NOTE

Specters of California's Homophobic Past: A Look at California's Sex Offender Registration Requirements for Perpetrators of Statutory Rape

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 Kendra Clark is a 2019 J.D. Candidate at the University of California, Davis, School of Law. I would like to thank Professors Irene O. Joe and Gabriel "Jack" Chin, as well as Senior Notes and Comments Editor Danielle Lauber for helpful feedback and guidance throughout the writing process. I could not have done this or law school generally without the love and support of my friends and family, to whom I am eternally in debt. Last, I would like to extend special thanks to the Stanislaus County Public Defenders' Office for the opportunity to work on a case with the very issues discussed in this piece. This piece is dedicated to that office.

INTRODUCTION

In October 2017, Governor Jerry Brown signed controversial Senate Bill 384, thereby redefining sex offender registration requirements in California.[1] The bill allows some individuals convicted of lower-level, nonviolent sex crimes to petition for removal of their names from the sex offender registry after ten or twenty years, depending on the crime.[2] This change in legislation emerges in the midst of a heated national debate about the merits of sex offender registration.[3] Many argue that requiring lifetime registration alienates those required to register with minimal practical justification.[4] Others argue that sex offender registration reduces recidivism and protects the public from those who have committed sex crimes.[5] However, all agree that sex offender registration enormously impacts the lives of those required to register.[6] Therefore, it is vital that legislators consider the gravity of impact on a sex registrant's life when reforming sex offender registration laws.[7]

While California begins to rethink lifetime sex registration, sex offender registration regarding statutory rape remains a specter of unjust registry laws of times past. Under California Penal Code section 290, different forms of sexual intercourse between an adult and a

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[1] Patrick McGreevy, *California Will Soon End Lifetime Registration of Some Sex Offenders Under Bill Signed by Gov. Jerry Brown*, L.A. TIMES (Oct. 6, 2017, 4:48 PM), http://www.latimes.com/politics/essential/la-pol-ca-essential-politics-updates-bill-ending-lifetime-registry-of-sex-1507332406-htmlstory.html.

[2] *Id.*

[3] *See, e.g.*, Editorial, *Finally Some Clear Thinking on Sex Offenders*, L.A. TIMES (June 23, 2017, 5:00 AM), http://www.latimes.com/opinion/editorials/la-ed-sex-offender-registries-20170623-story.html; *Should the Sex Offender Registry Be Abolished?*, DEBATE.ORG, http://www.debate.org/opinions/should-the-sex-offender-registry-be-abolished (last visited Oct. 24, 2017).

[4] *See* David Feige, *The Supreme Court's Sex-Offender Jurisprudence Is Based on a Lie*, SLATE (Mar. 7, 2017, 11:47 AM), http://www.slate.com/articles/news_and_politics/jurisprudence/2017/03/sex_offender_bans_are_based_on_bad_science.html (stating that "sex offenders are among the most reviled citizens of our nation" but that data and science indicate that sex offenders are actually not extremely likely to repeat their crimes).

[5] *Id.*

[6] *See generally* Erika Davis Frenzel et al., *Understanding Collateral Consequences of Registry Laws: An Examination of the Perceptions of Sex Offender Registrants*, 11 JUST. POL'Y J. 1 (2014) (conducting a survey of sex offenders in three states and analyzing how sex registry has affected their relationships with family, friends, employers and strangers).

[7] *See id.* at 17.

minor trigger different registration requirements.[8] If convicted of engaging in oral or anal sex with a minor, or of penetration with a foreign object or non-sexual body part, a defendant must register as a sex offender.[9] However, one who engages in non-forcible vaginal sex with a minor is subject only to discretionary sex offender registration.[10] Discretionary sex offender registration allows a defendant, as part of a plea bargain, to potentially avoid registration requirements.[11] Therefore, based on the type of sexual activity involved, some defendants in statutory rape cases may face sex offender registration's harrowing consequences on employment, relationships, and housing,[12] while other defendants may avoid these ramifications.

Predictably, these disparate registration requirements spurred debate in California courts. In 2006, the California Supreme Court examined the requirements in *People v. Hofsheier* and held that the Penal Code section 290 violated the Equal Protection Clause of the United States Constitution.[13] However, the California Supreme Court's recent decision in *Johnson v. Department of Justice* overruled *Hofsheier*, and reinstated pre-*Hofsheier* sex offender registration requirements.[14] The legal community and the general public responded to the *Johnson* decision with baffled disgust.[15]

Outrage relating to *Johnson* primarily stems from the fact that lesbian, gay, bisexual, transgender, and queer ("LGBTQ") people charged with statutory rape will be subject to mandatory registration, whereas heterosexual defendants may not.[16] A criminal defense firm notes that *Johnson*'s reasoning clearly "gives preferential treatment to those capable of procreating."[17] The Los Angeles Times indicates that

[8] *See* CAL. PENAL CODE § 290.006 (2018) (requiring registration of sexual offenders who commit certain sexual acts).

[9] *Id.* § 290(c) (2018).

[10] *See id.* § 290.006.

[11] *Mandatory vs. Discretionary Sex Offender Registration California Penal Code 290*, WALLIN & KLARICH L. CORP., https://www.wklaw.com/sex-offender-registration/discretionary-registration (last visited Oct. 15, 2017) [hereinafter *Mandatory vs. Discretionary Registration*].

[12] *See* Frenzel et al., *supra* note 6, at 4.

[13] People v. Hofsheier, 129 P.3d 29, 31 (Cal. 2006).

[14] *See* Johnson v. Dep't of Justice, 341 P.3d 1075, 1077-78 (Cal. 2015).

[15] *See generally* Maura Dolan, *California Supreme Court Sex-crime Ruling Criticized as Unfair to Gays*, L.A. TIMES (Jan. 29, 2015, 9:20 PM), http://www.latimes.com/local/crime/la-me-court-sex-offenders-20150130-story.html.

[16] *See, e.g.*, *id.*

[17] *Court Overturns Sex Offender Ruling. Do Registration Requirements Discriminate*

the law "would treat gays and lesbians more harshly than heterosexuals."[18] As demonstrated, the implications of *Johnson* extend beyond its impact on individuals convicted of statutory rape as the decision may be considered a modern iteration of a historical tradition of discrimination against LGBTQ people.[19]

Consider the following hypotheticals.[20] A twenty-one-year-old man enters into a romantic relationship with a seventeen-year-old boy. Eventually, the couple engages in both oral and anal sex. After an emotional breakup, the boy decides to go to the police to report his ex-boyfriend for statutory rape. If the District Attorney decides to press charges, the man could face several counts of misdemeanor statutory rape and lifetime registration as a sex offender.[21] Even if the man is able to negotiate his charges down to one count of misdemeanor oral copulation with a minor, the sex offender registration requirements remain non-negotiable. If the man pleads guilty to the misdemeanor, he is required to register as a sex offender, limiting his job prospects, his ability to find housing, and permanently branding him as a sexual deviant.[22]

Against Gays? (PC 290), WALLIN & KLARICH L. CORP., https://www.wksexcrimes.com/court-overturns-sex-offender-ruling-do-registration-requirements-discriminate-against-gays-pc-290 (last visited Oct. 24, 2017).

[18] Dolan, *supra* note 15.

[19] There is a noted history of using sex offender laws to target LGBTQ people. After the Holocaust, homosexual survivors continued to be imprisoned for homosexual conduct and were kept on lists reminiscent of today's sex offender registry. *See generally* GUNTER GRAU & CLAUDIA SHOPPMANN, THE HIDDEN HOLOCAUST? 86-103 (1995). While sex offender registration today is not blatantly targeted at LGBTQ people, many crimes that necessitate registration and involve homosexual conduct (oral and anal sex) are deemed "crimes against nature." Yasmin Nair, *Bars for Life: LGBTQs and Sex Offender Registries*, WINDY CITY TIMES (May 8, 2013), http://www.windycitymediagroup.com/LGBTQ/Bars-For-Life-LGBTQQs-and-sex-offender-registries/42714.html. This sort of diction "hark[s] back to older and still-prevalent ideas about sexual minorities." *Id.*

[20] While these hypotheticals compare a gay man with a straight man, the disparate registration requirements also impact lesbians to the same extent that they impact gay men. *See infra* Part III.C.

[21] *See* CAL. PENAL CODE § 286 (2018) ("[A]ny 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."); *id.* § 288a (2018) ("[A]ny person who participates in an act of oral copulation 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 a period of not more than one year."); *see also id.* § 290(c) (2018) (requiring those convicted of section 286 and section 288 to register as sex offenders).

[22] *See* Frenzel et al., *supra* note 6, at 18.

A twenty-one-year-old man enters into a romantic relationship with a seventeen-year-old girl. Eventually, the couple engages in vaginal intercourse. After an emotional breakup, the girl decides to go to the police to report her ex-boyfriend for statutory rape. If the District Attorney decides to press charges, the man could face several counts of misdemeanor statutory rape and lifetime registration as a sex offender.[23] However, the man could potentially negotiate his charges down to one count unlawful intercourse with a minor and no registration as a sex offender. While he may find it more difficult to obtain jobs with a misdemeanor on his record, the man faces no housing restrictions and is able to move forward with his life without registering as a sex offender.

As a result of the *Johnson* decision, these two scenarios result in drastically different outcomes.[24] These examples illustrate that *Johnson* upheld a law that establishes enormous practical consequences for LGBTQ people in that they cannot, within their sexual preferences, engage in the type of sexual intercourse that would allow sex offender registration to be plea-bargained away.[25] While both men engaged in sexual conduct in the same circumstances, the homosexual man is forced to register as a sex offender but the heterosexual man is not.[26]

This Note argues that the *Johnson* decision is ripe for reconsideration because of unconsidered issues in its reasoning and because it resulted in the unintentional consequence of institutionalized discrimination against LGBTQ people. Part I provides the legal landscape of statutory rape in the United States and in California.[27] Part II explores the *Johnson* decision's *stare decisis* analysis and argues that the analysis failed to adequately consider the unintentional consequences of overruling *Hofsheier*.[28] Part III argues that *Johnson* did not sufficiently address the discriminatory nature of the disparate sex offender registration requirements, thereby resulting in the unintended consequence of discrimination against LGBTQ people.[29] Part IV argues that public policy dictates that discriminatory

[23] *See* PENAL § 261.5 (2018) (stating that someone who has intercourse with a minor not more than three years younger is guilty of a misdemeanor); *see also id.* § 290.006 (2018) (subjecting those who are convicted of unlawful intercourse with a minor to discretionary registration as a sex offender).

[24] *See* Johnson v. Dept. of Justice, 341 P.3d 1075, 1079-80 (Cal. 2015).

[25] *See Mandatory vs. Discretionary Registration*, *supra* note 11.

[26] *See Johnson*, 341 P.3d at 1079-80.

[27] *See infra* Part I.

[28] *See infra* Part II.

[29] *See infra* Part III.

laws, such as the disparate requirements upheld in *Johnson*, must be eliminated.[30] Finally, this Note concludes that the Legislature ought to impose discretionary registration for all statutory rape crimes because of reliance upon the *Hofsheier* decision, discrimination against LGBTQ people, and social and legal acceptance of equality for homosexuals.[31]

I. BACKGROUND

A. Statutory Rape Defined

While easily defined, statutory rape poses complex issues based on the crime's history and its variation by state. Black's Law Dictionary defines statutory rape as the act of "having sexual intercourse with a person who is younger than the legal age of consent."[32] The term "legal age of consent" describes the age at which society deems an individual mature enough to competently decide whether to engage in sex.[33] Historically, statutory rape laws aimed to preserve female chastity until marriage.[34] Today, the purported justification for statutory rape laws is to prevent minors from engaging in "potentially coercive sex, that may not be recognized as meeting a legal definition or popular perception of forcible rape."[35]

The legal age of consent varies at the state level.[36] Thirty states deem the age of consent to be sixteen-years-old, eight states uphold a seventeen year-old-age limit, and thirteen states set an eighteen-year-old limit.[37] Less than half of the United States population lives in the thirty states setting the age of consent at sixteen-years-old, illustrating

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[30] *See infra* Part III.

[31] *See infra* CONCLUSION.

[32] *Statutory Rape*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[33] *What Is the Legal Age of Consent in the United States?*, AGEOFCONSENT, https://www.ageofconsent.net/states (last visited Oct. 1, 2017).

[34] *See, e.g.*, CAROLYN COCCA, JAILBAIT: THE POLITICS OF STATUTORY RAPE LAWS IN THE UNITED STATES 2 (2004) ("[I]n colonial times . . . the laws show less of a concern with the age of the victim and more of a concern with preserving a female's virginity as a precious commodity that would make her more marriageable."); Bryan Lowder, *16 Going on 17: Age-of-Consent Laws, Explained*, SLATE (Feb. 22, 2011, 10:49 AM), http://www.slate.com/articles/news_and_politics/explainer/2011/02/16_going_on_17.html (describing a statutory rape law from 1275 as protecting chastity because "defiled women were not considered fit to marry").

[35] COCCA, *supra* note 34, at 2.

[36] *See* Eugene Volokh, *Statutory Rape Laws and Ages of Consent in the U.S.*, WASH. POST (May 1, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/05/01/statutory-rape-laws-in-the-u-s/?utm_term=.60d54a750080.

[37] *Id.*

that more populous states tend to maintain higher legal ages of consent.[38]

However, the age of consent is not the only variable concerning statutory rape laws among states.[39] State laws vary as to how they treat two individuals close in age, who should be prosecuted, and the penalties associated with statutory rape.[40] For example, twenty-six states have "close in age" exceptions, also known as "Romeo and Juliet Laws," which prohibit the state from prosecuting two individuals who are both under the age of consent for engaging in intercourse.[41] Unlike early statutory rape laws that uniformly aimed to protect young women's "virtue," today's laws differ as the justification for statutory rape laws evolve and extra-legal considerations like gender, race, and class drive legislation.[42]

B. California's Statutory Rape Laws

California's statutory rape laws are codified in Penal Code sections 261.5, 286, 288a, and 289, and 286.[43] While different sections pertain to vaginal intercourse, oral copulation, penetration with a foreign object, and anal intercourse, all statutory rape laws define "minor" as an individual under eighteen-years-old.[44] Unlawful intercourse with a minor falls within the Penal Code section devoted to "Crimes Against the Person Involving Sexual Assault, and Crimes Against Public Decency and Good Morals."[45] However, oral copulation, anal copulation, and penetration with a foreign object fall within a section titled "Bigamy, Incest, and the Crime Against Nature."[46] Characterizing heterosexual conduct with minors as a crime against "Good Morals," and similar homosexual conduct as a "Crime Against Nature," indicates that law and society view homosexual conduct as more deviant than heterosexual conduct.[47]

The four statutory rape laws, while similar, contain distinct definitions. Unlawful vaginal intercourse is defined as "an act of sexual

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[38] *Id.*

[39] COCCA, *supra* note 34, at 2.

[40] *Id.*

[41] *What Is the Legal Age of Consent in the United States?*, *supra* note 33.

[42] *See* COCCA, *supra* note 34, at 2.

[43] *See* CAL. PENAL CODE §§ 261.5, 286, 288a, 289 (2018).

[44] *See id.* §§ 261.5, 286, 288a, 289.

[45] *See id.* § 261.5.

[46] *See id.* §§ 286, 288a, 289.

[47] *See id.* §§ 261.5, 286, 288a.

intercourse accomplished with a person who is not the spouse of the perpetrator, if the person is a minor."[48] Unlawful oral copulation with a minor is defined as "the act of copulating the mouth of one person with the sexual organ or anus of another person . . . who is under 18 years of age."[49] Anal intercourse ("sodomy") with a minor is defined as "sexual conduct consisting of contact between the penis of one person and the anus of another person . . . with another person who is under 18 years of age."[50] Penetration by a foreign object encompasses all other sexual penetration, including penetration by foreign objects and non-sexual body parts.[51]

Additionally, California law treats vaginal intercourse differently from how it treats other forms of sexual contact.[52] Vaginal intercourse with a minor is a misdemeanor if the age difference between the two parties is three years or less,[53] and it may be a felony or misdemeanor if the age difference spans more than three years.[54] Additionally, vaginal intercourse is a felony if the offender is twenty-one years or older and the victim is less than sixteen-years-old.[55] Other forms of sexual contact with a minor are misdemeanors except when the offender is twenty-one years or older and the victim is less than sixteen-years-old.[56] This disparity allows more prosecutorial discretion in terms of what amounts to a felony for those convicted of unlawful intercourse with a minor than for non-vaginal sex with a minor.[57] Additionally, one who engages in other forms of sex with a minor fourteen-years-old or younger when the offender is at least ten years older will be subject to three, six, or eight years in prison.[58] In contrast, the law pertaining to vaginal intercourse with a minor contains no such provision.[59] The punishment for vaginal intercourse between one over twenty-one-years-old with one sixteen-years-old or

[48] *Id.* § 261.5.

[49] *Id.* § 288a.

[50] *Id.* § 286.

[51] *See id.* § 289; *Forcible Sexual Penetration with a Foreign Object (California Penal Code 289 PC)*, SHOUSE CAL. L. GROUP, https://www.shouselaw.com/forcible-acts.html (last visited Oct. 30, 2017) (citing CAL. JURY INSTR. – CRIM. 1045 (2017)).

[52] *See* CAL. PEN. CODE §§ 261.5, 286, 288a, 289.

[53] *See id.* § 261.5.

[54] *Id.*

[55] *Id.*

[56] *Id.* §§ 286, 288a, 289(h)-(j) (2018).

[57] *See id.* §§ 261.5, 286, 288a, 289(h)-(j).

[58] *See id.* §§ 286, 288a, 289(h)-(j).

[59] *See id.* § 261.5.

younger is punishable by two, three, or four years in prison.[60] Therefore, punishment for non-vaginal sex with a minor tends to be harsher and more extensive than punishment for vaginal intercourse with a minor.

C. Johnson's *and* Hofsheier's *Impacts on California Statutory Rape Law*

In both *Johnson* and *Hofsheier*, the California Supreme Court made crucial decisions impacting individuals charged with statutory rape.[61] *Hofsheier* established a new standard for sex offender registration, making registration uniformly discretionary for those convicted of statutory rape.[62] In the wake of *Hofsheier*, defendants could file "*Hofsheier* Motions" to obtain relief from the requirement to register.[63] However, in *Johnson*, the Court reinstated mandatory registration for oral and anal sex with a minor and made it clear that the decision applied retroactively.[64]

1. *People v. Hofsheier*

In *People v. Hofsheier*, defendant Vincent Hofsheier, a twenty-two-year-old man, pled guilty to oral copulation with a sixteen-year-old girl and had to register as a sex offender.[65] Hofsheier appealed his sentence, arguing that the requirement to register as a sex offender violated the Equal Protection Clause of the United States Constitution.[66] He argued that he should not be required to register as a sex offender because someone in the same circumstances who engaged in vaginal intercourse with a minor was subject to discretionary registration.[67] The California Supreme Court held that subjecting one convicted of oral copulation with a minor to mandatory registration while requiring only discretionary registration for one

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[60] *Id.*

[61] *See* Johnson v. Dep't of Justice, 341 P.3d 1075, 1077-78 (Cal. 2015); People v. Hofsheier, 129 P.3d 29, 30 (Cal. 2006).

[62] *See* Robert Mestman, *Hofsheier Overturned: A Decade of Sex Registration Precedent Is Reversed*, CAL. DISTRICT ATT'YS ASS'N (2015), https://www.cdaa.org/archives/12363.

[63] *See id.*

[64] *See id.*

[65] *Hofsheier*, 129 P.3d at 31-32.

[66] *Id.* at 32.

[67] *See id.*

convicted of unlawful intercourse with a minor violated the Equal Protection Clause of the Constitution.[68]

The Court in *Hofsheier* sought to confine its holding to a particular set of circumstances.[69] The Court interpreted California's tiered levels of sentencing as indicating that the Legislature intended for oral copulation with a sixteen or seventeen-year-old to carry significantly lighter consequences than oral copulation with a younger victim.[70] Therefore, the Court maintained that discretionary registration for those convicted of oral copulation should extend only to those who engaged in oral sex with sixteen or seventeen-year-olds.[71] Following the *Hofsheier* decision, all iterations of statutory rape were subject to discretionary registration *except* those cases involving individuals who engaged in sexual relations with a minor younger than sixteen-years-old.[72]

2. *Johnson v. Department of Justice*

In *Johnson v. Department of Justice*, twenty-seven-year-old Richard Johnson pled guilty to a single count of felony unlawful oral copulation with a girl under fourteen-years-old.[73] Johnson pled guilty to this charge in 1990, fifteen years before the *Hofsheier* decision.[74] Invoking *Hofsheier* and the subsequent California Courts of Appeals cases following *Hofsheier*, Johnson sought to have his registration requirement removed.[75] The trial court denied Johnson's petition, but the Court of Appeal for the Fourth District reversed the denial.[76] The California Department of Justice appealed, and the Supreme Court of California granted review to determine whether Johnson was entitled to relief.[77] Before hearing the case, the California Supreme Court requested briefing concerning whether it should overrule *Hofsheier*.[78]

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[68] *Id.*

[69] *See id.* at 43 (stating that the ruling applies to those who have relations with sixteen or seventeen-year-olds).

[70] *See id.* at 34.

[71] *See id.*

[72] *See id.* at 31.

[73] Johnson v. Dep't of Justice, 341 P.3d 1075, 1078 (Cal. 2015).

[74] *See id.*

[75] *Id.* at 1079.

[76] *Id.*

[77] *See id.*

[78] *Id.*

Ultimately, the court concluded that *Hofsheier*'s equal protection analysis was erroneous and should be overruled.[79]

Johnson posited that California's disparate requirements do not violate the Equal Protection Clause because the Legislature had a rational basis for imposing different registration requirements for different sexual acts.[80] The court maintained that this rational basis is grounded in vaginal intercourse's potential to result in parenthood.[81] As the court reasoned, the State has an interest in preventing teenage mothers from seeking public financial assistance.[82] Thus, to prevent teenage dependency on welfare programs, adult fathers of children born from statutory rape should not have to register as sex offenders so that they have better job prospects to support their children.[83] The dissent in *Johnson,* however, argued that the majority's justification for the law fell outside the realm of plausibility.[84] Instead, the dissent reasoned that the legislative intent behind the disparate registration requirements were rooted in a long history of homophobia.[85]

In overruling *Hofsheier*, *Johnson* reinstated the disparate registration requirements that existed pre-*Hofsheier*.[86] More notably, the court held that its decision applied retroactively to those allowed discretionary registration under *Hofsheier*.[87] Therefore, post-*Johnson*, individuals convicted of unlawful non-vaginal forms of sex with a minor were subject to mandatory registration while those convicted of unlawful vaginal intercourse with a minor were still subject to only discretionary registration.[88]

II. *JOHNSON*'S *STARE DECISIS* ANALYSIS FAILED TO TAKE INTO ACCOUNT ALL *STARE DECISIS* FACTORS

In *Johnson*, the California Supreme Court expressly overruled its prior precedent from the *Hofsheier* decision.[89] When a court chooses to overrule precedent, it must do so pursuant to the principles of *stare*

[79] *Id.* at 1078.
[80] *Id.*
[81] *See id.*
[82] *See id.* at 1085.
[83] *See id.*
[84] *See id.* at 1098-99 (Werdegar, J., dissenting).
[85] *See id.* at 1088.
[86] *See id.* at 1087 (majority opinion).
[87] *Id.* at 1088.
[88] *See id.* at 1087-88.
[89] *Id.*

decisis.[90] While *Johnson* did consider *stare decisis* in its decision to overrule *Hofsheier*, the Court failed to use the correct precedent in its reasoning.[91] This section conducts a *stare decisis* analysis of the *Hofsheier* decision using the appropriate precedent.[92] This analysis exposes the unintentional consequences of the retroactivity of *Johnson* and unfairness to those who relied on *Hofsheier*.[93]

A. The Stare Decisis *Standard of Review*

Black's Law Dictionary defines *stare decisis* as the concept of standing by decided cases, or upholding former precedents.[94] Under the principle of *stare decisis*, courts should adhere to the rules and principles established in previous judicial decisions when considering similar issues.[95] There are two iterations of *stare decisis*: horizontal and vertical.[96] Horizontal *stare decisis* requires a court to follow its own precedent.[97] Vertical *stare decisis* requires a court to adhere to precedent of higher courts.[98] The justification for *stare decisis* is that following established precedent creates a measure of stability and predictability for lawyers and the public to rely on when considering legal action.[99] However, at times, *stare decisis* must be abandoned to accommodate growth and change in the political climate of the nation.[100]

The United States Supreme Court set forth the modern standard for *stare decisis* analysis in *Planned Parenthood v. Casey*.[101] This standard includes "a series of prudential and pragmatic considerations" that ought to be weighed to decide whether the costs of overruling a prior

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[90] *See* Hon. John M. Walker, *The Role of Precedent in the United States: How Do Precedents Lose Their Binding Effect?*, SLS CGCP (Feb. 29, 2016), https://cgc.law.stanford.edu/commentaries/15-john-walker/.

[91] *See infra* Part II.C.

[92] *See infra* Part II.C.

[93] *See infra* Part II.C.

[94] *Stare Decisis*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[95] *See id.*

[96] Timothy Oyen, *Stare Decisis*, LEGAL INFO. INST. (Mar. 2017), https://www.law.cornell.edu/wex/stare_decisis.

[97] *Id.*

[98] *Id.*

[99] Luca Anderlini et al., *Why Stare Decisis?*, 17 REV. ECON. DYNAMICS 726, 727 (2014).

[100] *See* William N. Eskridge Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1361 (1988).

[101] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854-55 (1992).

case are too great.[102] Those considerations include: (1) whether the central rule of the prior case proves unworkable; (2) whether the rule caused reliance and its removal would cause damage to stability; (3) whether society no longer endorses the rule set forth by the case; and (4) whether the facts of that case have changed or been viewed differently.[103] More than ten thousand cases have cited this standard when conducting *stare decisis* analysis.[104] Therefore, the *Casey* standard is the one a court should use in evaluating whether to overrule precedent.[105]

B. Johnson*'s* Stare Decisis *Analysis*

Johnson's *stare decisis* analysis employed a different standard than that set forth in *Casey*. Instead of applying *Casey*'s four-pronged approach, the Court relied on *Payne v. Tennessee* in its analysis.[106] In *Payne*, the United States Supreme Court held that *stare decisis* need not apply when "governing decisions are unworkable or are badly reasoned."[107] In *Johnson*, the Court concluded that *Hofsheier* was badly reasoned because it overlooked the fact that concerns regarding recidivism and teen pregnancy provided a rational basis for upholding disparate impact of the law on two similarly situated groups.[108] The Court held that this rational basis necessitated abandonment of *stare decisis*.[109]

However, the Court in *Johnson* employed an erroneous standard of review in its *stare decisis* analysis.[110] As previously mentioned, *Casey* sets forth the accepted modern standard for analyzing *stare decisis*

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[102] *Id.*

[103] *Id.*

[104] *See id.*, 505 U.S. 833, 1992 U.S. LEXIS 4751, at HN11 (1992) (follow "More like this Headnote" hyperlink under "HN11") (last visited Sept. 26, 2018).

[105] Several cases have cited *Casey* as the authority for evaluating whether to overrule a prior case. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 577 (2003) (applying the considerations to a case considering whether to strike down a Texas law targeting LGBTQ people); Jones v. Hansen, 867 P.2d 303, 321-22 (Kan. 1994) (applying the considerations to a Kansas trespass law); State v. Quintero, 34 A.3d 612, 625 (N.H. 2011) (Lynn, J., concurring) (applying the considerations to a New Hampshire criminal law).

[106] *See* Johnson v. Dep't of Justice, 341 P.3d 1075, 1080-81 (Cal. 2015).

[107] Payne v. Tennessee, 501 U.S. 808, 827 (1991).

[108] *See Johnson*, 341 P.3d at 1080-81.

[109] *See id.* at 1081.

[110] *See* Thomas Healy, *Stare Decisis and the Constitution: Four Questions*, 83 NOTRE DAME L. REV. 1173, 1210 (2008) (stating that the factors "have been relied upon by the [Supreme] Court in decisions since *Casey*").

issues.[111] *Casey* did not make consideration of whether a case was badly reasoned a deciding factor in evaluating whether a case should be overruled.[112] Therefore, by relying only on *Payne*, *Johnson* did not evaluate the considerations endorsed in the U.S. Supreme Court's *stare decisis* doctrine.[113]

Some may argue, however, that *Casey* is not the only standard for *stare decisis* analysis.[114] In its 2010 decision, *Citizens United v. Federal Election Commission*, the U.S. Supreme Court analyzed whether to overrule previous precedent by examining "the antiquity of the precedent, the reliance interests at stake, and . . . whether the decision was well reasoned."[115] This case, then, strayed from the *Casey* precedent by making whether a case is badly reasoned a factor in *stare decisis* analysis.[116] However, *Citizens United*'s analysis closely mirrored *Casey* in all other aspects of its reasoning.[117] As in *Casey*, the Court still evaluated antiquity and reliance interests, but merely added the consideration of whether the prior precedent was badly reasoned.[118] While the *Johnson* court only analyzed the badly reasoned prong, even *Citizens United*, which slightly strayed from *Casey*'s test, analyzed all other aspects of the *Casey* test.[119] Therefore, the California Supreme Court in *Johnson* should have evaluated the other *Casey* factors as the *Citizens United* Court did, even if it wanted to ground its opinion on whether *Hofsheier* was badly reasoned.

C. Applying the Casey *Standard to* Hofsheier

While *Casey*'s precedent set forth four prongs that courts should examine when performing a *stare decisis* analysis, these factors are not

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111 *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 577 (2003) (applying the considerations to a case considering whether to strike down a Texas law targeting LGBTQ people); Jones v. Hansen, 867 P.2d 303, 321-22 (Kan. 1994) (applying the considerations to a Kansas trespass law); State v. Quintero, 34 A.3d 612, 625 (N.H. 2011) (Lynn, J., concurring) (applying the considerations to a New Hampshire criminal law).

112 *See* Colin Starger, *The Dialectic of Stare Decisis Doctrine*, *in* PRECEDENT IN THE UNITED STATES SUPREME COURT 13 (Christopher J. Peters ed., 2013).

113 *See Johnson*, 341 P.3d at 1081.

114 *See, e.g.*, Starger, *supra* note 112, at 2 ("Instead of a generic maxim associated with common-law tradition, the concept of *stare decisis* appears to have become a contested doctrine.").

115 Citizens United v. FEC, 558 U.S. 310, 363 (2010).

116 *See id* (citing Montejo v. Louisiana, 556 U.S. 778, 792-93 (2009)).

117 *See id.*

118 *See id.*

119 *See id.*; Johnson v. Dep't of Justice, 341 P.3d 1075, 1080-81 (Cal. 2015).

definitive or determinative.[120] Rather, courts ought to assess the four factors based on the weight they bear upon the present facts and issues.[121] The last two prongs of the *Casey* test, which deal with whether the case has become antiquated either through changes in law or society, are not particularly relevant to analysis of *Hofsheier* because the Court decided *Hofsheier* only nine years before *Johnson* overruled it.[122] Therefore, this section will address only the first two prongs: (1) whether *Hofsheier* was unworkable; and (2) whether *Hofsheier* caused reliance such that its removal would cause damage to stability of the law.

In outlining its *stare decisis* test, the Court in *Casey* provided cases that illustrate the appropriate analysis for each prong.[123] For inquiry into whether a case is unworkable, *Casey* pointed to *Swift & Co. v. Wickham*.[124] Citing relevant text from *Swift & Co.*, the Court in *Casey* stated that an unworkable rule is one that carries "mischievous consequences to litigants and courts alike."[125] Under *Swift* — and as emphasized in *Casey* — an unworkable doctrine is one that so confuses courts and litigants that it is unclear what the outcome of a case would be.[126]

After *Hofsheier*, neither lawyers nor courts were confused regarding how to apply the new law. Indeed, defense lawyers embraced *Hofsheier* and even marketed their ability to complete "*Hofsheier* motions" to clients.[127] These motions allowed superior courts to use discretion in

120 *See* Walker, *supra* note 90.

121 *See id.*

122 *Casey* describes these prongs as considerations of whether "related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; or whether facts have so changed, or some to be seen so differently, as to have robbed the old rule of significant application or justification." Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 855 (1992) (citations omitted). Nine years is far from long enough to make a rule "no more than a remnant of abandoned doctrine." *Id.* Additionally, no changes in law or society indicate any new facts that "robbed the old rule of significant application or justification. *Id.*

123 *See id.*

124 *See id.* at 854; Swift & Co. v. Wickham, 382 U.S. 111, 112-13 (1965).

125 *Swift*, 382 U.S. at 116.

126 *See id.* at 115-16.

127 *See, e.g.*, *Sex Offense Appeal Lawyers*, LAW OFFS. BELES & BELES, http://beleslaw.com/aop/californian-sex-offense-appeals (last visited Oct. 16, 2017) (advertising the ability to aid with a *Hofsheier* Motion); *What is a Hofsheier Motion? (California PC 290)*, LAW OFFS. WALLIN & KLARICH, https://www.wksexcrimes.com/what-is-a-hofsheier-motion-pc290/ (last visited Oct. 16, 2017) (advertising the ability to aid with a *Hofsheier* Motion).

determining whether to impose sex offender registration.[128] Moreover, nothing indicates that courts had difficulty deciding those motions.[129] While after *Hofsheier* there was temporary confusion regarding the process by which individuals convicted of other forms of sex with a minor should appeal mandatory registration, the California Supreme Court quickly remedied this problem.[130] In *People v. Picklesimer*, the Court clarified *Hofsheier*, stating that those who wanted to appeal their registration requirements should file a petition for writ of mandate in the trial court.[131] Therefore, *Hofsheier*'s application did not defy practical workability as defined in *Casey*.[132]

However, the majority in *Johnson* did present one argument that *Hofsheier* was potentially unworkable.[133] In *Hofsheier*, the Court sought to confine its holding only to cases concerning sixteen- or seventeen-year-old victims.[134] However, in subsequent cases in the California Courts of Appeal, courts granted individuals discretionary registration in cases involving victims younger than sixteen-years-old.[135] For example, in *People v. Garcia*, the Second District Court of Appeal allowed discretionary registration where the defendant was twenty-six-years-old and the victim was fourteen-years-old.[136] The court stated that "if there is no rational reason for this disparate treatment when the victim is 16-years-old, there can be no rational reason for the disparate treatment when the victim is even younger . . . ."[137] Therefore, opponents to the *Hofsheier* holding may argue that lower courts' subsequent application of *Hofsheier* expanded the rule too far, making the decision unworkable.[138]

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[128] *Sex Offense Appeal Lawyers*, *supra* note 127.

[129] *See* Johnson v. Dep't of Justice, 341 P.3d 1075, 1087-88 (Cal. 2015) (Werdegar, J., dissenting).

[130] *Cf. id.* at 1090 (stating that after *Picklesimer* the court has found "no decisional conflict or conundrum that called for our review").

[131] People v. Picklesimer, 226 P.3d 348, 352 (Cal. 2010); *see also* Kenneth Ofgang, *Supreme Court: Sex Offender May Petition for Removal From Registry*, METROPOLITAN NEWS-ENTERPRISE (Mar. 16, 2010), http://www.metnews.com/articles/2010/pick031610.htm ("A person seeking to be removed from the sex offender registry based on a 2006 state Supreme Court ruling may seek that relief by writ petition, but not by postjudgment motion . . . .").

[132] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854 (1992).

[133] *See Johnson*, 341 P.3d at 1077-78 (majority opinion).

[134] *Id.*

[135] *Id.*

[136] People v. Garcia, 74 Cal. Rptr. 3d 681, 683, 689-90 (Cal. Ct. App. 2008).

[137] *Id.* at 686.

[138] *See Johnson*, 341 P.3d at 1077-78.

However, while applying discretionary registration in circumstances involving victims younger than sixteen-years-old falls outside the original holding of *Hofsheier*, such an application does not necessarily present a workability issue.[139] The *Hofsheier* decision did not confuse litigants or courts.[140] Instead, subsequent courts expanded *Hofsheier*'s ruling.[141] Even if application of *Hofsheier* extended beyond the intention of the Court, under *Casey*, this fact alone is not sufficient to warrant overruling prior precedent.[142] As it did in *Picklesimer*, if the court needed to clarify the holding to narrow its application, the court could have issued another decision defining the factual scope of the holding.[143] Therefore, the mere fact that subsequent applications fell outside the parameters of the original holding does not present an obstacle to practical workability warranting overruling the case.[144] The decision was easily applied and the court maintained the ability to clarify the age specifications set forth in *Hofsheier*.[145]

Additionally, *Casey* indicated which standard ought to be used when evaluating whether a case caused reliance.[146] *Casey* stated that when a rule is "subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation," a court ought to consider that as strong evidence in favor of not overruling precedent.[147] *Casey* relied on *United States v. Title Insurance & Trust Co.* to illustrate how to conduct an analysis regarding reliance upon precedent.[148] In *Title Insurance & Trust Co.*, the United States Supreme Court upheld a California property law because disturbing it would be "fraught with many injurious results."[149] In that case, the Court found that injurious results would occur because homeowners relied on the law for several years.[150] Therefore, as articulated in *Casey*, a rule that creates reliance that

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[139] *See generally* Swift & Co. v. Wickham, 382 U.S. 111 (1965); People v. Hofsheier, 129 P.3d 29, 41-42 (Cal. 2006).

[140] *See* Kesler v. Dep't of Pub. Safety, 369 U.S. 153, 157 (1962); *Johnson*, 341 P.3d at 1090-91 (Werdegar, J., dissenting).

[141] *See Johnson*, 341 P.3d at 1077-78 (majority opinion).

[142] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854 (1992).

[143] *Cf. Johnson*, 341 P.3d at 1090-91 (Werdegar, J., dissenting) (stating that *Picklesimer* adequately resolved a key procedural issue).

[144] *See Casey*, 505 U.S. at 854.

[145] *See Johnson*, 341 P.3d at 1087-88 (majority opinion).

[146] *See Casey*, 505 U.S. at 854.

[147] *Id.*

[148] *See id.*

[149] United States v. Title Ins. & Tr. Co., 265 U.S. 472, 486 (1924).

[150] *Id.*

would lead to injury if overruled should inspire hesitancy in overruling precedents.[151]

In the wake of *Hofsheier*, many defendants charged with other forms of sex with a minor relied on the supposition that they may not be subjected to mandatory registration.[152] For example, Mike Grandinetti accepted a plea deal after being charged with unlawful oral copulation with a seventeen-year-old girl.[153] Grandinetti decided to accept the plea deal because his attorney negotiated, pursuant to *Hofsheier*, that he would not need to register as a sex offender.[154] However, the *Johnson* decision applies retroactively to any case in which a defendant signed an acknowledgment that they may have to register as a sex offender.[155] Faced with the potential of registering as a sex offender, even innocent defendants may be tempted to accept a plea bargain.[156] The inclusion of such language in plea agreements, such as Grandinetti's, means that those who agreed to plea deals to avoid registration may still need to register as sex offenders.[157] Thus, defendants, innocent and guilty alike, who chose to take a plea bargain to avoid sex offender registration may still have to register post-

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[151] *See Casey*, 505 U.S. at 854.

[152] *See, e.g.*, Brad Branan, *California Supreme Court Reversal Forces Counties to Examine Sex Offender Registration*, SACRAMENTO BEE (June 27, 2015, 1:52 PM), http://www.sacbee.com/news/investigations/the-public-eye/article25669507.html (exposing a circumstance in which a defendant relied on *Hofsheier* in accepting his plea agreement).

[153] *See id.*

[154] *Id.*

[155] *California Supreme Court Makes Substantial Changes to Sex Offender Registration Law*, RECORDGONE (Feb. 4, 2015), http://www.recordgone.com/news/2015/california-sex-offender-registration-law-changes.

[156] Many write that plea deals are often accepted by innocent people because they fear worse consequences should they go to trial. *See, e.g.*, Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. BOOKS (Nov. 20, 2014), http://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty (stating that an innocent defendant may take a plea bargain because "he may find it 'rational' to take the plea"); Natasha Vargas-Cooper, *Three Ways Courts Screw the Innocent Into Pleading Guilty*, INTERCEPT (Nov. 7, 2014, 12:51 PM), https://theintercept.com/2014/11/07/how-the-innocent-get-screwed/ ("[A]ny defendant who sought a trial would face the most severe charges with the lengthiest prison sentences as a matter of policy."); Emily Yoffe, *Innocence Is Irrelevant*, ATLANTIC (Sept. 2017), https://www.theatlantic.com/magazine/archive/2017/09/innocence-is-irrelevant/534171/ ("Plea bargaining has become so coercive that many innocent people feel they have no option but to plead guilty.").

[157] *See California Supreme Court Makes Substantial Changes to Sex Offender Registration Law*, *supra* note 155.

Johnson.[158] While *Johnson* maintained that applying the rule retroactively would not result in "unfairness or inequity," many individuals who relied on *Hofsheier* face grave injury as a result of the *Johnson* decision.[159]

Similar to *Title Insurance & Trust Co.* where individuals relied on the challenged law for more than twenty years, individuals relied on *Hofsheier* for less than decade before it was overruled.[160] However, while *Title Insurance & Trust Co.* refused to disturb the law in order to avoid injuring those who relied on it, *Johnson* overruled *Hofsheier* without meaningful regard to the fact that many individuals relied on the decision when deciding whether or not to accept a plea bargain.[161] If *Johnson* properly analyzed whether overruling *Hofsheier* would result in injury to those who relied on it, as required under the principles of *stare decisis*, the court would have held that *Hofsheier* should not have been overruled.[162]

While this Note makes no effort to prove that *Johnson* was wrong per se, application of the correct *stare decisis* standard does expose the idea that the court's articulated holding did not consider key implications of overruling *Hofsheier*.[163] Under analysis of *Casey*'s first prong, it becomes clear that *Johnson* did not adequately consider the fact that *Hofsheier* was a workable and well-received rule.[164] More notably, analysis of *Casey*'s second prong exposes that overruling *Hofsheier* and allowing retroactive application resulted in confusion and inequity for those defendants who accepted plea deals in reliance upon the promise that they would not have to register as a sex offender.[165] Therefore, *Johnson*'s failure to use the *Casey* test in its analysis resulted in the court not sufficiently contemplating the unintended consequences of overruling *Hofsheier*.[166]

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158 *See* Branan, *supra* note 152.

159 Johnson v. Dep't of Justice, 341 P.3d 1075, 1088 (Cal. 2015); *see* Branan, *supra* note 152; *California Supreme Court Makes Substantial Changes to Sex Offender Registration Law*, *supra* note 155.

160 *See* United States v. Title Ins. & Tr. Co., 265 U.S. 472, 486 (1924). *See generally* People v. Hofsheier, 129 P.3d 29 (Cal. 2006).

161 *See Title Ins. & Tr. Co.*, 265 U.S. at 487; *Johnson*, 341 P.3d at 1089 (Werdegar, J., dissenting) ("The majority posits no adequate grounds for overruling *Hofsheier* . . . .").

162 *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854 (1992).

163 *See supra* Part II.B.

164 *See supra* Part II.C.

165 *See supra* Part II.C.

166 *See supra* Part II.C.

III. *JOHNSON* SHOULD HAVE ANALYZED WHETHER THE DISPARATE REQUIREMENTS DISCRIMINATED AGAINST LGBTQ PEOPLE IN EFFECT

This section explores *Johnson*'s equal protection analysis. First, it explains the established analysis for claims alleging a violation of the Equal Protection Clause.[167] Next, it briefly summarizes *Johnson*'s equal protection reasoning, revealing that *Johnson* did not engage in an analysis of whether the disparate registration requirements discriminate against LGBTQ people in effect.[168] Lastly, it analyzes whether the disparate registration requirements discriminate against LGBTQ people in effect.[169] This section ultimately argues that *Johnson* did not adequately take into consideration the discriminatory nature of the disparate sex offender registration requirements, and that failure to do so resulted in the unintended consequence of discrimination against LGBTQ people.[170]

A. Federal Equal Protection Analysis Standard

Under the Fourteenth Amendment, a state may not deny any of its citizens equal protection of the law.[171] Three questions govern traditional equal protection analysis: (1) What classification does a government action create?; (2) What level of scrutiny should courts apply to this classification?; and (3) Does this particular government action meet that level of scrutiny?[172] A challenged law can either be facially discriminatory or facially neutral.[173] Facially discriminatory laws trigger heightened scrutiny because they, on their face, blatantly discriminate against a certain classification of people.[174] Facially neutral laws, or those which do not blatantly discriminate against a particular group, may only be successfully challenged if the law is discriminatory in purpose or effect.[175] Moreover, even if a facially neutral law is discriminatory in purpose or effect, the level of scrutiny applied depends upon the classification of the suspect class, or the group that is being discriminated against.[176] The lowest level of

167 *See infra* Part III.A.
168 *See infra* Part III.B.
169 *See infra* Part III.C.
170 *See infra* Part III.C.
171 U.S. CONST. amend. XIV, § 1.
172 *See* Pers. Adm'r v. Feeney, 442 U.S. 256, 272, 287 (1979).
173 *See id.* at 272.
174 *See id.*
175 *See id.*
176 *See id.* at 272-73.

scrutiny, called "rational basis," requires only that the government prove that the classification is rationally related to a legitimate state interest.[177] Traditionally, the classification of homosexuality triggers this lower tier.[178]

B. Johnson's *Equal Protection Analysis*

Johnson's equal protection analysis focused primarily on presenting a variety of legitimate government purposes that could justify the disparate sex offender registration requirements.[179] The court's reasoning centered on the concept that the Legislature might have been trying to protect young mothers from financial duress.[180] However, the court also stated that the Legislature could have been trying to subject "sexual predators" who may be more prone to "manipulat[e] minors to engage in oral copulation, as opposed to sexual intercourse" to mandatory registration.[181] From that analysis, the court concluded there was a rational basis for upholding the disparate requirements.[182]

However, in its equal protection analysis, *Johnson* failed to consider whether the disparate registration requirements discriminate against LGBTQ people in effect.[183] Both the dissent in *Johnson* and the majority in *Hofsheier* focus analysis on the unequal impact of the registration requirements on LGBTQ people.[184] However, the *Johnson* majority does not address the disparate impact on LGBTQ people whatsoever.[185] Rather, *Johnson* simply concludes that rational basis scrutiny is triggered because no suspect class is implicated.[186]

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177 *See id.*

178 *See* Romer v. Evans, 517 U.S. 620, 639-40 (1996) (Scalia, J., dissenting).

179 *See* Johnson v. Dep't of Justice, 341 P.3d 1075, 1082-88 (Cal. 2015).

180 *See id.* at 1085.

181 *See id.* at 1084.

182 *See id.* at 1086-87.

183 *See id.* at 1082-88.

184 *See id.* at 1091 (Wedegard, J., dissenting) ("Under today's decision overruling . . . *Hofsheier*, a 23-year-old woman who had a month-long sexual relationship with a 15-year-old girl . . . must continue to register as a sex offender for the rest of her life . . . ."); People v. Hofsheier, 129 P.3d 29, 36-37 (Cal. 2006) (comparing the disparate registration requirements to a law in Kansas that required registration for anal sex with a minor that was struck down on equal protection grounds).

185 *Compare Johnson,* 341 P.3d at 876-79 *with Johnson*, 341 P.3d at 890-96 (Werdegar, J., dissenting).

186 *See Johnson*, 341 P.3d at 1082 (majority opinion).

C. The Disparate Registration Requirements Discriminate Against LGBTQ People in Effect

The legal standard for evaluating an equal protection case requires determining whether the law discriminates either facially or in purpose or effect.[187] In the case of sex offender registration requirements for statutory rape offenders in California, the law is not facially discriminatory because it does not expressly single out a group of people.[188] However, as explained in this Note, the disparate requirements are clearly discriminatory in effect.[189]

A law is discriminatory in effect if it "has the effect of distributing burdens and benefits unequally."[190] California's disparate registration requirements have the effect of burdening LGBTQ people and, to a certain extent, benefitting heterosexuals. Gay men and lesbians do not generally engage in the type of intercourse that would allow for discretionary registration under statutory rape laws.[191] Conversely, while heterosexual individuals may be subjected to mandatory registration for engaging in certain sex acts, they may also be subjected only to discretionary registration when engaging in vaginal intercourse with a minor.[192]

Homosexual men can only engage in oral or anal sex with one another.[193] Therefore, if a gay man were to engage in intercourse with a minor, he would be prosecuted either for oral or anal sex with a minor.[194] Both of the statutes relating to punishment for oral and anal sex with a minor include mandatory registration as a sex offender.[195]

Similarly, homosexual women are not able to enjoy traditional vaginal intercourse together, but are able to engage in oral sex or sex with a foreign object or non-sexual body part with one another.[196] Even though lesbian sex may include sex mechanisms mimicking a

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187 Russell W. Galloway, Jr., *Basic Equal Protection Analysis*, 29 SANTA CLARA L. REV. 121, 121 (1989).

188 *See id.* at 128.

189 *See id.* at 129.

190 *Id.*

191 *See* CAL. PENAL CODE §§ 286, 288a, 289 (h)-(j) (2018).

192 *See id.* § 290.006 (2018); sources cited *supra* note 185.

193 *See* Amanda Hess, *Mythbusting: What Gay Men Really Do in Bed*, GOOD (Oct. 21, 2011), https://www.good.is/articles/gay-sex-is-not-anal-sex.

194 *See* PENAL §§ 286, 288a.

195 *See id.* § 290.006.

196 Amy @ Planned Parenthood, *How Do Lesbians Have Sex?*, PLANNED PARENTHOOD (Oct. 9, 2010, 7:20 PM), https://www.plannedparenthood.org/learn/teens/ask-experts/what-do-you-do-when-you-have-lesbian-sex.

phallus inserting into a vagina, California law does not consider this type of sex vaginal intercourse.[197] Therefore, if a homosexual woman were to engage in any form of intercourse with a minor, she would be prosecuted either for oral sex with a minor or for penetration by a foreign object with a minor.[198] Both of the statutes relating to punishment for oral sex and penetration by a foreign object with a minor include mandatory registration as a sex offender.[199]

However, heterosexual men and women are able, within their sexual preferences, to engage in all forms of sex that LGBTQ people can engage in, and they have the ability to engage in vaginal intercourse.[200] In other words, heterosexual couples can engage in oral and anal sex, while homosexual couples cannot engage in vaginal sex. While not all heterosexual individuals are prosecuted for vaginal intercourse with a minor, many are.[201] Therefore, in contrast to LGBTQ people who will always be subject to mandatory registration when engaging in any sex act with a minor, heterosexual men and women may commit a sex act with a minor that is not subject to mandatory registration as a sex offender.[202] Therefore, the disparate registration requirements burden LGBTQ people while potentially benefitting heterosexuals.[203]

Despite this discriminatory effect, some may argue that because the facts in *Johnson* did not involve the disparate impact on LGBTQ people that the Court was not required to address that issue.[204] However, *Johnson* was granted *certiorari* to that case specifically to determine whether *Hofsheier* ought to be overruled.[205] The *Hofsheier* decision explicitly addressed the discriminatory impact of the disparate requirements on LGBTQ people.[206] In *Hofsheier*, the Court advanced the notion that the disparate registration requirements were likely remnants of discriminatory anti-oral and anal sex laws that historically targeted LGBTQ people.[207] Therefore, *Johnson* necessarily would have

197 *See* PENAL § 289 (h)-(j) (2018); Amy @ Planned Parenthood, *supra* note 196.

198 *See id.* §§ 286, 289 (h)-(k).

199 *Id.* § 290.006.

200 *See Types of Sex*, HEALTHY RESPECT, http://www.healthyrespect.co.uk/SexualHealthEssentialGuide/Pages/TypesOfSex.aspx (last visited Oct. 30, 2017).

201 *See* PENAL § 261.5, 286, 288a, 289 (h)-(j) (2018).

202 *See id.* § 290.006.

203 *See supra* Part III.C.

204 *See generally* Johnson v. Dep't of Justice, 341 P.3d 1075 (Cal. 2015).

205 *See id.* at 875.

206 *See id.*

207 *See* People v. Hofsheier, 129 P.3d 29, 42-43 (Cal. 2006).

been aware that the disparate registration requirements implicated discrimination toward LGBTQ people.[208]

Determining whether a law is discriminatory facially or in effect is only a preliminary step in an equal protection analysis.[209] This Note does not attempt to complete an entire equal protection analysis of the disparate registration requirements, as it is not attempting to argue that *Johnson*'s equal protection analysis was erroneous in its failure to address the potential discriminatory effect of the disparate registration requirements. However, in analyzing whether the disparate registration requirements are discriminatory in effect, it becomes clear that LGBTQ people were, and still are, burdened by the law.[210] Moreover, because *Johnson* reinstated these disparate requirements, mandatory registration in statutory rape cases continues to burden LGBTQ people, whereas heterosexuals retain the possibility of escaping this requirement.[211] Therefore, analyzing how the disparate requirements are discriminatory in effect illustrates that the *Johnson* holding resulted in the unintended consequence of discrimination against LGBTQ people.

IV. THE CALIFORNIA LEGISLATURE MUST ELIMINATE THE STATUTORY DISPARITIES AS A MATTER OF PUBLIC POLICY

This Part argues that, in light of the fact that the disparate registration requirements unequally impact LGBTQ people, public policy supports changing California statutory rape law to allow discretionary registration for all offenders. It first argues that progress in United States culture opens the door for such change. It also argues that not rectifying the current law perpetuates unequal treatment of LGBTQ people in the criminal justice system. Finally, it exposes that these factors require the California Legislature to adopt a bill making all forms of statutory rape subject to discretionary registration.

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[208] The dissent in *Johnson* spends an enormous amount of time exploring the statutory history surrounding the registration requirements, much of which is rooted in homophobia. *See Johnson*, 341 P.3d at 1088-89, 1095-99 (Wedegard, J., dissenting). This fact only makes it clearer that the *Johnson* majority ought to be aware of the fact that the registration requirements could have a discriminatory or burdensome effect on LGBTQ people.

[209] *See* Galloway, *supra* note 187, at 128.

[210] *See supra* Part III.C.

[211] *See* CAL. PENAL CODE §§ 261.5, 290.006 (2018).

A. Society Demands Equality for Homosexuals

Since the California Supreme Court decided *Johnson* in early 2015, both law and society embraced measures aimed towards expanding LGBTQ rights.[212] While there is certainly progress to be made, the public tends to believe that discrimination towards LGBTQ people should be eliminated.[213] Moreover, recent steps towards equality in the United States reflect a public attitude that homosexuals should be treated equally.

LGBTQ rights activists made considerable progress in the three years since *Johnson*. One of the most notable victories was the United States Supreme Court's ruling in *Obergefell v. Hodges*.[214] In *Obergefell*, the Court held that LGBTQ people are entitled to the right to marry.[215] The Court stated that the same legal right to liberty should be extended to LGBTQ people.[216] While *Johnson* characterizes non-vaginal intercourse as something that a "sexual predator" is more prone to engage in, *Obergefell* upholds that a preference for such intercourse is an "immutable" sexual preference.[217] This decision "was the culmination of decades of litigation and activism" and "set off jubilation and tearful embraces across the country."[218]

Major milestones for LGBTQ rights have not ceased after the *Obergefell* decision.[219] In 2016, President Obama dedicated the first monument for LGBTQ rights.[220] Additionally, the Seventh Circuit ruled that the Civil Rights Act prohibits workplace discrimination against LGBTQ people in 2017.[221] Even in the wake of President Donald Trump's anti-gay and transgender rhetoric,[222] in 2017 the

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[212] *See LGBT Rights Milestones Fast Facts*, CNN (Aug. 17, 2018, 1:57 PM), http://www.cnn.com/2015/06/19/us/LGBT-rights-milestones-fast-facts/index.html.

[213] Paul Waldman, *On Gay Rights, Conservatives — and the Trump Administration — Are in Full Retreat*, WASH. POST (Sept. 8, 2017), https://www.washingtonpost.com/blogs/plum-line/wp/2017/09/08/on-gay-rights-conservatives-and-the-trump-administration-are-in-full-retreat/?utm_term=.90663afae6da.

[214] 135 S. Ct. 2584 (2015).

[215] *See id.* at 2604-05.

[216] *See id.*

[217] *Id.* at 2594; Johnson v. Dep't of Justice, 341 P.3d 1075, 1084 (Cal. 2015).

[218] Adam Liptak, *Supreme Court Ruling Makes Same-Sex Marriage a Right Nationwide*, N.Y. TIMES (June 26, 2015), https://www.nytimes.com/2015/06/27/us/supreme-court-same-sex-marriage.html.

[219] *See LGBT Rights Milestones Fast Facts*, *supra* note 212.

[220] *Id.*

[221] *Id.*

[222] *See* German Lopez, *Trump Promised to be LGBTQ-Friendly. His First Year in Office Proved it Was a Giant Con.*, VOX (Jan. 22, 2018, 8:00 AM),

people of Virginia elected Danica Roem, a transgender woman, to the House of Delegates.[223] Moreover, even without federal legislation banning discrimination against LGBTQ people in the workplace, several states instated their own legislation doing so.[224]

From these facts, it is clear that there is a national trajectory towards treatment of LGBTQ people as equal citizens, deserving of all the privileges afforded to heterosexuals.[225] In *Obergefell*, the U.S. Supreme Court held that that the Constitution allows homosexuals "equal dignity in the eyes of the law."[226] The disparate sex offender registration requirements in California must be eliminated as a part of this trajectory. California ought to implement equal sex registration requirements for homosexuals and heterosexuals in order to assure such "dignity in the eyes of the law."[227] Society has shown that it is ready for equality for homosexuals under the law, and it is therefore time that California eliminates the disparate registration requirements.

However, critics may argue that instituting discretionary registration for all forms of statutory rape crimes raises public safety concerns.[228] Eliminating mandatory sex offender registration for all statutory rape offenses may mean that some people convicted of statutory rape would not be required to register. This means that some individuals convicted of statutory rape will not have their information posted on databases, thus preventing the public from knowing the addresses of certain sex offenders.[229] Additionally, those opposed to discretionary

https://www.vox.com/identities/2018/1/22/16905658/trump-lgbtq-anniversary.

[223] Najja Parker, *Who Is Danica Roem? Virginia Elects First Openly Transgender State Legislator*, AJC (Nov. 8, 2017), https://www.ajc.com/news/world/who-danica-roem-virginia-elects-first-transgender-woman-legislator/LcJ2dQO8bTtmRAxihr1prN/.

[224] *See Non-Discrimination Laws*, MOVEMENT ADVANCEMENT PROJECT, http://www.lgbtmap.org/equality-maps/non_discrimination_laws (last visited Nov. 10, 2018).

[225] *See, e.g.*, Kenneth Roth, *LGBT: Moving Towards Equality*, HUM. RTS. WATCH (Jan. 23, 2015, 12:28 PM), https://www.hrw.org/news/2015/01/23/LGBT-moving-towards-equality ("I see a positive trajectory [toward inclusion] as young people grow up with variations in sexual orientation around them being the norm.").

[226] Obergefell v. Hodges, 135 S. Ct. 2585, 2608 (2015).

[227] *Id.*

[228] *Cf.* Kibret Markos, *Pros and Cons of Sex Offender Rules Still Debated*, WASH. TIMES (Nov. 1, 2014), https://www.washingtontimes.com/news/2014/nov/1/pros-and-cons-of-sex-offender-rules-still-debated/ (reporting that Laura Ahern, executive director of Parents for Megan's Law and the Crime Victims Center, stated that sex offender registries help "law enforcement, and parents can use it to prevent their child from having a relationship with someone who could victimize them").

[229] *See* CAL. MEGAN'S L. WEBSITE, https://www.meganslaw.ca.gov (last visited Sept. 27, 2018).

registration may argue that not requiring sex offender registration will increase recidivism.[230]

However, discretionary registration will not relieve all those convicted of statutory rape from registration.[231] Because statutory rape is non-forcible by definition, some instances of statutory rape may not be deviant or may not indicate a propensity to prey on children.[232] For example, the twenty-year-old homosexual man who engaged in sex acts with a seventeen-year-old in the hypothetical situation at the beginning of this Note does not necessarily show an inclination to prey on children. Instead, he made a poor decision to engage in a romantic relationship with someone who was not yet eighteen. It is people in circumstances such as this that discretionary registration aims to protect. With discretionary registration, less severe conduct may not be subject to registration, whereas courts retain discretion to impose registration in more serious cases.[233]

Additionally, upholding the disparate registration requirements contributes to systemic discrimination of LGBTQ people in the criminal justice system. The United States simply does not incarcerate LGBTQ people at the same rate that it incarcerates heterosexual people.[234] The incarceration rate of LGBTQ people is disproportionate.[235] A 2017 study indicates that "sexual minority men and women were more likely than were straight men and women to be incarcerated for violent sexual and nonsexual crimes."[236] Additionally, LGBTQ people are on average sentenced to longer sentences than their heterosexual counterparts.[237] All of these factors contribute to a criminal justice system that systematically treats LGBTQ people unfairly.

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230 Historically, the justification for sex offender registration has been to decrease recidivism rates among sex offenders. Kate Hynes, Comment, *The Cost of Fear: An Analysis of Sex Offender Registration, Community Notification, and Civil Commitment Laws in the United States and the United Kingdom*, 2 PENN ST. J.L. & INT'L AFF. 351, 355 (2013).

231 *See Mandatory vs. Discretionary Registration*, *supra* note 11.

232 *See Statutory Rape*, *supra* note 32.

233 *See* A.B. 1640, 2013-2014 Leg., Reg. Sess. (Cal. 2014).

234 *See* CTR. FOR AM. PROGRESS & MOVEMENT ADVANCEMENT PROJECT, UNJUST: HOW THE BROKEN CRIMINAL JUSTICE SYSTEM FAILS LGBT PEOPLE iii (2016).

235 Ilan H. Meyer et al., *Incarceration Rates and Traits of Sexual Minorities in the United States: National Inmate Survey, 2011-2012*, 107 AJPH TRANSGENDER HEALTH 234, 234 (2017).

236 *Id.* at 237.

237 *See id.*

Some postulate that the reason that LGBTQ people are incarcerated at higher rates is because of prejudice towards homosexuals influencing their lives before and during the criminal justice process.[238] They argue that LGBTQ people may be more prone to commit crimes because of isolation and rejection as a result of their sexual preferences, an argument that mirrors the argument that sex offenders are more susceptible to recidivism.[239] However, what these critics fail to recognize is that the high incarceration rates and longer sentences of LGBTQ people are in large part a result of homophobic laws, just like the one upheld in *Johnson*.[240]

As discussed above, there is no way that heterosexuals charged with engaging in sex acts with a minor will be subject to discretionary registration after the *Johnson* decision.[241] That means that *Johnson* guarantees that LGBTQ people convicted of statutory rape will be subjected to harsher punishments than heterosexuals for essentially the same crimes.[242] As such, the disparate registration requirements fit squarely within the types of laws that ensure that homosexuals are not treated equally within the criminal justice system.[243]

However, society has changed and demands equality for homosexuals.[244] While only an example of many existing California laws that treat homosexuals as unequal, the disparate registration requirements have enormous consequences for LGBTQ people convicted of statutory rape.[245] California must eliminate the statutory disparity in registration requirements and allow *all* perpetrators of statutory rape to be subject to discretionary registration, not just those who engage in heterosexual sexual conduct.

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[238] *See, e.g.*, Mollie Reilly, *The Criminal Justice System Disproportionately Targets LGBT People, Study Finds*, HUFF POST (Feb. 25, 2016, 1:25 PM), https://www.huffingtonpost.com/entry/lgbt-criminal-justice-system_us_56ce3108e4b03260bf756d5c (stating that LGBT people are "at a higher risk of becoming homeless or turning to criminal activity"); Lara Stemple & Ilan H. Meyer, *The Unspoken Horror of Incarcerated LGBT People*, ADVOCATE (Feb. 23, 2017, 5:06 AM), https://www.advocate.com/commentary/2017/2/23/unspoken-horror-incarcerated-lgbt-people ("[S]exual minorities are more likely to experience family rejection and community marginalization, which can create pathways to substance abuse, homelessness, and detention.").

[239] Stemple & Meyer, *supra* note 238.

[240] *See* CTR. FOR AM. PROGRESS & MOVEMENT ADVANCEMENT PROJECT, *supra* note 234, at 7.

[241] *See supra* Part III.

[242] *See supra* Part III.

[243] *See* CTR. FOR AM. PROGRESS & MOVEMENT ADVANCEMENT PROJECT, *supra* note 234, at 7.

[244] *See supra* text accompanying notes 218-30.

[245] *See generally* Frenzel et al., *supra* note 6.

B. The California Legislature Must Pass New Legislation Rectifying the Disparate Registration Requirements

The California Legislature must pass a bill making all forms of statutory rape subject to discretionary registration. *Johnson*'s retroactivity resulted in inequity for those individuals who relied on existing law providing that they would not have to register when accepting a plea bargain.[246] Moreover, the laws themselves create a dynamic where an LGBTQ person cannot have sex with a minor and be subject to discretionary registration, whereas heterosexuals can, invoking equal protection issues.[247] These legal issues illustrate that sex offender registration for perpetrators of statutory rape, as currently codified in Penal Code section 290.006, remains a blight on California's legal system in its inequity and discrimination.[248]

While some may argue that mandatory registration would also ensure equality for all defendants, such a measure would not solve all the problems presented by the registration laws. While making registration mandatory for all those convicted of statutory rape would seemingly make the law more equal, it would not necessarily result in the laws being more just. Most notably, those who relied on *Hofsheier* in accepting plea bargains would not receive any discretionary relief.[249] In order to combat all issues presented by the *Johnson* holding, then, the most simple and obvious solution is to pass legislation making all forms of statutory rape subject to discretionary registration.

A 2014 California Assembly Bill provides guidance as to what legislation remedying the problems resulting from *Johnson* and the disparate requirements could look like.[250] The proposed legislation advanced subjecting all individuals convicted of statutory rape, in any form, to discretionary registration.[251] The bill also proposed allowing individuals convicted of statutory rape who were required to register before the enactment of the law to apply for discretionary relief.[252] While this bill did not pass in 2014, much has changed since its initial introduction. The United States has made and continues to make

246 *See supra* Part II.C.

247 *See supra* Part III.C.

248 *See* CAL. PENAL CODE § 290.006 (2018).

249 *See supra* Part II.C.

250 A.B. 1604, 2013-2014 Leg., Reg. Sess. (Cal. 2014).

251 *See id.*

252 *See id.*

strides towards equality for homosexuals.[253] Additionally, California itself is beginning to question the merits of lifetime registration as a sex offender.[254] While the legislation failed in 2014, these changes in society indicate that now is the time to enact such legislation in order to ensure fairness in the California criminal justice system.

Proposing a new bill with these same provisions would therefore combat the issue of unequal treatment of homosexuals. It would ensure that those who relied on the *Hofsheier* decision in accepting their plea bargains could petition for removal from the sex registry. Additionally, it would allow those required to register after *Johnson* to present petitions as well, thereby allowing the court to exercise its discretion in determining which instances of statutory rape warrant sex offender registration and which do not.

CONCLUSION

California must pass new legislation making all statutory rape offenses subject to discretionary sex offender registration. *Johnson*'s failure to consider how retroactivity would affect defendants who believed they would not have to register as a sex offender in accepting plea bargains requires reconsideration of the decision.[255] Moreover, because current statutory rape laws implicitly discriminate against LGBTQ people, the California Legislature must reexamine the laws governing sex offender registration requirements relating to statutory rape.[256] As both sex offender registry reform and measures towards LGBTQ equality gain traction in California and nationwide,[257] it is clear that now is the time to rectify the harm the *Johnson* decision caused and that the disparate registration requirements create.

253 *See supra* Part IV.A.

254 *See* McGreevy, *supra* note 1.

255 *See supra* Part II.C.

256 *See supra* Part III.C.

257 *See supra* Part IV.B.