, while a minor may be more susceptible to exploitation by an adult of much older age,<sup>123</sup> most would agree that “a college freshman who asks a high school junior on a date poses little threat to the commonwealth even if that date ends in bed.”<sup>124</sup> Unlike a rapist or pedophile, a young adult engaging in consensual contact with a slightly younger, albeit minor,

118. *Id.*

119. Santelli, *supra* note 106, at 160-61; *see also* Suzanne Meiners-Levy, *Challenging the Prosecution of Young “Sex Offenders”: How Developmental Psychology and the Lessons of Roper Should Inform Daily Practice*, 79 TEMP. L. REV. 499, 506 (2006) (demonstrating that research supports teenage sexuality as a “normal and expected state of development”); William N. Friedrich et al., *Normative Sexual Behavior in Children: A Contemporary Sample*, PEDIATRICS 1, 2 (1998) *available at* <http://pediatrics.aappublications.org/content/101/4/e9.full.pdf+html>.

The non-predatory sexual conduct of a close-in-age adult with a consenting minor does not rise to a dangerous level in need of state regulation. For a person to be diagnosed as a pedophile, he must exhibit a lengthy period of intense sexual fantasies for sexual activity with children, usually under age thirteen, that interferes with his social functioning. AM. PSYCHIATRIC ASS’N DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 528 (2002). This does not include an older adolescent in a sexual relationship with younger adolescent. *Id.*

120. Santelli, *supra* note 106, at 160-61.

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

122. *Id.*; *see also* Meiners-Levy, *supra* note 119, at 512 (explaining that the normalcy of teenage sexuality makes it unlikely that teenagers even know that sexual contact with their peers can lead to prosecution, unless they are specifically familiar with the law).

123. Birkhead, *supra* note 72, at 1098.

124. Appel, *supra* note 121.

partner lacks the culpability for the crime punished.<sup>125</sup> Ultimately, Illinois must reconstruct its statutory rape law to protect against exploitation without causing harm to newly turned adults engaging in sexual conduct with mature consenting minors.

As it presently stands, Illinois statutory rape laws suppress a minor's, particularly a female minor's, right to privacy and sexual freedom.<sup>126</sup> These minors deserve sexual privacy rights just as adults, and should be restricted only where absolutely necessary.<sup>127</sup> A statutory scheme that "winks at teenage boys for having multiple partners but disparages girls who do so" should not be supported under the guise of statutory rape laws.<sup>128</sup> Statutes, such as Illinois', that criminalize close-in-age sexual relationships like any other sexual crime, restrict minors' privacy rights when they should expand these rights for the welfare of the minors.<sup>129</sup>

Statutory rape laws are intended to protect children from exploitation and manipulation by adults,<sup>130</sup> but they also establish the age where children gain sexual rights to privacy.<sup>131</sup> This standard, however, is an unjustified barrier when minors, nearing the age of consent, are agreeing to sexual activity with their slightly older peers - an activity that has shown to be both beneficial and normal.<sup>132</sup>

Illinois should create statutory rape laws that include a Romeo and Juliet exception because it is consistent with the state's

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125. *Id.*

126. *See* Olsen, *supra* note 71, at 404-06 (arguing laws that penalize sexual activity among teenagers significantly impacts females' sexual expression).

127. *Id.*; *see also* Oberman, *supra* note 9, at 86 (inferring that minors rights can be restricted in order to protect against "vulnerability and immaturity of youth").

128. Appel, *supra* note 121.

129. *See id.* (noting that statutory rape laws that criminalize sexual conduct between close-in-age consenting partners are likely to cause more harm than good "denying them access to necessary information, deterring them from sharing their experiences with teachers and counselors for fear that they or their partners will be reported to authorities, or driving them to have sex in parked cars and dark alleys rather than safe, warm bedrooms.")

130. *See* Noy S. Davis & Jennifer Twombly, *State Legislators' Handbook for Statutory Rape Issues, Context and Questions*, AM. BAR. ASS'N CTR. ON CHILDREN & THE LAW (2000), <http://ojp.usdoj.gov/ovc/publications/infores/statutoryrape/handbook/cont.html> (demonstrating that a survey of twenty-one states advance statutory rape laws to protect minors from exploitation and early pregnancy).

131. Birkhead, *supra* note 72, at 1096 (stating that the policy behind statutory rape laws is not only to protect children, but also to set a firm age for which the law will hold them capable of voluntary sexual conduct); *see also* Connerton, *supra* note 9, at 254 (noting that the driving force behind statutory rape laws is providing protection to minors who society has deemed incompetent of making decisions of this degree).

132. Meiners-Levy, *supra* note 119, at 506.

other privacy right expansions and determinations of maturity.<sup>133</sup> Without a Romeo and Juliet exception, Illinois subjects minors' privacy rights to gender stereotyping on teenage sexuality rather than tailoring its laws to eliminate child exploitation.<sup>134</sup> The same logic that determines what age an individual is mature enough to drive, marry, or drink, should also determine when an individual can consent to sexual conduct.<sup>135</sup>

The proposed Illinois Romeo and Juliet Bill, which was turned down in March, allowed a judge to determine whether a registered individual should be removed from the registry based on a case-by-case analysis.<sup>136</sup> In the legislative discussion surrounding this Bill, Representatives Annazette Collins, Robert W., and Pritchard expressed an important concern—that in refusing to discuss minors' sexuality or sex in general, we are condemning individuals to a lifetime of job rejections, college denials, and empty opportunities.<sup>137</sup>

The proposed legislation would have cured some important deficiencies in the law. On the other hand, it would not address the wide range of latitude given to enforcing the laws in ways that often lead to suppression of female minors' privacy rights and over prosecution of males. In fact, it would give judges more discretion

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133. See Birkhead, *supra* note 72, at 1099 (maintaining that sexual activity should find its way on the continuum of maturity that other minor activity falls). For example, “it may be reasonable to conclude that someone is mature enough to have sex before they are mature enough to marry; it may be unreasonable, however to consider them mature enough to consume alcohol before they are mature enough to have sex.” *Id.* In other words, “the reasoning by which [society] sets the age of sexual consent should not be at odds with that by which it sets other ages of majority.” DAVID ARCHARD, *SEXUAL CONSENT* 124-25 (Westview Press, ed., 1998).

134. See Olsen, *supra* note 71, at 405-06 (criticizing laws that reinforce gender-based ideologies and violate female minor's right to privacy in ways that male's rights are unaffected).

135. *Id.*; see also Appel, *supra* note 121 (expressing concern for the misplacement of sexual consent in the continuum of maturity by noting that far more dangerous privileges, such as hunting or driving, are given to minors much before they are able to legally consent to sexual activity—sometimes as much as five years before).

136. IL H.R. Tran. 2011 Reg. Sess. No. 23.

137. *Id.* Representative Pritchard advocated for the Bill by framing the issue as “one mistake” that would lead to endless barriers for our youth. *Id.* He urged that Illinois should offer exceptions rather than “ask young people, who have made a mistake, to continue to pay for it through the next 10 years of their life when they're trying to get a job, they're trying to go to college, they're trying to get established.” *Id.* Representative Collins, on the other hand, expressed her frustration with her colleagues' inability to discuss sex and supported the bill's flexibility to determine what sex offenses should place an individual on the registry. *Id.* She noted her unwillingness to accept our current legislation that places children on the registry for minor crimes such as “merely touching a . . . breast or raising up a dress or hitting the buttocks.” *Id.*

in determining when the laws should apply.<sup>138</sup>

The standards for removing an individual from the registry were unclear, and it did not decriminalize sexual conduct in Romeo and Juliet situations, but rather allowed an individual already on the registry to petition for removal.<sup>139</sup> Therefore, an individual convicted of criminal sexual abuse when his or her consenting partner was less than five years younger is placed on the sex registry regardless of the relationship between him or her and his or her partner. He or she would then be required to petition the court to remove his or her name from the registry. If the court denied his petition, he or she must wait another two years before filing another petition.

A better solution is to decriminalize the behavior altogether for individuals close in age who are found to be in a consensual sexual relationship. The age of consent should remain at seventeen, to protect teenagers from coercion and exploitation of much older adults, but allow for a three-year gap in age for close-in-age sexual relationships.<sup>140</sup> This Comment proposes to change subsection (c) of the Criminal Sexual Abuse statute. Subsection (c) currently reads “[t]he accused commits criminal sexual abuse if he or she commits an act of sexual penetration or sexual conduct with a victim who was at least 13 years of age but under 17 years of age and the person was less than 5 years older than the victim.”<sup>141</sup> It should be amended to read as follows:

The accused commits criminal sexual abuse if he or she commits an act of sexual penetration or sexual conduct with a victim who was at least 13 years of age but under 17 years of age and the person *was more than 3 years older but less than 5 years older than the victim.*

This proposal allows for a healthy expansion of minors’ privacy rights while furthering a substantial government interest in protecting minors from adult exploitation and coercion. It rationally addresses the not so foreign topic of teenage sexuality and supports a healthy expression of sexuality at a reasonable age with

138. *See id.* (indicating that the proposed law gives individual judges the power to determine whether an individual should be removed from the sex registry). If the judge, in his discretion, determined that this was not a case in which the removal exception should apply, the individual could re-file his petition after two years and hope for a more sympathetic judge. *Id.*

139. Sex Offender Reg-Removal, H.R. 1139, 97th Gen. Assy. (Ill. 2011).

140. *See id.* (indicating some Representatives’ hesitancy to a gap as wide as four years). Representative Dennis Reboletti expressed his concerns and urged his colleagues to

[l]ook at the differences, Ladies and Gentlemen, between a 18-year-old adult and a 14-year-old . . . We have to look at the mindset of the 14-year-old and what they understand about the consequences of their actions . . . I believe that the age limit of 4 years is a great disparity . . .

*Id.*

141. 720 ILL. COMP. STAT. 5/11-1.50 (c).

partners within a reasonable age range.

## V. CONCLUSION

Unfortunately child exploitation is a widespread issue, but sexuality alone is not wrong or abusive.<sup>142</sup> However, after an honest reflection and “frank . . . discussion of adolescent sexuality,”<sup>143</sup> Illinois legislators should adopt a Romeo and Juliet exception that expands the privacy rights of minors and empowers them to practice safe sex. Instead of criminalizing normal behavior and ruining the lives of young adults like Shane Sandborg, Illinois should adapt its laws to foster healthy and open sexual relationships among our youth. This change will allow for the desired exception while still respecting the state interest in protecting minors.

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142. Appel, *supra* note 121.

143. *Id.* Representative Collins, in discussions surrounding the proposed bill, also argued that there needs to be an open discussion about sex, and particularly minors having sex. IL H.R. Tran. 2011 Reg. Sess. No. 23. Representative Reboletti indicated that he may be in favor of reworking the bill after the Representatives determine what message they want to send to the people of Illinois about the culpability and maturity of minors. *Id.*



