

COMMENT

The Present Case *Does* Involve Minors: An Overview of the Discriminatory Effects of Romeo and Juliet Provisions and Sentencing Practices on Lesbian, Gay, Bisexual, and Transgender Youth

Caitlyn Silhan*

I.	INTRODUCTION	98
II.	THE PROBLEMS FACING LGBT YOUTH	99
	<i>A. Discrimination</i>	99
	<i>B. Invisibility or Paternalism</i>	100
	<i>C. Lack of Support</i>	101
	<i>D. Consequences</i>	102
III.	STATUTORY RAPE LAWS: BACKGROUND	103
	<i>A. Sodomy Laws</i>	103
	<i>B. Bowers</i>	103
	<i>C. Bowers Dissents</i>	103
	<i>D. Lawrence</i>	104
IV.	STATUTORY RAPE LAWS AND JUSTIFICATIONS	106
	<i>A. Statutory Rape Laws: Romeo and Juliet Provisions</i>	107
	<i>B. Statutory Rape Laws: Problems</i>	108
	<i>C. The “Minor Exception”</i>	110
	<i>D. Romeo and Romeo, Juliet and Juliet Situations</i>	111
	<i>E. Justifications for Differentiating Between Opposite- and Same-Sex Sexual Conduct Among Teens</i>	112
	<i>F. Realities: Harm to LGBT Youth as a Result of Discriminatory Romeo and Juliet Provisions</i>	115
	<i>G. Prevention of Harm</i>	117
V.	SOLUTIONS	118
VI.	CONCLUSION	118

* © 2011 Caitlyn Silhan. J.D. candidate 2011, Tulane University Law School; B.A. 2007, Boston University.

I. INTRODUCTION

Lesbian, gay, bisexual, and transgender (LGBT) youth are overrepresented in child welfare and juvenile justice systems;¹ they have increased suicide attempt and success rates;² they face informal discrimination from peers and staff in schools,³ and in state facilities.⁴ They also face formal discrimination in the form of harsher punishments than their straight peers.⁵ 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.⁶ 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.⁷ Because *Lawrence v. Texas*⁸ prevents the government from using its criminal laws to discriminate against homosexual "conduct, practices, or relationships,"⁹ and because same-sex and opposite-sex sexual conduct are similarly

1. Valerie Gwinn, *Locked in the Closet: the Impact of Lawrence v. Texas on the Lives of Gay Youth in the Juvenile Justice System*, 6 WHITTIER J. CHILD & FAM. ADVOC. 437, 439 (2007); Joseph J. Wardenski, Comment, *A Minor Exception?: The Impact of Lawrence v. Texas on LGBT Youth*, 95 J. CRIM. L. & CRIMINOLOGY 1363, 1380 (2005).

2. Wardenski, *supra* note 1, at 1377.

3. Peter A. Hahn, Note, *The Kids Are Not Alright: Addressing Discriminatory Treatment of Queer Youth in Juvenile Detention and Correctional Facilities*, 14 B.U. PUB. INT. L.J. 117 n.3 (2004).

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).

8. 539 U.S. 558 (2003).

9. *Lawrence*, 539 U.S. at 574 (quoting *Romer v. Evans*, 517 U.S. 620, 624 (1996)); Def.-Appellant's Supplemental Brief on Review, *supra* note 7, at 4 (quoting *Romer v. Evans*, 517 U.S. 620, 624 (1996)).

situated for equal-protection purposes,¹⁰ Romeo and Juliet provisions must apply equally to heterosexual and LGBT youth if they are to withstand constitutional scrutiny.¹¹

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.¹² Many LGBT youth are isolated and depressed.¹³ Unlike LGBT adults, however, LGBT youth still face the kind of government-sanctioned discrimination that *Romer v. Evans* and *Lawrence* purported to abolish.¹⁴

LGBT youth are placed in residential treatment and detention programs at a higher rate than their straight peers.¹⁵ 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.”¹⁶ 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.¹⁷ Had he performed the same sexual act on a female teen, he would have faced a mere fifteen months.¹⁸

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,¹⁹ society frequently views gay teenagers as “impossible.”²⁰ Adults often conclude that LGBT youth are just rebelling, confused, or seeking attention;²¹ 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,²² 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.²³

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

17. *State v. Limon*, 122 P.3d 22, 24-25 (Kan. 2005); Nancy Bourke, Comment, *Heeding the Equal Protection Clause in the Case of State v. Limon and in Other Instances of Discriminatory Romeo and Juliet Statutes*, 12 WIDENER L. REV. 613, 613 (2006).

18. Def.-Appellant’s Supplemental Brief on Review, *supra* note 7, at 1.

19. Ritch C. Savin-Williams & Lisa M. Diamond, *Sexual Identity Trajectories Among Sexual-Minority Youths: Gender Comparisons*, 29 ARCHIVES OF SEXUAL BEHAV. 607, 618, 622 (2000).

20. Gwinn, *supra* note 1, at 443 (internal quotation marks omitted); see Hahn, *supra* note 3, at 122.

21. Gwinn, *supra* note 1, at 443; see Teemu Ruskola, *Minor Disregard: The Legal Construction of the Fantasy That Gay and Lesbian Youth Do Not Exist*, 8 YALE J.L. & FEMINISM 269, 323 (1996).

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 Council; 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.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;²⁵ ignorant of the realities of teenage sexual identity development,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.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.²⁸ On this front as well, LGBT teens must

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).

25. *See* State v. Limon, 122 P.3d 22, 35 (Kan. 2005); State v. Limon, 83 P.3d 229, 236 (Kan. Ct. App. 2004), *rev'd*, 122 P.3d 22 (Kan. 2005).

26. Margaret Rosario et al., *Sexual Identity Development Among Lesbian, Gay and Bisexual Youths: Consistency and Change Over Time*, 31 J. SEX. RES. 46, 46-47 (2006). Identity formation is defined as "becoming aware of one's unfolding sexual orientation, beginning to question whether one may be LGB, and exploring that emerging LGB identity by becoming involved in gay-related social and sexual activities." *Id.* This is followed by sexual identity integration, or "incorporating and consolidating a LGB identity." *Id.* at 47.

27. *Id.* at 46; *see* Wardenski, *supra* note 1, at 1376.

28. *See* Wardenski, *supra* note 1, at 1375; *see also* Andrew Sullivan, *It's The Gays' Fault*, ATLANTIC, Apr. 1, 2010, 3:39 PM, http://andrewsullivan.theatlantic.com/the_daily_dish/2010/04/its-the-gays-fault.html; Michael Tomasky, *William Donohue Wrong on Abuse*, GUARDIAN, Apr. 1, 2010, <http://www.guardian.co.uk/commentisfree/michaeltomasky/2010/apr/01/catholicism-childprotection>. Social scientists have attempted to classify child molesters on the basis of their victims' sex, arguing that "among extrafamilial offenders, same-sex child molesters are at highest risk to reoffend and opposite-sex child molesters are at lowest risk." ROBERT A. PRENTKY, ET AL., NAT'L INST. OF JUSTICE & OFF. OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, CHILD SEXUAL MOLESTATION: RESEARCH ISSUES 4 (June 2007), *available at* <http://www.ncjrs.gov/pdffiles/>

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."²⁹ On the streets, many LGBT youth are forced to resort to criminal activity in an effort to support themselves.³⁰ On the streets or off, all LGBT teens have increased suicide attempt and success rates.³¹ One Massachusetts study concluded that LGBT youth are approximately four times as likely to attempt suicide as their straight peers.³² For those that do not take their own lives, their chances of being placed in child welfare or detention systems are much higher.³³ They often receive harsher punishments,³⁴ and also are more likely to receive treatment in a residential facility.³⁵ While in state custody, LGBT youth face discrimination from peers and staff.³⁶ 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.³⁷

163390.pdf. This "sex-of-victim" approach, however, has recently been called into question by at least four studies finding either no difference or the opposite. *Id.*

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.").

32. Hahn, *supra* note 3, at 122 (citing MASS. DEP'T OF EDUC., 2001 MASSACHUSETTS YOUTH RISK BEHAVIOR SURVEY 59 (Sept. 2002), available at <http://www.doe.mass.edu/cnp/hprograms/yrbs/01/results.pdf>).

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.³⁸ 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.”³⁹ 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.⁴⁰ 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.”⁴¹ 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.⁴² Noting that there is no “fundamental right upon homosexuals to engage in sodomy,”⁴³ 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.⁴⁴

C. *Bowers Dissents*

The *Bowers* dissenters strongly disagreed with the majority’s characterization of the issue of the case.⁴⁵ 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.

40. Nicole A. Hough, Comment, *Sodomy and Prostitution: Laws Protecting the “Fabric of Society,”* 3 PIERCE L. REV. 101, 105 (2004).

41. *Lawrence*, 539 U.S. at 572 (quoting MODEL PENAL CODE, Commentary 277-80 (Tent. Draft No. 4, 1955)).

42. *Bowers v. Hardwick*, 478 U.S. 186, 189 (1986) *overruled by Lawrence*, 539 U.S. at 558 (2003).

43. *Id.* at 190.

44. *Id.* at 192.

45. *Id.* at 199 (Blackmun, 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 “[l]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

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

premises are not without doubt and, at the very least, are overstated.” *Id.* at 571. See *Bowers*, 478 U.S. at 214-15 (Stevens, J., dissenting).

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.⁶³

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.”⁶⁴ Statutory rape laws reflect “an attempt to protect teenagers from themselves, as well as from those who would prey upon their vulnerability.”⁶⁵ 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.⁶⁶

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.”⁶⁷ In order to promote these interests, many states have raised the age limit of the minors protected by statutory rape laws.⁶⁸

In 1994, a federal law encouraging the enactment of state sex offender registration laws took effect;⁶⁹ as a result, all states currently have sex offender registration laws on their books.⁷⁰ 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.”⁷¹ 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.

64. Catherine L. Carpenter, *The Constitutionality of Strict Liability in Sex Offender Registration Laws*, 86 B.U. L. REV. 295, 309 (2006).

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.

66. Carpenter, *supra* note 64, at 310; see NOY S. DAVIS & JENNIFER TWOMBLY, ABA CTR. ON CHILD. AND THE LAW & OFF. FOR VICTIMS OF CRIME, U.S. DEP’T OF JUSTICE OFF. OF JUSTICE PROGRAMS STATE LEGISLATORS’ HANDBOOK FOR STATUTORY RAPE ISSUES 6 (Feb. 2000) available at <http://www.ojp.usdoj.gov/ovc/publications/infores/statutoryrape/handbook/statrape.pdf>.

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.*

69. 42 U.S.C. § 14071 (2006).

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.

74. See Charles A. Phipps, *Misdirected Reform: On Regulating Consensual Sexual Activity Between Teenagers*, 12 CORNELL J.L. & PUB. POL’Y 373, 390, 403 (2003). These are essentially “peer exception[s].” Daniel Allender, *Applying Lawrence: Teenagers and the Crime Against Nature*, 58 DUKE L.J. 1825, 1828 (2009). “[T]he modern trend is toward multilevel statutes, with increased penalties associated with sexual intercourse with younger minors . . . States in recent years increasingly believe ‘older’ defendants warrant increased or mandatory minimum penalties.” Davis & Twombly, *supra* note 66, at note 12.

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.”⁸⁰ Connecticut, for example, revised its statutory rape laws in 2007 to “[get] a little more focused and [try] to go after the real predators.”⁸¹ Now, the statutes have “widen[ed] the age gap between consenting sexual partners” from two to three years.⁸² Though “some Republican lawmakers were ‘very uncomfortable’ about expanding the scope of consensual sex,”⁸³ the Connecticut statutes now exclude a teenager within three years of age of his or her younger sexual partner.⁸⁴ Similarly, Indiana has created a Romeo and Juliet exception to its “sexually violent predator”⁸⁵ 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.”⁸⁶

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.⁸⁷ Problems remain, however, in the enforcement of laws originally intended to protect the chastity of women.⁸⁸

80. John Gramlich, *New Laws Take ‘Romeo’ into Account*, STATELINE (July 16, 2007, 5:30 PM), <http://www.stateline.org/live/details/story?contentId=224279>.

81. *Id.* (quoting Connecticut State Representative Mike Lawlor, chairman of the House Judiciary Committee and a former state prosecutor); see Hilda Munoz, *A Plan to Redefine Teen Sex Offenders*, HARTFORD COURANT, May 3, 2007 at A1, available at http://articles.courant.com/2007-05-03/news/0705030904_1_offender-statutory-sexual.

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.⁸⁹ Prosecutors, then, must prioritize, often selecting cases that are easily identified for reasons like large age differences and teen pregnancy.⁹⁰ They most often prosecute males,⁹¹ 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.⁹² While the argument that teen girls need more protection from teen pregnancy may go towards explaining the gender bias,⁹³ 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.⁹⁴ 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.⁹⁵ 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.⁹⁶

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.⁹⁷ Further, as evinced by Connecticut Representative Mike Lawlor's comments,⁹⁸ communities usually do not think most statutory rape offenders should

Felons: The Persistence of the Crime Against Nature After Lawrence v. Texas, 43 WAKE FOREST L. REV. 155, 170 (2008) (noting that North Carolina originally punished statutory rape with death).

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.⁹⁹ Indeed, evidence shows that forty-seven percent of high school students have had sex,¹⁰⁰ 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.¹⁰¹ These numbers, coupled with the fact that about forty-two percent of statutory rape defendants are fewer than five years older than their partners,¹⁰² that most are under the age of twenty,¹⁰³ and that many states are widening the age gap in their statutory rape statutes,¹⁰⁴ 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”¹⁰⁵

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.”¹⁰⁶ 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,”¹⁰⁷ has become a popular justification for far-reaching statutory rape laws.¹⁰⁸

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,¹⁰⁹ statutory rape laws that single out

99. See James, *supra* note 88, at 247-48.

100. *Id.* at 249.

101. Gross, *supra* note 75, at 23.

102. James, *supra* note 88, at 247.

103. Kate Sutherland, *From Jailbird to Jailbait: Age of Consent Laws and the Construction of Teenage Sexualities*, 9 WM. & MARY J. WOMEN & L. 313, 316 (2003).

104. Davis & Twombly, *supra* note 66, at 3, 8-9, 12.

105. Gwinn, *supra* note 1, at 454-55; Wardenski, *supra* note 1, at 1394-95; see *State v. Limon*, 83 P.3d 229, 234 (Kan. Ct. App. 2004), *rev'd*, 122 P.3d 22 (Kan. 2005).

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.”).

107. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

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).

109. See, e.g., *Romer v. Evans*, 517 U.S. 620, 634-35 (1996); *Loving v. Virginia*, 388 U.S. 1, 8-9 (1967).

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.¹¹⁰ 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,¹¹¹ but not for unlawful sexual intercourse with a minor.¹¹²

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.¹¹³ 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.”¹¹⁴ 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

110. Wardenski, *supra* note 1, at 1390, 1407 (suggesting a more “reasonable reading of that exception” as one that “leaves regulation of all youth sexual activity to the states”).

111. *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).

112. *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.

113. *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.

114. TEX. PENAL CODE § 21.11(a) (Vernon Supp. 2010).

than the victim and *of the opposite sex*.”¹¹⁵ An LGBT teen above the age of seventeen, then, will face a jail sentence of two to twenty years, a fine of up to \$10,000,¹¹⁶ and sex offender registration if he or she has any consensual sexual contact with another teen of the same sex.¹¹⁷ 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,¹¹⁸ 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.¹¹⁹ While both offenses are Class B felonies subject to a two to twenty-year sentence, fine, and sex offender registration,¹²⁰ 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.¹²¹ 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.¹²²

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

115. *Id.* § 21.11(b)(1) (emphasis added).

116. *Id.* § 12.33(a)-(b).

117. *Id.* § 62.001(5)(A). *But see* TEX. CODE CRIM. PROC. Art. 62.301 (Vernon 2006) (describing the “Exemption from Registration for Certain Young Adult Sex Offenders”).

118. ALA. CODE § 13A-6-62(a) (LexisNexis 2005) (applying to any “person”).

119. ALA. CODE § 13A-6-64(a) (LexisNexis 2005).

120. *Id.* §§ 13A-6-62 (a), 13A-6-64(a), 13A-5-6, 13A-11-200 (sentencing for felonies and reporting and registration requirements).

121. *Id.* § 13A-6-62(a)(1).

122. *Id.* § 13A-6-60(1), (2) (defining “[s]exual intercourse” as penetration and “[d]eviate sexual intercourse,” as “[a]ny act of sexual gratification” between unmarried partners “involving the sex organs of one person and the mouth or anus of another”); *see also* VA. CODE ANN. § 18.2-63(B)-(c) (2009) (providing Romeo and Juliet exception to “[c]arnal knowledge of child between thirteen and fifteen years of age” only if the conduct at issue is sexual intercourse and not other forms of carnal knowledge like “cunnilingus, fellatio, anilingus, anal intercourse”).

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

123. *State v. Limon*, 83 P.3d 229, 232 (Kan. Ct. App. 2004), *rev'd*, 122 P.3d 22 (Kan. 2005) (charging the defendant with criminal sodomy under KAN. STAT. ANN. § 21-3505(a)(2) (2010)); Def.-Appellants Brief on Review, *supra* note 7, at 1.

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.

125. Government interests in statutes with a discriminatory effect must be legitimate, and rationally related to the classification drawn by the statute. *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558, 579 (2003) (O’Connor, J., concurring); *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985).

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.

129. Brief Amici Curiae of the Nat’l Assoc. of Soc. Workers & the KS Chapter of the Nat’l Assoc of Soc. Workers in Support of Def.-Appellant Matthew Limon at 4-5, *State v. Limon*, 122 P.3d 22 (Kan. 2005) (No. 85-898), 2004 WL 1958980, at *4-5 [hereinafter Amici Brief]; Davis &

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.¹³⁰ 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.¹³¹ 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,¹³² and female-female sexual contact has a much lower risk of STD transmission than female-male or male-male.¹³³ 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.¹³⁴

Ultimately, these justifications boil down to one real motivation: promoting the morality of the majority. Under Supreme Court equal

Twombly, *supra* note 66, at 3, 8, 12 (noting legislative trends in statutory rape laws); Gross, *supra* note 75, at 23 (discussing the norms of teenage sexual behavior); *see* Lawrence v. Texas, 539 U.S. 558, 572 (2003).

130. Amici Brief, *supra* note 129, at 5. Children experience their first same-sex sexual attractions between the ages of seven and nine, well before they engage in their first same-sex sexual contact between the ages of fourteen and sixteen. Savin-Williams & Diamond, *supra* note 19, at 619, 622-23.

131. Def.-Appellant’s Supplemental Brief on Review, *supra* note 7, at 10; *see* Bowers v. Hardwick, 478 U.S. 186, 208-09 (1986) (Blackmun, J., dissenting).

132. Bourke, *supra* note 17, at 630-31.

133. Def.-Appellant’s Supplemental Brief on Review, *supra* note 7, at 10.

134. If legislatures are so concerned about the health of teenage bodies, they should seek to discourage the conduct that results in one of the most dangerous health conditions a body can endure: pregnancy. *See* ANN P. MCCAULEY & CYNTHIA SALTER, POPULATION INFO. PROGRAM, CTR. FOR COMM. PROGRAMS, THE JOHNS HOPKINS SCHOOL OF PUB. HEALTH, MEETING THE NEEDS OF YOUNG ADULTS: HEALTH RISKS OF EARLY PREGNANCY (Oct. 1995), *available at* http://info.k4health.org/pr/j41/j41chap2_3.shtml. Oregon, for example, has increased the penalty for “contributing to the sexual delinquency of a minor if a pregnancy results.” Davis & Twombly, *supra* note 66, at 11. In addition to potential emotional and physical harm to the mother, teen pregnancy also costs society: preventing teen pregnancy could save the United States \$9 billion a year. CENTERS FOR DISEASE CONTROL AND PREVENTION, NAT’L CTR. FOR CHRONIC DISEASE PREVENTION AND HEALTH PROMOTION, DIV. OF REPRODUCTIVE HEALTH, PREVENTING TEEN PREGNANCY 2010-2015, (Aug. 10, 2009), *available at* http://www.cdc.gov/TeenPregnancy/PDF/TeenPregnancy_AAG.pdf. Teen moms are also more likely to drop out of high school and be and remain single mothers. *See Preventing Teen Pregnancy*, *supra* note 134. They are also more likely to be cautionary tales on MTV. *See Teen Mom*, (MTV Television Broadcast), *available at* http://www.mtv.com/shows/teen_mom/series.jhtml (last visited Apr. 4, 2010); *16 and Pregnant*, (MTV Television Broadcast), *available at* http://www.mtv.com/shows/16_and_pregnant/season_2/series.jhtml (last visited Apr. 4, 2010).

protection and due process precedent, however, this is not a legitimate government interest capable of surviving even rational basis scrutiny.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.”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,¹³⁷ neither can discriminatory Romeo and Juliet statutes that distinguish between same- and opposite-sex sexual conduct.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.¹³⁹

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

In *Lawrence*, the Court reached its holding in part because of the extraordinary stigma Texas’ sodomy prohibition placed on LGBT individuals.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.”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

135. See *Lawrence v. Texas*, 539 U.S. 558, 577-78 (2003) (citing with approval *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting) and overruling *Bowers* holding that the promotion of morality was a legitimate interest that survived rational basis review); *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.” Allender, *supra* note 74, at 1848 (citing *B.B. v. State*, 659 So. 2d 256 (Fla. 1995)); *id.* at 575 (noting the relationship between due process and equal protection with regard to homosexual conduct).

136. *Romer v. Evans*, 517 U.S. 620, 624 (1996) (internal quotation marks omitted).

137. *Bowers*, 478 U.S. at 219 (Stevens, J., dissenting); see also *Lawrence*, 539 U.S. at 578-79.

138. Amici Brief, *supra* note 129, at 2; Snyder *supra* note 10, at 248.

139. See Allender, *supra* note 74, at 1847.

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); *id.* at 584 (O’Connor, J., concurring) (noting the “lifelong penalty and stigma” of sex-offender status).

141. Hough, *supra* note 40, at 118.

Juliet provisions.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.¹⁴³ LGBT youth already face higher rates of suicide and suicide attempts, depression, isolation, and abuse,¹⁴⁴ which likely contribute to their rates of delinquency.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,”¹⁴⁶ despite a complete dearth of objective supporting evidence, is unconscionable.¹⁴⁷ If a presumption of criminality on all homosexual adults is unconstitutional because of the harm it can cause,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;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;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 identity¹⁵¹ lest they be institutionalized,¹⁵² victimized,¹⁵³ and

142. Def.-Appellant’s Supplemental Brief on Review, *supra* note 7, at 1.

143. Amici Brief, *supra* note 129, at 11-12.

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.

145. Hahn, *supra* note 3, at 121.

146. Amici Brief, *supra* note 129, at 11 (internal quotation marks omitted).

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.

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).

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.

150. *See* Amici Brief, *supra* note 129, at 6-7.

151. Wardenski, *supra* note 1, at 1373.

152. *Id.* at 1380; Gwinn, *supra* note 1, at 439; Valentine, *supra* note 15, at 468.

153. Valentine, *supra* note 15, at 468; Hahn, *supra* note 3, at 121-25.

declared sex offenders.¹⁵⁴ They simultaneously perpetuate the invisibility and impossibility of LGBT youth and the homophobia against them.¹⁵⁵

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.”¹⁵⁶ Since anywhere from two percent to ten percent of the adult population is lesbian, bisexual or gay,¹⁵⁷ a *minimum*¹⁵⁸ of 6.21 to 31.07 million Americans are lesbian, bisexual, or gay.¹⁵⁹ 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.”¹⁶⁰ 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.¹⁶¹ 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.¹⁶²

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—

154. Valentine, *supra* note 15, at 471.

155. See Gwinn, *supra* note 1, at 441-43; Ruskola, *supra* note 21, at 270.

156. *Lawrence v. Texas*, 539 U.S. 558, 572 (2003) (citing MODEL PENAL CODE, Commentary 227-280 (Tent. Draft No. 4, 1955)).

157. See Jennifer Robinson, *What Percentage of the Population Is Gay?*, GALLUP.COM (Oct. 8, 2002), <http://www.gallup.com/poll/6961/what-percentage-population-gay.aspx>. A 2004 CNN exit poll showed four percent of the voting population is gay, lesbian, or bisexual. See *Election 2004*, CNN.COM (Nov. 2004), available at <http://www.cnn.com/ELECTION/2004/pages/results/states/US/P/00/epolls.0.html>.

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.

159. As of February 7, 2011, the total U.S. population was 310,775, 376. *U.S. & World Population Clock*, CENSUS.GOV, <http://www.census.gov/main/www/popclock.html> (last visited Apr. 4, 2010).

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.¹⁶³ Because sexual activity between teenagers of the same sex is no more harmful than that between members of the opposite sex,¹⁶⁴ 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*,¹⁶⁵ 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.

165. 539 U.S. 558 (2003).

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.