COMMENT


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I. INTRODUCTION

Lesbian, gay, bisexual, and transgender (LGBT) youth are overrepresented in child welfare and juvenile justice systems; they have increased suicide attempt and success rates; they face informal discrimination from peers and staff in schools, and in state facilities. They also face formal discrimination in the form of harsher punishments than their straight peers. A particularly glaring area of legislature- and court-sanctioned discrimination against LGBT youth comes in the form of many states’ so-called “Romeo and Juliet” statutes, some of which allow for dramatically mitigated sentences for heterosexual offenders engaging in certain sexual activities with minors, but exclude same-sex sexual conduct from these benefits.

The application of these provisions to heterosexual youth can result in a reduced sentence of fifteen months detention, whereas the bare application of statutory rape statutes in the absence of these mitigating provisions can result in as many as seventeen years in jail, five years of post-release supervision, and sex-offender registration for the exact same conduct engaged in by consenting teenagers who happen to be of the same sex. Because Lawrence v. Texas prevents the government from using its criminal laws to discriminate against homosexual “conduct, practices, or relationships,” and because same-sex and opposite-sex sexual conduct are similarly

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2. Wardenski, supra note 1, at 1377.
4. Gwinn, supra note 1, at 442.
5. Id. at 440.
6. See, e.g., TEX. PENAL CODE ANN. § 21.11 (Vernon Supp. 2010) (containing an affirmative defense to sexual contact with a child under seventeen if the actor is three or fewer years older than the victim and is of the opposite sex); VA. CODE ANN. § 18.2-63 (2009) (reducing the sentence for sexual intercourse between a minor between the ages of thirteen and fifteen and someone three or fewer years older to a misdemeanor, but not applicable to cunnilingus, fellatio, anilingus, or anal intercourse).
7. State v. Limon, 122 P.3d 22, 24 (Kan. 2005); Def.-Appellant’s Supplemental Brief on Review at 1; State v. Limon, 122 P.3d 22 (Kan. 2005).
The present case does involve minors, situated for equal-protection purposes, Romeo and Juliet provisions must apply equally to heterosexual and LGBT youth if they are to withstand constitutional scrutiny.

II. THE PROBLEMS FACING LGBT YOUTH

A. Discrimination

LGBT youth, like LGBT adults, face discrimination on a daily basis. They face homophobia and rejection in their families, their schools, and their communities. Many LGBT youth are isolated and depressed. Unlike LGBT adults, however, LGBT youth still face the kind of government-sanctioned discrimination that Romer v. Evans and Lawrence purported to abolish.

LGBT youth are placed in residential treatment and detention programs at a higher rate than their straight peers. They also face harsher punishments. In New York City, a lesbian girl “received an extended sentence for simply voicing her attraction to another girl;” in California, a girl received a six-month addition to her sentence after she was caught engaging in a sexual act with another girl, whereas “a peer’s sexual contact with a boy resulted in [only] a three month extension.”

In Kansas, a teen received a 206-month sentence—not for a violent sexual assault or murder, but for performing consensual oral sex on

10. Victoria Snyder, Romeo and Romeo: Coming Out from Under the Umbrella of Sexual Abuse, 8 WHITTIER J. CHILD & FAM. ADVOC. 237, 256 (2009).
11. See Limon, 122 P.3d at 38.
12. Hahn, supra note 3, at 121-22; Sarah E. Valentine, Queer Kids: A Comprehensive Annotated Legal Bibliography on Lesbian, Gay, Bisexual, Transgender, and Questioning Youth, 19 YALE J. L. & FEMINISM 449, 451 (2008) (“Queer kids are the most isolated, attacked, endangered, and underserved adolescent population in the United States. Their sexuality is often a wedge that separates them from their families, schools, and peers.”); NAT’L INST. JUSTICE, SOLVING YOUTH VIOLENCE: PARTNERSHIPS THAT WORK 84 (Aug. 1994), available at http://www.ncjrs.gov/txtfiles/youthvio.txt (“Violence against lesbian, gay, and bisexual youth often goes unchecked in schools because many school administrators are afraid of homosexuals, have institutionalized homophobia, and are afraid to discipline gay-bashers. Most local school districts provide gays, lesbians and bisexuals with no special protection against bias.”) [hereinafter NAT’L INST. JUSTICE, SOLVING YOUTH VIOLENCE]; Gwinn, supra note 1, at 441-42 (describing “government sanctioned homophobia” in juvenile facilities).
13. See Hahn, supra note 3, at 122.
14. See Lawrence, 539 U.S. 558; Romer, 517 U.S. at 620.
15. See Valentine, supra note 12, at 468. Additionally, a small study indicated that one-third of girls in juvenile facilities “had engaged in or were interested in” same-sex relationships. Gwinn, supra note 1, at 439.
16. Gwinn, supra note 1, at 440 (internal quotation marks omitted); see also Hahn, supra note 3, at 118 (noting increased punishment for “girls who commit gender transgressive criminal acts”).
another male teen. Had he performed the same sexual act on a female teen, he would have faced a mere fifteen months.

B. Invisibility or Paternalism

In addition to outright discrimination, LGBT youth also experience invisibility. Despite clear scientific evidence that children experience their first same-sex attractions around age eight and typically wait another seven years before having their first same-sex sexual encounter, society frequently views gay teenagers as “impossible.” Adults often conclude that LGBT youth are just rebelling, confused, or seeking attention; consequently, intervention, punishment, and treatment are needed to straighten these LGBT teens out and to protect them from themselves.

Alternatively, if LGBT youth are acknowledged at all, they are frequently subject to more paternalism than their straight peers. While some judges may recognize that LGBT youth face a special set of problems in the juvenile justice system, and order stricter protective custody as a result, others seek to protect heterosexual teens from the influence or reach of LGBT youth, unmindful of the effects this may have on the LGBT youth’s interests.

As a result of these attitudes and practices, LGBT youth are more likely to conceal their sexual orientation, keeping themselves invisible. While LGBT youth typically experience their first same-sex sexual attractions under the age of ten, they wait until just before their

18. Def.-Appellant’s Supplemental Brief on Review, supra note 7, at 1.
20. Gwinn, supra note 1, at 443 (internal quotation marks omitted); see Hahn, supra note 3, at 122.
22. Gwinn, supra note 1, at 444. In detention, LGBT youth face verbal harassment, physical assault, social isolation, poorly trained staff, and sexual assault by staff and other juveniles. Wardenski, supra note 1, at 1380. LGBT youth are considered members of the underserved populations, and will be studied more extensively by the Underserved Teen Victims Initiative of the National Crime Prevention Counsel; funding will be provided by a federal grant. *See Underserved Teen Victims Initiative*, NAT’L CRIME PREVENTION COUNCIL, http://www.ncpc.org/programs/utvi-1/ (last visited Apr. 4, 2010).
23. Gwinn, supra note 1, at 444-45. These harsher sentences are otherwise usually reserved for more serious offenders. Id. at 444.
eighteenth birthdays to first disclose their sexual orientation.\textsuperscript{24} This should not come as a surprise; LGBT youth are forced to protect themselves by hiding their identities because the adult society around them denies their very existence. This, in turn, reinforces the courts’ and legislatures’ beliefs that same-sex conduct could “turn” or otherwise harm even consenting teens;\textsuperscript{25} ignorant of the realities of teenage sexual identity development,\textsuperscript{26} and the fact that sexual conduct almost always follows and does not cause the formation of sexual identity, adults continue to believe that intervention is necessary to rescue these “misguided” teens.

C. Lack of Support

On top of all of this, LGBT youth face hardships that other minority populations rarely encounter. Versus other minorities, most LGBT youth are from families and communities that do not share their minority traits.\textsuperscript{27} While a foreign immigrant in even the most xenophobic Small Town, USA may face isolation and discrimination, he also goes home to a family that shares his experiences. And, for better or for worse, he probably cannot hide his minority status; LGBT teens, on the other hand, have to hide their sexual identity, lest they be labeled deviants in need of a cure, or find themselves the victims of hate crimes.

Further, LGBT adults tend to keep their distance from LGBT minors because of society’s irrational fears that they have a propensity to molest or “turn” children.\textsuperscript{28} On this front as well, LGBT teens must

\begin{itemize}
  \item \textsuperscript{24} Savin-Williams & Diamond, supra note 19, at 618; see also Ruskola, supra note 21, at 282 (noting many LGBT youth do not identify as LGBT until adulthood).
  \item \textsuperscript{26} Ruskola, supra note 21, at 282 (noting many LGBT youth do not identify as LGBT until adulthood).
  \item \textsuperscript{27} See Wardenski, supra note 1, at 1376.
suffer the consequences of society’s flawed and harmful understanding of youth sexual identity development and outrageous views of homosexual behavior. They are denied the mentorship, understanding, and guidance that are taken for granted in other groups of teenagers, who are constantly surrounded by adults who are openly like them.

D. Consequences

As a consequence of discrimination, invisibility, protectionism, and isolation, LGBT youth suffer higher rates of homelessness, suicide and suicide attempts, and overrepresentation and harsher sentences in the juvenile justice system. In major cities, as many as half of all homeless teens self-identify as LGBT; nationally, this figure is “between eleven and forty percent.”

On the streets, many LGBT youth are forced to resort to criminal activity in an effort to support themselves. On the streets or off, all LGBT teens have increased suicide attempt and success rates. One Massachusetts study concluded that LGBT youth are approximately four times as likely to attempt suicide as their straight peers. For those that do not take their own lives, their chances of being placed in child welfare or detention systems are much higher. They often receive harsher punishments, and also are more likely to receive treatment in a residential facility. While in state custody, LGBT youth face discrimination from peers and staff. Once out of custody, they are often forced to enroll in sex-offender registration programs that, had they engaged in opposite-sex conduct instead of same-sex conduct, would be off the table.

29. Wardenski, supra note 1, at 1363-64.
30. See Hahn, supra note 3, at 123.
31. Wardenski, supra note 1, at 1377; Nat’l Inst. Justice, Solving Youth Violence, supra note 12, at 85 (“Criticism of homosexuality contributes to low self-esteem, depression, truancy, self-destructive behavior, and even suicide.”).
33. See Wardenski, supra note 1, at 1380.
34. See, e.g., State v. Limon, 122 P.3d 22, 24 (Kan. 2005); Gwinn, supra note 1, at 440; Hahn, supra note 3, at 118.
35. See Valentine, supra note 12, at 468.
36. Gwinn, supra note 1, at 440-41.
37. Def.-Appellant’s Supplemental Brief on Review, supra note 7, at 1; see also Valentine, supra note 12, at 471 (noting the “arbitrary” assignment of sex-offender status).
III. STATUTORY RAPE LAWS: BACKGROUND

A. Sodomy Laws

Until 1961, every state outlawed sodomy. At the same time, however, the Supreme Court said in Lawrence, “there [was] no longstanding history in this country of laws directed at homosexual conduct as a distinct matter.” Instead, sodomy laws reached all sex either outside of marriage or without potential for procreation, whether between same or opposite sexes; only later were these laws applied to homosexuals, and only recently have they been associated almost exclusively with same-sex conduct. By as early as 1955, though, the American Law Institute recommended removing criminal penalties for private consensual sexual conduct, largely because “[t]he prohibitions undermined respect for the law by penalizing conduct many people engaged in; [because] the statutes regulated private conduct not harmful to others; [and because] the laws were arbitrarily enforced.” The Supreme Court, however, was slow to agree.

B. Bowers

In June of 1986, the Supreme Court upheld a Georgia statute criminalizing sodomy between consenting adults in the privacy of their own homes. Noting that there is no “fundamental right upon homosexuals to engage in sodomy,” Justice White’s majority opinion relied on what he characterized as the longstanding and traditional criminal prohibitions on sodomy dating back to the common law.

C. Bowers Dissents

The Bowers dissenters strongly disagreed with the majority’s characterization of the issue of the case. Instead of being about “a

38. Lawrence v. Texas, 539 U.S. 558, 572 (2003); Gwinn, supra note 1, at 450. By the time Lawrence was decided, however, only thirteen states maintained criminal sodomy statutes. Gwinn, supra note 1, at 450.
39. Lawrence, 539 U.S. at 568.
41. Lawrence, 539 U.S. at 572 (quoting MODEL PENAL CODE, Commentary 277-80 (Tent. Draft No. 4, 1955)).
43. Id. at 190.
44. Id. at 192.
45. Id. at 199 (Blackman, J., dissenting); id. at 216 (Stevens, J., dissenting).
fundamental right to engage in homosexual sodomy,"^{46} Justice Blackmun viewed the issue as one of the right to “privacy and freedom of intimate association.”^{47} This right could not be subordinated to the religious or moral beliefs of a majority absent an independent justification.^{48}

Justice Stevens agreed with Blackmun, but wrote separately to elaborate.^{49} Comparing Georgia’s sodomy statute to unconstitutional antimiscegenation statutes, he noted that moral disapproval, history, and tradition are insufficient grounds for “prohibiting the practice.”^{50} Under relevant precedent, Stevens argued that the right of individuals to make their own decisions about their intimate lives is a fundamental one,^{51} and that this right applies to homosexuals and heterosexuals alike.^{52}

D. Lawrence

In June of 2003, the Supreme Court explicitly overruled Bowers, declaring criminal sodomy statutes that only prohibited private sexual conduct between adults of the opposite sex unconstitutional.^{53} In his landmark opinion in Lawrence, Justice Kennedy noted not only the flawed reasoning that Bowers relied on, including the real historical nature of sodomy prohibitions,^{54} but also the extreme stigma imposed by

46. Id. at 199 (Blackmun, J., dissenting).
47. Id. at 202 (Blackmun, J., dissenting). He argued that because the statute, on its face (if not as enforced), applied equally to both homosexual and heterosexual activity, the issue was improperly characterized as dependent on the respondent’s sexual orientation. Id. at 201 (Blackmun, J., dissenting). Justice Stevens’ dissent made a parallel point, noting that “[i]ike the statute that is challenged in this case, the rationale of the Court’s opinion applies equally to the prohibited conduct regardless of whether the parties who engage in it are married or unmarried, or are of the same or different sexes.” Id. at 214 (Stevens, J., dissenting).

48. Bowers, 478 U.S. at 211 (Blackmun, J., dissenting). Justice Blackmun also drew a distinction “between laws that protect public sensibilities and those that enforce private morality,” noting that the former may be a valid justification for banning public sexual activity, but the latter cannot be applied to the private sphere where no genuine governmental interest is at stake. Id. at 212 (Blackmun, J., dissenting). “[T]he mere fact that intimate behavior may be punished when it takes place in public cannot dictate how States can regulate intimate behavior that occurs in intimate places.” Id. at 213 (Blackmun, J., dissenting).

49. Id. at 214 (Stevens, J., dissenting).
50. Id. at 216 (Stevens, J., dissenting).
51. Id. at 217-18 (Stevens, J., dissenting) (“The essential ‘liberty’ that animated the development of the law in cases like Griswold, Eisenstadt, and Carey surely embraces the right to engage in non-reproductive, sexual conduct that others may consider offensive or immoral.”).
52. Id. at 218-19 (Stevens, J., dissenting) (“From the standpoint of the individual, the homosexual and the heterosexual have the same interest in deciding how he will live his own life, and, more narrowly, how he will conduct himself in his personal and voluntary associations with his companions. State intrusion into the private conduct of either is equally burdensome.”).
53. Lawrence v. Texas, 539 U.S. 558, 578 (2003) (“Bowers was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent.”).
54. Id. at 568-69. “The historical grounds relied upon in Bowers are more complex than the majority opinion and the concurring opinion by Chief Justice Burger indicate. Their historical
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a criminal statute—however rarely enforced—that required sex-offender registration and allowed discrimination against homosexuals for private, consensual sexual acts that, if engaged in by persons of the opposite sex, would have been beyond the state’s legitimate reach. 55

Although it recognized the validity of an equal protection analysis, the Lawrence majority used a due process analysis to reject Bowers, which held that voluntary, private homosexual conduct may be criminalized because it is viewed as immoral. 56 Justice O’Connor’s concurrence, however, reached the same conclusion by applying equal protection principles. 57 Using a “more searching form of rational basis review,” 58 O’Connor first noted that the Texas statute treated sodomy as criminal only when engaged in by members of the same sex, thereby treating homosexuals as “unequal in the eyes of the law.” 59 Then, after a brief discussion of the consequences of a conviction, 60 she addressed Texas’ primary justification for the statute: “further[ing] the legitimate governmental interest of the promotion of morality.” 61 Justice O’Connor rejected this justification, stating that “[m]oral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause.” 62 Moral

55. Lawrence, 539 U.S. at 564, 575-76.

56. Id. at 577. The Court noted that the equal protection argument was a “tenable” one, but instead chose a due process analysis in order to completely address Bowers’ “continuing validity.” Id. at 574-75. “Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests.” Id. at 575; see Bourke, supra note 17, at 615; Wardenski, supra note 1, at 1391.

57. O’Connor did not, however, join the Court in overruling Bowers. Lawrence, 539 U.S. at 579 (O’Connor, J., concurring).

58. Id. at 580 (O’Connor, J., concurring). “When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause.” Id. (O’Connor, J., concurring).

59. Id. at 581 (O’Connor, J., concurring).

60. These included restricting a person’s “ability to engage in a variety of professions” and subjecting them to sex-offender registration requirements in several states. Id. (O’Connor, J., concurring). The statute also served to brand homosexuals as criminals, whether or not they had actually been convicted of a crime, and legally sanctioned discrimination. Id. at 581-82 (O’Connor, J., concurring).

61. Id. at 582 (O’Connor, J., concurring).

62. Lawrence, 539 U.S. at 582 (O’Connor, J., concurring); see Romer v. Evans, 517 U.S. 620, 634-35 (1996).
disapproval, without other significant government justifications, cannot justify discrimination against a group of people.  

IV. STATUTORY RAPE LAWS AND JUSTIFICATIONS

“At its essence, statutory rape is unlawful sexual intercourse with a person under a specified age, who, because of that age, is presumed incapable of consenting to the sexual activity.” Statutory rape laws reflect “an attempt to protect teenagers from themselves, as well as from those who would prey upon their vulnerability.” Thus, though the sexual act at issue may be voluntary in that it is not against the will of the victim, it is nevertheless criminal.

State interests in enacting these laws include “protecting minors from sexual intercourse, protecting minors from exploitation by older predators, preventing and reducing teen pregnancy, reducing the number of young mothers on welfare, and encouraging responsibility in sexuality and parenting.” In order to promote these interests, many states have raised the age limit of the minors protected by statutory rape laws.

In 1994, a federal law encouraging the enactment of state sex offender registration laws took effect; as a result, all states currently have sex offender registration laws on their books. Because the federal law referred to criminal offenses “against a victim who is a minor . . . statutory rape offenses should be covered under [s]tate sex offender registration laws to comply with [f]ederal law.” Convictions for

63. Lawrence, 539 U.S. at 582-83. “[T]he State cannot single out one identifiable class of citizens for punishment that does not apply to everyone else, with moral disapproval as the only asserted state interest for the law.” Id. at 584.


65. Michelle Oberman, Regulating Consensual Sex with Minors: Defining a Role for Statutory Rape, 48 Buff. L. Rev. 703, 710 (2000); see Carpenter, supra note 64, at 309-10.


67. Snyder, supra note 10, at 247 (internal quotation marks omitted); see Davis & Twombly, supra note 66, at 8.

68. Davis & Twombly, supra note 66, at 8. “Currently, the highest ages protected range from fourteen to eighteen, with more than ninety percent ending protection at age sixteen, seventeen, or eighteen years.” Id.


70. Davis & Twombly, supra note 66, at 11.

71. Id. at 11-12 (internal quotation marks omitted).
statutory rape carry a variety of penalties, including sex offender registration.72

A. Statutory Rape Laws: Romeo and Juliet Provisions

In thirty states plus the District of Columbia, statutory rape is a strict liability offense.73 In many states, however, some voluntary sex acts between teenagers are excluded from statutory rape laws, or the penalties for such acts are reduced, via so-called “Romeo and Juliet” provisions.74 These statutes attempt to take into account the fact that teens are increasingly sexually active,75 reserving the harshest punishment for older adults.76 In some of these states, defendants below a certain age are exempted from the statute;77 in others, the actor must be a certain number of years older than the victim in order to fall within the statute’s reach;78 in still others, the statutes combine these two, exempting actors below a certain age and within a certain number of years of the victim.79

These Romeo and Juliet provisions have different approaches, but the same goal: they are “designed to eliminate unintended consequences—such as a lifetime inclusion on sex-offender registries for

72. Id. These penalties also include “possible or mandatory prison or jail time, child support, fines, and . . . civil penalties.” Id. at 10-11.
73. Carpenter, supra note 64, at 317.
75. Fifty percent of fifteen- to nineteen-year-olds have given and/or received oral sex; seventy percent of eighteen- to nineteen-year-olds have given and/or received oral sex. Bruce Gross, Romeo & Juliet Laws: When Punishment Does Not Fit the Crime, ANNALS AM. PSYCHOTHERAPY ASS’N 21, 23 (Summer 2007). Increasingly, teenagers view oral sex as less significant and/or intimate sexual behavior as compared to intercourse, finding it “morally syntonic, more appropriate in both dating and non-dating relationships, and more acceptable behavior for younger teens.” Id.
76. Davis & Twombly, supra note 66, at 12.
77. See, e.g., ALA. CODE § 13A-6-64 (LexisNexis 2005) (punishing sodomy in the second degree only if the actor is sixteen or older and the victim is between twelve and sixteen); Davis & Twombly, supra note 66, at 8 (“Twenty-six States have specified an age minimum for the defendant under at least one statutory rape offense.”).
78. See, e.g., CAL. PENAL CODE § 261.5 (West 2008) (reducing the punishment for an actor who is not more than three years older than the victim); CONN. GEN. STAT. § 53a-71 (West 2007). “Twenty-three States have age differentials for at least one of their statutory rape offenses.” Davis & Twombly, supra note 66, at 8.
79. See, e.g., GA. CODE ANN. § 16-6-4 (Supp. 2010) (reducing the charge to a misdemeanor if an actor is eighteen or younger and no more than four years older than the victim).
young people convicted of less-serious infractions.”

Connecticut, for example, revised its statutory rape laws in 2007 to “[get] a little more focused and [try] to go after the real predators.” Now, the statutes have “widen[ed] the age gap between consenting sexual partners” from two to three years.” Though “some Republican lawmakers were ‘very uncomfortable’ about expanding the scope of consensual sex,” the Connecticut statutes now exclude a teenager within three years of age of his or her younger sexual partner.

Similarly, Indiana has created a Romeo and Juliet exception to its “sexually violent predator” designation when the victim is twelve or older, the actor is no more than four years older than the victim, and the actor and victim were in “a dating relationship or an ongoing personal relationship.”

B. Statutory Rape Laws: Problems

Compared to the recent past, statutory rape laws have, for the most part, come a long way. For instance, Idaho is the only state that still uses gender-specific pronouns in its rape provisions. Problems remain, however, in the enforcement of laws originally intended to protect the chastity of women.

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82. Gramlich, supra note 80.
83. Id. (quoting Connecticut State Senator John A. Kissel).
84. CONN. GEN. STAT. §§ 53a-71, -73a (West 2007) (applying to actors who are “more than three years older than” the other teenager).
85. IND. CODE ANN. § 35-38-1-7.5(h) (LexisNexis Supp. 2010). The offense at issue must not be rape, criminal deviate conduct, or result in serious bodily injury. Id.
86. Id. Florida’s Romeo and Juliet provision is also a recent one, but it takes a more unique form: instead of exempting the “Romeos” from the statutory rape statutes, Florida allows them to petition to have their names removed from the sexual offender registry when the actor is not more than four years older than the victim, who must have been between the ages of fourteen and seventeen at the time of the offense. FLA. STAT. ANN. § 943.04354(1)(c) (West Supp. 2010); see Gramlich, supra note 80; Associated Press, Man Shed Sex Offender Status Under New ‘Romeo and Juliet’ Law, TAMPA TRIB., Aug. 6, 2007, http://www2.tbo.com/content/2007/aug/06/272020/man-shed-sex-offender-status-under-new-romeo-and-j/news-breaking/.
87. IDAHO CODE ANN. § 18-6101 (Supp. 2010) (defining statutory rape as penetration into a vaginal opening); IDAHO CODE ANN. § 18-6108 (Supp. 2010) (defining male rape as a separate offense); see Carpenter, supra note 64, at 313. Alabama, however, uses one gender-specific pronoun in its sodomy prohibitions. ALA. CODE § 13A-6-64(a) (applying to men who engage in “deviate sexual intercourse” with another person).
88. Steve James, Romeo and Juliet Were Sex Offenders: An Analysis of the Age of Consent and a Call for Reform, 78 UMKC L. REV. 241, 245 (2009); Snyder, supra note 10, at 246-47; see also Michael Kent Curtis & Shannon Gilreath, Transforming Teenagers into Oral Sex
A major problem with statutory rape laws is their selective enforcement. These laws are so broad, gathering so much conduct into their nets, that prosecutorial discretion has to play a huge role in their enforcement; there simply is not enough time or resources to prosecute all teenage sex that could be reached by the statutory rape provisions. Prosecutors, then, must prioritize, often selecting cases that are easily identified for reasons like large age differences and teen pregnancy. They most often prosecute males, and may be more likely to enforce a sexual-preference bias, prosecuting same-sex more than opposite-sex conduct, perhaps because reporting is more likely in the former. While the argument that teen girls need more protection from teen pregnancy may go towards explaining the gender bias, that rationale is obviously inapplicable to the sexual-orientation bias.

The prosecutor’s selection of the victim and perpetrator between two minor teenagers who engage in consensual sexual conduct is also problematic. Often, this choice comes down to one based on age and gender. Despite the inherent unfairness of this practice, the Supreme Court has sanctioned a “de facto categorization of the male minor as the perpetrator and the female minor as the victim” when they have been caught engaging in consensual sexual activity. This practice becomes even more problematic when coupled with the fact that oftentimes these same arbitrarily chosen victims are punished if they refuse to cooperate.

Once enforced, these statutes are over-inclusive: they put teenagers who engaged in consensual sex with a peer on sex offender registrations with pedophiles and other serial and/or violent sex offenders. Further, as evinced by Connecticut Representative Mike Lawlor’s comments, communities usually do not think most statutory rape offenders should

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89. See Phipps, supra note 74, at 383 (discussing Oberman, supra note 65, at 703-04).
90. See Phipps, supra note 74, at 383-85.
91. James, supra note 88, at 250-51.
92. Id at 253-54.
93. Id at 254.
94. Snyder, supra note 10, at 248-49. Prosecutors may also consider whose parents are angrier. Gramlich, supra note 80 (noting that a common complaint about statutory rape cases is that they are “enforced unfairly,” and stating that enforcement usually depends on how angry the parents are).
95. Snyder, supra note 10, at 249.
96. James, supra note 88, at 248.
97. See id at 246-47.
98. Gramlich, supra note 80 (“[S]tates are ‘getting a little more focused and trying to go after the real predators.’”).
be criminals. Indeed, evidence shows that forty-seven percent of high school students have had sex, that fifty percent of fifteen- to nineteen-year-olds have either given or received oral sex, and that by ages eighteen to nineteen that figure jumps to seventy percent. These numbers, coupled with the fact that about forty-two percent of statutory rape defendants are fewer than five years older than their partners, that most are under the age of twenty, and that many states are widening the age gap in their statutory rape statutes, shows that neither the parties involved nor the community think statutory rape offenders are deserving of sex offender, much less criminal, status.

C. The “Minor Exception”

Statutory rape laws prohibiting private, consensual sexual activity between minors or teens are justified, notwithstanding the holding of Lawrence, by the doctrine of parens patriae, which allows the state to “protect minors even when doing so would violate the rights of adults.” Thus, though the state cannot control certain adult sexual behavior conducted in the privacy of the home, it may be able to regulate the same behavior if it involves a minor. This doctrine, when combined with the qualifying paragraph at the end of Lawrence—or the “minor exception”—stating that “[t]he present case does not involve minors,” has become a popular justification for far-reaching statutory rape laws.

But because Supreme Court precedent, including Lawrence, makes it clear that a state cannot exercise its powers in a discriminatory manner absent at least a rational basis, statutory rape laws that single out

100. Id. at 249.
102. James, supra note 88, at 247.
104. Davis & Twombly, supra note 66, at 3, 8-9, 12.
106. Allender, supra note 74, at 1842 (“[T]he Supreme Court has justified this enhanced power of the state on three grounds (1) the particular vulnerability of children; (2) minors’ inability to make critical decisions in an informed, mature manner; and (3) the importance of parents in child rearing.”).
108. See Limon, 83 P.3d at 234 (finding factual distinction from Lawrence for the application of a discriminatory statutory rape statute “[b]ecause the present case involved a 14-year-old developmentally disabled child”), rev’d 122 P.3d 22 (Kan. 2005).
specific actors or specific conduct for harsher punishment are subject to the same constitutional standards as laws that apply to adult sexual behavior. Even a “minor exception” cannot justify discriminatory laws.\footnote{For this reason, the California Supreme Court held unconstitutional a statutory scheme that required a lifetime sex offender registration for criminal sodomy with a minor,\footnote{People v. Hofsheier, 129 P.3d 29, 34-35, 41-42 (Cal. 2006); see CAL. PENAL CODE § 290 (West 2008) (requiring a person found guilty of oral copulation in violation of § 299a(b)(1) to register as a sex offender for life but not if found guilty of unlawful sexual intercourse under CAL. PENAL CODE. § 261.5 (West 2008) while the two provisions were otherwise treated similarly).} but not for unlawful sexual intercourse with a minor.\footnote{Hofsheier, 129 P.3d at 41-42 (holding that the groups of oral- and vaginal-sex offenders were similarly situated and that a requirement that only the former be subject to mandatory sex offender registration was a violation of equal protection). Though both the trial court and the prosecutor said the sentencing outcomes were “out of whack,” they applied the law. Id. at 32; see also Humphrey v. Wilson, 652 S.E.2d 501 (Ga. 2007) (holding seventeen-year-old defendant Genarlow Wilson’s punishment—a minimum sentence of ten years for engaging in oral sex with a minor versus a mere misdemeanor if he had vaginal intercourse with her—was cruel and unusual under the Georgia and United States Constitutions, especially in light of the fact that the statute under which he was convicted was later amended to avoid such disparate sentencing outcomes). Even the author of the Georgia law Genarlow Wilson was convicted under was against his sentence and stated that the law was “grossly misinterpreted” (even though the law clearly stated that the minimum punishment for aggravated child molestation was not less than ten years). Gramlich, supra note 80; see Humphrey, 652 S.E.2d at 503 n.2.}

D. Romeo and Romeo, Juliet and Juliet Situations

Lawrence’s holding seems clear: a liberty interest protects consenting people from government intrusion in the form of criminal sanctions when they choose to engage in acts of sodomy in private.\footnote{Lawrence v. Texas, 539 U.S. 558, 578 (2003). “When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.” Id. at 567.} Despite Lawrence, however, some LGBT youth still have criminality attached to their sexual orientation; despite Romer, LGBT youth are still punished more severely than their heterosexual peers for the same conduct.

In Texas, for instance, a person is guilty of indecency with a child if he or she “engages in sexual contact” with “a child younger than 17.”\footnote{TEX. PENAL CODE § 21.11(a) (Vernon Supp. 2010).} The Romeo and Juliet provision of the statute, an affirmative defense to the charge, applies only if the actor “was not more than three years older...
than the victim and of the opposite sex.” An LGBT teen above the age of seventeen, then, will face a jail sentence of two to twenty years, a fine of up to $10,000, and sex offender registration if he or she has any consensual sexual contact with another teen of the same sex. The very same sexual contact, if engaged in by members of the opposite sex, is not criminal.

Similarly, Alabama criminalizes rape in the second degree, consisting of sexual intercourse with a member of the opposite sex between a defendant over the age of sixteen and a victim under the age of sixteen, as well as sodomy in the second degree, consisting of “deviate sexual intercourse” by a male defendant over the age of sixteen and a male or female victim under the age of sixteen. While both offenses are Class B felonies subject to a two to twenty-year sentence, fine, and sex offender registration, the Romeo and Juliet exception exempting actors within two years of age of the victim applies only to members of the opposite sex who engage in sexual intercourse with their partner. Thus, though Alabama does not penalize the exact same conduct differently, it singles out heterosexual teens that engage in vaginal intercourse for special treatment, leaving LGBT youth to face the full punishment for their sexual contact.

E. Justifications for Differentiating Between Opposite- and Same-Sex Sexual Conduct Among Teens

The difference between the application of Romeo and Juliet provisions and the bare statutory rape statutes is a huge one. In one case, an eighteen-year-old male teen was “sentenced to over 17 years in prison [and] five years of postrelease [sic] supervision, and ordered to register as a sex offender” for engaging in voluntary oral sex with another male.
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teen.123 Had one of the teens been a female, the Romeo and Juliet provision would have applied, and the maximum sentence would have been fifteen months, and no registration requirement would have applied.124

To justify these gross disparities, states offer four primary government interests in sentencing homosexual conduct more harshly than heterosexual conduct:125 (1) preserving traditional sexual mores, (2) promoting marriage and procreation, (3) preventing the spread of sexually transmitted diseases, and (4) “[e]ncouraging [p]arental [r]esponsibility” and/or reducing the number of mothers on welfare.126

Several of these justifications are patently untenable, and therefore cannot survive even the most deferential constitutional scrutiny. Promoting marriage and procreation, for instance, simply cannot be accomplished by penalizing parties that may later decide to marry, by exempting parties that could not get married any time soon,127 or by putting a statutory wedge between families that are formed as a result of the criminalized sexual conduct.128 Similarly, promoting traditional sexual mores and societal values cannot be accomplished by statutes that penalize conduct widely believed to be undeserving of criminal punishment.129 And, assuming it were somehow constitutionally or


124. Def.-Appellant’s Brief on Review, supra note 7, at 1 (citing KAN. STAT. ANN. § 21-3522 (2009 Supp.) which applies to unlawful voluntary sexual relations only if the “parties involved . . . are members of the opposite sex”). The Kansas Supreme Court reversed the defendant’s conviction, but not before the defendant served five years of his sentence, or forty-five months more than he would have if the Romeo and Juliet provision applied to his conduct. Limon, 122 P.3d at 24, 41; see Wardenski, supra note 1, at 1403.


126. See Def.-Appellant’s Supplemental Brief on Review, supra note 7, at 5-6, 8-12; Gwinn, supra note 1, at 456. These governmental interests are in addition to the general interest in promulgating statutory rape laws to protect minors from predators and/or exploiters. James, supra note 88, at 246.

127. Texas law, for instance, prohibits minors from marrying without parental consent until both parties are above the age of eighteen. TEX. FAM. CODE § 2.003 (Vernon 2006). If they engage in prohibited opposite-sex sexual contact, however, the Romeo and Juliet exemption would nevertheless apply if they are within three years of age of each other. TEX. PENAL CODE § 21.11(a) (Vernon Supp. 2010).

128. See Man in ‘Romeo and Juliet’ Case Pardoned 15 Years after Being Named Sex Offender, supra note 86.

ethically acceptable for the state to penalize teenage homosexual conduct in order to discourage the development of a minority sexual identity, the fact remains that “[s]exual orientation is already well[-]settled by the time” these laws apply. Even if this justification were legitimate, the statutes are too little, too late.

The prevention of STDs is not a legitimate basis for distinguishing between same-sex and opposite-sex sexual conduct, since STDs can be transmitted regardless of the sex of the partners. HIV, for instance, can be transmitted just as easily during homo- or heterosexual anal sex, while it is almost impossible for male-male oral sex to result in the transmission of an STD, and female-female sexual contact has a much lower risk of STD transmission than female-male or male-male. Thus, these statutes are both over-inclusive, because they include female-female sexual contact, and under-inclusive, because they do not include male-female sexual contact or any sexual contact engaged in without a condom.

Ultimately, these justifications boil down to one real motivation: promoting the morality of the majority. Under Supreme Court equal
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protection and due process precedent, however, this is not a legitimate
government interest capable of surviving even rational basis scrutiny.\textsuperscript{135}
“Minor exception” or not, statutory schemes that penalize LGBT youth
more than their heterosexual peers run afoul of constitutional law that
prohibits discrimination against LGBT “orientation, conduct, practices,
or relationships.”\textsuperscript{136}

Just as the presumed interest of Georgia and Texas—protecting
individuals from the alleged harm that homosexual conduct causes—
could not withstand constitutional scrutiny for want of evidence,\textsuperscript{137}
nor can discriminatory Romeo and Juliet statutes that distinguish
between same- and opposite-sex sexual conduct.\textsuperscript{138} Because there is no
greater government interest in preventing sodomy than preventing other
teenage sexual conduct, statutory rape laws and their concomitant
penalties should be the same for all.\textsuperscript{139}

F Realities: Harm to LGBT Youth as a Result of Discriminatory
Romeo and Juliet Provisions

In \textit{Lawrence}, the Court reached its holding in part because of the
extraordinary stigma Texas’ sodomy prohibition placed on LGBT
individuals.\textsuperscript{140} Yet still, “[t]he Conservative Moral Approach and
heterosexist views have caused [LGBT youth] to be classified as a lower
class of people than heterosexuals.”\textsuperscript{141} The harm resulting from Romeo
and Juliet statutes that classify LGBT youth in this way is not just forced
upon them, but also borne by our social and legal systems as a whole.

The aforementioned vast sentencing disparities are obvious and
incredible harms forced upon LGBT youth by discriminatory Romeo and

\begin{thebibliography}{99}
\bibitem{135} See \textit{Lawrence} v. Texas, 539 U.S. 558, 577-78 (2003) (citing with approval \textit{Bowers} v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting) and overruling \textit{Bowers} holding that the promotion of morality was a legitimate interest that survived rational basis review); \textit{Id.} at 582 (O’Connor, J., concurring) (stating that moral disapproval is not a legitimate government interest). While “the state’s interest in preventing adult sexual exploitation trumps the minor’s right to privacy . . . the state’s interest in safeguarding morality does not.” \textit{Allender}, supra note 74, at 1848 (citing B.B. v. State, 659 So. 2d 256 (Fla. 1995)); \textit{Id.} at 575 (noting the relationship between due process and equal protection with regard to homosexual conduct).
\bibitem{136} \textit{Romer} v. Evans, 517 U.S. 620, 624 (1996) (internal quotation marks omitted).
\bibitem{137} \textit{Bowers}, 478 U.S. at 219 (Stevens, J., dissenting); \textit{see also Lawrence}, 539 U.S. at 578-79.
\bibitem{138} Amici Brief, supra note 129, at 2; Snyder \textit{supra} note 10, at 248.
\bibitem{139} \textit{See Allender}, \textit{supra} note 74, at 1847.
\bibitem{140} 539 U.S. at 575 (noting that a conviction under the Texas law would require a
mandatory sex-offender registration in other jurisdictions, and disclosure on job applications); \textit{Id.} at 584 (O’Connor, J., concurring) (noting the “lifelong penalty and stigma” of sex-offender status).
\bibitem{141} Hough, \textit{supra} note 40, at 118.
\end{thebibliography}
Juliet provisions.\footnote{142} What is more, according to the National Association of Social Workers, discriminatory Romeo and Juliet provisions not only marginalize and stigmatize LGBT youth, but also encourage violence.\footnote{143} LGBT youth already face higher rates of suicide and suicide attempts, depression, isolation, and abuse,\footnote{144} which likely contribute to their rates of delinquency.\footnote{145} To add to this a legally-sanctioned view that the most intimate part of their development is criminal, “unnatural, deviant, and not to be tolerated,”\footnote{146} despite a complete dearth of objective supporting evidence, is unconscionable.\footnote{147} If a presumption of criminality on all homosexual adults is unconstitutional because of the harm it can cause,\footnote{148} the same ought to be true as applied to LGBT youth, who already face greater harm because of their sexual orientation.

If the fact that these discriminatory laws exist is harmful in itself—even to those who are not convicted of them—the legislative justifications for them are at least as damaging. These justifications indicate that the government not only thinks that LGBT youth’s sexual conduct is criminal, but also that it is morally wrong;\footnote{149} they indicate that the government thinks it has an interest in preventing minority sexual orientations from developing and even in changing the sexual identity of teens;\footnote{150} they indicate that the government is unwilling to back down from prejudice and discrimination, and that instead they will institutionalize it. They encourage LGBT youth to remain silent about their sexual identity\footnote{151} lest they be institutionalized,\footnote{152} victimized,\footnote{153} and

\begin{footnotes}
\footnote{142}{Def.-Appellant’s Supplemental Brief on Review, supra note 7, at 1.}
\footnote{143}{Amici Brief, supra note 129, at 11-12.}
\footnote{144}{Gwinn, supra note 1, at 441-42; Rosario et al., supra note 26, at 46; Hahn, supra note 3, at 121-22; Wardenski, supra note 1, at 1376, 1383.}
\footnote{145}{Hahn, supra note 3, at 121.}
\footnote{146}{Amici Brief, supra note 129, at 11 (internal quotation marks omitted).}
\footnote{147}{“There is no support in social science for the grossly disparate sentencing outcomes that such laws impose on teenagers involved in sexual activities with members of the same sex. On the contrary, social science confirms that these laws cause harm by reinforcing prejudice and discrimination against persons who are involved in sexual activity with same-sex partners.” Id. at 2.}
\footnote{148}{See Lawrence v. Texas, 539 U.S. 558, 575 (2003); id. at 581-82 (O’Connor, J., concurring) (noting that Texas’ law had far-reaching collateral effects including “in the areas of employment, family issues, and housing”) (internal quotation marks and citation omitted).}
\footnote{149}{State v. Limon, 83 P.3d 229, 235-38 (Kan. Ct. App. 2004), rev’d, 122 P.3d 22 (Kan. 2005); Def.-Appellant’s Brief on Review, supra note 7, at 5-6; see Allender, supra note 74, at 1848-49.}
\footnote{150}{See Amici Brief, supra note 129, at 6-7.}
\footnote{151}{Wardenski, supra note 1, at 1373.}
\footnote{152}{Id. at 1380; Gwinn, supra note 1, at 439; Valentine, supra note 15, at 468.}
\footnote{153}{Valentine, supra note 15, at 468; Hahn, supra note 3, at 121-25.}
\end{footnotes}
declared sex offenders. They simultaneously perpetuate the invisibility and impossibility of LGBT youth and the homophobia against them.

The legal system also suffers as a result of these laws. Discriminatory statutory rape laws, just like anti-sodomy laws before them, “undermine respect for the law by penalizing conduct many people engage in.” Since anywhere from two percent to ten percent of the adult population is lesbian, bisexual or gay, a minimum of 6.21 to 31.07 million Americans are lesbian, bisexual, or gay. Criminalizing teenage sexual activity that is common to such a large number of people undermines respect for and the effectiveness of criminal laws.

These provisions, like their anti-sodomy predecessors, also “regulate[] private conduct [that is] not harmful to others.” There is no scientific support for the suggestion that consensual homosexual activity between teens is harmful to them or to anyone else; instead, it is normal. Respect for the legal system is undermined when the government uses its powers to reach too far into the lives of its citizens, regulating conduct in which it has no legitimate interest.

G. Prevention of Harm

Society has an interest in preventing all of these harms. First, it has an interest in ensuring the physical and psychological welfare of its minorities. The alarming rates of LGBT youth suicide, depression, homelessness, and overrepresentation in the juvenile justice system indicate that this population is suffering, and this suffering is at least partially attributable to legal attitudes—both formal and informal—

155. See Gwinn, supra note 1, at 441-43; Ruskola, supra note 21, at 270.
158. The number is, of course, much larger when LGBT youth are included, but this number is not currently reportable due to the aforementioned invisibility of LGBT youth.
160. Lawrence, 539 U.S. at 572 (citing MODEL PENAL CODE, Commentary 227-280 (Tent. Draft No. 4, 1955)).
161. Amici Brief, supra note 129, at 8.
162. These provisions are also “arbitrarily enforced and thus invite[] the danger of blackmail.” Lawrence, 539 U.S. at 572 (citing MODEL PENAL CODE, Commentary 227-280 (Tent. Draft No. 4, 1955)).
towards them. Because society has an undeniable interest in all of the symptoms of discrimination against LGBT youth, it also has an interest in the underlying cause.

Second, society has an interest in promoting respect for, and the progress of, its legal system. If a small group of legislators are able to craft criminal statutes in support of their own ill-informed and prejudicial beliefs at the expense of basic notions of fairness, not to mention constitutionality and scientific evidence, the public receives the wrong message about our legal system. Disparate sentencing outcomes like the ones at issue here are particularly damaging to the public’s perception of the law in light of increasing acceptance of the proscribed conduct. In order to be widely accepted, the law should reflect society’s values, not attempt to shape them.

V. SOLUTIONS

In order to address these harms, statutory rape laws should treat all similar sexual conduct alike. Because sexual activity between teenagers of the same sex is no more harmful than that between members of the opposite sex, it should not be penalized differently. Romeo and Juliet statutes, if they are to exist at all, should therefore apply not only to vaginal, but also to oral and anal sex; they should apply to male and female teens alike, whether they engage in same- or opposite-sex sexual activity.

VI. CONCLUSION

Despite the legal progress the LGBT community gained with Lawrence, LGBT youth are still suffering the consequences of discriminatory criminal laws that target their sexual conduct. Though minority sexual identities have gained increasing acceptance and teenage sexual activity is increasingly prevalent, state legislatures still attempt to justify discrimination against LGBT youth with reference to tradition, morality, and prejudicial assumptions about homosexual conduct. As a result, LGBT youth face much harsher punishments than their straight peers for engaging in identical sexual conduct with members of their same sex. Because criminal law cannot legitimately be used as a tool to discriminate against an unpopular group on the basis of morality or

163. See Lawrence, 539 U.S. at 579 (O’Connor, J., concurring).
164. Indeed, it may be less harmful, considering the fact that same-sex sexual activity cannot result in pregnancy, and often times has a lower rate of STD transmission.
prejudice, Romeo and Juliet statutes that punish conduct differently based on the sexual identity of the actors are unconstitutional, and must be revised or removed.