DIFFICULT DECISIONS: SHOULD ALABAMA LAWS BE TOUGHER ON JUVENILE SEXUAL OFFENDERS?[1]

INTRODUCTION

Stories of sexual crimes perpetrated against children appear on the nightly news all too often. The fear that a child could be abducted or sexually abused virtually anywhere by anyone hovers in the thoughts of parents, teachers, and other loved ones. With the advent of Megan's Law[2] and Amber Alerts,[3] stories of sexual offenders preying on innocent children and stories of missing children are broadcast with increasing regularity. Nevertheless, the less publicized, but equally serious, problem is the increasing regularity with which children themselves are perpetrating sexual crimes.[4] This Comment discusses the need to address this growing problem with additions to the Alabama Criminal Code that would specifically target juvenile sexual offenders.

Although the numbers vary, studies report a growing number of juvenile sexual offenders.[5] As recently as the 1980s, little attention was given to juvenile sexual offenders.[6] However, this growing problem is finally attract-

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1. The author would like to acknowledge Assistant District Attorneys Jill Ganus and Brandon Falls for proposing the statutes that this Comment is based on and for their help with this Comment. Special thanks is due to Mr. Falls for his considerable help and expertise.

2. Megan's Law, Pub. L. No. 104-145, 110 Stat. 1345 (1996) (codified as amended at 42 U.S.C. § 14071 (2000)). President Clinton enacted Megan's Law in 1996 after public outcry over the rape and killing of Megan Kanka, a seven-year-old girl, in 1994. *Megan's Law by State*, KLAAS KIDS FOUND. (2002), http://www.klaaskids.org/pg-legmeg.htm. The law requires information and registration of sex offenders to be available to the public. *Id.*

3. Amber Alert is a program that runs on a state-by-state basis, but it has been implemented in most every state in some form. *See America's Missing: Broadcast Emergency Response by State*, KLAAS KIDS FOUND. (2002), http://www.klaaskids.org/pg-amberplan.htm. The program incorporates law enforcement and local and national media sources to announce probable child abductions. *Id.* The program was started in 1996 after a nine-year-old child, Amber Hagerman, was abducted and killed in Arlington, Texas. *Id.*

4. *See* Sander N. Rothchild, Comment, *Beyond Incarceration: Juvenile Sex Offender Treatment Programs Offer Youths a Second Chance*, 4 J.L. & POL'Y 719, 719-722 (1996) (stating that sexual abuse by juveniles has been on the rise in recent years).

5. Statistics are only given for a general idea of the prevalence of juvenile sexual offending in the United States. The reader should remember that statistical studies differ and incorporate a variety of factors. FRANKLIN E. ZIMRING, AN AMERICAN TRAVESTY 40 (2004). Furthermore, the reader should keep in mind that a large number of sexual crimes, including those involving children go unreported. *Id.* at 21.

6. *See* Howard E. Barbaree et al., *Sexual Assault in Society: The Role of the Juvenile Offender, in* THE JUVENILE SEX OFFENDER 1, 10 (Howard E. Barbaree et al. eds., 1993) (noting that before the 1980s, society predominantly viewed juvenile sex offenses as only a nuisance).

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ing attention.[7] In 2000, twenty-three percent of all sexual offenders were under the age of eighteen.[8] Forty percent of those offenders victimized children under the age of six.[9] In 2003, the Federal Bureau of Investigation (FBI) reported that of the 18,446 arrests made for forcible rapes, 1,108 of those arrested were under the age of fifteen and 2,966 were under the age of eighteen.[10] Most disturbing is the report that of those 18,446 arrested, twenty-eight were under the age of ten, 266 were between the age of ten and twelve, and 814 were ages thirteen to fourteen.[11] The report also showed that of the 63,759 arrests made for sexual offenses other than rape and prostitution, 6,531 of those arrested were under the age of fifteen and 12,747 were under the age of eighteen.[12] Of those arrested under the age of fifteen, 420 were under age ten, 1,873 were ages ten to twelve, and 4,238 were ages thirteen to fourteen.[13] Two commentators noted that "[t]he best available estimates claim that approximately twenty percent of all rapes and between thirty and fifty percent of all child molestations are perpetrated by adolescent males."[14]

Some studies report that, overall, juvenile arrest rates have decreased since the 1980s.[15] The FBI's Violent Crime Index reports arrest rates for the most serious crimes, such as murder, forcible rape, robbery, and aggravated assault.[16] In 2002, this report showed that, on average, juvenile arrests for these offenses had dropped by nineteen percent since 1998 to their lowest levels since 1980.[17] While these numbers are encouraging, a closer look at the statistics reveals that there has not been a significant drop in juvenile sexual offenses. Forcible rape arrests dropped fourteen percent from 1998-2002, but arrests for sex offenses other than forcible rape and prostitution increased nine percent during that same period.[18] In 2002, juveniles still

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7. *See* John A. Hunter, *Understanding Juvenile Sex Offenders: Research and Guidelines for Effective Management and Treatment*, JUV. FORENSIC EVALUATION RES. CTR. (2000), *available at* http://www.ilppp.virginia.edu/juvenile_forensic_fact_sheets/undjuvsexoff.html (stating that sexual aggression on the part of juveniles is a growing concern in American society and has been for the past decade).

8. WIS. COALITION AGAINST SEXUAL ASSAULT, CHILD SEXUAL ABUSE 1 (2000) (citing HOWARD N. SNYDER, U.S. DEP'T OF JUSTICE, SEXUAL ASSAULT OF YOUNG CHILDREN AS REPORTED TO LAW ENFORCEMENT: VICTIM, INCIDENT, AND OFFENDER CHARACTERISTICS 8 (2000)), *available at* http://www.wcasa.org/resources/factsheets/childsa.pdf.)

9. *Id.*

10. *See* FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES 2003, at 280 (2004), *available at* http://www.fbi.gov/ucr/cius_03/pdf/03sec4.pdf (table 38 identifies the number of arrests by age in 2003).

11. *Id.*

12. *Id.*

13. *Id.*

14. Earl F. Martin & Marsha Kline Pruett, *The Juvenile Sex Offender and the Juvenile Justice System*, 35 AM. CRIM. L. REV. 279, 287 (1998).

15. Howard N. Snyder, *Juvenile Arrests 2002*, JUV. JUST. BULL., Sept. 2004, at 1, *available at* http://www.ncjrs.org/pdffiles1/ojjdp/204608.pdf.

16. *Id.*

17. *Id.*

18. *Id.* at 3.

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made up twenty percent of arrests for sex offenses other than forcible rape and prostitution, and seventeen percent of arrests for forcible rapes.[19]

One study, by Howard Snyder of the National Center for Juvenile Justice, compiled data from the National Incident-Based Reporting System (NIBRS) to provide an interesting look at the age differences between juvenile offenders and juvenile victims.[20] This data suggested that children nine-years-old and younger constituted seventy-eight percent of the victims of ten-year-old and under offenders, but only thirteen percent of the victims of seventeen-year-old offenders were nine or younger.[21] Moreover, of all the victims under nine-years-old, sixty percent were victimized by offenders younger than fourteen and eighty-eight percent by offenders younger than fifteen.[22]

Not only are more and more juveniles committing sexual offenses, but their crimes are worsening in severity. For instance, in one 2004 case, a fourteen-year-old juvenile was adjudicated delinquent on two counts of aggravated sexual assault for an attack on a nine-year-old girl.[23] The victim's head and genital region were bruised.[24] Her injuries were severe enough to leave blood on her clothes and in her home.[25] The examining counselor described the fourteen-year-old as a power rapist.[26] In another case in Georgia, a sixteen-year-old was charged with raping two eight-year-olds, one of whom was his nephew.[27] The youth was sentenced as a child molester because the rapes allegedly occurred on several occasions over an extended period of time.[28]

An even more appalling case occurred in 2002.[29] A fourteen-year-old boy received a ten-year sentence for the rape and kidnapping of a twelve-year-old girl.[30] The offender punched the victim in the head until she lost consciousness.[31] Afterward, he dragged her two houses over, where he bound her to a pole, gagged her with her own clothing, raped her, and continued beating her on the head.[32]

Illustrations of this trend can be seen in Alabama in the first few months of 2003. In January of 2003, an Alabama boy, only twelve-years-old, was

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19. *Id.* at 4.
20. ZIMRING, *supra* note 5, at 46, 49.
21. *Id.* at 49.
22. *Id.*
23. *In re* K.K.D., No. 03-03-00702-CV, 2004 WL 1792399, at *1 (Tex. App. Aug. 12, 2004).
24. *Id.*
25. *Id.*
26. *Id.* Rapists are often classified according to shared characteristics. Generally, a power rapist is one whose crime is more about the power that he asserts over his victim, rather than the sex that he forces upon her. *See* Martha Chamallas, *Lucky: The Squeal*, IND. L.J. 441, 462 (2005).
27. Jane O. Hansen, *State Law Shields Child Sex Offenders*, ATLANTA J.-CONST., Mar. 30, 2003, at A1, *available at* 2003 WLNR 6209691.
28. *Id.*
29. Beth Warren, *Boy Sentenced to 10 Years for Rape Victim, 12, was Abducted Near Middle School*, ATLANTA J.-CONST., Nov. 21, 2003, at E4, *available at* 2003 WLNR 6225448.
30. *Id.*
31. *Id.*
32. *Id.*

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accused of involvement in the raping of a nine-year-old girl.[33] One month later, a fourteen-year-old Alabama boy was accused of raping a thirteen-year-old girl at their junior high school.[34] In April, also at a school, a fifteen-year-old Alabama boy was accused of raping a fourteen-year-old girl.[35]

To combat this problem in Alabama, two assistant district attorneys have proposed adding three new crimes to the Alabama Criminal Code.[36] The purpose of these new amendments is to lower the statutory age to facilitate the prosecution of a growing number of juvenile sexual offenders.[37] This Comment examines the need for this proposal through several key aspects. First, the proposed amendment will be compared to the current Alabama Criminal Code. Next, an overview of the juvenile justice system will be provided. Finally, the need for the proposed statute will be examined in relation to three concerns: the statutory age concern, the forcible compulsion concern, and a consideration of other state statutes regarding sexual offenses.

I. THE PROPOSED STATUTES VERSUS THE CURRENT ALABAMA CRIMINAL CODE

The three proposed crimes are rape in the third degree (Rape Three), sodomy in the third degree (Sodomy Three), and sexual abuse in the third degree (Sexual Abuse Three).[38] Currently in Alabama, there are only two degrees of each crime.[39] The proposal for Rape Three states that:

> A person commits the crime of rape in the third degree if the person, being less than 16 years old, but more than 12 years old, engages in sexual intercourse with a member of the opposite sex less than 12 years old; provided, however, the actor is at least two years older than the member of the opposite sex.[40]

Rape Three would be a Class C felony.[41] The proposal for Sodomy Three states that:

> A person commits the crime of sodomy in the third degree if the person, being less than 16 years old, but more than 12 years old,

33. *Police Arrest Twelve-Year-Old in Rape Case*, ASSOCIATED PRESS NEWSWIRE, Jan. 17, 2003.
34. Ken Spear, *Rape Allegation Examined*, MONTGOMERY ADVERTISER, Feb. 22, 2003, at B1.
35. *15-Year-Old Charged with Raping Classmate*, ASSOCIATED PRESS NEWSWIRE, Apr. 23, 2003.
36. Telephone Interview with Brandon Falls, Assistant District Attorney, Jefferson County, Ala. (Nov. 17, 2004) [hereinafter Interview].
37. *Id.*
38. *Id.*
39. *See* ALA. CODE § 13A-6-61 (1994 & Supp. 2004); ALA. CODE § 13A-6-62 (1994 & Supp. 2004); ALA. CODE § 13A-6-63 (1994); ALA. CODE § 13A-6-64 (1994); ALA. CODE § 13A-6-66 (1994); ALA. CODE § 13A-6-67 (1994 & Supp. 2004).
40. S. 124, 2005 Leg., Reg. Sess. (Ala. 2005), *available at* http://alisdb.legislature.state.al.us/acas/searchableinstruments/2005rs/bills/sb124.htm.
41. *Id.*

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> engages in deviate sexual intercourse with another person less than 12 years old; provided, however, the actor is at least two years older than the other person.[42]

Sodomy Three would also be a Class C felony.[43] Finally, the proposal for Sexual Abuse Three states that:

> A person commits the crime of sexual abuse in the third degree if the person, being less than 16 years old, but more than 12 years old, subjects another person to sexual contact who is less than 12 years old; provided, however, the actor is at least two years older than the other person.[44]

Sexual Abuse Three would be a Class B misdemeanor.[45] At the time of the writing of this Comment, all three statutes were pending in the Judiciary Committee of the Alabama Legislature.[46]

Currently in Alabama, both degrees of each of the three crimes have a statutory subsection.[47] Rape in the first degree is committed statutorily when a person, "16 years or older, engages in sexual intercourse with a member of the opposite sex who is less than 12 years old."[48] It is a Class A felony.[49] Rape in the second degree is committed when, "[b]eing 16 years old or older, [a person] engages in sexual intercourse with a member of the opposite sex less than 16 and more than 12 years old; provided, however, the actor is at least two years older than the member of the opposite sex."[50] Rape in the second degree is a Class B felony.[51]

Sodomy in the first degree carries with it the same statutory age as rape in the first degree.[52] The differences between the two statutes do not turn on age, but rather on the fact that only a male can be prosecuted for sodomy in the first degree, and the crime involves deviate sexual intercourse as opposed to the sexual intercourse necessary for statutory rape.[53] Sodomy in the first degree is a Class A felony.[54] Similarly, sodomy in the second degree has the same statutory ages as rape in the second degree with only a few

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42. *Id.* § 2(a).
43. *Id.*
44. *Id.* § 3(a).
45. *Id.*
46. *Id.*
47. *See* ALA. CODE § 13A-6-61(a)(3) (1994 & Supp. 2004); ALA. CODE § 13A-6-62(a)(1) (1994 & Supp. 2004); ALA. CODE § 13A-6-63(a)(3) (1994); ALA. CODE § 13A-6-64(a)(1) (1994); ALA. CODE § 13A-6-66(a)(3) (1994); ALA. CODE § 13A-6-67(a)(2) (1994 & Supp. 2004).
48. § 13A-6-61(a)(3).
49. *Id.* § 13A-6-61(b).
50. *Id.* § 13A-6-62(a)(1).
51. *Id.* § 13A-6-62(b).
52. *See id.* §§ 13A-6-61(a)(3), 63(a)(3).
53. § 13A-6-63(a)(3).
54. *Id.* § 13A-6-63(b).

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differences.[55] As with the first degree offense, only a male can be convicted of sodomy in the second degree, and it must involve deviate sexual intercourse. [56] Furthermore, the requirement of the two years age difference does not apply to sodomy in the second degree as it does to rape in the second degree.[57] Sodomy in the second degree is a Class B felony.[58]

Finally, sexual abuse in the first degree is committed when a male, "being 16 years old or older, subjects another person to sexual contact who is less than 12 years old."[59] Sexual abuse in the first degree is a Class C felony.[60] Sexual abuse in the second degree is committed when a male "being 19 years old or older, subjects another person to sexual contact who is less than 16 years old, but more than 12 years old."[61] Sexual abuse in the second degree is a Class A misdemeanor.[62] It can, however, become a Class C felony if the person commits sexual abuse in the second degree "within one year of another sexual offense."[63]

Under the current Alabama Criminal Code, only individuals over the age of sixteen can be convicted of statutory rape, sodomy, or sexual abuse.[64] There are other means—subsections that do not require that a statutory age be proven—by which individuals of any age may be prosecuted for rape, sodomy, or sexual abuse in Alabama.[65] These other statutes, in relation to the need for the proposed statutes, will be discussed. First, however, since the proposed statutes focus on juvenile sexual offenders, an overview of the juvenile justice system is provided.

II. THE JUVENILE JUSTICE SYSTEM

Around the turn of the twentieth century, juveniles were protected from adult court only by the "common law doctrine of infancy."[66] Later, though, a more paternalistic and protective approach to dealing with juvenile offenders began to develop.[67] This doctrine was referred to as *parens patriae* and stood for the idea that there should be a juvenile justice system that acted as the "juvenile's ultimate parent."[68] The new idea was rehabilitation, not punishment.[69] However, beginning in the 1970s and 1980s, there was a

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55. § 13A-6-62(a)(1); ALA. CODE § 13A-6-64(a)(1) (1994).
56. § 13A-6-64(a)(1).
57. *Id.*
58. *Id.* § 13A-6-64(b).
59. ALA. CODE § 13A-6-66(a)(3) (1994).
60. *Id.* § 13A-6-66(b).
61. ALA. CODE § 13A-6-67(a)(2) (1994 & Supp. 2004).
62. *Id.* § 13A-6-67(b).
63. *Id.*
64. *See* ALA. CODE § 13A-6-61 (1994 & Supp. 2004); ALA. CODE § 13A-6-62 (1994 & Supp. 2004); ALA. CODE § 13A-6-63 (1994); ALA. CODE § 13A-6-64 (1994); § 13A-6-66; § 13A-6-67.
65. *See* § 13A-6-61; § 13A-6-62; § 13A-6-63; § 13A-6-64; § 13A-6-66; § 13A-6-67.
66. Bree Langemo, Comment, *Serious Consequences for Serious Juvenile Offenders: Do Juveniles Belong in Adult Court?*, 30 OHIO N.U. L. REV. 141, 142-43 (2004).
67. *Id.* at 143.
68. *Id.*
69. *Id.*

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shift away from the goal of rehabilitation toward "justice system accountability and punishment."[70] This shift occurred, in large part, because the seriousness of juvenile offenses was increasing, sparking more and more public concern.[71] The shift toward tougher punishment and less rehabilitation, especially when mandated by the seriousness of an accused's offense, continues today.[72] Still, there are remnants of the *parens patriae* idea, and some continue to refer to the juvenile court as quasi-criminal. [73]

States have responded to juvenile crime in a number of ways.[74] For instance, an increasing number of individuals under eighteen-years-old are being processed as adults in the criminal courts and not as children in the juvenile courts.[75] This began in the late 1980s, if not earlier.[76] The number of juveniles transferred out of the juvenile system rose by forty-one percent (to 11,800) between 1989 and 1993.[77] Of those, twelve percent were fifteen-years-old or younger.[78]

Judicial waiver is a typical means for processing juveniles in the adult criminal courts.[79] Legislatures set boundary ages above which an individual will automatically be processed in adult court.[80] In most states, if there is probable cause to believe the juvenile defendant, under or at the boundary age, committed a serious offense and if the community's interests will be served by the waiver, a juvenile court judge may rule that the offender should be tried in adult criminal court.[81] It is worth noting here that "[t]he question of when a child ceases to be a child ha[s] been debated since the creation of the juvenile court."[82] Chronological age has historically been used to set somewhat of a bright-line rule for distinguishing between childhood and adulthood.[83] However, the difficult part is determining what that age will be.[84]

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70. *Id.* at 144.
71. *Id.*
72. *Id.*
73. F. LEE BAILEY & HENRY B. ROTHBLATT, HANDLING JUVENILE DELINQUENCY CASES § 1:5 (1982).
74. Barry C. Feld, *Legislative Exclusions of Juvenile Offenses from Juvenile Court Jurisdiction: A History and Critique*, *in* THE CHANGING BORDERS OF JUVENILE JUSTICE 83, 113 (Jeffrey Fagan & Franklin E. Zimring eds., 2000) ("[M]ore states have excluded at least some offenses from their juvenile courts' jurisdiction, lowered the ages of juveniles' eligibility for criminal prosecution, and then increased the numbers of offenses for which states may prosecute youths as adults.") (citations omitted).
75. *See* AM. BAR ASS'N CRIMINAL JUSTICE SECTION TASK FORCE ON YOUTH IN THE CRIMINAL JUSTICE SYS., YOUTH IN THE CRIMINAL JUSTICE SYSTEM: GUIDELINES FOR POLICYMAKERS AND PRACTITIONERS 1 (2001) [hereinafter YOUTH IN THE CRIMINAL JUSTICE SYSTEM].
76. *See* THOMAS JACOBS, CHILDREN AND THE LAW: RIGHTS AND OBLIGATIONS § 8:6 n.1 (2005), *available at* Westlaw, CALRO § 8:6.
77. *Id.*
78. *Id.*
79. Robert O. Dawson, *Judicial Waiver in Theory and Practice*, *in* THE CHANGING BORDERS OF JUVENILE JUSTICE, *supra* note 74, at 45, 45.
80. *Id.* at 47.
81. *Id.* at 45.
82. David S. Tanenhaus, *The Evolution of Transfer Out of the Juvenile Court*, *in* THE CHANGING BORDERS OF JUVENILE JUSTICE, *supra* note 74, at 13, 31.
83. *See id.* at 13.
84. *Id.* at 31.

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Another way courts have dealt with juvenile offenders is by lowering boundary ages for certain offenses[85] or "specifically exclud[ing] certain conduct from juvenile court treatment."[86] For instance, while the boundary age for juvenile court may be at seventeen or eighteen,[87] it may be lower based on the seriousness of the offense or whether the offender has had a prior adjudication.[88] Still, if the offender is very young, the offense must be more severe for the offender to be tried in adult criminal court.[89] Usually, offenses excluded from the juvenile justice system must be quite serious in nature.[90] If a juvenile is tried in adult court, options exist for sentencing, such as sentencing the offender as a juvenile, an adult, or a youthful offender.[91]

In Alabama, if an individual is under the age of eighteen and alleged to be delinquent, the juvenile court has original jurisdiction.[92] If the prosecutor then wishes to transfer the juvenile to adult criminal court, he or she can file a motion to request the transfer, provided that "the child was 14 or more years of age at the time of the conduct charged and is alleged to have committed an act which would constitute a crime if committed by an adult."[93] In deciding whether to grant the motion, the judge looks to such factors as the seriousness of the offense; the alleged offender's record, demeanor, and maturity; and the community's interest.[94] If, however, the juvenile is sixteen-years-old or older and is charged with certain serious offenses, he or she is not "subject to the jurisdiction of juvenile court but shall be charged, arrested, and tried as an adult."[95] Those offenses include capital murder; Class A felonies; felonies involving the use of a deadly weapon; felonies involving death or serious physical injury; drug trafficking; felonies involving the use of a dangerous instrument against certain people such as law enforcement officers, judicial officials, or employees of the education system; and the lesser included offenses of all of these crimes.[96] With this background in mind, the rationale for the proposed statutes and whether such rationales are justified will be discussed next.

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85. Dawson, *supra* note 79, at 47-48.
86. BAILEY & ROTHBLATT, *supra* note 73, § 1:33.
87. Dawson, *supra* note 79, at 47.
88. *Id.* at 48.
89. *Id.* at 61.
90. BAILEY & ROTHBLATT, *supra* note 73, § 1:33.
91. JACOBS, *supra* note 76, § 8:10.
92. ALA. CODE §§ 12-15-1, -30 (1995).
93. ALA. CODE § 12-15-34(a) (1995).
94. *Id.* § 12-15-34(d)(1)-(6).
95. ALA. CODE § 12-15-34.1(a) (1995).
96. *Id.* § 34.1(a)(1)-(7).

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III. THE NEED FOR RAPE THREE, SODOMY THREE, AND SEXUAL ABUSE THREE

A. The Statutory Age Consideration

The most obvious rationale for the proposed statutes is that something must be done when a child is raped, sodomized, or sexually abused, even if the offender is a juvenile.[97] Rape and sodomy in the first degree already have statutory subsections.[98] To be convicted under those subsections, the offender must be sixteen or older and the victim must be younger than twelve-years-old.[99] Rape and sodomy in the second degree also have similar statutory subsections.[100] For rape in the second degree, the offender must be sixteen or older and the victim must be "less than 16 and more than 12 years old," with the offender being "at least two years older,"[101] whereas the two-year age difference is not required with sodomy.[102] The statutory subsection for sexual abuse in the first degree provides that the offender must be sixteen or older, and the victim must be younger than twelve-years-old.[103] Finally, the statutory subsection for sexual abuse in the second degree is that the offender must be nineteen or older, and the victim must be younger than sixteen but older than twelve.[104] The obvious issue here is that there is no statutory subsection for an offender who is younger than sixteen-years-old. The proposed statutes are intended to fill that vacancy. The question is whether they should.

One concern that arises is the relationship between a juvenile's culpability and his or her capacity to consent to sex.[105] One reason for the juvenile justice system is that juveniles, because of their age and development, are less culpable for certain acts than adults.[106] The purpose of statutory rape laws is to protect children under a certain age.[107] As the Mississippi Supreme Court commented, "At the heart of these statutes is the core concern that children should not be exploited for sexual purposes regardless of their

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97. Interview, *supra* note 36.
98. *See* ALA. CODE § 13A-6-61(a)(3) (1994 & Supp. 2004); ALA. CODE § 13A-6-63(a)(3) (1994).
99. *See* § 13A-6-61(a)(3); § 13A-6-63(a)(3).
100. ALA. CODE § 13A-6-62(a)(1) (1994 & Supp. 2004); ALA. CODE § 13A-6-64(a)(1) (1994).
101. § 13A-6-62(a)(1).
102. § 13A-6-64(a)(1).
103. ALA. CODE § 13A-6-66(a)(3) (1994).
104. ALA. CODE § 13A-6-67(a)(2) (1994 & Supp. 2004).
105. Interview, *supra* note 36; *see also* Feld, *supra* note 74, at 84 ("Waiver laws attempt to reconcile the conflicted impulses engendered when the child is a criminal and the criminal is a child and the cultural contradictions between adolescent immaturity and criminal responsibility."); YOUTH IN THE CRIMINAL JUSTICE SYSTEM, *supra* note 75, at 3 (finding that cases involving younger children involve complicated issues of "competency and culpability").
106. *See* ZIMRING, *supra* note 5, at 103; *see also* Laurence Steinberg & Elizabeth Cauffman, *A Developmental Perspective on Jurisdictional Boundary*, *in* THE CHANGING BORDERS OF JUVENILE JUSTICE, *supra* note 74, at 379, 381 ("The ways we interpret and apply laws should rightfully vary when the case at hand involves a defendant whose understanding of the law is limited by intellectual immaturity or whose judgment is impaired by emotional immaturity.").
107. Collins v. State, 691 So. 2d 918, 924 (Miss. 1997).

'consent'. [sic] They simply cannot appreciate the significance or the consequences of their actions."[108] However, the idea that juveniles are incapable of consenting to sex below a certain age and yet can instigate a sexual crime is somewhat anomalous.[109]

Not only can the proposed statutes be used to prosecute consensual sex between two minors, but it can also, more importantly, be used to prosecute non-consensual sex between two minors. The need to use a statutory sexual offense statute to prosecute non-consensual sex is necessary in these cases because of the lack of available alternatives.[110] It is imperative, therefore, to consider the "competency and culpability" of juveniles when looking at the need for the proposed statutes.[111]

The Supreme Judicial Court of Massachusetts presented a helpful discussion regarding the differences in the capacity to commit a crime and the capacity to consent to sex in relation to a rape charge. In *Commonwealth v. Walter*,[112] a thirteen-year-old juvenile defendant was charged with raping and abusing an eleven-year-old victim.[113] The juvenile court sent three questions to the appeals court, but the supreme court took up the questions on its own initiative.[114] Among the questions was "[w]hether the common law presumption that a child under the age of fourteen [was] conclusively presumed incapable of committing rape as defined at common law" applied in Massachusetts.[115] The court held that, in Massachusetts, the common law presumption was not applicable, based in part on the fact that precedent in Massachusetts had never adopted the presumption.[116]

The court went on, however, to note the rationale for the presumption: (1) during the time of English common law, the age of puberty, and thus of the ability to have sex, was fourteen; and (2) it protected those fourteen-years-old and under from the common law penalty of death.[117] Clearly, the second rationale is irrelevant because the Supreme Court recently held that an individual under the age of eighteen at the commission of a crime cannot be executed.[118] Concerning the first rationale, the court stated that "[t]o the extent the common law presumption rested on an assumption that males under the age of fourteen were not sexually mature, current medical information suggests otherwise."[119] The court further noted that the age of puberty has dropped over time and is now around ten to twelve years of age.[120]

108. *Id.*
109. *See* Interview, *supra* note 36.
110. *Id.*
111. YOUTH IN THE CRIMINAL JUSTICE SYSTEM, *supra* note 75, at 3 (finding that cases involving younger children involve complicated issues of "competency and culpability").
112. 610 N.E.2d 323 (Mass. 1993).
113. *Id.* at 323.
114. *Id.* at 323-24.
115. *Id.*
116. *Id.* at 325.
117. *Id.* at 324.
118. Roper v. Simmons, 125 S. Ct. 1183, 1200 (2005).
119. *Walter*, 610 N.E.2d at 325 (citing STEDMAN'S MEDICAL DICTIONARY 1289 (25th ed. 1990)).
120. *Id.* (citing S.R. AMBRON & N.J. SALKIND, CHILD DEVELOPMENT 468 (4th ed. 1984)).

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In essence, the court reasoned that the thirteen-year-old was capable of committing a sex crime based either on his legal culpability or his mental maturity.

In considering the delinquency proceedings of *Gammons v. Berlat*,[121] the Arizona Supreme Court refused to apply the rebuttable presumption of incapacity to commit a crime for children under fourteen-years-old found in Arizona's criminal code. The thirteen-year-old defendant was tried for sexually abusing a minor. The court reasoned "that the juvenile code has its own capacity provision,"[122] and "the legislature intended to provide a different standard to be applied in juvenile cases."[123]

On the other side of the coin, however, commentators urge that "children are not simply miniature adults" and must not be treated as such.[124] The American Bar Association, for instance, recognizes that when juveniles are punished in any kind of facility, the different needs of juveniles regarding housing, education, and mental health should be taken into account,[125] especially when the juvenile is a sex offender.[126] This is because juveniles are not on the same developmental, emotional, or physical level as adults.[127]

Many juveniles lack certain characteristics to warrant full accountability.[128] There is the concern that juveniles will be convicted of a crime or adjudicated a delinquent before he or she is "developmentally mature."[129] Moreover, it is interesting to note that no person under sixteen can have a diagnosable sexual disorder under the DSM-IV, the Diagnostic and Statistical Manual of Mental Disorders adopted by the American Psychiatric Association.[130] It is unlikely that many juveniles will be diagnosed as pedophiles, for example, even if the victim is rather young.[131] The lack of emotional or intellectual maturity should be considered when applying sexual offenses to juveniles.[132]

Juveniles are also developmentally different from one another, "even during the same stage of development."[133] Juveniles of similar ages may have completely different intellectual, emotional, or maturity levels, and one may be much more capable of committing a sexual offense than another

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121. 696 P.2d 700, 704 (Ariz. 1985).
122. *Id.* at 703.
123. *Id.* at 704.
124. YOUTH IN THE CRIMINAL JUSTICE SYSTEM, *supra* note 75, app. B, at 39.
125. *Id.* at 7.
126. *Id.* at 21 ("Administrative staff and people in policy making positions dealing with [incarcerated youth] should have education, training, and experience regarding the distinctive characteristics of children and adolescents.").
127. *Id.* at 33.
128. Steinberg & Cauffman, *supra* note 106, at 398.
129. *Id.* at 381.
130. ZIMRING, *supra* note 5, at 65 (citing the AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 572 (2000), which states that there is no sexual conduct-based disorder unless "[t]he person is at least 16 years of age and at least 5 years older than the prepubescent child or children").
131. *Id.* at 140.
132. Steinberg & Cauffman, *supra* note 106, at 381.
133. YOUTH IN THE CRIMINAL JUSTICE SYSTEM, *supra* note 75, app. B, at 39.

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of a similar age.[134] Not only do developmental stages vary *among* individual juveniles, but they vary *within* an individual juvenile.[135] For example, an individual juvenile may be mature physically but lack emotional or moral maturity, and some children even go through periods of developmental progress only to later regress on some level.[136]

There is research to suggest that nine-year-olds can engage in intentional behavior and differentiate between right and wrong.[137] Other research suggests that juveniles fourteen and older can make rational adult-like decisions regarding medical treatment, suggesting that adolescents have "the potential for logical reasoning and competent decision making."[138] Furthermore, some have recommended that the age of fifteen should be set as the age at which juveniles have the capacity to consent to issues of reproductive health, such as contraceptive use and abortion.[139]

In Alabama, an individual under sixteen-years-old is legally incapable of consenting to sex.[140] Nevertheless, the apparent contradiction between a juvenile's legal inability to consent to sex and his or her ability to perpetrate a sexual crime becomes effectively meaningless, when viewed in light of two important considerations. First, sexual abuse between young individuals "often involves children of different ages, or different levels of power, knowledge, and resources."[141] If such is the case, even a youth could coerce another more vulnerable youth into non-consensual sexual activity.[142] Juveniles preying on younger children can go as far as bribing, coercing, or threatening a younger child into compliance.[143] Prosecutors and juvenile court judges have the ability to take into account the individual juvenile and his or her particular level of developmental maturity. So, taking prosecutorial discretion into account with the available research lessens the likelihood that an immature juvenile (by common standards) would be seen as incapable of consenting to sex.

Second, juveniles can be charged with a sexual crime—or any other crime—regardless of whether there is a statutory age requirement. A juvenile can be charged with rape under a forcible compulsion theory notwithstanding his or her inability to legally consent to sex. If the apparent contradiction argument prevailed, all Alabama sexual offenses would have to be reconsidered.

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134. *See id.* at 39, 41.
135. Steinberg & Cauffman, *supra* note 106, at 384.
136. *Id.*
137. *Id.* at 398 (citing J. Rest, *Morality*, *in* 3 HANDBOOK OF CHILD PSYCHOLOGY 501-02 (John H. Flavell & Ellen. Markman eds., 4th ed. 1983)).
138. HYMAN RODMAN ET AL., THE SEXUAL RIGHTS OF ADOLESCENTS: COMPETENCE, VULNERABILITY, AND PARENTAL CONTROL 83, 85 (1984).
139. *Id.* at 135-36.
140. ALA. CODE § 13A-6-70(c)(1) (1994).
141. CYNTHIA CROSSON-TOWER, WHEN CHILDREN ARE ABUSED 78 (2002).
142. *See id.* at 77-78.
143. Hunter, *supra* note 7.

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Normal and abnormal juvenile sexual conduct must nevertheless be differentiated.[144] Some reports allege that juvenile sexual experiences progress over time in an orderly manner.[145] Juveniles are having consensual sexual intercourse at young ages.[146] However, the fact that there is societal acceptance of some juvenile sexual conduct should not justify a lack of criminal penalties for certain juvenile misconduct. While some juvenile sexual conduct can be seen as harmless experimentation, "a tendency toward experimentation . . . may lead to risky and antisocial behavior."[147] Additionally, some research suggests that a significant number of juvenile sexual offenders first engaged in normal sexual behavior.[148]

Given these concerns, establishing a statutory age for any offense that addresses all developmental concerns is clearly impossible.[149] This does not mean, however, that age is not highly relevant to policy decisions, such as whether to adopt the proposed statutes.[150] The age and developmental concerns of juveniles are best accounted for in the discretionary practices of arresting, prosecuting, and trying of these sexual offenses.

Furthermore, the age and developmental stages of juveniles must be balanced against the need to protect the public. After all, the basic function of the criminal justice system is to protect society.[151] This need to protect society cannot be neglected simply because the individuals that society is being protected from are juveniles. For instance, the emphasis in Alabama on the community's well-being is apparent in other aspects of juvenile-related crimes. The Honorable Judge Sandra Ross Storm in Jefferson County created a successful gun court, which was designed to and has been successful in protecting, the public against juvenile, gun-related violence.[152] Even the Alabama Juvenile Justice Act acknowledges that the purpose of the juvenile court is "to facilitate the care, protection and discipline of children who come within the jurisdiction of the juvenile court, while acknowledging the responsibility of the juvenile court to preserve the public peace and security."[153]

144. Victor I. Vieth, *When the Child Abuser is a Child: Investigating, Prosecuting and Treating Juvenile Sex Offenders in the New Millennium*, 25 HAMLINE L. REV. 47, 55 (2001).
145. ZIMRING, *supra* note 5, at 52.
146. *See id.*
147. YOUTH IN THE CRIMINAL JUSTICE SYSTEM, *supra* note 75, at 43; *see also* ZIMRING, *supra* note 5, at 125 ("The general calculus . . . is the same as that used in any other delinquency case of any seriousness: balancing a commitment to normal youth development against considerations of [just] desert and personal dangerousness.").
148. Martin & Pruett, *supra* note 14, at 283 (citing Judith V. Becker, *Adolescent Sexual Offenders: Demographics, Criminal and Sexual Histories, and Recommendations for Reducing Future Offenses*, 1 J. INTERPERSONAL VIOLENCE 431, 441-43 (1986)).
149. *See* Steinberg & Cauffman, *supra* note 106, at 384.
150. *See id.* at 385.
151. YOUTH IN THE CRIMINAL JUSTICE SYSTEM, *supra* note 75, at 3.
152. THE SENTENCING INST., ALABAMA'S JUVENILE JUSTICE SYSTEM: FINDINGS AND RECOMMENDATIONS FOR THE FUTURE 20-21 (1999) [hereinafter THE SENTENCING INST.].
153. ALA. CODE § 12-15-1.1 (1995).

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There is also the concern that without some kind of serious consequences, juveniles will continue to commit more and more sexual offenses.[154] One therapist who treats those convicted of sexual assault noted that juvenile sexual offenders openly admit that they are not afraid of committing crimes because there are no consequences.[155] Further, there is the danger that the offender's conduct will only become more severe when they reach adulthood if some form of treatment or punishment is not implemented in their youth.[156] Jan Hindman and James M. Peters summarized results from research studies, using polygraph techniques to verify self-reports of both juvenile and adult sexual offenders.[157] Generally, they concluded that the adults were not only lying about the number of offenses they committed as adults, but were also lying about the number of offenses they committed as juveniles.[158]

The need for public safety must further be balanced with concerns for the juvenile's well-being. Negative repercussions are possible with the proposed statutes, especially if they are used overzealously. Consequences such as the juvenile being labeled indefinitely and rejected by his or her peers, as well as the use of interrogation or detention techniques inappropriate for younger offenders, are all real possibilities.[159] Moreover, even younger sexual offenders may have to register as sex offenders.[160] Also, some studies show that typical juvenile sexual recidivism rates are not high,[161] but when juveniles are transferred to the adult criminal system, they "recidivate at higher rates and with more serious offenses than youth who have committed similar offenses but are retained in the juvenile justice system."[162] Furthermore, if a juvenile is confined in an adult facility, some studies report that he or she will be more likely to be physically or sexually attacked or to commit suicide.[163]

Treatment programs for juvenile sexual offenders have proven, in many cases, to be advantageous both for juveniles and for communities.[164] Many

154. *See* Larry R. Abrahamson, *The Need to Get Back to Basics in Juvenile Justice*, *in* PROSECUTOR, Mar.-Apr. 1999, at 28, 29 (1999); *see also* Harry L. Shorstein, *Statement on Juvenile Justice*, *in* THE SENTENCING INST., *supra* note 152, at L-15; Richard E. Redding & James C. Howell, *Blended Sentencing in American Juvenile Courts*, *in* THE CHANGING BORDERS OF JUVENILE JUSTICE, *supra* note 74, at 146 ("Many believe juvenile court sanctions are neither certain nor severe enough (with sanctions like probation and short periods of confinement) to deter serious delinquents from reoffending.") (citations omitted).

155. Abrahamson, *supra* note 154, at 28-29.

156. Martin & Pruett, *supra* note 14, at 332.

157. Jan Hindman & James M. Peters, *Polygraph Testing Leads to Better Understanding Adult and Juvenile Sex Offenders*, 65 FED. PROBATION 8, 8 (2001).

158. *Id.* at 14.

159. Vieth, *supra* note 144, at 56.

160. ZIMRING, *supra* note 5, at 6, 11-13 (criticizing, for example, Idaho's juvenile notification statute, which adopted the adult statute and only replaced the word "adult" with the word "juvenile," failing to consider the special needs of juveniles).

161. *Id.* at 119.

162. YOUTH IN THE CRIMINAL JUSTICE SYSTEM, *supra* note 75, at 26.

163. *See* Feld, *supra* note 74, at 119.

164. Rothchild, *supra* note 4, at 758.

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in Alabama generally view treatment as the most beneficial route for juvenile offenders, with incarceration or other stricter punitive sanctions only utilized after all treatment options have failed.[165] One of the goals of the Alabama Juvenile Justice Act is "[t]o hold a child found to be delinquent accountable for his or her actions . . . and to provide a program of supervision, care, and rehabilitation."[166] While some adequate treatment programs exist in the state, more need to be developed.[167] Still, juvenile sexual offenders may never get the treatment they need if there is no statute to bring them into the system,[168] as few individuals in need of such treatment will voluntarily seek it.[169] Further, court supervision is often vital in ensuring that the juvenile sexual offender completes all treatment requirements.[170]

Although the adequacy of scientific evidence regarding the effectiveness of treatment for juvenile sexual offenders continues to be debated,[171] much of the research indicates success.[172] Researchers have created seven categories to classify juvenile sexual offenders.[173] First, naïve experimenters are those youths, typically between the ages of eleven and fourteen, who act out of curiosity and are unlikely to use force.[174] Second, undersocialized abusers are those who look to younger children for acceptance and affection.[175] Third, pseudosocialized abusers are often narcissistic and manipulative, often seeking out victims to regain a sense of control in their own lives.[176] Fourth, sexually compulsive abusers are often motivated by anxiety and plan their offenses, although the offenses may be acts such as obscene phone calls and not always actual sexual contact.[177] Fifth, some young offenders are influenced by a group of deviant peers.[178] Sixth, young, sexually aggressive abusers exhibit characteristics much like an adult power rapist. They often have "poor impulse control, anger and rage, a need to have

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165. THE SENTENCING INST., *supra* note 152, at 3-4.

166. ALA. CODE § 12-15-1.1(7) (1995).

167. THE SENTENCING INST., *supra* note 152, at 3-4. One adequate treatment program in the state for juvenile sex offenders is ASK, the Accurate Sexual Knowledge Program, a four-week program designed to educate juvenile sex offenders on topics such as growth and development, diseases, decisionmaking, and legal issues. *Id.* at 11-12.

168. *Id.* at 32 ("To the extent that intervention and intermediate sanctioning programs remain unavailable, juvenile court judges will be limited in their ability to order juveniles to participate in community-based programs, and there will be a continued over-reliance on state juvenile detention facilities.").

169. William D. Murphy, *Management and Treatment of the Adult Sexual Offender*, *in* SEXUALIZED VIOLENCE AGAINST WOMEN AND CHILDREN: A PSYCHOLOGY AND LAW PERSPECTIVE 221 (B.J. Cling ed., 2004).

170. Hunter, *supra* note 7.

171. *See* Murphy, *supra* note 169, at 231.

172. *See* CYNTHIA CROSSON-TOWER, UNDERSTANDING CHILD ABUSE AND NEGLECT 142 (6th ed. 2005); *The Effective Legal Management of Juvenile Sexual Offenders*, ASS'N TREATMENT SEXUAL ABUSERS (2000), http://www.atsa.com/ppjuvenile.html.

173. CROSSON-TOWER, *supra* note 172, at 141.

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

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power or to dominate, and a myriad of other antisocial behaviors."[179] Finally, disturbed impulsive abusers are likely to be mentally impaired due to illness or injury and come from a dysfunctional home life.[180]

Research suggests that at least some treatment options reduce the risk of recidivism. For example, relapse prevention models, which focus on the individual's own motivations and empower him or her with tools to control those motivations, have proven to be successful.[181] Also, individualized therapy, especially when combined with family-centered treatment, has demonstrated effective results.[182] Another study of young sexual offenders found "that treated offenders showed a decrease in deviant arousal, more internalized locus of control, fewer cognitive distortions, and an improved ability to cope with potential relapse situations."[183] The Association for the Treatment of Sexual Abusers (ATSA) promotes policies that balance punitive sanctions with treatment interventions.[184] The ATSA "encourages the prosecution and adjudication of adolescent sexual offenders in the juvenile courts," while adhering to the idea that juvenile sexual offenders will benefit from effective treatment options.[185]

Some studies propose that certain juvenile sexual aggression simply ends as the juvenile reaches adulthood.[186] However, other studies have shown that, on average, the "statistically significant effects [of intervention programs are] equivalent to about a twelve percent reduction in subsequent reoffense rates" for serious juvenile offenders.[187] Of these intervention programs, the best "were capable of reducing recidivism rates by as much as forty percent, an accomplishment of considerable practical value in terms of the expense and social damage associated with the delinquent behavior of . . . juveniles."[188] These numbers represent an offending population that covers all serious juvenile offenders, not just those that commit sexual offenses. However, such studies provide further support for the proposed statutes by highlighting the far-reaching importance of treatment for juvenile offenders. One report has suggested a seven to thirteen percent recidivism rate for certain juvenile sexual offender treatment programs, while "rates of non-sexual recidivism are generally higher (25-50%)."[189]

179. *Id.*
180. *Id.*
181. *Id.* at 332.
182. *Id.* at 336; *see also* Carrie J. Petrucci & Albert R. Roberts, *Principles and Evidence of the Effectiveness of Family Treatment*, *in* JUVENILE JUSTICE SOURCEBOOK 340 (Albert R. Roberts ed., 2004) (reporting that family treatment is often an effective means to reduce recidivism).
183. *See* CROSSON-TOWER, *supra* note 172, at 336.
184. *See The Effective Legal Management of Juvenile Sexual Offenders*, *supra* note 172.
185. *Id.*
186. Hunter, *supra* note 7.
187. Mark W. Lipsey & David B. Wilson, *Effective Intervention for Serious Juvenile Offenders: A Synthesis of Research*, *in* SERIOUS & VIOLENT JUVENILE OFFENDERS 338 (Rolf Loeber & David P. Farrington eds., 1998).
188. *Id.*
189. Hunter, *supra* note 7.

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Opponents of statutory rape statutes often argue that such statutes are ineffective because they too often condemn consensual sexual contact between two individuals close in age, such as an eighteen-year-old boy and his sixteen-year-old girlfriend.[190] Statutory rape offenses have been described by one commentator as "predation without force" because of its goal of criminalizing sexual conduct with young individuals deemed incapable of consenting to sex.[191] Even opponents of statutory rape statutes cannot effectively argue with the goal of criminalizing the sexual predation of older individuals on young children. As one commentator pointed out, statutory rape laws often criminalize conduct that does not rise to the level of forcible rape.[192] There is evidence to suggest that most statutory rape prosecutions, whether the offender is an adult or a juvenile, are used to prosecute non-consensual sexual encounters. For example, one commentator conducted a Westlaw search for cases between January 1, 1996 and March, 31, 1996 for charges of "statutory rape," resulting in 272 cases.[193] In only seven percent of those cases did both the victim and the offender claim that the relationship was consensual.[194] Specifically in relation to juvenile offenders, there is NIBRS research suggesting that consensual sex activities are less likely to be prosecuted than non-consensual activities.[195] This research, combined with the lack of available alternatives discussed in the following section, lends support to the effectiveness of the proposed statutes.

B. The Forcible Compulsion Consideration

Another rationale for the proposed statutes relates to the lack of available alternatives for prosecuting juvenile sexual offenders in Alabama when the facts of the case do not constitute "forcible compulsion."[196] Forcible compulsion is defined by the Alabama Criminal Code as "[p]hysical force that overcomes earnest resistance or a threat, express or implied, that places a person in fear of immediate death or serious physical injury to himself or another person."[197] Thus, there are two ways to show forcible compulsion. First, in order to prove earnest resistance, there must be "some 'genuine physical effort . . . [by the victim] to prevent her assailant from accomplishing his intended purpose.'"[198]

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190. *See, e.g.*, Heidi Kitrosser, *Meaningful Consent: Toward a New Generation of Statutory Rape Laws*, 4 VA. J. SOC. POL'Y & L. 287 (1997); Michelle Oberman, *Turning Girls Into Women: Re-Evaluating Modern Statutory Rape Law*, 8 DEPAUL J. HEALTH CARE L. 109 (2004); Michelle Oberman, *Regulating Consensual Sex with Minors: Defining a Role for Statutory Rape*, 48 BUFF. L. REV. 703 (2000).

191. ZIMRING, *supra* note 5, at 17.

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

193. *Id.* at 747.

194. *Id.*

195. *Id.* at 746-47.

196. Interview, *supra* note 36.

197. ALA. Code § 13-A-6-60(8) (1994).

198. Powe v. State, 597 So. 2d 721, 721 (Ala. Crim. App. 1991) (quoting Rider v. State, 544 So. 2d

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In describing the force required as "relative," the Court of Criminal Appeals of Alabama has held that "[t]he force required to consummate the crime against a mature female is not the standard for application in a case in which the alleged victim is a child thirteen years of age."[199] But, neither is the standard the same when the offender is a mature adult as when the offender is a juvenile.[200] It has been suggested that Alabama courts have essentially created a counter-intuitive, higher standard when the offender is a juvenile, making forcible compulsion convictions much more difficult.[201] When the offender is an adult, it seems that the victim has to fight back less than when the offender is a juvenile.[202]

There seems to be a universal lack of "contemporary writing on juvenile sex offenders by academic specialists in juvenile justice or juvenile court judges."[203] This is especially true in Alabama where there is an unfortunate lack of case law to provide guidance concerning juvenile sexual offenders.[204] One of the rare reported cases is the Alabama Supreme Court decision of *Ex parte J.A.P.*,[205] in which a juvenile was charged with a sexual crime based on forcible compulsion. The fourteen-year-old defendant was charged with attempted first-degree rape of his nine-year-old half sister.[206] He allegedly showed the nine-year-old victim a pornographic video, attempted to have sex with her, and instructed her not to tell. The victim testified that she felt like J.A.P. made her watch the video and that she was afraid of him.[207] J.A.P. testified that he stopped his attempt to penetrate her when she began to cry.[208] The Alabama Supreme Court reversed the appeals court's determination that there was sufficient evidence to prove forcible

994, 996 (Ala. Crim. App. 1989), *cert. denied*, 544 So. 2d 997 (Ala. 1989) (ellipsis and brackets in original).

199. Pittman v. State, 460 So. 2d 232, 235 (Ala. Crim. App. 1984).

200. Interview, *supra* note 36.

201. *Id.*

202. *See* Parrish v. State, 494 So. 2d 705, 712-13 (Ala. Crim. App. 1985) (finding that in analyzing whether forcible compulsion exists in the case of a child victim, the totality of the circumstances must be looked at, and in this case, the factors held determinative were that the victim was twelve-years-old and pretended to be sleeping and the offender, an adult who had been drinking, entered the victim's bedroom and held her leg down with his foot); *Pittman*, 460 So. 2d at 234-35 (finding that there was enough evidence of forcible compulsion to present a jury question even where there was evidence that the thirteen-year-old victim "rolled over" at her mother's request so her step-father could rape her); *Ex parte* J.A.P., 853 So. 2d 280, 281 (Ala. 2002) (finding the evidence insufficient to prove forcible compulsion even though the defendant was fourteen-years-old, the victim was nine-years-old, and the victim testified that she was afraid of the defendant and felt like he made her watch a pornographic video).

203. ZIMRING, *supra* note 5, at 112.

204. It is important to keep in mind that the cases discussed in this Comment represent cases which were prosecuted, appealed, and reported. Due to Alabama privacy laws regarding juveniles, there may be no way to determine the actual number of cases involving juveniles charged with sexual offenses. *Cf.* ALA. CODE § 12-15-65 (1995). When a juvenile offender pleads true, or the juvenile version of guilty, the case is rarely appealed and thus not reported. However, it is the reported cases that guide attorneys and set precedents for future cases.

205. 853 So. 2d 280 (Ala. 2002).

206. J.A.P. v. State, 853 So. 2d 264, 266 (Ala. Crim. App. 2001), *rev'd and remanded to* 853 So. 2d 280 (Ala. 2002) (stating facts of case).

207. *Id.*

208. *Id.* at 266-67.

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compulsion.[209] The appeals court relied on *B.E. v. State*,[210] a case in which the Court of Criminal Appeals extended the limited holding of *Powe v. State*'s[211] adult-to-child forcible compulsion analysis to a juvenile offender.[212] Because the Alabama Supreme Court disagreed with that decision, it overruled *B.E.*[213] On remand, the judgment was reversed.[214]

In *Powe*, the Alabama Supreme Court held that the second kind of forcible compulsion, the implied threat, can be met when an adult offender holds a position of trust in regard to a child victim.[215] This rationale is based on "the great influence and control that an adult who plays a dominant role in a child's life may exert over the child."[216] The court went on to note that "the child may submit to the acts because the child assumes the conduct is acceptable or because the child does not have the capacity to refuse."[217] However, that holding does not extend to cases where the offender is a juvenile, as the Alabama Supreme Court reaffirmed in *J.A.P.*[218]

The most recent reported case involving the prosecution of a juvenile under a forcible compulsion theory is the Court of Criminal Appeals of Alabama case of *C.M. v. State*.[219] The fifteen-year-old appellant was adjudicated delinquent for, among other things, two counts of sexual abuse in the first degree, where the victims were a five- and a four-year-old girl.[220] The evidence revealed that both girls were over at a friend's house. The friend's mother saw the five-year-old victim make some inappropriate gestures towards the appellant's private areas. When the friend's mother called out to the victim, she ran in the house crying and stating that the appellant "made [her] do it."[221] She further testified that he took a toy away from her, said he would return it if she would "lick his 'pee pee'" and that she saw the appellant pull down the four-year-old victim's pants and touch her with his hand and genitals.[222] Both girls told a Sheriff's Department investigator that they were afraid of the appellant, but only the five-year-old victim told the investigator that she tried to tell the appellant no and that she knew he was stronger and bigger than she was.

The court rejected the State's argument that there was forcible compulsion through an implied threat because the threat of taking away the toy was not sufficient, nor was the victims' fear of the appellant enough to show the

209. *Ex parte J.A.P.*, 853 So. 2d at 281.
210. B.E. v. State, 778 So. 2d 863 (Ala. Crim. App. 2000).
211. 597 So. 2d 721 (Ala. 1991).
212. *B.E.*, 778 So. 2d at 866.
213. *Ex parte J.A.P.*, 853 So. 2d at 284.
214. *Id.* at 285.
215. *Id.* at 728.
216. *Id.*
217. *Id.* at 279.
218. 853 So. 2d 280, 284 (reaffirming that the *Powe* "holding [is] extremely narrow").
219. 889 So. 2d 57 (Ala. Crim. App. 2004).
220. *Id.* at 59.
221. *Id.*
222. *Id.*

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fear of death or serious injury.[223] The court further rejected the State's argument that *Powe*'s holding regarding the relationship that exists when a defendant "plays an authoritative role" should apply.[224]

The court went on to state that "[b]ecause the victims in this case were children, the level of physical force and earnest resistance that is necessary to establish forcible compulsion is dependent upon the totality of the circumstances."[225] Furthermore, it said that "when determining whether there was earnest resistance, the relative strength of the victim and the defendant, the victim's age, the victim's physical and mental condition, and the degree of force employed must be considered."[226]

Reaching an almost inconceivable result, the court concluded that there was sufficient evidence to prove forcible compulsion with regard to the five-year-old victim, but not enough with regard to the four-year-old victim.[227] The court reasoned that because the five-year-old victim, *considering her age and size*, told the appellant no and described him as bigger and stronger than herself, and because the appellant told her to keep the incident a secret, there was enough evidence to prove earnest resistance.[228] There was also some evidence of a minor physical injury.[229] Yet, even considering the fact that the other victim was only four-years-old and also smaller than and scared of the appellant, the court found that there was not sufficient evidence to prove forcible compulsion in her case.[230] The dissent disagreed, stating that "[b]ased on the differences between the appellant's and [four-year-old victim's] ages and sizes; [her] statement that the appellant 'made' her perform the acts; [her] obvious dislike for what happened; and the fact that the acts certainly were not consensual, the State established forcible compulsion."[231] Considering such conduct as occurred in *C.M.*, surely there must be some avenue for prohibiting fifteen-year-olds from sexually preying on much younger victims.

There is not enough information in *C.M.*'s opinion to know precisely what occurred during the interview with the Sheriff's Department investigator, but the differences in the two girls' testimonies could have been caused by a lack of communication with the investigator. Further, both accounts may not have been complete due to the limited ability of both victims to express what happened, their limited ability to understand what happened, or both. For instance, at Birmingham's Prescott House, forensic interviewers interview young children who have been sexually abused because, more

223. *Id.* at 63.
224. *Id.* at 63 n.3.
225. *Id.* at 64 (citing Parrish v. State, 494 So. 2d 705, 709 (Ala. Crim. App. 1985)).
226. *Id.* at 64 (citing Richards v. State, 475 So. 2d 893, 895 (Ala. Crim. App. 1985)).
227. *Id.* at 66-67.
228. *Id.*
229. *Id.* at 66.
230. *Id.* at 66-67.
231. *Id.* at 67 (Baschab, J., concurring in part and dissenting in part).

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often than not, the information that the child gives depends on how the question is asked.[232]

Experts continue to debate the extent to which a child can accurately report abuse they have experienced.[233] Still, research has shown that even young children know and can accurately report when they have experienced some form of sexual abuse.[234] However, in order to be accurate, children must be properly interviewed.[235] When interviewing a child concerning abuse, it is important to remember that children differ from adults on many levels.[236] Children express themselves differently than adults and are often unable to give a literal interpretation of a situation.[237] Consequently, they frequently relate their experiences using metaphors, stories, or drawings.[238] In addition, sexually abused children can display a wide variety of behavioral symptoms, even "exceptional secrecy" or withdrawal.[239] They can also be overcompliant.[240]

Trained interviewers, such as those at Prescott House, are vital because they have the ability to consider the special needs involved when interviewing children about abuse. An interviewer "must take into consideration the child's age, maturity, language and communication skills, and emotional readiness to be interviewed."[241] Children may not grasp time like adults, and thus their interpretation of days or weeks may differ.[242] Their perception of adults as authority figures may also affect how they respond to certain questions.[243] Even "the way in which [a] child tells [his or her] story to a given adult may differ according to the adult's style and manner of interviewing."[244]

Developmentally, children have difficulty expressing experiences that are not within their "frame of reference."[245] Thus, the younger the victim, the more difficulty he or she would have in expressing sexual abuse because, presumably, he or she has not had a prior sexual experience.[246] Furthermore, only as children get older are they able to give complete accounts

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232. Interview, *supra* note 36.

233. *See* B.J. Cling, *Sexualized Violence Against Children*, *in* SEXUALIZED VIOLENCE AGAINST WOMEN AND CHILDREN, *supra* note 169, at 149.

234. *Id.*

235. *See id.*

236. *See* CROSSON-TOWER, *supra* note 172, at 240.

237. *Id.*

238. *Id.*

239. CROSSON-TOWER, *supra* note 141, at 23.

240. *Id.*

241. CROSSON-TOWER, *supra* note 172, at 242.

242. *Id.* at 240.

243. *Id.*

244. *Id.* at 244; *see also* Matthew Fanetti & Richard Boles, *Forensic Interviewing and Assessment Issues with Children*, *in* HANDBOOK OF FORENSIC PATHOLOGY 250 (William O'Donohue & Eric Levensky eds., 2004).

245. *See* CROSSON-TOWER, *supra* note 172, at 240-41.

246. *See id.*

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of events.[247] Younger children often omit more facts when recalling events than do older children.[248]

Alabama courts are requiring young victims to be capable of expressing their resistance to sexual activity. Thus, the courts are holding child victims to the same—or an even greater—standard than they hold adult victims.[249] Juvenile offenders are generally held to a lower standard for their criminal behavior; yet, Alabama courts are holding child victims to adult standards. This inconceivable standard has an additional consequence: if prosecutors know that a given case with a child victim will not rise to the high level of forcible compulsion required by case law, he or she may be ethically forced to drop the case completely.[250]

It is worth briefly mentioning that another alternative charging option is sexual misconduct.[251] Under this statute, a person can be convicted if:

> (1) Being a male, he engages in sexual intercourse with a female without her consent, under circumstances other than those covered by Sections 13A-6-61 and 13A-6-62; or with her consent where consent was obtained by the use of any fraud or artifice; or
>
> (2) Being a female, she engages in sexual intercourse with a male without his consent; or
>
> (3) He or she engages in deviate sexual intercourse with another person under circumstances other than those covered by Sections 13A-6-63 and 13A-6-64. Consent is no defense to a prosecution under this subdivision.[252]

However, there are two problems with using this option. First, since (a)(3) of this statute provides that consent is not a defense, there is the possibility that this section is similar to the statute that was struck down as unconstitutional in *Lawrence v. Texas*.[253] The second problem is that the statute only carries with it the penalty of a class A misdemeanor[254] and therefore, cannot adequately protect either the public or the juvenile's best interests.

247. *Id.* at 250.
248. *Id.*
249. Interview, *supra* note 36.
250. *Id.*
251. ALA. CODE § 13A-6-65(a) (1994).
252. *Id.*
253. 539 U.S. 558, 562-63, 574, 578-79 (2003) (striking down a statute that prohibited certain sexual conduct between consenting same sex partners and finding, in part, that the Fourteenth Amendment "afford[s] constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education"); Interview *supra* note 36.
254. § 13A-6-65(b).

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C. A Look At Other States

The difficulty in comparing other state statutes regarding sexual offenses lies in the diversity of sexual crimes. Not only do states define sexual offenses differently, but they also give statutes different titles and subsections. Additionally, not all state statutes are organized in similar manners. However, a comparison of other state statutes regarding sexual offenses provides the most support for Alabama's adoption of Rape Three, Sodomy Three, and Sexual Abuse Three.

Many states have made policy decisions to "raise the level of accountability of juveniles in the criminal justice system."[255] For instance, between 1985 and 1994, seventy-one percent more juveniles were waived to adult criminal court than in previous years.[256] Further, over the years, half of the states have lowered the age at which a juvenile can be tried as an adult, and many jurisdictions now allow juveniles of any age to be tried as adults for more severe crimes.[257]

Some states do take a more lenient view and deal with juveniles less severely. In California, one can be convicted of unlawful sexual intercourse with a person under eighteen-years-old, but "[a]ny person who engages in an act of unlawful sexual intercourse with a minor who is not more than three years older or three years younger than the perpetrator, is guilty of a misdemeanor."[258] In Alaska, "[s]exual abuse of a minor in the fourth degree is [also] a class A misdemeanor."[259] In Oklahoma, "[n]o person can be convicted of rape or rape by instrumentation on account of an act of sexual intercourse with anyone over the age of fourteen (14) years, with his or her consent, unless such person was over the age of eighteen (18) years at the time of such act."[260]

Many state statutes hold that "any person" can be convicted of a sexual offense against a minor, and statutes that apply to any person have been upheld against minors, as was the case in *In re John C.*[261] In that case, the minor defendant was charged with causing or permitting a "child under the age of sixteen years to be placed in such a situation that [her] . . . morals [were] likely to be impaired."[262] The statute stated that this conduct was a crime for "any person."[263] The thirteen-year-old defendant was alleged to have exposed himself to the eight-year old victim and was subsequently adjudicated a delinquent.[264] Rejecting the defendant's argument on appeal that the statute "should not apply to violators who are minors since they are

255. *See* Hunter, *supra* note 7.
256. *Id.*
257. *Id.*
258. CAL. PENAL CODE § 261.5(b) (West 1999).
259. ALASKA STAT. § 11.41.440(b) (2004).
260. 21 OKL. ST. ANN. § 1112 (West 2002).
261. 569 A.2d 1154, 1156-58 (Conn. App. Ct. 1990).
262. *Id.* at 1155 n.1 (quoting CONN. GEN. STAT. § 53-21).
263. *Id.*
264. *Id.* at 1156.

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themselves within the class of children protected by the statute," the court held that it would not "interpret the law to give minors license to sexually molest other minors."[265] As a final note on the case, charges of sexual assault were eventually dismissed, without any reasons articulated by the court.[266]

Some states do set specific age limits for a sexual offender, and some of these statutes also require an age difference. For example, in Alaska, for the offender to be convicted of sexual abuse of a minor in the third degree, the offender must be sixteen-years-old or older if the victim is under thirteen- to fifteen-years-old and eighteen-years-old or older if the victim is sixteen- or seventeen-years old.[267] However, similar to the proposed Alabama statutes, an offender under sixteen-years-old can be convicted of sexual abuse of a minor in the fourth degree if the victim is under thirteen-years-old and is "at least three years younger than the offender."[268] Similarly, in Illinois, an offender can be convicted of criminal sexual abuse if he is under seventeen-years-old and the victim is between nine- and seventeen-years-old.[269]

Many states deal harshly with juvenile sexual offenders in a similar way that the proposed Alabama statutes would. South Carolina, for instance, has a similar statute to the Alabama proposals.[270] An offender over fourteen-years-old can be convicted of committing or attempting a lewd act upon a child under sixteen-years old, which is a felony.[271] In Florida, an offender who is less than eighteen-years-old can be convicted of lewd or lascivious offenses committed on a person less than sixteen-years-old.[272] Whether the crime is punishable as a first, second, or third degree felony depends on the specific conduct and the age difference of the victim and offender.[273] An offender under eighteen-years-old can also commit felony sexual battery.[274] Oregon's rape in the third degree is a class C felony.[275] This statute is quite similar to Alabama's proposed rape statute. Under this statute, "[a] person commits the crime of rape in the third degree if the person has sexual intercourse with another person under 16 years of age."[276]

Other states have statutes explicitly considered "statutory rape." Georgia has a statutory rape offense under which an increased punishment exists if the offender is twenty-one-years old or older and a decreased sentence if the victim is either fourteen- or fifteen-years-old, and the offender is less

265. *Id.* at 1157.
266. *Id.* at 1156 n.2.
267. ALASKA STAT. § 11.41.438(a)(1)-(3) (2004).
268. *Id.* § 11.41.440(a)(1).
269. 720 ILL. COMP. STAT. 5/12-15(b), (d) (2002).
270. S.C. CODE ANN. § 16-15-140 (2003).
271. *Id.*
272. FLA. STAT. ANN. § 800.04 (West 2000 & Supp. 2005).
273. *See id.* § 800.04(5)(c)-(d), (6)(c), (7)(a), (d).
274. FLA. STAT. ANN. § 794.011(2)(b)-(6) (2000).
275. OR. REV. STAT. § 163.355 (2003).
276. *Id.*

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than three years older than the victim.[277] Mississippi's statutory rape statute holds that the offender can be convicted of statutory rape in several ways.[278] One way is if the offender is seventeen-years-old or older and the victim is between fourteen- and sixteen-years-old, provided that the victim is three years younger than the offender.[279] However, any person of any age can be convicted of statutory rape when the victim is younger than fourteen and at least two years younger than the offender.[280] Missouri has not set an age limit for an offender under its statutory rape in the first degree statute, which is a felony.[281] However, the victim must be less than fourteen-years-old.[282] Statutory rape in the second degree exists in Missouri when the offender is over twenty-one-years-old, and the victim is less than seventeen-years-old.[283]

Idaho's statute governing lewd conduct with a minor child under sixteen-years-old[284] provides an interesting example for comparing Alabama's difficulties with the difficulties of other states in convicting a juvenile for a sexual offense that is not based solely on age. In Idaho, any person can be convicted of lewd conduct with a minor child under sixteen-years-old, which is a felony, only by showing that the offender had the intent to "arous[e], appeal[] to, or gratify[] the lust or passions or sexual desires of [him or herself], such minor child, or third party."[285] Simply from the statute's language, it seems to be less difficult to prove than "[p]hysical force that overcomes earnest resistance or a threat, express or implied, that places a person in fear of immediate death or serious physical injury to himself or another person."[286]

Another interesting statute is Virginia's indecent liberties by children.[287] Under this statute, an offender over thirteen but under eighteen-years-old can be convicted of exposing him or herself to another child under fourteen-years-old, but five or more years younger than the offender.[288] However, lascivious intent must be proven.[289]

Other states set age difference requirements, but not for specific ages.[290] In the District of Columbia, for example, if an offender is "at least 4 years older than a child," he or she can be convicted of first or second degree sexual abuse.[291] In Louisiana, an offender can be convicted of indecent behav-

277. GA. CODE ANN. § 16-6-3 (2003).
278. MISS. CODE ANN. § 97-3-65 (2000).
279. *Id.* § 97-3-65(1)(a).
280. *Id.* § 97-3-65(1)(b).
281. MO. REV. STAT. § 566.032 (West 1999).
282. *Id.* § 566.032.
283. *Id.* § 566.034.
284. IDAHO CODE § 18-1508 (2004).
285. *Id.*
286. ALA. CODE § 13-A-6-60(8) (1994).
287. VA. CODE ANN. § 18.2-370.01 (2004).
288. *Id.*
289. *Id.*
290. *See, e.g.*, D.C. CODE ANN. § 22-3008 (LexisNexis 2001).
291. *Id.* § 22-3008-09.

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ior with a juvenile when the victim is less than seventeen-years-old and the offender is more than two years older than the victim.[292] In Montana, an offender can be convicted of sexual assault when the victim is younger than sixteen-years old and the offender is at least three years older than the victim.[293] This conviction carries with it the possibility of life imprisonment.[294]

While state statutes regarding sexual offenses do vary, it seems that a majority of states evidence a desire to deal harshly with anyone convicted of a sexual offense. Alabama's proposed statutes do not depart in any significant way from other state statutes, and therefore, they seem to be appropriate for inclusion in the Alabama Criminal Code.

CONCLUSION

When a child is sexually abused in any way, the case is gut-wrenching. When another child commits the offense, the issues become even more heart-breaking. A multitude of complicated concerns must be taken into account when determining whether the proposals to the Alabama Criminal Code should be passed. On the one hand, the culpability and special needs of juvenile offenders must be considered. However, the victims' needs and the state's obligation to protect its citizens must not be forgotten. Both the offenders themselves and society can be served when juvenile sexual offenders receive treatment. Treatment can be ordered when these offenders are brought into the criminal justice system, but there must be a way to bring them in.

With dim hope for the future of convicting juvenile sexual offenders under a forcible compulsion theory, few alternatives exist when a young person sexually abuses another young person. Support for passing the proposed statutes can also be found by looking to most other state statutes. Given the harshness with which most other states are treating juvenile sexual offenders and the severity of the crimes, the Alabama Legislature should pass Rape Three, Sodomy Three, and Sexual Abuse Three as proposed.

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292. LA. REV. STAT. ANN. § 14:81 (2004).
293. MONT. CODE ANN. § 45-5-502(3) (2004).
294. *Id.*

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