
Queer Teens and Legislative Bullies: The Cruel and Invidious Discrimination Behind Heterosexist Statutory Rape Laws

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Most states make an exception to their statutory rape laws for sexual acts involving an adolescent victim, who is below the age of consent, when the defendant is close in age to the victim (i.e., generally no older than three or four years). However, a few states explicitly limit such exceptions (commonly referred to as Romeo and Juliet exceptions) to only those situations involving teens who are of the opposite gender. Thus, adolescents in these states who have sex with someone below the age of consent, and who are also the same gender as the defendant, cannot avail themselves to the exception. As a result, these teens are faced with felony convictions, large fines and mandatory sex offender registration — penalties that would not attach had the victim been the opposite gender. This article argues that such disparate treatment is not only cruel, but is also invidious discrimination that violates the Equal Protection Clause given that these laws serve primarily to stigmatize LGBT adolescents, a class of individuals that is already one of the most stigmatized and at-risk groups in American society.

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“Lesbian and gay youth are the most invisible and outcast group of young people with whom you will come into contact.”¹

INTRODUCTION

A number of commentators have drawn compelling parallels between current laws that discriminate against homosexuals and Jim Crow² laws of the post-Civil War South.³ Both were designed to brand a discrete class of Americans “as immoral, inferior, and not deserving of society’s tolerance and protection.”⁴ At the heart of Jim Crow laws was the concept of “separate but equal,” which required that schools and businesses keep the black and white races segregated from one another. In 1954, this concept was unanimously struck down in the Supreme Court’s decision in *Brown v. Board of Education*, largely because of the stigmatizing impact that these laws had on African-American children.⁵

Unfortunately, for the lesbian, gay, bisexual and transgender (“LGBT”) community, the equivalent of Jim Crow laws still exists today. For example, in contrast to heterosexuals, homosexuals cannot marry, cannot openly serve in the military, and, in some instances, cannot even adopt children. Although these prohibitions apply equally to all homosexuals, some states have gone so far as to pass legislation that is specifically directed at LGBT youth. Just like the discrimination at issue in *Brown*, such state action is extremely stigmatizing to LGBT

¹ Paul Gibson, *Gay and Lesbian Youth Suicide*, in U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES YOUTH SUICIDE REPORT 110 (1989), reprinted in LESBIANS, GAY MEN, AND THE LAW 163, 163 (William B. Rubenstein ed., 1993).

² See generally Olympia Duhart, *A Native Son’s Defense: Bigger Thomas and Diminished Capacity*, 49 HOW. L.J. 61, 65-66 (2005) (“Jim Crow was the term given to the system of segregation that characterized life in much of America from the mid-1870s to the mid-1960s. Jim Crow customs encompassed a ‘cradle to grave system of racial segregation.’”) (footnote omitted).

³ See Devon W. Carbado, *Black Rights, Gay Rights, Civil Rights*, 47 UCLA L. REV. 1467, 1497 (2000); Richard A. Epstein, *Caste and the Civil Rights Laws: From Jim Crow to Same-Sex Marriages*, 92 MICH. L. REV. 2456, 2468-76 (1994); Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by “Unenforced” Sodomy Laws*, 35 HARV. C.R.-C.L. L. REV. 103, 114-15 (2000).

⁴ Leslie, *supra* note 3, at 114.

⁵ 347 U.S. 483, 494 (1954) (noting how school segregation is damaging to African-American children in that it “generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone”); see also *infra* text accompanying notes 217-221.

youth, especially because these youth are politically powerless and extremely marginalized within American society.⁶

In essence, laws that target LGBT adolescents are anti-sodomy statutes. While the Supreme Court in *Lawrence v. Texas* invalidated such statutes as they pertain to consensual adult sexual relations,⁷ some states have retained such prohibitions as part of their criminal statutes relating to statutory rape. These prohibitions, in and of themselves, likely pose no Constitutional impediment given that states have broad powers to protect minors.⁸ However, presumably recognizing that sexual experimentation is common among adolescents, most states have created exceptions to their statutory rape laws. The most frequent exceptions cover consensual adolescent sexual activity involving an adolescent below the age of consent when the sexual partner is another adolescent close in age.⁹

These exceptions are commonly referred to as “Romeo and Juliet” laws and, when triggered, generally result in either no crime or a much reduced penalty.¹⁰ Unfortunately, some states have decided that such an exception should apply only to heterosexual activity and have written their Romeo and Juliet laws to explicitly exclude adolescents who engage in homosexual activity.¹¹ Accordingly, in those states, adolescent defendants who would be protected by the Romeo and Juliet exception had their sexual act been with someone of the opposite gender, instead face the prospect of a felony conviction.

To see the inequities in punishment that result because of discriminatory Romeo and Juliet laws, consider the case of Matthew Limon.¹² In February of 2000, after Limon had just turned eighteen, he violated the state’s statutory rape law when he engaged in oral sex with M.A.R., who was almost fifteen years old at the time of the incident.¹³ Had Limon fallen under the Kansas Romeo and Juliet exception, the maximum sentence would have been fifteen months.¹⁴ Furthermore, he would not have had to register as a convicted sex

⁶ See *infra* Part I.C.

⁷ 539 U.S. 558, 578-79 (2003).

⁸ See *Carey v. Population Servs. Int’l*, 431 U.S. 678, 694 n.17 (1977) (“[I]n the area of sexual mores . . . the scope of permissible state regulation is broader as to minors than as to adults.”).

⁹ See *infra* Part II.

¹⁰ See *infra* Part II.

¹¹ See *infra* Part II.

¹² *State v. Limon (Limon III)*, 122 P.3d 22, 24 (Kan. 2005).

¹³ *Id.*

¹⁴ *Id.* at 25 (citing KAN. STAT. ANN. § 21-4704 (Supp. 1999)).

offender.¹⁵ However, Kansas' Romeo and Juliet provision required that the two actors be of the opposite gender.¹⁶ Solely as a result of that requirement, Limon did not qualify for the Romeo and Juliet exception because he and M.A.R. were male.¹⁷ Accordingly, Limon was convicted of a felony, sentenced to over seventeen years in prison, subjected to sixty months post-release supervision, and required to register as a sexual offender.¹⁸

This Article contends that such discriminatory Romeo and Juliet provisions violate the Equal Protection Clause of the Fourteenth Amendment. Specifically, these statutes impose an extreme level of stigma on a group of children, many of whom already suffer daily from harassment, violence, homelessness, and psychological problems, simply because they fail to conform to the heterosexual norm.¹⁹ Accordingly, these discriminatory Romeo and Juliet laws are a particularly invidious form of discrimination that cannot satisfy even the lowest level of Constitutional review.²⁰

Part I of this Article details the nature of LGBT adolescents, including the process by which sexual orientation develops, the rate of homosexual activity during adolescence, and the problems that LGBT adolescents face as a result of the societal stigma associated with homosexuality. Part II will then look at how some state legislatures are using statutory rape laws as a means of exacerbating the homosexual stigma already facing LGBT adolescents. Finally, against that background, Part III will chart Supreme Court jurisprudence relating to the application of the Equal Protection Clause to stigmatizing legislation and examine how, in light of that jurisprudence, discriminatory Romeo and Juliet laws are unconstitutional given the extremely stigmatizing impact they have on LGBT adolescents.

I. HOMOSEXUAL ADOLESCENCE: A PAINFUL AND PERILOUS JOURNEY

Few would disagree that adolescence is a difficult time for everyone, regardless of sexual orientation. However, studies reveal that, for LGBT youth, adolescence brings with it additional challenges and problems as a result of the stigma that attaches to individuals who fail

¹⁵ *Id.* (citing KAN. STAT. ANN. § 22-4902 (Supp. 1999)).

¹⁶ *Id.* at 24.

¹⁷ *Id.*

¹⁸ *Id.* at 25.

¹⁹ *See infra* Part II.C.

²⁰ *See infra* Part IV.

to abide by gender and heterosexual norms. After all, “those queers who organize their sexual practices or gender performances outside the range of heteronorms can be seen as recalcitrant traitors to the cause, unwilling to make the appropriate sacrifices for the sake of inclusion.”²¹

Indeed, LGBT youth face a whole host of difficulties in a variety of settings simply because of their nonconformity. To fully appreciate this level of stigma and the ensuing harm it often produces, one must first understand the development of nonconforming sexual identity among LGBT youth as well as the resulting incidence of homosexual activity.

A. *The Development of Sexual Identity*

For those who believe that sexual identity²² is purely a product of adulthood,²³ “adolescent homosexuals” simply do not exist. As one commentator notes: “In this conceptual framework, there is simply no place for a homosexual child or adolescent. There are only children and adolescents with latent homosexual inclinations, and adult homosexuals.”²⁴ Or, more succinctly, “[a]ll youths are considered innocent and straight until proven guilty and gay.”²⁵

However, the reality is that homosexuals today are “coming out” at much younger ages, often during puberty.²⁶ Of course, social

²¹ Susan Talburt, Eric Rofes & Mary Louise Rasmussen, *Transforming Discourses of Queer Youth and Educational Practices Surrounding Gender, Sexuality, and Youth*, *Introduction to YOUTH AND SEXUALITIES: PLEASURE, SUBVERSION, AND INSUBORDINATION IN AND OUT OF SCHOOLS* 1, 5 (Mary Louise Rasmussen, Eric Rofes & Susan Talburt eds., 2004).

²² By way of terminology, psychologists define sexual identity as “an enduring sense of oneself as a sexual being fitting into a culturally prescribed category.” Ritch C. Savin-Williams & Richard G. Rodriguez, *A Developmental, Clinical Perspective on Lesbian, Gay Male, and Bisexual Youths*, in *ADOLESCENT SEXUALITY* 77, 80 (Thomas P. Gullotta, Gerald R. Adams & Raymond Montemayor eds., 1993).

²³ As one commentator notes, there is a “false presumption that a conclusive sexual identity cannot be formed until adulthood.” Joseph J. Wardenski, *A Minor Exception?: The Impact of Lawrence v. Texas on LGBT Youth*, 95 *J. CRIM. L. & CRIMINOLOGY* 1363, 1375 (2005).

²⁴ Teemu Ruskola, *Minor Disregard: The Legal Construction of the Fantasy that Gay and Lesbian Youth Do Not Exist*, 8 *YALE J.L. & FEMINISM* 269, 281 (1996).

²⁵ Savin-Williams & Rodriguez, *supra* note 22, at 79.

²⁶ See ELLEN C. PERRIN, M.D., *SEXUAL ORIENTATION IN CHILD AND ADOLESCENT HEALTH CARE* 72 (2002) (“The age of self-identification as gay or lesbian appears to be decreasing. Recent anecdotal accounts report children as young as 11, 12, or 13 feeling certain of their homosexual orientation and disclosing it to their parents.”) (citations omitted).

scientists agree that it is unclear at exactly what point sexual identity emerges²⁷ and “[m]any gay and lesbian teenagers — or those who will ultimately self-identify as such — tend to get through adolescence without publicly adopting the label of ‘gay’ or ‘lesbian.’”²⁸ Nonetheless, even for those individuals who may not self-identify as homosexual until adulthood, the path to this ultimate “discovery”²⁹ is one that begins long before the “magic” age of eighteen.³⁰

Furthermore, it is important to keep in mind that, although sexual identity may become finalized in adulthood, many agree that sexual orientation becomes fixed during childhood. For example, in his book *Sexual Science and the Law*, Richard Green notes that the “age at which sexual orientation emerges is still being debated, but most of the debate is about how *early*.”³¹ Green goes on to describe his own research, which reveals that some men who will ultimately come to identify as homosexual or bisexual can often be identified by behaviors they exhibit in early childhood.³² Furthermore, Green posits that not only is sexual orientation established early in childhood, but that once established the orientation is “essentially irreversible.”³³

When focusing on the difficulties that adolescent homosexuals face, the relevant inquiry becomes not at what age a person’s sexual orientation becomes fixed, but the process that a person undergoes before ultimately accepting their identity as a homosexual. After all, “[p]eople are not born with perceptions of themselves as heterosexual, bisexual, or homosexual in relation to sexual or romantic settings.”³⁴

²⁷ Savin-Williams & Rodriguez, *supra* note 22, at 83 (“As clinicians and scientists, we know relatively little about one of the most important developments in the lives of lesbian, gay male, and bisexual youths: how they come to the point of identifying themselves as gay persons. At what age did this occur?”).

²⁸ Wardenski, *supra* note 23, at 1373 (footnote omitted).

²⁹ Of course, many question whether we can trust the statistics concerning those adolescents who self-identify as gay given the stigma that may play a part in suppressing an accurate count. See Ruskola, *supra* note 24, at 282-83.

³⁰ Warkenski, *supra* note 23, at 1373 (“[T]he formation and realization of sexual identity is a long-term process that, for many individuals, is only just beginning during adolescence.”) (footnote omitted).

³¹ RICHARD GREEN, *SEXUAL SCIENCE AND THE LAW* 53 (1992).

³² *Id.*

³³ *Id.* at 83; see also Martin Dannecker, *Towards a Theory of Homosexuality: Socio-Historical Perspectives*, in *GAY PERSONALITY AND SEXUAL LABELING* 6 (John P. De Cecco ed., 1984) (theorizing that “sexual disposition is acquired in early childhood[,] which determines adult behavior”).

³⁴ Richard R. Troiden, *Homosexual Identity Development*, 9 J. ADOLESCENT HEALTH CARE 105, 105 (1988).

Instead, these perceptions develop gradually. Social science reveals that this process is characterized by various stages, each with its own difficulties.

Richard Troiden, a noted social scientist who has written extensively on the process by which homosexuals develop sexual identity, has divided the process into four stages: sensitization, identity confusion, identity assumption and commitment.³⁵ The last stage, commitment, is the stage where “the individual’s homosexual identity is internalized and integrated.”³⁶ Given that this Article focuses on adolescent homosexuality and that the commitment stage does not generally occur until adulthood, the remainder of this Part focuses on the first three stages and the corresponding age at which each generally occurs.³⁷

1. Childhood: The Sensitization Stage

Many scientists agree that, for gays and lesbians, the process of understanding and defining a sexual identity begins in early childhood. Specifically, according to Troiden, the first step in this process is a “sensitization” or “prehomosexual” stage that occurs between the ages of six and twelve.³⁸ During this stage, “gay and lesbian individuals may experience a vague feeling of being different from their peers without specifically seeing themselves as sexually different”.³⁹

When adult homosexuals are interviewed, many (but not all) report that they felt “different” from other children when they were young. Frequently, when questioned more closely, it

³⁵ *Id.*; see also RICHARD R. TROIDEN, *GAY AND LESBIAN IDENTITY: A SOCIOLOGICAL ANALYSIS* 41 (1988); Richard R. Troiden, *The Formation of Homosexual Identities*, in *GAY AND LESBIAN YOUTH* 43, 48-49 (Gilbert Herdt ed., 1989).

³⁶ See PERRIN, *supra* note 26, at 78.

³⁷ Despite the order in which these steps are laid out, it is important to note that “[h]omosexual identity development is not a linear, step-by-step process Instead, . . . [p]rogress through developmental stages occurs in a back-in-forth, up-and-down fashion.” Troiden, *supra* note 34, at 105.

³⁸ Troiden, *supra* note 35, at 50-52.

³⁹ Susanne M. Stronski Huwiler & Gary Remafedi, *Adolescent Homosexuality*, 33 *REV. JUR. U.P.R.* 151, 160 (1999); see also Savin-Williams & Rodriguez, *supra* note 22, at 85 (“One common experience reported by lesbians, bisexuals, and gay men is that from an early age, usually before adolescence, they felt different”). However, only a minority of gays and lesbians saw themselves as *sexually* different before age 12. See Troiden, *supra* note 34, at 106 (“Children who are ‘prehomosexuals’ rarely if ever wonder ‘Am I a homosexual?’ or believe that homosexuality has anything to do with them personally.”).

turns out that this sense of “differentness” came from the fact that they had play interests of the opposite gender during childhood. Boys may find they are less interested in sports than their peers and prefer solitary activities such as reading and music; girls may find that they are more independent or athletic than other girls. All of this occurs completely outside the realm of sexuality at this age⁴⁰

As this quote makes clear, these feelings often emanate not from any sexual feelings but simply from gender nonconformity.⁴¹ Of course, many children, including those who will ultimately identify as heterosexual, experience feelings of being different.⁴² However, research shows that this feeling is much more common among homosexuals. Specifically, research on adults reveals that, among gays and lesbians, 75% to 85% reported feelings of being different during childhood, compared with only 10% of heterosexuals.⁴³ In another study, 72% of gay men reported feeling “somewhat or very different” from male peers in contrast to only 39% of heterosexual males who reported similar feelings.⁴⁴

Indeed, homosexual males have described this feeling of alienation as an “awareness of a normative standard of how boys are ‘supposed to’ feel and act and a belief from an early age that they violate this ideal.”⁴⁵ Likewise, lesbian women attribute this feeling to the fact that they were “more ‘masculine’ than other girls, more interested in sports, and did not enjoy typical girls’ activities, such as hopscotch and playing house.”⁴⁶ These feelings are not that surprising given that

⁴⁰ FRANCIS MARK MONDIMORE, *A NATURAL HISTORY OF HOMOSEXUALITY* 163 (1996); see also PERRIN, *supra* note 26, at 60 (noting that gender nonconformity during childhood, although not determinative, is good predictor of homosexuality).

⁴¹ See also PERRIN, *supra* note 26, at 75 (“This sense of differentness arises largely from their gender-neutral or gender-atypical interests and behaviors, not because of same-sex attractions or sexual activities.”).

⁴² See MONDIMORE, *supra* note 40, at 163 (“Some persons who as adults consider themselves heterosexual recall also feeling ‘different’ from same-sex peers and engaging in gender nonconforming play — and [vice versa]”); PERRIN, *supra* note 26, at 60.

⁴³ See Savin-Williams & Rodriguez, *supra* note 22, at 85.

⁴⁴ See MONDIMORE, *supra* note 40, at 163.

⁴⁵ PERRIN, *supra* note 26, at 59-60; see also Paul Flowers & Katie Buston, “I Was Terrified Of Being Different”: Exploring Gay Men’s Accounts Of Growing-Up In A Heterosexist Society, 24 J. ADOLESCENCE 51, 54 (2001) (noting that negativity that many gay men report having felt during adolescence “stems from the surrounding social context that provides powerful expectations of heterosexuality”).

⁴⁶ PERRIN, *supra* note 26, at 75. However, it is important to note that “neither feelings of differentness nor childhood gender atypicality correlate[s] as strongly with

“children are exquisitely sensitive to gender roles at a very young age.”⁴⁷ As psychiatrist Francis Mark Mondimore points out, one need only visit a school playground to see the gender differentiation that occurs among children: “In a playground full of children under the age of ten or so, boys will be observed to play with boys and girls with girls. Research has confirmed this to be true across many cultures.”⁴⁸ Children who challenge these gender roles often feel like “outsiders, wanting but fearing to be let in.”⁴⁹

Furthermore, it is in this “playground” setting, with its corresponding emphasis on gender norms and the expectation of gender conformity, that most people first encounter the labels of sexual orientation. Indeed, as Mondimore notes, “children learn the labels for sexual orientation several years before they are capable of understanding the concept of sexual orientation.”⁵⁰ Not surprisingly, children generally first encounter these terms as derisive ones: “Elementary school children can be heard using words like *sissy*, *tomboy*, and even *queer* and *faggot* as terms of contempt for each other years before they have mature sexual feelings or become familiar with concepts of sexual orientation.”⁵¹

Finally, those who have reported experiencing these sensations of “not fitting in” report that, although they were unable to identify the origin or meaning, they knew that these feelings were very important.⁵²

2. Late Childhood / Early Adolescence: Identity Confusion

As “prehomosexual” children get older, but generally some time before age fifteen, they begin to develop same-sex attractions.⁵³ At this time, the sense of being different starts to “crystallise into a sense of

same-sex orientations among women as they do among men.” *Id.* at 60-61.

⁴⁷ MONDIMORE, *supra* note 40, at 162.

⁴⁸ *Id.*

⁴⁹ Savin-Williams & Rodriguez, *supra* note 22, at 85.

⁵⁰ MONDIMORE, *supra* note 40, at 162.

⁵¹ *Id.* Mondimore notes that children typically associate such words with “gender non-conforming behaviors” as well as simply “being different and unwanted.” *Id.* at 162-63.

⁵² See Savin-Williams & Rodriguez, *supra* note 22, at 85.

⁵³ See MONDIMORE, *supra* note 40, at 165; Eric M. Dubé & Ritch C. Savin-Williams, *Sexual Identity Development Among Ethnic Sexual-Minority Male Youths*, 35 DEVELOPMENTAL PSYCHOL. 1389, 1389 (1999) (putting age at 8-11 years old); see also PERRIN, *supra* note 26, at 76 (noting that age has dropped over past few decades).

sexual difference.”⁵⁴ As a result, for the first time in their lives, many of these children begin to suspect that they might be homosexual. Such a realization is often at odds with the child’s previously acquired heterosexual identity. The resulting dissonance leads to what Troiden describes as “identity confusion.”⁵⁵ However, this stage is more complicated than its name might imply. Indeed, this stage of development is not only about the confusion that comes from this revelation concerning sexual orientation, but also the resulting anxiety and shame:⁵⁶

The stigma surrounding homosexuality which the individual internalized at a younger age adds emotional overtones to this dilemma. The adolescent is confronted by the possibility that a previously held self-image as a “normal” person may be incorrect and he or she may in fact be terribly “abnormal,” “perverted,” “sinful,” or any number of other negative characterizations that spring from internalized stigmatization of homosexuality.⁵⁷

In other words, these children are confronted with the troubling suspicion that they might actually be one or more of those “dykes” or “faggots” that they have frequently heard their peers speak of contemptuously.⁵⁸ Indeed, social condemnation of homosexuality has much to do with this resulting identity confusion.⁵⁹

⁵⁴ Adrian Coyle, *Developing Lesbian and Gay Identity in Adolescence*, in *TEENAGE SEXUALITY: HEALTH, RISK AND EDUCATION* 163, 168 (John Coleman & Debi Roker eds., 1998). However, studies seem to indicate that women tend to experience same-sex attractions later than men, and women begin to question their sexual identities at a later age. See PERRIN, *supra* note 26, at 61; Troiden, *supra* note 34, at 107 (“As a general rule, gay males are aware of their same-sex attractions at earlier ages than lesbians.”).

⁵⁵ Troiden, *supra* note 34, at 107.

⁵⁶ See MONDIMORE, *supra* note 40, at 166.

⁵⁷ *Id.*

⁵⁸ It is important to note here that not all children and adolescents who experience same-sex attractions will ultimately self-identify as homosexual. See *infra* Part I.B. Thus, the stigma resulting from these attractions are likely to befall not only homosexual children but heterosexual children as well.

⁵⁹ Troiden, *supra* note 34, at 107 (“Stigma creates guilt, a perceived need for secrecy, and social isolation; it discourages adolescent lesbians and gay males from discussing their emerging sexual desires or activities with peers or families.”). Furthermore, this stage is especially difficult for males given the rather rigid gender role to which society expects males to conform. See F.G. Bolton, Jr. & Ann E. MacEachron, *Adolescent Male Sexuality: A Developmental Perspective*, 3 J. ADOLESCENT RES. 259, 263-64 (1988).

Those adolescents who experience feelings of identity confusion often deal with those feelings in one of five ways: denial, repair, avoidance, redefinition, and/or acceptance.⁶⁰ Those who choose *denial* actively try to ignore all homosexual feelings and desires.⁶¹ As Mondimore describes, “[t]here is a separation of the thinking and feeling components of their psychological functioning, and the unacceptable feelings are mentally rejected whenever they crop up.”⁶² Of course, denial offers little in the way of a solution and can result in additional problems. Aside from the obvious self-esteem issues that can easily result,⁶³ denial may also lead to promiscuous heterosexual activity and pregnancy.⁶⁴ Additionally, as Mondimore notes, many “[e]scape into alcohol and drug abuse,” which “may serve the dual purposes of distracting the individual from unacceptable feelings and providing an excuse for having them in the first place.”⁶⁵

In contrast to denial, those dealing with homosexual feelings with *repair* confront their homosexual feelings head on but at the same time are actively trying to alter those feelings.⁶⁶ A number of religious and conservative organizations currently exist with the mission of “curing” homosexuals who seek to change their orientation.⁶⁷ However, as many have pointed out, “[t]here is no evidence that these attempts to ‘cure’ homosexuality do anything but increase confusion and guilt”⁶⁸ and can even lead to lasting psychological damage.⁶⁹

Still other LGBT adolescents deal with identity confusion using *avoidance* and simply ignore their feelings.⁷⁰ Those teens exercising

⁶⁰ Troiden, *supra* note 34, at 108; *see also* PERRIN, *supra* note 26, at 76-77.

⁶¹ Troiden, *supra* note 34, at 108 (“Lesbians and gay males who use *denial* disavow the homosexual component to their feelings, fantasies, or activities.”).

⁶² MONDIMORE, *supra* note 40, at 167.

⁶³ Flowers & Buston, *supra* note 45, at 52 (linking denial with low self-esteem).

⁶⁴ PERRIN, *supra* note 26, at 76.

⁶⁵ MONDIMORE, *supra* note 40, at 167.

⁶⁶ Troiden, *supra* note 34, at 108 (“Repair involves vigorous attempts to eradicate homosexual feelings and behaviors.”).

⁶⁷ *See* MONDIMORE, *supra* note 40, at 167-68; PERRIN, *supra* note 26, at 76.

⁶⁸ PERRIN, *supra* note 26, at 76 (citations omitted).

⁶⁹ *See generally* Douglas C. Haldeman, *Sexual Orientation Conversion Therapy for Gay Men and Lesbians: A Scientific Examination*, in *HOMOSEXUALITY: RESEARCH IMPLICATIONS FOR PUBLIC POLICY* 149 (John C. Gonsiorek & James D. Weinrich eds., 1991) (discussing how psychological harm can result from such “therapies”); Terry S. Stein, *A Critique of Approaches to Changing Sexual Orientation*, in *TEXTBOOK OF HOMOSEXUALITY AND MENTAL HEALTH* 525 (Robert P. Cabaj & Terry S. Stein eds., 1996) (same).

⁷⁰ Troiden, *supra* note 34, at 108 (“Although avoidant women and men recognize that their behavior, thoughts, or fantasies are homosexual, they shun situations that

avoidance may also attempt to avoid activities that might even be associated with homosexuality: “A boy may abruptly quit taking music lessons and go out for the high school baseball team; a girl may drop off the softball team and take up dance.”⁷¹ A fourth approach to identity confusion is *redefining*, where young homosexuals simply classify their feelings as temporary, experimental, or somehow justified based on special circumstances.⁷² Finally, some teens “com[e] to a successful resolution of identity confusion and find[] *acceptance*.”⁷³ Based on the increasingly visible gay and lesbian community, more and more teens are able to deal with identity confusion using the acceptance approach.

Of course, rarely are these different approaches mutually exclusive. Instead, many teens who experience homosexual feelings will engage in a number of these different approaches.⁷⁴ However, LGBT adolescents suffering from identity confusion must accept their differences before they will be able to move into the third stage of sexual identity development.⁷⁵

confirm these inclinations.”).

⁷¹ MONDIMORE, *supra* note 40, at 167. Troiden actually identifies six ways that LGBT teens might attempt to avoid their feelings of homosexuality. Troiden, *supra* note 34, at 108. These include (1) inhibiting interests and behaviors associated with homosexuality; (2) limiting exposure to the opposite sex “to prevent others from learning about their relative lack of heterosexual responsiveness”; (3) limiting their exposure to information about homosexuality; (4) adopting anti-homosexual attitudes and actions; (5) immersing themselves in heterosexual settings and actions; and (6) engaging in escapism, often with the assistance of drugs and alcohol. *Id.*

⁷² Troiden, *supra* note 34, at 108 (“*Redefinition* . . . involves redefining the behavior, feelings, or context along more conventional lines.”); *see also* MONDIMORE, *supra* note 40, at 168.

⁷³ PERRIN, *supra* note 26, at 77; *see also* Troiden, *supra* note 34, at 109 (“With acceptance, men and women acknowledge that their behavior, feelings, or fantasies may be homosexual and seek out additional sources of information about homosexuality.”).

⁷⁴ *See* Troiden, *supra* note 34, at 112 (stating that “homosexual identity is emergent: that is, it is never fully determined in a fixed or absolute sense and is always subject to modification and further change”).

⁷⁵ *See* MONDIMORE, *supra* note 40, at 168 (“Considerable psychological energy must continue to be expended denying, avoiding, or redefining homosexual thoughts and feelings (and sometimes behavior) to prevent incorporating them into the individual’s identity.”).

3. Mid to Late Adolescence: Identity Assumption

Having worked through identity confusion, the next stage in an adolescent's development of sexual identity is "identity assumption."⁷⁶ As Troiden describes, "[t]he hallmarks of identity assumption are self-definition as homosexual, identity tolerance and acceptance, regular association with other homosexuals, sexual experimentation, and exploration of the homosexual subculture."⁷⁷ Even at this point, sexual identity is still a work-in-progress given that homosexual adolescents are typically more tolerant than accepting of their sexual identity.⁷⁸

Scientists agree that it is somewhat difficult to accurately gauge the age at which LGBT teens tend to self-identify given the extreme stigma associated with homosexuality.⁷⁹ What is clearer is the age at which most LGBT adolescents tend to "come out" — the process by which these adolescents reveal their sexual orientation to others.⁸⁰ Of

⁷⁶ See Troiden, *supra* note 34, at 109.

⁷⁷ *Id.*; see also PERRIN, *supra* note 26, at 77 ("This stage of adolescence begins with self-definition as homosexual, tolerance and acceptance of this new identity, regular association with other homosexuals and (usually) sexual experimentation.").

⁷⁸ Troiden, *supra* note 34, at 109; see also Vivienne C. Cass, *Homosexual Identity Formation: Testing a Theoretical Model*, 20 J. SEX RES. 143, 156 (1984) ("You feel sure you're a homosexual and you put up with, or tolerate this. You see yourself as a homosexual for now but are not sure about how you will be in the future.").

⁷⁹ Cf. Ruskola, *supra* note 24, at 282 (stating that "many gay men and lesbians have . . . not self-identified as gay or lesbian until adulthood, often after years of lonely but fierce resistance to the stigmatized identity 'homosexual'"). Other factors which may prevent self-identification include "a lack of support structures in addressing the social and psychological challenges involved with coming out, and uncertainty about what degree of weight to attach to internal emotional attractions and sexual feelings." Wardenski, *supra* note 23, at 1373. In addition, one scholar attributes the "tardiness of self-identification" to the "unavailability of the label 'gay adolescent.'" Ruskola, *supra* note 24, at 282.

Furthermore, within certain cultures this stigma may be especially great, thus delaying the age at which many ethnic minorities identify as gay or lesbian. See Dubé & Savin-Williams, *supra* note 53, at 1390 ("The theoretical literature suggests that ethnic-minority youths may experience delayed timing of identity labeling and disclosure due to a variety of factors such as internalized homophobia, perceptions of rejection, and availability of support resources.") (citations omitted); see also CAITLIN RYAN & DONNA FUTTERMAN, *LESBIAN AND GAY YOUTH: CARE AND COUNSELING* 14-15 (1998) (noting ethnic minorities may be less likely to self-identify given, "[f]or many ethnic groups, being lesbian or gay may represent rejection of one's ethnic heritage" as "[m]ost ethnic minorities consider homosexuality to be a 'Western' or white phenomenon").

⁸⁰ See also Huwiler & Remafedi, *supra* note 39, at 160 ("Coming out' refers to the process whereby gay and lesbian individuals come to terms with their sexual orientation, integrate it within their lives, and begin disclosure.").

course, this coming-out process happens for different individuals at different times.⁸¹ Studies reveal that adolescents are starting to self-identify as homosexuals at earlier ages. For example, studies in the 1970s and 80s found that the average age of coming-out was in the early to mid-twenties.⁸² In contrast, more recent research has put that age in the late teens.⁸³ Furthermore, one study found that the average age of self-identification as homosexual is sixteen.⁸⁴ These statistics are relevant because “[c]oming out to oneself usually leads to disclosure to someone else.”⁸⁵

For homosexual adolescents, the coming-out process can bring with it some positive results. Importantly, the feelings of stigma and discrimination lessen as these teens “perceive that they belong to a world that includes others with similar histories and concerns.”⁸⁶ However, this process of coming out is rarely smooth and frequently brings with it new problems. Specifically, coming out can result in a number of painful rejections, including the loss of friendships.⁸⁷ Another more painful rejection can come from parents: “Some parents are unable to adopt a supportive attitude, and a substantial

⁸¹ See MONDIMORE, *supra* note 40, at 172 (“Many individuals quickly and easily become settled in their sexual orientation identity and confidently start communicating this identity to others immediately. For others the process is slower and more difficult.”); Troiden, *supra* note 34, at 109.

⁸² See, e.g., Barry M. Dank, *Coming Out in the Gay World*, 34 *PSYCHIATRY* 180, 182-83, 190 (1971) (noting while study found average age at which respondents decided they were homosexual was 19.3, respondents commonly “come out” sometime after this decision); Gary J. McDonald, *Individual Differences in the Coming Out Process for Gay Men: Implications for Theoretical Models*, 8 *J. HOMOSEXUALITY* 47, 50 (1982) (noting study found that most respondents self-labeled as gay at around age 19 but did not acquire “positive gay identity” until age 24).

⁸³ See, e.g., RITCH C. SAVIN-WILLIAMS, *GAY AND LESBIAN YOUTH: EXPRESSIONS OF IDENTITY* 37 (1990) (noting younger ages at which LGBT teens are realizing their homosexuality); see also Gary Remafedi, *Male Homosexuality: The Adolescent’s Perspective*, 79 *PEDIATRICS* 326, 328 (1987) (noting study found average age of self-labeling as gay or bisexual was age 14).

⁸⁴ GILBERT HERDT & ANDREW BOXER, *CHILDREN OF HORIZONS* 181 (1993). As noted earlier, however, accurate statistics on this issue are difficult to obtain given that stigma can retard self-identification. See *supra* text accompanying note 79.

⁸⁵ Anthony R. D’Augelli, *Developmental Implications of Victimization of Lesbian, Gay, and Bisexual Youths*, in *STIGMA AND SEXUAL ORIENTATION: UNDERSTANDING PREJUDICE AGAINST LESBIANS, GAY MEN, AND BISEXUALS* 187, 191 (Gregory M. Herek ed., 1998).

⁸⁶ PERRIN, *supra* note 26, at 77.

⁸⁷ See Huwiler & Remafedi, *supra* note 39, at 160-61 (“Unfortunately, many gay and lesbian youth experience painful rejection and loss of heterosexual friendships.”).

number of adolescents are expelled or run away from home to escape intolerable family conflict.”⁸⁸

Finally, for LGBT adolescents who are unable to successfully assume their sexual identity, the results can be quite debilitating. As Dr. Ellen C. Perrin notes, such teens “may maintain an internalized stigmatizing view of homosexuality, experience self-hatred and despair, and avoid homosexual activity.”⁸⁹ Of course, as the next Part discusses, adolescent homosexual activity does not necessarily determine one’s ultimate sexual identity.

B. Homosexual Activity During Adolescence

Although many might think otherwise,⁹⁰ many teenagers have sex with one another.⁹¹ In fact, studies reveal that four out of five people have their first sexual experience during adolescence.⁹² Furthermore, when looking at the particular sexual practices of these adolescents, it is common to find that some of their experiences are commonly homosexual.⁹³ More specifically, in terms of men, “homosexual

⁸⁸ *Id.* at 161.

⁸⁹ PERRIN, *supra* note 26, at 77.

⁹⁰ See JOHN D’EMILIO & ESTELLE B. FREEDMAN, *INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA*, at xviii-xix (2d ed. 1997) (“Sex is easily attached to other social concerns, especially those related to impurity and disorder, and it often evokes highly irrational responses.”); JUDITH LEVINE, *HARMFUL TO MINORS: THE PERILS OF PROTECTING CHILDREN FROM SEX* 93 (2002) (“The idea that sex is a normative — and, heaven forbid, positive — part of adolescent life is unutterable in America’s public forum.”).

⁹¹ Comm. on Adolescence, *Am. Acad. of Pediatrics, Homosexuality and Adolescence*, 92 *PEDIATRICS* 631, 631 (1993) (“During the adolescent years, many youths engage in sexual experimentation.”); Dana M. Northcraft, *A Nation Scared: Children, Sex, and the Denial of Humanity*, 12 *AM. U. J. GENDER SOC. POL’Y & L.* 483, 489 (2004) (reviewing LEVINE, *supra* note 90) (“Minors’ premarital sexual experimentation, even before puberty, is not a new phenomenon . . .”).

⁹² See Susan S. Kuo, *A Little Privacy, Please: Should We Punish Parents for Teenage Sex?*, 89 *KY. L.J.* 135, 136 (2000). Furthermore, a 2003 study found that 47% of all teens were sexually active. ROBERT L. MADDEX, *ENCYCLOPEDIA OF SEXUAL BEHAVIOR AND THE LAW* 344 (2006); see also LEVINE, *supra* note 90, at 93 (“[A]round the globe, most people begin to engage in sexual intercourse or its equivalent homosexual intimacies during their teen years.”).

More specifically, in two independent surveys, 18% to 19% of female respondents reported having had vaginal intercourse by age 15. EDWARD O. LAUMANN, JOHN H. GAGNON, ROBERT T. MICHAEL & STUART MICHAELS, *THE SOCIAL ORGANIZATION OF SEXUALITY: SEXUAL PRACTICES IN THE UNITED STATES* 327 (1994). By age 19, the percentage rose to 71. *Id.* Additionally, data reveal that more than 50% of Americans between the ages of 15 and 19 have engaged in oral sex. MADDEX, *supra* note 92, at 344.

⁹³ See MONDIMORE, *supra* note 40, at 169 (“Homosexual contact during adolescence as an expression of sexual exploring and defining is common.”).

experimentation is a presumed commonality among young adolescent males.”⁹⁴ Although empirical support is limited, at least one study found that, among sixteen to nineteen year olds, 6% of females and 17% of males had experienced at least one homosexual encounter.⁹⁵ Furthermore, the Kinsey Report found that, between the onset of puberty and age twenty, 28% of boys and 17% of girls had had at least one homosexual experience.⁹⁶

If these percentages appear high, it is important to note that homosexual activity between adolescents is not limited to those teens who will eventually identify as gay or lesbian. In fact, the majority of teens who engage in homosexual sex do not become gay.⁹⁷ For example, one study of both males and females found that almost 12% reported some homosexual contact after age fourteen, yet only 6.7% experienced such contacts after age nineteen.⁹⁸ Another study found that, of adult males who have engaged in homosexual activity, 42% of them reported that they had done so only during adolescence.⁹⁹ Furthermore, while researchers estimate that only 2% to 4% of the male population identify as homosexual,¹⁰⁰ research has also revealed that “two out of five men . . . have had orgasmic sex with men.”¹⁰¹

⁹⁴ Bolton & MacEachron, *supra* note 59, at 265 (“[H]omosexual experimentation is a presumed commonality among young adolescent males . . .”). More specifically, “solitary/group masturbation, orgasm, and same-sex sexual experiences have been well-known components in the sexual histories of adolescent males.” *Id.* at 266.

⁹⁵ Comm. on Adolescence, *supra* note 91, at 631.

⁹⁶ See PERRIN, *supra* note 26, at 73. Incidentally, only 4% of the men in Kinsey’s study practiced homosexuality exclusively from adolescence through adulthood. *Id.*

⁹⁷ See Gary Ross-Reynolds, *Issues in Counseling the “Homosexual” Adolescent*, in *PSYCHOLOGICAL APPROACHES TO PROBLEMS OF CHILDREN AND ADOLESCENTS* 55, 70 (Jeff Grimes ed., 1982) (“The majority of adolescents who engage in homosexual behavior do not continue this practice into adulthood.”) (citation omitted).

⁹⁸ Robert E. Fay, Charles F. Turner, Albert D. Klassen, & John H. Gagnon, *Prevalence and Patterns of Same-Gender Sexual Contact Among Men*, 243 *SCIENCE* 338, 342 (1989).

⁹⁹ See David Weiss & Vern L. Bullough, *Adolescent American Sex*, in *ADOLESCENCE SEXUALITY, AND THE CRIMINAL LAW: MULTIDISCIPLINARY PERSPECTIVES* 43, 50 (Helmut Graupner & Vern L. Bullough eds., 2004).

¹⁰⁰ See Comm. on Adolescence, *supra* note 91, at 631; James Lock & Hans Steiner, *Gay, Lesbian, and Bisexual Youth Risks for Emotional, Physical, and Social Problems: Results From a Community Based Survey*, 38 *J. AM. ACAD. CHILD ADOLESCENT PSYCHIATRY* 297, 297 (1999).

¹⁰¹ Richard D. Mohr, *Gay Basics*, in *SEX, MORALITY, AND THE LAW* 52, 52 (Lori Gruen & George E. Panichas eds., 1997); see also Dannecker, *supra* note 33, at 7 (“Large numbers of men engage in homosexual behavior for long periods of time without acquiring the slightest traces of homosexual identity.”).

In looking at what contributes to this practice of homosexual experimentation among adolescents, most agree that one of the biggest causes is teenage curiosity about sex.¹⁰² Indeed, few would disagree that sexual curiosity is not only a normal part of adolescence, but also the driving force behind most sexual acts between both gay and straight adolescents. Furthermore, social science reveals that some adolescent heterosexual males may engage in homosexual activity as a demonstration of virility:

In a more general vein, solitary/group masturbation, orgasm, and same-sex sexual experiences have been well-known components in the sexual histories of adolescent males. These activities seemed to have provided not only sexual release, but also served as a means of expressing manhood and dominance in terms of demonstrating the ease and rapidity of orgasm. Issues of intimacy with another person generally have been absent. Through this competitive masculinity the young male may show himself to be a “real” man who is infused with sexualized masculinity.¹⁰³

Finally, for adolescents without access to the opposite gender, homosexuality can also be situational. Thus, heterosexual adolescents commonly engage in homosexual activity in such settings as “boarding schools, clubs, military cadet units, [and] reformatories.”¹⁰⁴ For individuals who fall into this situational category, Dr. Francis Mondimore notes that “homosexual behavior is a kind of detour in their development of a heterosexual identity.”¹⁰⁵

Regardless of the impetus behind homosexual activity during adolescence, most scientists agree that there is little to no correlation between sexual orientation and adolescent sexual experiences:

It is important to emphasize that the development of a homosexual identity and the decision to engage in same-sex

¹⁰² See MORRIS PLOSCOWE, *SEX AND THE LAW* 206 (1951) (stating that “[m]uch homosexual activity is due to adolescent curiosity and sex experimentation”).

¹⁰³ Bolton & MacEachron, *supra* note 59, at 266 (citations omitted).

¹⁰⁴ Elisabeth Young-Bruehl, *Are Human Beings “By Nature” Bisexual?*, 2 *STUD. IN GENDER & SEXUALITY* 179, 202 (2001); see also PLOSCOWE, *supra* note 102, at 206 (noting that homosexual activity during adolescence is “normally carried on with schoolmates or friends of the same age, and is a problem for boarding schools and camps confined to one sex”). Some have referred to individuals in this category as “accidental homosexuals.” SAMUEL G. KLING, *SEXUAL BEHAVIOR AND THE LAW* 96 (1965).

¹⁰⁵ MONDIMORE, *supra* note 40, at 169 (“Often, the homosexual activity is accompanied by fantasies of heterosexual activity.”).

intimacy are quite independent processes. . . . For the majority of individuals, sexual fantasies and feelings increasingly center on males or on females during adolescence, and assigning meaning to them in terms of a sexual orientation identity can occur independently of physical sexual activity.¹⁰⁶

Indeed, “[t]here are heterosexuals who have experimented with homosexuality, and there are heterosexuals who perform homosexual acts with other heterosexuals.”¹⁰⁷ In fact, studies show that “[b]y early to middle adolescence, a large majority of lesbians and gay males have experienced both heterosexual and homosexual arousal and behavior.”¹⁰⁸ Of course, some adolescents will identify as homosexual even before engaging in any sexual activity.¹⁰⁹ Nonetheless, the important point is that for the many teens, both heterosexual and homosexual, who do engage in sexual activity, this activity commonly involves a person of the same gender.

C. *The Impact of Societal Stigma on Adolescent Homosexuals*

Regardless of whether an adolescent is actually engaging in homosexual sex or is merely experiencing homosexual desires, many adolescents have difficulty contending with the stigma associated with homosexuality. Furthermore, for those teens that will eventually identify as homosexual, this stigma likely exists at every stage of sexual identity development. As Troiden notes, “[n]early all of the models view homosexual identity formation as taking place against a backdrop of stigma, which heavily influences identity development and personal adjustment.”¹¹⁰

¹⁰⁶ *Id.*; see also Bolton & MacEachron, *supra* note 59, at 265-66.

¹⁰⁷ Christine Jax, *Same-Sex Marriage — Why Not?*, 4 WIDENER J. PUB. L. 461, 478 (1995).

¹⁰⁸ Troiden, *supra* note 34, at 107; see also Savin-Williams & Rodriguez, *supra* note 22, at 81 (“Various forms of sexual activity may be played out regardless of one’s attractions or impulses, perhaps out of curiosity, peer or familial pressure, opportunities that emerge, or lustful desire. For example, the majority of lesbians and gay men have engaged in heterosexual sex, usually during their adolescence.”) (citations omitted).

¹⁰⁹ See PERRIN, *supra* note 26, at 73 (“[A]dolescents who think they may be gay or lesbian, like adolescents who are sure of a heterosexual orientation, may not have any sexual experiences at all during adolescence.”); see also Savin-Williams & Rodriguez, *supra* note 22, at 81 (“It is also apparent that some lesbian and gay male youths come to the realization of a homosexual sexual identity without the benefit of same-sex sexual activity.”) (citations omitted).

¹¹⁰ Troiden, *supra* note 34, at 106.

Much of this stigma arises from societal homophobia, defined as an irrational fear or hatred of homosexuality.¹¹¹ Homophobia “emerge[s] from a complex interplay of sociocultural and historical factors, individual psychological defenses, and experiential learning.”¹¹² Furthermore, underlying this homophobia is the concept of *heterosexualism*, which is “the widespread and often unconscious habit of interpreting human experience in strictly heterosexual terms, thus ignoring and invalidating homosexuality.”¹¹³ Regardless of the cause, the sad reality is that homophobia is not only widespread but also, in many instances, socially acceptable. As Gerald Unks states in *The Gay Teen: Educational Practice and Theory for Lesbian, Gay and Bisexual Adolescents*:

Homosexuals are arguably the most hated group of people in the United States. While other minorities have gained a modicum of protection and acceptance, homosexuals remain essentially outside the pale. In their public lives, few Americans any longer use words such as “nigger,” “kike,” “gook,” or “wop.” Yet “faggot,” “fairy,” “homo,” and “queer” are used by many without hesitation. Picking on persons because of their ethnicity, class, religion, gender, or race is essentially taboo behavior, but adults and children alike are given license to torment and harm people because of their sexuality.¹¹⁴

This homophobia and the resulting stigma begin in childhood, where, as noted earlier, children who do not conform to gender norms quickly find themselves shunned by their peers.¹¹⁵ The stigma continues through adolescence and even into the stage of development when the individual fully accepts and integrates his homosexuality

¹¹¹ Huwiler & Remafedi, *supra* note 39, at 162.

¹¹² *Id.* at 163.

¹¹³ *Id.*; see also David McInnes, *Melancholy and the Productive Negotiations of Power in Sissy Boy Experience*, in *YOUTH AND SEXUALITIES: PLEASURE, SUBVERSION, AND INSUBORDINATION IN AND OUT OF SCHOOLS* 223, 227 (Mary Louise Rasmussen, Eric Rofes & Susan Talburt eds., 2004) (“To be called a ‘nancy,’ ‘poof,’ ‘fudge-tunneller,’ among others, is still an experience of vilification, but it is also an experience, by its very quality as hate speech, that calls forth and into view aspects of a heteronormative and masculine world still threatened by male-to-male sexual desire and sexual practice.”).

¹¹⁴ Gerald Unks, “*Thinking About the Gay Teen*,” in *THE GAY TEEN: EDUCATIONAL PRACTICE AND THEORY FOR LESBIAN, GAY AND BISEXUAL ADOLESCENTS* 3, 3 (Gerald Unks ed., 1995).

¹¹⁵ See *supra* notes 49-51 and accompanying text.

into his self-identity.¹¹⁶ Nonetheless, where this stigma is particularly potent, and thus most likely to inflict the greatest amount of physical and psychological damage, is during adolescence. Indeed, as one commentator aptly notes, “[g]ay and lesbian youth are constantly exposed to environmental and internal stressors that stem from homophobia.”¹¹⁷

It should come as little surprise that, for LGBT teens, adolescence would be a particularly difficult time given that, “[a]mong the troubling phenomena of adolescence is the egocentric belief that they are ‘on stage,’ that people are watching and potentially criticizing them.”¹¹⁸ Thus, “[f]or teenagers who feel ‘different’ and marginalized, the intensity of this common and normal worry is even more dramatic.”¹¹⁹ Accordingly, some have equated the difficulty that homosexual adolescents face to the oppression and discrimination experienced by other minority groups. Indeed, “[t]he psychological impact of incorporating negative and devaluing beliefs about one’s gay identity may be just as devastating as being discriminated against because one is a female or African-American, Latino, or Asian-American.”¹²⁰

What makes adolescence particularly difficult for LGBT teens is the profound sense of isolation. Unlike most ethnic and racial minorities, gay and lesbians teens are generally disconnected from one another. Thus, LGBT teens lack one of the key coping mechanisms that might help relieve the stress associated with homophobia and stigma. Psychologists Paul Flowers and Katie Buston illustrate the problem as follows:

[F]or many minority groups it is likely that social support, and affirmation of minority culture and minority values[,] are available within the home and adjacent local communities. Similarly, it may be that others sharing minority status are present and identifiable in the school context and in other social spaces, affording some protection from minority stress. Yet the situation for the adolescent who is beginning to

¹¹⁶ See Troiden, *supra* note 34, at 110 (“Once they adopt homosexual identities, lesbians and gay males are confronted with the issue of stigma and its management.”).

¹¹⁷ Huwiler & Remafedi, *supra* note 39, at 163; see also Lynne Hillier & Doreen Rosenthal, *Special Issue on Gay, Lesbian and Bisexual Youth*, 24 J. ADOLESCENCE 1, 3 (2001) (“The quality of life of many same sex attracted young people is compromised by hostility, invisibility and alienation in their daily lives.”).

¹¹⁸ PERRIN, *supra* note 26, at 72.

¹¹⁹ *Id.*

¹²⁰ Savin-Williams & Rodriguez, *supra* note 22, at 88.

experience homoerotic desires is clearly dissimilar. Homophobic contexts make it difficult to be public and open about these desires and it may not be possible to identify others who are having similar experiences. As adolescents get older they may be able to access gay communities in their immediate locality (this is more likely in large urban centres) and minority stress may thus be ameliorated. For many teenagers, however, there may be barriers to such contact, including a lack of awareness that such communities, or even other people who feel as they do, exist. In these ways the heterosexism that is embedded in dominant culture often leads to the absence of protective buffers[,] which could make young gay and lesbian people less vulnerable to minority stress.¹²¹

Understanding this sense of isolation makes it that much easier to appreciate the wide range of emotional and psychological problems that these teens frequently experience. Although societal stigma and homophobia exist in many different environments, gay and lesbian teens generally experience this stigma and homophobia in two primary environments — at home and school. Each of these settings poses a discrete set of problems. But even beyond these two settings, it is also necessary to look at the cumulative harms that can result from societal stigma in general.

1. Parental Abuse and Homelessness

Many gay and lesbian teens first experience homophobia in their own home.¹²² Sadly, aside from increasing a gay or lesbian teen's stress and sense of isolation, homophobia at home can also result in parental abuse and rejection.¹²³ First, in terms of abuse, a study by the National Gay Task Force found that 33% of gay and lesbian teens had experienced verbal abuse from their families because of their sexual

¹²¹ Flowers & Buston, *supra* note 45, at 52 (citation omitted). However, for those adolescents who are both homosexual and a member of an ethnic minority, this sense of isolation can be even more extreme. See, e.g., PERRIN, *supra* note 26, at 74 (“Lesbian and gay youth from ethnic/racial subcultures have to manage more than one stigmatized identity, often without family support, creating additional stress and isolation.”).

¹²² Wardenski, *supra* note 23, at 1377 (“LGBT youth often first confront discrimination in their homes.”).

¹²³ See Sonia Renee Martin, *A Child's Right to be Gay: Addressing the Emotional Maltreatment of Queer Youth*, 48 HASTINGS L.J. 167, 172-74 (1996).

orientation.¹²⁴ Unfortunately, for many the abuse does not end there. In fact, one-third of gay and lesbian teens has suffered physical violence at the hands of a family member as a consequence of having their orientation revealed.¹²⁵ Thus, as one commentator puts it, “[f]or many gay youth, the closet is the only safe home.”¹²⁶

Beyond physical and verbal abuse, homophobia can also cause parents to reject LGBT teens. In fact, in one study involving gay and lesbian youth, one half of all respondents reported experiencing some form of parental rejection simply because of their sexual orientation.¹²⁷ For many such teens, the consequence of this rejection is homelessness.¹²⁸ In fact, one survey reports that one gay male out of four is forced to leave home once his parents learn of his sexual orientation.¹²⁹

Indeed, based on the number of gay and lesbian teens who are evicted from their homes and those that run away as a result of parental abuse,¹³⁰ the percentage of homeless teens that are gay or lesbian is extremely high.¹³¹ Although it is difficult to accurately

¹²⁴ *Id.* at 169 (footnote omitted). Sadly, such verbal abuse is not limited to those adolescents who have disclosed their sexual orientation. See Anthony R. D’Augelli, Arnold H. Grossman & Michael T. Starks, *Parents’ Awareness of Lesbian, Gay, and Bisexual Youths’ Sexual Orientation*, 67 J. MARRIAGE & FAM. 474, 481 (2005) (“Parents who suspect their children to be LGB may make more antigay comments, which may lead to learning that they have an LGB child.”).

¹²⁵ Wardenski, *supra* note 23, at 1378. Furthermore, “[a]buse rates against LGBT youth are highest for those that are also racial minorities.” *Id.*

¹²⁶ Ruskola, *supra* note 24, at 270. Being “in the closet” is a term used to refer to a non-heterosexual person who hides his/her sexuality from others. Of course, any teen, regardless of sexual orientation, may face abuse within the home. However, “studies clearly demonstrate that the rate of psychological abuse among queer teens is higher than that among heterosexual teens.” Martin, *supra* note 123, at 169.

¹²⁷ See BENNETT L. SINGER & DAVID DESCHAMPS, *GAY AND LESBIAN STATS: A POCKET GUIDE OF FACTS AND FIGURES* 77 (1994).

¹²⁸ Wardenski, *supra* note 23, at 1377 (“Flowing from these problems, LGBT youth are disproportionately likely to experience periods of homelessness . . .”).

¹²⁹ Ruskola, *supra* note 24, at 270. Furthermore, many of these teens never would have anticipated such a response from the parents: “We have seen several instances where a young person, confident of the love of his or her parents, reveals his or her homosexuality and then ends up on the street.” Emery S. Hetrick & A. Damien Martin, *Developmental Issues and Their Resolution for Gay and Lesbian Adolescents*, 14 J. HOMOSEXUALITY 25, 35 (1987).

¹³⁰ Martin, *supra* note 123, at 176 (“Many abused queer youth escape abuse by running away from home.”).

¹³¹ See Huwiler & Remafedi, *supra* note 39, at 164 (“Among the estimated 2 million U.S. adolescents who are living on the streets, homosexual youth are clearly overrepresented.”); Martin, *supra* note 123, at 176 (“[Q]ueer youth comprise a drastically disproportionate number of the homeless youth in this country.”).

gauge the numbers, social service agencies estimate that between 25% and 35% of homeless youth in Los Angeles is gay or lesbian.¹³² In some areas the percentage is higher. For example, in New York City, up to 50% of homeless youth self-identifies as gay, lesbian, bisexual or transgender.¹³³

In addition to the trauma that results from merely being homeless, gay and lesbian teens are also much more susceptible to a variety of additional problems. Indeed, as one commentator notes, “[l]ife on the streets exposes youth to drugs and sexual abuse and promotes illegal conduct such as prostitution, drug dealing, and theft in order to survive.”¹³⁴ Specifically, one study found that up to 50% of gay and bisexual male teens who are ejected from their homes supports themselves by engaging in prostitution;¹³⁵ this, of course, typically brings with it other problems. As Huwiler and Remafedi notes: “In association with substance abuse and high-risk behavior, prostitution can be understood as just one element in the vicious cycle of stigmatization, school dropout, runaway/throwaway [i.e., teens who are ejected from the home], substance abuse, and risky sexual behavior.”¹³⁶ Given then the heavy correlation between this behavior

¹³² Gabe Kruks, *Gay and Lesbian Homeless/Street Youth: Special Issues and Concerns*, 12 J. ADOLESCENT HEALTH 515, 516 (1991).

¹³³ See Jenny Casciano, Colleen Sullivan, David Pumo & Cynthia Kern, *Client-Centered Advocacy on Behalf of At-Risk LGBT Youth*, 26 N.Y.U. REV. L. & SOC. CHANGE 221, 231 (2001); see also Martin, *supra* note 123, at 176 (noting that percentage of homeless adolescents in San Francisco, Seattle and Los Angeles who are LGBT is estimated to be 50%, 40% and 30%, respectively).

¹³⁴ Huwiler & Remafedi, *supra* note 39, at 165.

¹³⁵ SINGER & DESCHAMPS, *supra* note 127, at 77; see also Eli Coleman, *The Development of Male Prostitution Activity Among Gay and Bisexual Adolescents*, 17 J. HOMOSEXUALITY 131, 137 (1989) (finding that approximately two-thirds of all adolescent male prostitutes is gay).

For many, prostitution is a replacement for the lack of support these teens have received at home. See Ritch C. Savin-Williams, *Verbal and Physical Abuse as Stressors in the Lives of Lesbian, Gay Male, and Bisexual Youths: Associations with School Problems, Running Away, Substance Abuse, Prostitution, and Suicide*, 62 J. CONSULTING & CLINICAL PSYCHOL. 261, 266 (1994) (“Among their fellow prostitutes, they found camaraderie and kinship that substituted for the neglect or rejection they received from their biological families and peers.”).

¹³⁶ Huwiler & Remafedi, *supra* note 39, at 165 (footnotes omitted); see also Lock & Steiner, *supra* note 100, at 298 (“[A] study of homosexual and bisexual youth[] found an association between lower sexual risk-taking and higher self-esteem, suggesting that perception of self-worth (a possible corollary for level of internalized homophobia) may contribute to behaviors of gay youth.”).

and HIV rates, it is not surprising that HIV infection rates among homeless gay teens are quite high.¹³⁷

Obviously, not all LGBT teens in homophobic households become homeless. Even if parental abuse does not result in rejection, any psychological abuse by a parent can be extremely devastating. Indeed, any child who has endured such abuse “has not only the burden of his distress to bear, but [also] that of being left with extremely inadequate mental resources to cope with a degree of pain [that] would overwhelm the most favourably brought up child.”¹³⁸ However, for a gay and lesbian youth, such abuse can be even more costly. In fact, some have characterized the resulting consequences as “morbid.”¹³⁹ In at least one study, most gay and lesbian teens who had attempted suicide cited family troubles as the biggest contributing factor.¹⁴⁰

2. At School: Bullying and Educational Consequences

As one commentator aptly notes, “[h]igh school is one of the most intensely and often violently anti-gay sites in our culture and a central institution in the socialization of youth into homophobia.”¹⁴¹ Of course, most youth spend about half their waking hours at school.¹⁴² As a result the school setting, which is frequently laced with extreme homophobia,¹⁴³ can be an incredibly traumatic environment. Additionally, as a consequence of this abuse, “academic underachievement, truancy, and dropout are prevalent among homosexual youth.”¹⁴⁴

In terms of school bullying, statistics reveal that almost 90% of LGBT youth “sometimes or frequently hear[s] homophobic remarks” in school.¹⁴⁵ What is more troubling is that over 66% of that same population reports having been verbally or physically harassed on the

¹³⁷ See PERRIN, *supra* note 26, at 85 (stating that homeless youth are at high risk for HIV infection); Huwiler & Remafedi, *supra* note 39, at 165.

¹³⁸ Rolene Szur, *Emotional Abuse and Neglect*, in CHILD ABUSE: THE EDUCATIONAL PERSPECTIVE 104, 121 (Peter Maher ed., 1987).

¹³⁹ Savin-Williams & Rodriguez, *supra* note 22, at 90.

¹⁴⁰ Gary Remafedi, James A. Farrow & Robert W. Deisher, *Risk Factors for Attempted Suicide in Gay and Bisexual Youth*, 87 PEDIATRICS 869, 874 (1991).

¹⁴¹ Ruskola, *supra* note 24, at 271.

¹⁴² Hillier & Rosenthal, *supra* note 117, at 3.

¹⁴³ See Unks, *supra* note 114, at 5 (“High schools may be the most homophobic institutions in American society, and woe be to anyone who would challenge the heterosexist premises on which they operate.”).

¹⁴⁴ Huwiler & Remafedi, *supra* note 39, at 164.

¹⁴⁵ Wardenski, *supra* note 23, at 1378.

basis of their sexual orientation.¹⁴⁶ Another study found that 80% of homosexual youth has experienced verbal abuse.¹⁴⁷ In that same study, 43% of those surveyed had items thrown at them, 17% had been physically assaulted, and 10% had been assaulted with a weapon.¹⁴⁸ Regardless of the specific kind of abuse, all of the abuse that those surveyed reported was a direct result of their sexual orientation.¹⁴⁹

Within the school setting, students and roommates are usually responsible for this bullying.¹⁵⁰ In addition, studies on violence towards LGBT youth reveal that the typical assailant is another teenager.¹⁵¹ Finally, and perhaps most disturbing, these “violent homophobes are not atypical, anti-social, self-destructive, easily identifiable students.”¹⁵² As one author describes:

Perpetrators are not only predominately male and white, but just as likely, or even more likely, to be middle class; good in their classes; involved in school and community activities, organizations, and athletics; popular, friendly, and sociable; enrolled in college-preparatory programs in high school or enrolled in college; and/or in the military.¹⁵³

Regardless of the demographics associated with most teenage assailants, one would be mistaken to say that peers are the sole source of homophobia and abuse directed toward LGBT youth in the school setting. Instead, school officials and administrators most frequently share much of that responsibility. As an initial matter, many administrators simply refuse to acknowledge the existence of gay teens.¹⁵⁴ As a result, teen bullies often “act with impunity in schools

¹⁴⁶ *Id.*

¹⁴⁷ Huwiler & Remafedi, *supra* note 39, at 163.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ Anthony R. D’Augelli, *Lesbians’ and Gay Men’s Experiences of Discrimination and Harassment in a University Community*, 17 AM. J. COMMUNITY PSYCHOL. 317, 317 (1989); see also GARY DAVID COMSTOCK, VIOLENCE AGAINST LESBIANS AND GAY MEN 58 (1991) (noting that while “unknown people” most frequently perpetrate anti-gay violence, “fellow students are the next most frequently reported perpetrators”).

¹⁵¹ Elvia R. Arriola, *The Penalties for Puppy Love: Institutionalized Violence Against Lesbian, Gay, Bisexual and Transgendered Youth*, 1 J. GENDER RACE & JUST. 429, 450 (1998). Arriola notes that, “The motivation for antigay violence is male insecurity over one’s masculinity and the fear of peer rejection for not being sufficiently masculine.” *Id.*

¹⁵² Ruskola, *supra* note 24, at 310 (internal references omitted).

¹⁵³ COMSTOCK, *supra* note 150, at 106.

¹⁵⁴ Ruskola, *supra* note 24, at 304 (“[A]dministrators, teachers, and other professional helpers are hellbent on not seeing gay kids and not acknowledging their

that do nothing to curb teens from calling other teens ‘fags,’ ‘homos,’ and ‘lezzies’ because they dress and/or behave differently from other kids.”¹⁵⁵ LGBT youth sometimes face more than mere neglect at the hands of school administrators. As one commentator notes, “[i]n many schools it is simply too ‘dangerous mentally and physically to come out,’ especially [because] school administrators and teachers typically not only ‘refuse to protect gay youth from peer violence’ but themselves ‘harass, misinform, and unfairly punish gay students.’”¹⁵⁶ In fact, one study found that 55% to 72% of gay and lesbian college students had reported being the victims of violence.¹⁵⁷ While 64% of the perpetrators were a peer, 23% were faculty or staff.¹⁵⁸

All of these statistics and findings greatly undermine the popular notion that school “is one place where all young people will be safe.”¹⁵⁹ Instead, many mental health experts have gone so far as to label “the high school environment as the single greatest source of negativity for LGBT youth.”¹⁶⁰

3. Societal Stigma, Psychological Harm, and Suicide

In addition to parental abuse, homelessness, and school bullying, the compound effect of the stigma and homophobia that many LGBT youth encounter can also result in serious harm, which all too frequently proves deadly. For example, in February 2008, fifteen-

abuse, whether subtle or brutal.”).

As one school administrator has stated, “I’ve been a guidance counselor at this school for more than twenty years, and I don’t ever recall a student coming to me and telling me that he or she was a homosexual. I don’t think we have any gay kids here.” Robert Parlin, *We Don’t Have a Problem Here*, in *ONE TEACHER IN 10: GAY AND LESBIAN EDUCATORS TELL THEIR STORIES* 219, 219 (Kevin Jennings ed., 1994).

¹⁵⁵ Arriola, *supra* note 151, at 447-48; *see also* Linda L. Morrison & Jeff L’Heureux, *Suicide and Gay/Lesbian/Bisexual Youth: Implications for Clinicians*, 24 *J. ADOLESCENCE* 39, 43 (2001) (“An overwhelming majority (97%) of GLB youth report hearing homophobic remarks within their immediate school environment, and some of these remarks are made in front of school personnel that do nothing to challenge the peers’ anti-gay attitudes.”) (citations omitted); Ruskola, *supra* note 24, at 311 (“While teachers typically do not beat up gay and lesbian students, they almost invariably let homophobic acts by others go unchallenged and often engage in them themselves.”).

¹⁵⁶ Ruskola, *supra* note 24, at 271.

¹⁵⁷ PERRIN, *supra* note 26, at 86.

¹⁵⁸ *Id.* These statistics are not that surprising given that, in a 1991 study of school counselors, two-thirds expressed negative attitudes about gays and lesbians. *See* James T. Sears, *Educators, Homosexuality, and Homosexual Students: Are Personal Feelings Related to Professional Beliefs?*, 22 *J. HOMOSEXUALITY* 29, 55 (1991).

¹⁵⁹ Hillier & Rosenthal, *supra* note 117, at 3.

¹⁶⁰ Arriola, *supra* note 151, at 448.

year-old Lawrence King, a male student who frequently came to school wearing “high-heeled boots, makeup, jewelry and painted nails,” was shot and killed by a fourteen-year-old classmate during school hours.¹⁶¹ Many attribute the killing to King’s gender nonconformity.¹⁶²

Of course, anti-gay violence need not be fatal to result in lasting harm. As Dr. Ellen C. Perrin explains:

[For LGBT adolescents, the threat of violence] reinforces their sense of vulnerability and isolation, discourages them from “coming out,” and may restrict their educational and career aspirations. Anxiety, depression, sleep disorders, substance abuse, and frank post-traumatic stress disorder may follow the experience or witnessing of anti-gay violence. Lesbian and gay youth may blame themselves for the violence, further exacerbating the destructive effects of internalized homophobia.¹⁶³

Aside from the threat of actual violence, even the stigma of not conforming to heterosexual norms can be quite a catalyst for psychological harm. As one commentator notes, “[p]eer pressure and harassment become a primary source of the emotional stress that produces alienated, isolated, and depressed LGBT teenagers.”¹⁶⁴ Indeed, numerous studies indicate the relatively high prevalence of anxiety and mood disorders that exist among homosexual adults.¹⁶⁵

¹⁶¹ See Gregory W. Griggs, *Student Is Declared Brain Dead: Lawrence King, 15, Was Shot and Wounded at an Oxnard Campus Tuesday. A Classmate Faces Murder Charge*, L.A. TIMES, Feb. 14, 2008, at 1.

¹⁶² See Catherine Saillant, *1,000 Gather In Tribute To Slain Oxnard Teen: A March Organized by Students Focuses on Tolerance in the Wake of the Fatal Shooting of an Openly Gay Boy*, L.A. TIMES, Feb. 17, 2008, at 3.

¹⁶³ PERRIN, *supra* note 26, at 86-87 (citations omitted).

¹⁶⁴ Arriola, *supra* note 151, at 448.

¹⁶⁵ See, e.g., Susan D. Cochran & Vickie M. Mays, *Relation Between Psychiatric Syndromes and Behaviorally Defined Sexual Orientation in a Sample of the U.S. Population*, 151 AM. J. EPIDEMIOLOGY 516, 516 (2000) (noting research “has found evidence that lesbians and gay men may be at greater-than-expected risk for several stress-related disorders, including drug and/or alcohol abuse, suicide attempts during adolescence and young adulthood, depressive distress, anxiety disorders, and perhaps bipolar episodes”) (citations omitted); Theo G. M. Sandfort, Ron de Graaf, Rob V. Bijl & Paul Schnabel, *Same-Sex Sexual Behavior and Psychiatric Disorders: Findings From the Netherlands Mental Health Survey & Incidence Study (NEMESIS)*, 58 ARCHIVES GEN. PSYCHIATRY 85, 87 (2001) (“Compared with heterosexual men, homosexual men had significantly higher 12-month and lifetime rates of mood and anxiety disorders.”) (citation omitted).

Furthermore, such depression and anxiety is also quite common among LGBT adolescents.¹⁶⁶

For many of these adolescents, these psychological conditions prove fatal. In fact, LGBT youth are two to three times more likely than heterosexual youth to commit suicide.¹⁶⁷ Indeed, of the various studies that have looked at this issue, most found that between 30% to 50% of LGBT youth has attempted suicide.¹⁶⁸ Furthermore, a 1989 report by the U.S. Department of Health and Human Services found that LGBT youth are two to three times more likely to attempt suicide than other adolescents.¹⁶⁹ In fact, LGBT youth may comprise up to 30% of all completed adolescent suicides annually.¹⁷⁰ Although alarming, these findings are consistent with the sociological theory of suicide, which posits that “one of the major reasons people kill themselves is a lack of integration into the dominant culture.”¹⁷¹ As one teen said of his coming out process: “I found myself staring at pills or a knife on more than one occasion as I came out, and nearly succeeded in destroying myself. I vividly remember the long hours of glaring at the mirror, trying to decide if the image I saw was worth saving.”¹⁷²

Furthermore, those best equipped to help these teens often harbor their own homophobic and heterosexist views. Studies show that a large number of psychologists and social workers are homophobic.¹⁷³ Additionally, many such health professionals simply lack the required knowledge to deal with LGBT youth. As one psychologist notes:

¹⁶⁶ PERRIN, *supra* note 26, at 88 (“Lesbian and gay youth also often experience depression and anxiety as they come to recognize their homosexuality and its implications.”) (citation omitted); Sandfort et al., *supra* note 165, at 86 (“Young people with a homosexual or bisexual orientation were found to be at increased risk of major depression, generalized anxiety disorder, conduct disorder, substance abuse/dependence, and suicidal behaviors.”).

¹⁶⁷ Lock & Steiner, *supra* note 100, at 297.

¹⁶⁸ Ritch C. Savin-Williams, *A Critique of Research on Sexual-Minority Youths*, 24 J. ADOLESCENCE 5, 9 (2001); *see also* Huwiler & Remafedi, *supra* note 39, at 163 (“[R]ates of attempted suicide among gay and lesbian youth have consistently been found to be greater than expected in the general population of adolescents, ranging from 20% to 42%.”).

¹⁶⁹ *See* Gibson, *supra* note 1, at 163.

¹⁷⁰ *Id.*

¹⁷¹ Morrison & L'Heureux, *supra* note 155, at 39.

¹⁷² *David*, 19, in *TWO TEENAGERS IN TWENTY: WRITINGS BY GAY AND LESBIAN YOUTH* 68, 73 (Ann Heron ed., 1994).

¹⁷³ *See* Morrison & L'Heureux, *supra* note 155, at 43 (stating that “heterosexist and homophobic attitudes continue to be prevalent in psychologists”).

[Among] mental health care providers, there is a demonstrated lack of knowledge about [LGBT] issues and life-styles, differential assessment and treatment of clients based on sexual orientation, a lack of awareness of oppression as it relates to [LGBT] clients, and the pathologizing and denigration of [LGBT] persons simply because of their sexual orientation.¹⁷⁴

Finally, the fact that many at-risk LGBT youth do not seek help further compounds LGBT youth suicide rates. As pediatrician Gary Remafedi notes, “[y]ouths who are at the greatest risk for suicide are the ones who are least likely to reveal their sexual orientation to anyone.”¹⁷⁵ According to Dr. Remafedi, “[s]uicide may be a way of making sure that no one ever knows.”¹⁷⁶

II. AGE OF CONSENT, STATUTORY RAPE LAW, AND “ROMEO AND JULIET” EXCEPTIONS

Given the dangers and hardships that LGBT adolescents experience as a result of societal homophobia, it is important that the criminal laws, which apply to adolescent sexuality, treat all adolescents equally to nullify these problems as much as possible. Unfortunately, some states have failed to do this. Instead, some states have gone so far as to draft their statutory rape laws so as to further marginalize LGBT teens.

As noted earlier, sexual activity among all adolescents, whether homosexual or heterosexual, is relatively common.¹⁷⁷ Furthermore, few would deny that all teens, regardless of whether they act upon them, experience sexual desires. Accordingly, given these adolescent propensities, coupled with the understanding that most adolescents lack full emotional, mental and physical maturity, state legislatures are rightly concerned with protecting teens from “unequal, manipulative, or predatory relationships.”¹⁷⁸ One of the primary ways in which legislatures attempt to protect teens is through statutory rape laws.

¹⁷⁴ *Id.* (citation omitted).

¹⁷⁵ Chris Bull, *Suicidal Tendencies: Is Anguish Over Sexual Orientation Causing Gay and Lesbian Teens to Kill Themselves?*, in WITNESS TO REVOLUTION: THE ADVOCATE REPORTS ON GAY AND LESBIAN POLITICS, 1967-1999, at 332, 336 (Chris Bull ed., 1999) (quoting pediatrician Gary Remafedi).

¹⁷⁶ *Id.*

¹⁷⁷ *See supra* Part I.B.

¹⁷⁸ CAROLYN E. COCCA, *JAILBAIT: THE POLITICS OF STATUTORY RAPE LAWS IN THE UNITED STATES 2* (2004).

In essence, statutory rape laws criminalize sexual activity with a child who is below the statutorily defined age of consent.¹⁷⁹ Thus, age of consent laws, which vary by state, lay out the minimum age at which a person can legally consent to engage in a sexual act.¹⁸⁰ As a result, in most instances,¹⁸¹ engaging in a sexual act with someone below the age of consent is a criminal act.¹⁸² As one commentator states: “The law conceives of the younger partner as categorically incompetent to say either yes or no to sex. Because she is by definition powerless, both personally and legally, to resist or to voluntarily relinquish her ‘virtue,’ the state, which sees its interest in guarding that virtue, resists for her.”¹⁸³ In most states, the offense of statutory rape is a felony.

At one point, most statutory rape laws criminalized as a felony all sexual activity with a person under the age of consent regardless of the age of the “perpetrator.”¹⁸⁴ Thus, “if the male were the same age as the female, or even younger than the female, he would still be prosecuted for the crime.”¹⁸⁵ However, presumably recognizing that sexual experimentation with peers is relatively common during adolescence, many states today have enacted “Romeo and Juliet” laws. These laws provide for either a mitigated penalty or complete exculpation when both actors are close in years yet one party is below the age of

¹⁷⁹ MADDEX, *supra* note 92, at 274-75.

¹⁸⁰ *Id.* at 275; see also Catherine L. Carpenter, *On Statutory Rape, Strict Liability, and the Public Welfare Offense Model*, 53 AM. U. L. REV. 313, 334 (2003) (“At its most basic, statutory rape is the carnal knowledge of a person who is deemed underage as proscribed by statute and who is therefore presumed to be incapable of consenting to sexual activity.”) (footnotes omitted).

¹⁸¹ One notable exception involves a married couple. See generally Kelly C. Connerton, *The Resurgence of the Marital Rape Exemption: The Victimization of Teens by Their Statutory Rapists*, 61 ALB. L. REV. 237, 251 (1997) (examining history of marital rape exemption and how exemption “continues to excuse the rape of young women and make the prosecution of marital rapists under state statutory rape laws impossible”).

¹⁸² MADDEX, *supra* note 92, at 275.

¹⁸³ LEVINE, *supra* note 90, at 71. Interestingly enough, the original impetus behind statutory rape laws was the property interest that fathers had in their daughter’s chastity. See COCCA, *supra* note 178, at 11 (“The idea behind such laws at the time was less about the ability or lack thereof to consent to such activity on the part of the female, and more about protecting white females and their premarital chastity — a commodity — as property.”) (citations omitted).

¹⁸⁴ COCCA, *supra* note 178, at 29.

¹⁸⁵ *Id.*

consent.¹⁸⁶ As Carolyn E. Cocca explains in her book *Jailbait: The Politics of Statutory Rape Laws in the United States*:

[Romeo and Juliet laws] mandate that the perpetrator be a certain number of years older than the victim; some require that the perpetrator be at least of a certain age, such as 18. A law that formerly read, “It is a felony for any person to commit an act of sexual penetration with any person under the age of 16,” would be changed to[,] “It is a felony for any person to commit an act of sexual penetration with any person under the age of 16, provided that the actor is at least four years older than the victim.” An age span effectively decriminalizes sexual activity between similar-aged teens at the felony level.¹⁸⁷

Of course, this is not to suggest that all states freely permit sexual acts between an older adolescent and one below the age of consent. Instead, in most states, such acts are still criminalized; however, at most, the perpetrator will merely be guilty of a misdemeanor and not a felony.¹⁸⁸ Furthermore, in most states, a defendant who falls under the ambit of the Romeo and Juliet exception is not required to register as a convicted sex offender as is required of those who commit statutory rape and do not qualify for the exception.¹⁸⁹

Most states’ Romeo and Juliet laws are applicable to both heterosexual and homosexual couplings.¹⁹⁰ In other words, in those states, a defendant who engages in a sexual act with someone below the age of consent will qualify for the exception regardless of whether the two actors are of the same or opposite gender. However, three

¹⁸⁶ See Shulamit H. Shvartsman, “Romeo and Romeo”: An Examination of *Limon v. Kansas* in Light of *Lawrence v. Texas*, 35 SETON HALL L. REV. 359, 361-62 (2004). This change in the law was largely the result of feminist lobbying efforts during the 1970s and ’80s. See COCCA, *supra* note 178, at 19 (“[Romeo and Juliet provisions were] intended by the liberal feminists to allow conduct that was more likely to be consensual, between teenagers of similar ages, to go unprosecuted. Age acts as a proxy for a power differential that is suspect of coercion.”) (citation omitted).

¹⁸⁷ COCCA, *supra* note 178, at 29.

¹⁸⁸ *Id.* at 34.

¹⁸⁹ See, e.g., *infra* text accompanying notes 195, 203 & 209. See generally Meredith Cohen, *No Child Left Behind Bars: The Need to Combat Cruel and Unusual Punishment of State Statutory Rape Laws*, 16 J.L. & POL’Y 717, 738-39 (2008) (citing state laws that require registration by those not falling under “Romeo and Juliet” exception).

¹⁹⁰ See 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, 633 (2006) (noting that, as of 2006, only four states had discriminatory “Romeo and Juliet” provisions).

states follow a much different approach. These states are Texas, Alabama, and California.

A. Texas

Under the Texas statute entitled “Indecency with a Child,” a person is guilty of statutory rape if that person “engages in sexual contact” with “a child younger than 17 years and not the person’s spouse, whether the child is of the same or opposite sex.”¹⁹¹ Anyone who violates this provision is guilty of “a felony of the second degree.”¹⁹² The penalty for such a felony is imprisonment for at least two years and no more than twenty.¹⁹³ In addition, anyone convicted can be fined up to \$10,000.¹⁹⁴ Finally, those guilty of violating the Texas statute are required by state law to register as a convicted sex offender.¹⁹⁵

However, this same statute contains a Romeo and Juliet exception, which states that “[i]t is an affirmative defense to prosecution under this section that the actor . . . was not more than three years older than the victim *and of the opposite sex*.”¹⁹⁶ Thus, under this statute, an eighteen-year-old male who has consensual sex with a sixteen-year-old male would be guilty of a felony.

B. Alabama

In Alabama, a person commits the crime of rape in the second degree if “[b]eing 16 years old or older, he or she engages in sexual intercourse with a member of the opposite sex less than 16 and more than 12 years old.”¹⁹⁷ Alabama law provides the following definition for “sexual intercourse”: “Such term has its ordinary meaning and

¹⁹¹ TEX. PENAL CODE ANN. § 21.11(a) (Vernon 2001).

¹⁹² *Id.* § 21.11(d).

¹⁹³ *Id.* § 12.33(a) (Vernon 2001).

¹⁹⁴ *Id.* § 12.33(b).

¹⁹⁵ TEX. CODE CRIM. PROC. ANN. art. 62.001(5)(A) (Vernon 2007). Texas law, however, does provide a mechanism whereby an adolescent with a single conviction of statutory rape can petition “for an order exempting the person from registration.” *See id.* art. 62.301 (Vernon 2007). However, the court is only required to grant such a petition proved, by a preponderance of the evidence, that such an exemption would not “threaten public safety.” *Id.* art. 62.301(d)(1). Not only does this rather loose standard provide judges with much flexibility in deciding whether to grant such a petition, but teens who engaged in the exact same conduct but with someone of the opposite sex are automatically exempt. *See* TEX. PENAL CODE ANN. § 21.11(b)(1).

¹⁹⁶ TEX. PENAL CODE ANN. § 21.11(b)(1) (emphasis added).

¹⁹⁷ ALA. CODE § 13A-6-62(a)(1) (1975).

occurs upon any penetration, however slight; emission is not required.”¹⁹⁸ Similarly, a person is guilty of sodomy in the second degree if “[h]e, being 16 years old or older, engages in deviate sexual intercourse with another person less than 16 and more than 12 years old.”¹⁹⁹ The legislature has defined “deviate sexual intercourse” as “[a]ny act of sexual gratification between persons not married to each other involving the sex organs of one person and the mouth or anus of another.”²⁰⁰ Both crimes are considered Class B felonies, the commission of which requires at least a two-year and up to a twenty-year sentence.²⁰¹ In addition, anyone convicted may be fined up to \$30,000.²⁰² Finally, state law requires any defendant convicted of either crime to register as a sex offender.²⁰³

However, Alabama law provides an affirmative defense for the crime of rape in the second degree. Specifically, the statute provides that a defendant is not guilty unless “the actor is at least two years older than the member of the opposite sex.”²⁰⁴ No such exception exists for the statute governing sodomy in the second degree.

Accordingly, given Alabama’s definition of “sexual intercourse” and “sodomy,” all sexual acts between same sex adolescents would be governed by the sodomy statute. The rigid definitions of “intercourse” versus “sodomy” in the Alabama scheme, along with the lack of any Romeo and Juliet exception for the latter, has the same effect as the Texas statute. Thus, although the Alabama statutes are not as explicit as the Texas statutes, both impose a much harsher penalty on adolescents who engage in homosexual acts.

C. California

California, like Alabama, also distinguishes between sexual intercourse and sodomy. Thus, in California, “[a]ny person who engages in an act of unlawful sexual intercourse with a minor who is not more than three years older or three years younger than the perpetrator, is guilty of a misdemeanor.”²⁰⁵ This is a reduced penalty. If their age difference were more than three years, the perpetrator

¹⁹⁸ *Id.* § 13A-6-60(1) (1975).

¹⁹⁹ *Id.* § 13A-6-64(a)(1) (1975).

²⁰⁰ *Id.* § 13A-6-60(2).

²⁰¹ *Id.* § 13A-5-6(a)(2) (1975).

²⁰² *Id.* § 13A-5-11(a)(2) (1975).

²⁰³ *Id.* § 13A-11-200 (1975).

²⁰⁴ *Id.* § 13A-6-62(a)(1) (1975).

²⁰⁵ CAL. PENAL CODE § 261.5(b) (West 2007).

could face a felony conviction.²⁰⁶ In contrast, the state sodomy law simply provides that “any person who participates in an act of sodomy with another person who is under 18 years of age shall be punished by imprisonment in the state prison, or in a county jail for not more than one year.”²⁰⁷ Unlike the penalties relating to sexual intercourse with a minor, this penalty for sodomy attaches regardless of whether the two actors are close in age. Furthermore, in contrast to Alabama’s more general definition, California defines sodomy as “sexual conduct consisting of contact between the penis of one person and the anus of another person.”²⁰⁸

Finally, those convicted under the sodomy statute are required to register as sex offenders “for the rest of his or her life while residing in California, or while attending school or working in California.”²⁰⁹ In contrast, those convicted of sexual intercourse need only register “if the court finds at the time of conviction or sentencing that the person committed the offense as a result of sexual compulsion or for purposes of sexual gratification.”²¹⁰ Thus, like Texas and Alabama, the effect of the California law is to punish the same conduct between two homosexual youth more harshly than between two heterosexual youth.

III. DISCRIMINATORY “ROMEO AND JULIET” EXCEPTIONS DENY ADOLESCENT HOMOSEXUALS THE EQUAL PROTECTION OF THE LAW

As outlined in Part I, within American culture and society, LGBT adolescents are an extremely stigmatized and bullied group.²¹¹ Again, for these teens, much of that stigma arises and is perpetuated within the home and school.²¹² Of course, sociologists note that in addition to the home and school settings, where stigma is common, other

²⁰⁶ *Id.* § 261.5(c).

²⁰⁷ *Id.* § 286(b)(1) (West 2007).

²⁰⁸ *Id.* § 286(a).

²⁰⁹ *See id.* § 290(b) (West 2007). After submission of this Article, however, one California court ruled that the lifetime registration requirement was unconstitutional as applied to California’s statute dealing with oral copulation with a minor, CAL. PENAL CODE § 288 (West 2007), given that the statutory scheme imposed a harsher penalty for those guilty of oral copulation with a 14 year-old than for those guilty of sexual intercourse with a 14 year-old. *See People v. Garcia*, 74 Cal. Rptr. 3d 681, 686 (Cal. Ct. App. 2008). Although this ruling did not extend to the lifetime registration requirement vis-à-vis a violation of the state’s sodomy statute, future courts would hopefully follow the same logic as the *Garcia* court and reach a similar result.

²¹⁰ *See* CAL. PENAL CODE § 290.006 (West 2007).

²¹¹ *See supra* Part I.C.

²¹² *See supra* Part I.C.1–2.

sources, such as religion and the media, amplify and perpetuate that stigma.²¹³ As many commentators have noted, the law is also one of the forces behind the social construction of stigma.²¹⁴ As Professor Thomas Healy describes: “[L]aw not only reflects social norms, but also ‘helps shape social power and norms by prefiguring preferences, prejudices and interests.’ Similarly, law creates and contributes to stigma. When a social understanding develops that a particular trait is deeply discrediting, law often crystallizes and reinforces that understanding.”²¹⁵

To see this principle in play, one need only consider the discriminatory Romeo and Juliet provisions in Texas, Alabama, and California. By adding these provisions, these states have not only contributed to the stigma felt by LGBT adolescents but have also added a legal stamp of approval to this stigma. As detailed in this Part, these statutes are not only stigmatizing and cruel but also unconstitutional under the Fourteenth Amendment.

A. *Stigma, Invidious Discrimination and The Equal Protection Clause:
An Overview*

“The concept of ‘stigma’ is at the heart of modern equal protection analysis.”²¹⁶ Nowhere has the Supreme Court been more explicit on this point than in the case of *Brown v. Board of Education*.²¹⁷ In *Brown*, the Court addressed the following question: “Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other ‘tangible’ factors may be equal, deprive the children of the minority group of equal educational opportunities?”²¹⁸

²¹³ See Thomas Healy, *Stigmatic Harm and Standing*, 92 IOWA L. REV. 417, 451 (2007) (“[S]ociologists have observed that ‘beliefs about minorities and other markable groups are transmitted by parents, the media, and other socialization agents,’ such as churches and schools.”).

²¹⁴ See, e.g., Scott Burris, *Disease Stigma in U.S. Public Health Law*, 30 J.L. MED. & ETHICS 179, 183 (2002) (discussing how “law contributes to creation and maintenance of stigma”); William N. Eskridge, Jr., *No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review*, 75 N.Y.U. L. REV. 1327, 1336 (2000) (“[L]aw creates opportunities for identity politics. Legal stigma not only is a mechanism for thrusting an unwanted identity upon its objects but also can be the focal point for resistance, when like-situated objects perceive that they are being treated similarly and unfairly and start thinking and acting in concert.”).

²¹⁵ Healy, *supra* note 213, at 451 (footnotes omitted).

²¹⁶ 2 RODNEY A. SMOLLA, SMOLLA & NIMMER ON FREE SPEECH § 17:38, at 17-79 n.11 (2007).

²¹⁷ 347 U.S. 483 (1954).

²¹⁸ *Id.* at 493.

In response, the Court found that racial segregation in public schools was a violation of equal protection because “[t]o separate [African-American children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”²¹⁹ In support of its holding and rationale, the Court relied on the earlier case of *Sweatt v. Painter*,²²⁰ which set forth the following observations about the Equal Protection Clause:

The words of the [A]mendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race — the right to exemption from unfriendly legislation against them distinctively as colored; exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race.²²¹

Of course, *Brown* dealt with racial discrimination, which is subject to strict scrutiny, the most searching form of review that federal courts apply to an alleged violation of the Equal Protection Clause.²²² Importantly, however, the Court has considered harm from stigmatization under lesser standards of review. In fact, the Court invalidated laws because of their stigmatic effects even when applying rational basis review, the least searching form of judicial review under the Equal Protection Clause.²²³

Under the traditional form of rational basis, courts will uphold any governmental action where the “the classification drawn by the statute

²¹⁹ *Id.* at 494.

²²⁰ 339 U.S. 629 (1950).

²²¹ *Id.* at 492 n.5 (quoting *Strauder v. West Virginia*, 100 U.S. 303, 307-08 (1880)).

²²² See *Plyler v. Doe*, 457 U.S. 202, 216-17 (1982) (“[W]e have treated as presumptively invidious those classifications that disadvantage a ‘suspect class,’ or that impinge upon the exercise of a ‘fundamental right.’ With respect to such classifications, it is appropriate to enforce the mandate of equal protection by requiring the State to demonstrate that its classification has been precisely tailored to serve a compelling governmental interest.”) (footnotes omitted).

²²³ As an example of just how difficult the rational basis standard can be to overcome, see *Regan v. Taxation with Representation*, 461 U.S. 540, 548 (1983), in which the Court held that classifications reviewed under rational basis are presumptively valid unless “the one attacking the legislative arrangement [negates] every conceivable basis [that] might support it.” (citation omitted).

is rationally related to a legitimate state interest.”²²⁴ As the Court has further explained:

Whether embodied in the Fourteenth Amendment or inferred from the Fifth, equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.²²⁵

Looking at this language, it would be difficult to imagine a law where the government could not demonstrate some rational basis for enacting the law. Nonetheless, in a number of cases, the Court has actually applied a more searching inquiry under the guise of “rational basis.” Professor Gerald Gunther has referred to this level of review as rationality with “considerable bite.”²²⁶ As Gunther explains, although the Court may be unwilling to employ strict or intermediate level scrutiny, it occasionally uses this rational basis “plus” as an “interventionist tool” to strike down laws it feels are unfair or unjust.²²⁷

These two versions of rational basis raise the question of how the Court distinguishes between traditional rational basis and rational basis plus. Because laws are designed to classify based on some characteristic, all laws discriminate to some extent.²²⁸ For example, speed limits discriminate against individuals who like to drive at excessive speeds. These sorts of laws, which further legitimate government purposes, are subject to traditional rational basis review. Rather, the Equal Protection Clause is concerned with invidious discrimination. Although the Court has never specifically defined what “invidious” means,²²⁹ the term generally refers to “any systematic

²²⁴ *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985) (citations omitted).

²²⁵ *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993).

²²⁶ Gerald Gunther, *Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 12 (1972).

²²⁷ *Id.*

²²⁸ See *Romer v. Evans*, 517 U.S. 620, 631 (1996) (“[M]ost legislation classifies for one purpose or another, with resulting disadvantages to various groups or persons.”) (citation omitted).

²²⁹ See Brenda Jones Quick, *Ethical Rules Prohibiting Discrimination by Lawyers: The Legal Profession's Response To Discrimination on the Rise*, 7 NOTRE DAME J.L. ETHICS

or purposeful deprivation, marked by ill will, of identifiable segments of our population of valuable goods and opportunities.”²³⁰ It is this type of discrimination, even when targeted at groups not part of a suspect or quasi-suspect class, to which the Court has applied rational basis plus review to strike down governmental laws or action.

Furthermore, in applying this heightened version of rational basis review, the Court has frequently looked to the stigma that results from the state action as a proxy for determining when that action violates the Fourteenth Amendment. Indeed, as noted by Professor Peter Bayer, the Court has routinely found government action to be irrational when that action “is designed primarily to inflict harm or otherwise disadvantage a politically weak group.”²³¹

Thus, rational basis plus has some similarity to strict and intermediate scrutiny in that, like these more searching forms of inquiry, the question as to whether to apply rational basis plus depends on who the governmental action is directed against as well as the government’s motive. As one commentator notes, for “such groups that do not constitute suspect classes but nevertheless resemble discrete and insular minorities, the Court has applied a heightened form of rational basis review.”²³² This standard of review reflects the Court’s concern that the “politically disenfranchised and socially marginalized are more vulnerable to the majoritarian tyranny against which equal protection guards.”²³³ Some of the groups that the Court has found to require such heightened protection, albeit not quite to the level of intermediate or strict scrutiny, are the mentally disabled, illegal aliens, and, most pointedly for this inquiry, homosexuals.

First, in *City of Cleburne v. Cleburne Living Center, Inc.*, the Court struck down a Texas zoning ordinance that required proposed group homes for the mentally retarded to obtain a special permit that was not required for other group homes.²³⁴ In so ruling, the Court essentially affirmed the earlier judgment of the Fifth Circuit Court of

& PUB. POL’Y 5, 38 (1993) (“The Supreme Court has applied the label ‘invidious’ to unlawful discrimination, but never has attempted to prospectively define the term.”).

²³⁰ George S. Gray, *Benign Preference as a Course to Equality: Its Morality, Efficacy and Constitutionality*, 30 HOW. L.J. 807, 808-09 (1987) (footnote omitted).

²³¹ Peter Brandon Bayer, *A Plea for Rationality and Decency: The Disparate Treatment of Legal Writing Faculties as a Violation of Both Equal Protection and Professional Ethics*, 39 DUQ. L. REV. 329, 343 (2001).

²³² Note, *Making Outcasts Out of Outlaws: The Unconstitutionality of Sex Offender Registration and Criminal Alien Detention*, 117 HARV. L. REV. 2731, 2742 (2004) [hereinafter *Making Outcasts*].

²³³ *Id.* at 2742 (footnote omitted).

²³⁴ 473 U.S. 432, 442-43 (1985).

Appeals. The Court, however, disagreed with the Fifth Circuit's ruling that governmental action directed at the mentally retarded was subject to heightened scrutiny.²³⁵ Although the Court did explicitly point out the immutable nature of the mentally retarded as well as the "undeniable differences between the retarded and others," it nonetheless held that rational basis was the correct level of scrutiny to be applied in this situation.²³⁶ Under a more traditional application of rational basis scrutiny, the inquiry would have ended there. It did not.

Instead, the Court noted that the "refusal to recognize the retarded as a quasi-suspect class does not leave them entirely unprotected from invidious discrimination."²³⁷ With that, the Court went on to invalidate the zoning ordinance as an irrational governmental action. Specifically, in analyzing the government's rationale for distinguishing between group homes for the mentally retarded and all other group homes, the Court found that the primary motivator for the distinction was "the negative attitude of the majority of property owners located within 200 feet of the [proposed facility], as well as the fears of elderly residents of the neighborhood."²³⁸ The Court unanimously agreed that it was precisely this kind of discrimination against which the Equal Protection Clause was designed to proscribe:

[M]ere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently from apartment houses, multiple dwellings, and the like. . . . "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."²³⁹

Next, in *Plyler v. Doe*, the Court struck down a state statute that denied public education to the children of illegal immigrants.²⁴⁰ As an initial matter, the Court found that illegal immigrants, similar to the mentally retarded in *Cleburne*, do not constitute a suspect class.²⁴¹ In so holding, the Court noted that undocumented status is not an

²³⁵ *Id.* at 442-43.

²³⁶ *Id.* at 444.

²³⁷ *Id.* at 446 ("The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational.") (citations omitted).

²³⁸ *Id.* at 448.

²³⁹ *Id.* at 448 (quoting *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (citations omitted)).

²⁴⁰ 457 U.S. 202, 216 (1982).

²⁴¹ *Id.* at 219 n.19 ("We reject the claim that 'illegal aliens' are a 'suspect class.'").

immutable characteristic given that “it is the product of conscious, indeed unlawful, action.”²⁴² Nonetheless, the Court found that the governmental action was not so much directed at illegal immigrants but the children of illegal immigrants. In that regard, those bearing the brunt of this legislation were, in fact, an immutable group. Specifically, the Court noted that the governmental action in this case was “directed against children, and imposes its discriminatory burden on the basis of a legal characteristic over which children can have little control.”²⁴³

Even after drawing this distinction between illegal immigrants and their children, the Court still applied rational basis review.²⁴⁴ However, the Court ultimately struck down the legislation given the stigma it imposed on the children at issue: “[The law at issue] imposes a lifetime hardship on a discrete class of children not accountable for their disabling status. The stigma of illiteracy will mark them for the rest of their lives.”²⁴⁵ Furthermore, in so ruling, the Court was unwilling to give automatic deference to any colorable rationale that the state might use to support the legislation. Instead, the Court noted the need to engage in a balancing test: “In determining the rationality of [the subject legislation], we may appropriately take into account its costs to the Nation and to the innocent children who are its victims.”²⁴⁶ Ultimately, the Court refused to recognize any of the states’ proffered rationales as sufficient to override the extreme harm inflicted on the children of illegal immigrants. Indeed, the Court ultimately noted that “[i]t is difficult to understand precisely what the State hopes to achieve by promoting the creation and perpetuation of a subclass of illiterates within our boundaries.”²⁴⁷

Finally, the Court has also applied rational basis plus to laws that adversely impact homosexuals. In *Romer v. Evans*, the Court struck down an amendment to the Colorado Constitution that prevented any state anti-discrimination laws from protecting homosexuals.²⁴⁸ In

²⁴² *Id.* at 220.

²⁴³ *Id.*

²⁴⁴ *Id.* (“It is thus difficult to conceive of a rational justification for penalizing these children for their presence within the United States.”).

²⁴⁵ *Id.* at 223 (noting that this case involved more than merely whether state action “discriminates against a suspect class, or whether education is a fundamental right”).

²⁴⁶ *Id.* at 223-24.

²⁴⁷ *Id.* at 230. The Court further noted that “whatever savings might be achieved by denying these children an education, they are wholly insubstantial in light of the costs involved to these children, the State, and the Nation.” *Id.*

²⁴⁸ 517 U.S. 620, 623-24 (1996).

describing the impact of this amendment, the Court noted: “Homosexuals, by state decree, are put in a solitary class with respect to transactions and relations in both the private and governmental spheres. The amendment withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies.”²⁴⁹

Unlike *Cleburne* and *Plyler*, the Court declined to explicitly state the level of scrutiny that attaches to laws that adversely impact homosexuals. Instead, the Court noted that the Colorado amendment “fails, indeed defies, even” rational basis scrutiny.²⁵⁰ Specifically, the Court invalidated the Colorado amendment on two grounds. First, the Court noted that the amendment “imposes a special disability upon [homosexuals] alone”²⁵¹:

It is not within our constitutional tradition to enact laws of this sort. Central both to the idea of the rule of law and to our own Constitution’s guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance. “Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.”²⁵²

Second, the Court ruled that the amendment also failed rational basis review given that its “sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects.”²⁵³ As the Court explained:

Even laws enacted for broad and ambitious purposes often can be explained by reference to legitimate public policies which justify the incidental disadvantages they impose on certain persons. [Colorado’s amendment], however, in making a general announcement that gays and lesbians shall not have any particular protections from the law, inflicts on them

²⁴⁹ *Id.* at 627.

²⁵⁰ *Id.* at 632.

²⁵¹ *Id.* at 631.

²⁵² *Id.* at 633 (quoting *Sweatt v. Painter*, 339 U.S. 629, 635 (1950) (quoting *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948))).

²⁵³ *Id.* at 632.

immediate, continuing, and real injures that outrun and belie any legitimate justifications that may be claimed for it.²⁵⁴

Accordingly, the Court held that the Colorado amendment was a violation of the Equal Protection Clause given that it “classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else.”²⁵⁵

Our understanding of the Equal Protection Clause as it applies to homosexuals cannot, however, rest entirely on *Romer*; it must also take into account the Court’s decision in *Lawrence v. Texas*.²⁵⁶ In *Lawrence*, the Court invalidated Texas’ anti-sodomy statute, which criminalized homosexual but not heterosexual sodomy.²⁵⁷ Although the majority in *Lawrence* based its decision on substantive due process grounds, *Lawrence* nonetheless provides guidance to the equal protection analysis courts would likely apply to laws targeting homosexuals. In fact, when discussing the Court’s decision in *Romer*, Justice Kennedy himself noted when writing for the majority, “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.”²⁵⁸ In fact, one commentator describes Justice Kennedy’s majority opinion as seemingly using “rational basis on steroids for analyzing a substantive due process claim.”²⁵⁹ In applying this standard, the Court invalidated the state statute, as well as anti-sodomy statutes nationwide, on the basis that “[t]he State cannot demean [homosexuals’] existence or control their destiny by making their private sexual conduct a crime.”²⁶⁰

Justice O’Connor concurred in the judgment but noted that she would have decided the case using the Equal Protection Clause rather than the Due Process Clause of the Fourteenth Amendment.²⁶¹ As Justice O’Connor pointed out, “Texas’ sodomy law brands all homosexuals as criminals, thereby making it more difficult for homosexuals to be treated in the same manner as everyone else.”²⁶² Given the stigmatizing impact this statute imposed on homosexuals,

²⁵⁴ *Id.* at 635.

²⁵⁵ *Id.*

²⁵⁶ 539 U.S. 558 (2003).

²⁵⁷ *Id.* at 579.

²⁵⁸ *Id.* at 575.

²⁵⁹ See Nan D. Hunter, *Living with Lawrence*, 88 MINN. L. REV. 1103, 1129 (2004).

²⁶⁰ *Lawrence*, 539 U.S. at 578.

²⁶¹ *Id.* at 579.

²⁶² *Id.* at 581.

Justice O'Connor, relying on *Plyler*, saw no rational basis behind the legislation: "The Texas sodomy statute subjects homosexuals to 'a lifelong penalty and stigma. A legislative classification that threatens the creation of an underclass . . . cannot be reconciled with' the Equal Protection Clause."²⁶³ In reaching this conclusion, O'Connor also relied on a rather expansive view of *Romer* when she stated that "[m]oral disapproval of a group cannot be a legitimate governmental interest."²⁶⁴ Furthermore, Justice O'Connor saw no saving grace in the fact that Texas's statute applied not explicitly to homosexuals but to homosexual conduct:

While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, Texas' sodomy law is targeted at more than conduct. It is instead directed toward gay persons as a class. "After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal."²⁶⁵

Despite deciding the case on the basis of substantive due process, the majority nonetheless declared O'Connor's equal protection approach to be "a tenable argument."²⁶⁶

Finally, both the majority opinion and O'Connor's concurrence relied, in part, on the fact that a violation of the Texas statute had collateral impacts as well. A criminal conviction for sodomy would disqualify a convicted individual from entering certain professions and require that person to register as a sex offender in both Texas and any other state that person chose to relocate.²⁶⁷ These collateral impacts, thus, would only heighten the stigmatic harm resulting from the challenged legislation.

²⁶³ *Id.* at 584 (quoting *Plyler v. Doe*, 457 U.S. 202, 239 (1982) (Powell, J., concurring)).

²⁶⁴ *Id.* at 583. As Professor Hunter points out, the state, in *Romer*, "did not claim morality as a state interest" to justify its action and, thus, "the Court had no occasion to declare whether morality could comprise a proper basis for such a law." Hunter, *supra* note 259, at 1129 (footnote omitted).

²⁶⁵ *Lawrence*, 539 U.S. at 583 (Scalia, J., dissenting) (quoting *Romer v. Evans*, 517 U.S. 620, 641 (1996) (O'Connor, J., concurring)).

²⁶⁶ *Id.* at 574.

²⁶⁷ *Id.* at 575, 581.

B. *Discriminatory Romeo and Juliet Exceptions: Invidious, Cruel, and Unconstitutional*

To understand why discriminatory Romeo and Juliet exceptions to statutory rape laws are an invidious form of discrimination, it is first important to note that all LGBT adolescents “belong to at least two politically powerless groups: children and homosexuals.”²⁶⁸ As a result, it seems quite evident that a more searching form of rational basis review would certainly apply to any state action directed at LGBT youth. Indeed, as noted earlier, “the central justification for countermajoritarian intervention by the courts to strike down discriminatory laws has been the lack of political power on the part of the disadvantaged minority.”²⁶⁹ Furthermore, as evidenced by *Plyler*, *Romer*, and *Lawrence*, the Court has already applied this level of review to state actions directed at children and homosexuals, respectively.²⁷⁰

However, LGBT teens are even more deserving of rational basis plus review because they are *both* homosexual and children, each a politically isolated group. LGBT youth are considered one of the most isolated and invisible minorities within the United States.²⁷¹ Indeed, whereas most youth enjoy the benefit of having the support of those who are not politically powerless, like parents and educators, LGBT children often lack those support systems. Likewise, unlike LGBT adults who may vote and theoretically effectuate change through the election process, LGBT youth cannot participate in the democratic process.

Because of this greater level of political isolation, laws directed at LGBT youth deserve a higher level of scrutiny beyond even rational basis plus. But this article assumes, for the sake of argument, that a court need not reach this issue. As shown below, rational basis plus is more than sufficient to invalidate the discriminatory Romeo and Juliet exceptions in Texas, Alabama, and California.

Specifically, *Cleburne*, *Plyler*, *Romer*, and *Lawrence* stand for the proposition that the Constitution prohibits state governments from “mak[ing] the members of a particular group second-class citizens even if that group is not considered a suspect classification”²⁷² if the

²⁶⁸ Ruskola, *supra* note 24, at 320.

²⁶⁹ Hunter, *supra* note 259, at 1131.

²⁷⁰ See *supra* notes 240-67 and accompanying text.

²⁷¹ See *supra* notes 118-21 and accompanying text.

²⁷² Diana Hasse, *The Use of Criminal Sodomy Laws in Civil Litigation*, 79 TEX. L. REV. 813, 826 (2001) (footnote omitted).

benefits of the governmental action are outweighed by the harm inflicted on the affected group. The Court put forth this approach most explicitly in *Plyler* when it stated that “[i]n determining the rationality of [the subject legislation], we may appropriately take into account its costs to the Nation and to the innocent children who are its victims.”²⁷³ But the Court implicitly followed this same principle in both *Cleburne* and *Romer* as it weighed the government’s purported interest against the resulting stigmatic harm on the targeted groups.²⁷⁴ With this understanding, discriminatory Romeo and Juliet exceptions would most likely be subject to rational basis plus review.

Under this standard, courts first look at the states’ asserted justifications for drawing distinctions between homosexual and heterosexual teenage activity. Then the courts compare those justifications to the harm these laws inflict upon LGBT youth. I address these justifications and harms in turn.

1. State Justifications for Criminalizing LGBT Sexuality

Interestingly, the legislative histories behind discriminatory Romeo and Juliet exceptions fail to shed light on why those states thought sexual acts between adolescents of the same sex warranted harsher penalties than similar acts between those of the opposite sex.²⁷⁵ These omissions are not surprising given that legislatures are rarely explicit when enacting legislation that discriminates against an unpopular group.²⁷⁶ Fortunately for our purposes, the Supreme Court of Kansas has already struck down its state’s discriminatory Romeo and Juliet provision on equal protection grounds. Through that litigation, the State of Kansas delineated its reasons for discriminating between homosexual and heterosexual adolescents.²⁷⁷ However, before moving on to these purported justifications, some background on the case is necessary.

In *State v. Limon*, Matthew Limon, one week after turning eighteen, had consensual oral sex with M.A.R. who was one month shy of turning fifteen.²⁷⁸ In Kansas, the Romeo and Juliet statute allowed for a much

²⁷³ *Plyler v. Doe*, 457 U.S. 202, 223-24 (1982).

²⁷⁴ See *supra* notes 234-39, 248-55 and accompanying text.

²⁷⁵ See, e.g., *Limon III*, 122 P.3d 22, 33 (Kan. 2005) (concluding, after review of relevant legislative history, that “there is nothing in the legislative record regarding the legislative purpose for adding the opposite sex requirement”).

²⁷⁶ See, e.g., Charles R. Lawrence III, *The ID, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 319 (1987) (“Improper motives are easy to hide.”).

²⁷⁷ See *Limon III*, 122 P.3d at 26-27.

²⁷⁸ *Id.* at 24.

reduced penalty for violating the statutory rape laws provided that (1) the victim was fourteen or fifteen years of age, (2) the defendant was both less than nineteen years of age and less than four years older than the victim, (3) the victim and the defendant were the only ones involved in the sexual act, and (4) the victim and the defendant are of the opposite sex.²⁷⁹ Had Matthew Limon been convicted under the Romeo and Juliet statute, his sentence would have been no greater than fifteen months, and he would not have been required to register as a convicted sex offender.²⁸⁰ Limon, however, did not qualify for the Romeo and Juliet statute because he and M.A.R. were both male. Accordingly, Limon was convicted, sentenced to over seventeen years (206 months) in prison, subject to five years of post-release supervision, and required to register as a persistent sexual offender.²⁸¹

After his conviction and sentence, Limon appealed to the Kansas Court of Appeals. In its 2002 opinion,²⁸² the court affirmed the conviction relying on the U.S. Supreme Court's decision in *Bowers v. Hardwick*.²⁸³ When the Kansas Supreme Court refused to grant Limon's petition for review, Limon filed a petition for writ of certiorari with the U.S. Supreme Court.²⁸⁴ The day after it issued *Lawrence*, the U.S. Supreme Court granted Limon's petition, vacated the judgment of the Kansas Court of Appeals, and remanded the case to the state appellate court for reconsideration in light of *Lawrence*.²⁸⁵ In a "fractured" opinion, the Kansas Court of Appeals again affirmed Limon's conviction and sentence.²⁸⁶ The court distinguished *Lawrence* on the grounds that *Lawrence* involved the Due Process Clause of the Fourteenth Amendment and not the Equal Protection Clause, which is what formed the basis of Limon's challenge.²⁸⁷ Once again, Limon filed a petition for review with the Kansas Supreme Court, and this time, the petition was granted.

The Kansas Supreme Court, in striking down the part of the statute requiring the defendant and the victim to be of the opposite sex, gave

²⁷⁹ *Id.*

²⁸⁰ *Id.* at 25.

²⁸¹ *Id.*

²⁸² *State v. Limon (Limon I)*, 41 P.3d 303 (Kan. Ct. App. 2002) (depublished), *cert. denied*, 58 P.3d 711 (2002) (opinion on file with author).

²⁸³ 478 U.S. 186 (1986).

²⁸⁴ *Limon III*, 122 P.3d at 25.

²⁸⁵ *Limon v. Kansas*, 539 U.S. 955 (2003).

²⁸⁶ *Limon III*, 122 P.3d at 26 (describing Court of Appeals' decision as "fractured" given that each member of three judge panel filed separate opinion).

²⁸⁷ *State v. Limon (Limon II)*, 83 P.3d 229, 235 (Kan. Ct. App. 2004).

thoughtful consideration to all the potential justifications for the requirement, paying attention to not only those arguments that the state had put forth but also to the potential state rationales that had been posited by the Kansas Court of Appeals.²⁸⁸ The list of plausible state interests included:

(1) the protection and preservation of the traditional sexual mores of society; (2) preservation of the historical notions of appropriate sexual development of children; (3) protection of teenagers against coercive relationships; (4) protection of teenagers from the increased health risks that accompany sexual activity; [and] (5) promotion of parental responsibility and procreation²⁸⁹

As the Kansas Supreme Court correctly found, the first potential justification, sexual morality, is the easiest to reject. Indeed, as Justice O'Connor made clear in her concurrence in *Lawrence*, “[m]oral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause because legal classifications must not be ‘drawn for the purpose of disadvantaging the group burdened by the law.’”²⁹⁰ Furthermore, this same principle can be found in the majority opinion in *Lawrence*, where the Court discussed its rationale for overruling *Bowers*:

[T]he Court in *Bowers* was making the broader point that for centuries there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives. These considerations do not answer the question before us²⁹¹

Accordingly, to the extent that concerns over sexual morality might motivate states to discriminate between (1) sexual activity involving same sex partners and that involving opposite sex partners and/or (2)

²⁸⁸ *Limon III*, 122 P.3d at 33-39.

²⁸⁹ *Id.* at 33-34. A sixth reason, to protect those in group homes, is not relevant to this Article.

²⁹⁰ *Lawrence v. Texas*, 539 U.S. 558, 583 (2003).

²⁹¹ *Id.* at 571.

between sexual intercourse and sodomy, such concerns are illegitimate justifications.

Second, any concern the state has in preserving the sexual development of children also fails as a justification for discriminatory Romeo and Juliet provisions. Specifically, as noted earlier, numerous studies indicate that sexual orientation is acquired long before adolescence and that sexual experiences during adolescence are quite independent of a person's ultimate sexual orientation.²⁹² In fact, it was because of such research that the Kansas Supreme Court rejected this purported state interest:²⁹³ "We conclude, as the United States Supreme Court stated in *Romer*, the 'status-based enactment [is so] divorced from any factual context' we cannot 'discern a relationship' to the espoused State interest that the law preserves the sexual development of children consistent with traditional sexual mores."²⁹⁴

Third, in addressing the states' purported concern with "the coercive effect often existing in a relationship between an adult and a child,"²⁹⁵ the Kansas Supreme Court found that this rationale would undermine the whole point behind the Romeo and Juliet exception:

The legislature determined, at least as to those in a heterosexual relationship, that a mutual relationship between teenagers is less likely to involve the same coercion that a relationship between an older adult and a child might and is more likely to be one where the minor's participation is voluntary, although not legally consensual.²⁹⁶

In light of that motivating policy, the Kansas Supreme Court found no rational basis to distinguish between a class of those eighteen years old and younger who engage in voluntary, heterosexual activity with minors aged fourteen or fifteen and an identical class who engage in homosexual activity with such minors.²⁹⁷ "We see no basis to determine that as a class one group or the other would have a higher

²⁹² See *supra* notes 38-49, 106-09 and accompanying text.

²⁹³ *Limon III*, 122 P.3d at 35 (pointing out one amicus brief filed in case that "cites a number of studies indicating that sexual orientation is already settled by the time a child turns 14, that sexual orientation is not affected by the sexual experiences teenagers have, and the efforts to pressure teens into changing their sexual orientation are not effective").

²⁹⁴ *Id.* (citing *Romer v. Evans*, 517 U.S. 620, 635 (1996)).

²⁹⁵ *Id.*

²⁹⁶ *Id.* at 36.

²⁹⁷ *Id.*

tendency to be coercive. A distinction on this basis has no factual support.”²⁹⁸

Fourth, the Kansas Supreme Court found that the state’s purported concern for public health was “so broad and so divorced from supporting facts that we cannot discern a relationship to the facially legitimate interest of protecting public health.”²⁹⁹ Specifically, in putting forth this potential state interest, the state appeared to be talking about its concern over the spread of HIV.³⁰⁰ However, the Kansas court made a number of findings that undermined this purported rationale. First, the court noted that, among adolescent females, the biggest risk for sexual transmission of HIV is through heterosexual, not homosexual, sex.³⁰¹ Second, an adolescent involved in oral sex, such as the activity that resulted in Limon’s arrest, has a “near-zero chance of acquiring the HIV infection.”³⁰² Finally, the Kansas court quoted from a dissenting judge from the Kansas Court of Appeals who pointed out the faulty logic behind a “public health” justification:

“[U]nder the law a female infected with every venereal disease yet identified, and engaging in acts quite likely to infect or actually infecting a male minor, will receive a much lighter sentence. A disease-free male engaging in sex with another male in a manner not likely to spread disease if it [were] present will receive a much heavier sentence. Perversely, under the law, a male with a venereal disease who infects and impregnates an underage female will also receive a much lighter sentence.”³⁰³

As a result, the Kansas Supreme Court held that the “statute’s superficial earmarks as a health measure” fail the rational basis test.³⁰⁴

Finally, the Kansas Supreme Court addressed what the Kansas Court of Appeals had proposed as a potential justification for the discriminatory statute: “[T]he legislature might have determined that lengthy incarceration of a young adult offender who has become a

²⁹⁸ *Id.*

²⁹⁹ *Id.* at 37.

³⁰⁰ *Id.* at 36.

³⁰¹ *Id.* at 37 (relying on statistics from U.S. Centers for Disease Control and Prevention).

³⁰² *Id.*

³⁰³ *Id.* (quoting *Limon II*, 83 P.3d 229, 247 (Kan. Ct. App. 2004) (Pierron, J., dissenting)).

³⁰⁴ *Id.* (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 452 (1972)).

parent as a result of a heterosexual relationship with a minor would be counterproductive to that young adult's duty to support his or her child."³⁰⁵ However, such a concern would not apply to homosexual pairings as such activity cannot result in pregnancy. The Kansas Supreme Court quickly rejected this purported justification given that (1) the state has an interest in discouraging teenage pregnancy, not encouraging it, and (2) "the statute does not reduce penalties solely for conduct that results in pregnancy, but also for heterosexual conduct [that] does not result in pregnancy."³⁰⁶

Accordingly, the Kansas Supreme Court failed to find any legitimate justifications behind the state's action. Although Kansas is the only state in which a discriminatory Romeo and Juliet provision has been litigated, it can be presumed that other states would put forth similar justifications. Thus, *State v. Limon* informs our understanding of those potential arguments and their inherent weaknesses.

2. Stigmatic Harm to LGBT Youth

In employing rational basis plus scrutiny, the Supreme Court has made clear that the state's purported justifications must be weighed against the corresponding harm to the target group. Despite the thorough job that the Supreme Court of Kansas did in fleshing out all the colorable state interests underlying the state's Romeo and Juliet provision, the court failed to fully consider the stigmatic impact such laws have on LGBT adolescents.

Given that it is the potential for the harm to the targeted group is what underlies rational basis plus scrutiny, it is important to fully understand just how harmful these laws are to LGBT adolescents. To the extent those states that continue to adhere to discriminatory Romeo and Juliet provisions may have additional justifications outside of those identified in *Limon*, understanding the level of harm those statutes cause will guide future courts called upon to evaluate those justifications. Indeed, as the Supreme Court has made clear, any purported state interest must be balanced against the resulting harm.

Discriminatory Romeo and Juliet provisions, just like their now-extinct relatives, adult anti-sodomy statutes, are extremely stigmatizing to homosexual adolescents regardless of whether the statutes are even enforced. As one commentator notes, "unenforced sodomy laws are the chief systematic way that society as a whole tells

³⁰⁵ *Id.*

³⁰⁶ *Id.* Accordingly, the court ruled that "the relationship between the objective and the classification is so strained that we cannot conclude it is rational." *Id.*

gays they are scum.”³⁰⁷ As Professor Christopher R. Leslie described when writing about the injuries that unenforced sodomy laws cause:

Sodomy laws are kept on the books, even though state governments do not intend to actively enforce them, because the laws send a message to society that homosexuality is unacceptable. Even without actual criminal prosecution, the laws carry meaning. Statutes have significance completely independent of their actual enforcement. Law reflects society and informs it. Current generations enshrine their morality by passing laws and perpetuate their prejudices by handing these laws down to their children. Soon, statutes take on lives of their own, and their very existence justifies their premises and consequent implications. . . . In short, the primary importance of sodomy laws today is the government’s message to diminish the societal status of gay men and lesbians.³⁰⁸

In short, Professor Leslie concludes that “[s]tates maintain sodomy laws to pin a badge of criminality on every gay man and lesbian, whether or not he or she lives in a state with a sodomy statute.”³⁰⁹

Although *Lawrence* made extinct the sodomy statutes to which Professor Leslie referred, these same arguments apply to discriminatory Romeo and Juliet provisions. Specifically, in those states, LGBT adolescents are told it is a felony to engage in sexual acts with someone of the same gender who is under age yet it is no offense whatsoever (or, in California, merely a misdemeanor) to engage in similar acts with someone of the opposite sex.³¹⁰

³⁰⁷ Richard D. Mohr, *Mr. Justice Douglas at Sodom: Gays and Privacy*, 18 COLUM. HUM. RTS. L. REV. 43, 53 (1986).

³⁰⁸ Leslie, *supra* note 3, at 114 (footnotes omitted).

³⁰⁹ *Id.* at 110.

³¹⁰ Furthermore, it does not matter that some states, like Alabama and California, do not explicitly have an opposite gender requirement for application of the Romeo and Juliet provision. As noted earlier, in those states, the statutory rape laws simply place the Romeo and Juliet exception in the statute relating to “sexual intercourse” with someone below the age of consent, yet leave out any such exception in the otherwise-analogous “sodomy” statute, which applies to acts of sodomy involving someone below the age of consent. See *supra* Part II.

As Justice O’Connor noted in her *Lawrence* concurrence, when discussing the Texas sodomy statute, “[w]hile it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, Texas’s sodomy law is targeted at more than conduct. It is instead directed toward gay persons as a class.” *Lawrence v. Texas*, 539 U.S. 558, 583 (2003) (O’Connor, J., concurring).

Furthermore, these consequences flow not only to those who may violate those laws but also the entire LGBT adolescent community. Indeed, the stigma that results from a state's law will rarely be contained within that jurisdiction. Thus, even if only one state maintained a discriminatory Romeo and Juliet law, LGBT teens nationwide are likely to suffer the resulting harm. The Court's decision in *Lawrence* is instructive here. Specifically, in the majority opinion, the Court noted that, even though *Bowers* did not require the criminalization of sodomy, nonetheless, "[i]ts continuance as precedent demeans the lives of homosexual persons."³¹¹

In many ways discriminatory Romeo and Juliet laws are even more damaging than the sodomy laws that pertained to consensual adult activity. First off, these laws are directed not at LGBT adults, most of whom would now be accepting of their homosexuality, but are targeted at LGBT adolescents, who are generally less secure in their sexual identity.³¹² Thus, because adolescence is a time of severe conflict and self-doubt for most LGBT teens,³¹³ laws that criminalize sex between two teens of the same gender can only exacerbate the psychological problems these teens already experience.³¹⁴ Second, these statutes may also increase the incidence of violence targeted at LGBT youth. Finally, adolescents convicted under these discriminatory statutes will continue to face stigma throughout their lives given the collateral consequences that arise from statutory rape convictions.

a. Psychological Harm

Professor Leslie identified three ways in which sodomy laws, even when unenforced, inhibited sound emotional and mental development among homosexuals. These apply with equal force to discriminatory Romeo and Juliet laws.

First, there is the threat of fueling internalized homophobia, including "denial of membership in the group, self-derision, self-hatred, hatred of others in the group, and acting out self-fulfilling prophecies about one's own inferiority."³¹⁵ As indicated earlier, internalized homophobia and feelings of isolation are fairly common

³¹¹ *Lawrence*, 539 U.S. at 575.

³¹² See *supra* Part I.A.2–3.

³¹³ See *supra* Part I.A.2–3.

³¹⁴ See *supra* Part I.C.3.

³¹⁵ Leslie, *supra* note 3, at 117 (quoting Brief for American Psychological Association et al. as Amici Curiae Supporting Respondents at 7, *Bowers v. Hardwick*, 478 U.S. 186 (1986) (No. 95-140), 1986 WL 720445).

among LGBT youth. These feelings are often to blame for many of the tragic endings that befall these adolescents.³¹⁶ Thus, discriminatory Romeo and Juliet provisions are only likely to increase the incidence of such harm. Because the state now cannot apply such laws to adult homosexuals, LGBT adolescents (many of whom are already extremely isolated in their home and school environments)³¹⁷ are then further isolated from the one group in which they might find some degree of kinship and support — the adult LGBT community.

Second, given that sexual experimentation is a normal part of human development, laws targeting adolescent sexual activity “would interfere with healthy mental and emotional development.”³¹⁸ As the American Psychological Association and the American Public Health Association argued in *Bowers*, “research also indicates that the freedom to engage in such conduct is important to the psychological health of individuals and of their most intimate and profound relationships.”³¹⁹ Of course, if taken to an extreme, one could use this rationale to argue that the Constitution forbids states from ever criminalizing sexual activity between adolescents, even if one is below the age of consent. However, the point here is merely that those states with Romeo and Juliet provisions on their books are permitting heterosexual teens to obtain the developmental and psychological benefit that is associated with sexual expression yet denying LGBT teens the same opportunity. Professor Leslie’s words, although in reference to state sodomy laws, are equally appropriate here: “In sum, prohibiting sexual expression thwarts proper mental and emotional development because the driving force behind sodomy laws is that ‘they enlist and redirect physical and emotional desires that we do not expect people to suppress.’”³²⁰

Finally, many health experts believe that the existence of these laws could discourage someone from seeking psychiatric help. In other words, a sexually active LGBT adolescent may be discouraged from seeking counseling for psychological problems for fear of exposing himself or a sexual partner to criminal liability.³²¹ This potentiality is

³¹⁶ See *supra* notes 167-76 and accompanying text.

³¹⁷ See *supra* Part I.C.1-2.

³¹⁸ Leslie, *supra* note 3, at 119.

³¹⁹ Brief for American Psychological Association et al. as Amici Curiae Supporting Respondents at 2, *Bowers v. Hardwick*, 478 U.S. 186 (1986) (No. 85-140), 1986 WL 720445.

³²⁰ Leslie, *supra* note 3, at 120.

³²¹ See, e.g., Louis B. Schwartz, *Morals, Offenses, and the Model Penal Code*, 63 COLUM. L. REV. 669, 676 (1963) (stating anti-gay criminal laws prevent LGBT teens

not to be taken lightly, given LGBT adolescents high susceptibility to psychological disorders and the tragic consequences of those disorders.³²² Instead, states should be doing all they can to make it more likely that LGBT adolescents are willing and able to seek out assistance.

b. Increased Risk of Violence

As noted earlier, LGBT adolescents are routinely the victims of verbal and physical assaults.³²³ As one commentator notes, “the criminalization of homosexual sodomy and crimes of homophobic violence mutually reinforce one another.”³²⁴ Additionally, even non-criminal laws directed at homosexuals may translate into an increase in violence towards homosexuals. For example, after Colorado passed Amendment Two — the amendment struck down in *Romer* — reports of violence in Colorado against gays and lesbians tripled.³²⁵

In fact, some commentators have noted that “gay bashers” may even use the existence of such laws to justify their acts of violence. As Professor Kendall Thomas notes: “[H]omosexual sodomy statutes express the official ‘theory’ of homophobia; private acts of violence against gay men and lesbians ‘translate’ that theory into brutal ‘practice.’ In other words, private homophobic violence punishes what homosexual sodomy statutes prohibit.”³²⁶ Professor Leslie finds support for Professor Thomas’ theory in that “[m]any law enforcement officials appear less than eager to prosecute acts of anti-gay violence.”³²⁷

Thus, states that continue to maintain discriminatory Romeo and Juliet exceptions could, in effect, enhance the risk of anti-gay violence that LGBT teens already face. Furthermore, given the attention that

from seeking help).

³²² See *supra* Part I.C.3.

³²³ See *supra* Part I.C.

³²⁴ Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431, 1490 (1992).

³²⁵ See Charlene L. Smith, *Undo Two: An Essay Regarding Colorado’s Anti-Lesbian and Gay Amendment 2*, 32 WASHBURN L.J. 367, 369-70 (1993); Note, *Constitutional Limits on Anti-Gay Initiatives*, 106 HARV. L. REV. 1905, 1911-12 (1993) (“Within days of Amendment Two’s passage, numerous gay-affiliated groups were subjected to anonymous phone threats, bomb threats, and property damage.”) (footnote omitted).

³²⁶ Thomas, *supra* note 324, at 1485-86 (footnote omitted).

³²⁷ Leslie, *supra* note 3, at 124-25. Additionally, an estimated 80% of violent crime directed at the LGBT population goes unreported. See Thomas, *supra* note 324, at 1464.

the national media typically devotes to statutory rape cases,³²⁸ enforcement of these laws can result in increased violence not just against LGBT adolescents in the states that have these laws but against LGBT teens nationwide.

c. Collateral Consequences of Conviction

As noted earlier, both the violence and the psychological consequences of criminal laws targeting LGBT adolescents may easily occur regardless of whether those laws are ever enforced.³²⁹ Furthermore, these consequences flow not only to those who may violate those laws but also the entire LGBT adolescent community. For those adolescents who are convicted under discriminatory statutory rape laws, they face a host of additional penalties. Indeed, these adolescents are exposed to a number of stigmatic harms that are likely to follow them throughout the remainder of their lives. Just as the Supreme Court noted in *Lawrence*, “[t]he stigma this criminal statute imposes . . . is not trivial.”³³⁰

Moreover, convicted LGBT youth who do not qualify under Romeo and Juliet provisions must register as sex offenders. This is perhaps the most obvious and damaging collateral consequence.³³¹ A number of commentators have criticized state statutes that require registration as a sex offender.³³² Although those arguments need not be repeated here in their entirety, there are a couple of issues germane to LGBT adolescents that do bear some emphasis.

First, these discriminatory Romeo and Juliet provisions should immediately inspire caution given that they require individuals who are not even adults to register as a sex offender. This punishment is especially cruel because LGBT adolescents may be less equipped to deal with the public disclosure that automatically accompanies sex offender registration.³³³ For LGBT adolescents, this concern is

³²⁸ See, e.g., LEVINE, *supra* note 90, at 69 (detailing 1997 incident where 21 year old ran away with his 13-year-old girlfriend: “The story received almost daily coverage in the local newspapers and radio and television stations and in the Boston media. *USA Today* and newspapers across the country picked up the story.”).

³²⁹ See *supra* notes 307-09 and accompanying text.

³³⁰ *Lawrence v. Texas*, 539 U.S. 558, 575 (2003).

³³¹ See *supra* note 189 and accompanying text.

³³² See Catherine L. Carpenter, *The Constitutionality of Strict Liability in Sex Offender Registration Laws*, 86 B.U. L. REV. 295, 296 (2006); Britton Guerrina, *Mitigating Punishment for Statutory Rape*, 65 U. CHI. L. REV. 1251, 1255 (1998); *Making Outcasts*, *supra* note 232, at 2744-45.

³³³ See generally Suzanne Meiners-Levy, *Challenging the Prosecution of Young “Sex*

particularly acute given that, as noted earlier, those adolescents least likely to reveal their sexual orientation to others are most likely to attempt suicide.³³⁴

Second, the requirement that the convicted teen register as a sex offender goes well beyond the state where the “crime” occurred. Indeed, a LGBT teen convicted of statutory rape in Texas, Alabama, or California would not only have to register as a sex offender in the state but also in a number of other states simply by virtue of the conviction in the original state.³³⁵ Of course, adolescents who commit statutory rape but qualify for their state’s Romeo and Juliet exception are spared this indignity.

Aside from having to register as sex offenders, those LGBT teens who are convicted under a discriminatory statutory rape law face a number of other legal consequences as a direct result of their conviction. For example, Professor Diana Hassel has analyzed how violations of state sodomy laws can subsequently return to haunt defendants in several types of civil litigation, including family law, employment discrimination, and immigration law:

A gay father who could provide a financially and emotionally stable home for his son was denied custody because he was determined to be violating state sodomy laws. The child was instead placed with his mother and stepfather in spite of the fact that the stepfather had been convicted of assault and charged with domestic abuse. An accomplished attorney’s offer of employment from the state attorney general’s office was revoked because she was a lesbian and therefore could be presumed to have violated state sodomy laws. A gay immigrant was denied citizenship because his violation of sodomy law made him morally unfit.³³⁶

Although these examples relate to either actual or presumed violations of state sodomy laws, statutory rape convictions for LGBT adolescents would carry similar consequences. For example, a felony conviction would disqualify a LGBT adolescent, just like other felons, from

Offenders”: *How Developmental Psychology and the Lessons of Roper Should Inform Daily Practice*, 79 TEMP. L. REV. 499 (discussing generally problems associated with requiring juveniles to register as sex offenders).

³³⁴ See *supra* note 175 and accompanying text.

³³⁵ For example, as noted by both the majority and concurrence in *Lawrence*, many states require sex offender registration of new residents who were convicted of a sexual offense while domiciled in another state. See *supra* note 267 and accompanying text.

³³⁶ Hasse, *supra* note 272, at 813-14 (footnotes omitted).

pursuing certain kinds of employment. Justice O'Connor in *Lawrence* discovered a similar problem when analyzing Texas' sodomy statute: "It appears that petitioners' convictions, if upheld, would disqualify them from or restrict their ability to engage in a variety of professions . . ." ³³⁷ Furthermore, a conviction for statutory rape qualifies as a crime of moral turpitude, which can subject a non-U.S. citizen, whether here illegally or legally, to deportation. ³³⁸

Thus, in those states with discriminatory Romeo and Juliet provisions, an older adolescent who commits a heterosexual sex act with someone who is close in age yet below the age of consent, will be guilty of no crime or, in California, of merely a misdemeanor so long as the two teens are of opposite genders. ³³⁹ However, if the two happen to be of the same gender, then the older adolescent is guilty of a felony, will have to serve between two and twenty years in prison, and must register as a convicted sex offender, with the penalties accompanying registration. ³⁴⁰

Regardless of how gender neutral these states may attempt to write these discriminatory provisions, those most adversely affected by such statutes are clearly LGBT adolescents, one of the most powerless and stigmatized groups in the country. As noted at the beginning of this Article, the U.S. Department of Health and Human Services has described gay and lesbian youth as "the most invisible and outcast group of young people with whom you will come into contact." ³⁴¹

Accordingly, because no legitimate justification seems to exist for the particular classification these states are making and the given disparate penalties accompanying that classification, discriminatory Romeo and Juliet exceptions are premised solely on "a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit." ³⁴²

³³⁷ *Lawrence v. Texas*, 539 U.S. 558, 581 (2003).

³³⁸ See, e.g., *Castle v. INS*, 541 F.2d 1064, 1066 (4th Cir. 1976) (holding that Maryland's statutory rape law is crime involving moral turpitude, and defendant was deportable after having been convicted under statute); *Marciano v. INS*, 450 F.2d 1022, 1025 (8th Cir. 1971) (holding that Minnesota's statutory rape law is crime involving moral turpitude).

³³⁹ See *supra* Part II.

³⁴⁰ See *supra* Part II.

³⁴¹ Gibson, *supra* note 1, at 163.

³⁴² *Romer v. Evans*, 517 U.S. 620, 635 (1996).

CONCLUSION: WHAT STATES SHOULD BE DOING

This Article takes no position on whether and to what extent a state can criminalize sex involving a minor. However, in fashioning its criminal laws, the state cannot draw distinctions based on that minor's sexual orientation. To give heterosexual adolescents a free or a much-reduced pass under the state's statutory rape law yet insist on full fare for a similarly situated homosexual adolescent violates the Equal Protection Clause of the Fourteenth Amendment. Furthermore, what makes these laws even more egregious is the extent to which they impose enormous stigma on a group that is already extremely marginalized in American society.

Although most LGBT teens are well accustomed to being teased, harassed, and abused, that is no justification for the state legislature to bully them as well. Quite the opposite, states should be looking for ways to help minimize the extreme cruelty and alienation experienced by some of its most helpless citizens. At the very least, states like Texas, Alabama, and California should remove distinctions based on homosexual versus heterosexual activity from their statutory rape laws. As demonstrated above, such classifications are not only unconstitutional but are also unpardonably cruel in light of the extreme societal stigma that LGBT youth already face.

By repealing these laws, and not just waiting for a court to ultimately strike them down, these states would be sending a message to LGBT adolescents that (1) their existence is recognized; (2) whatever other sources of stress and alienation they currently experience, the state has no wish to provide an additional form of stigma; and (3) the state does not approve of LGBT adolescents being treated any differently than other adolescents. Considering the high level of invisibility and alienation felt by LGBT adolescents, such a message would be a welcome reduction in the amount of stigma society currently directs at this fragile minority group.