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

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QUEER TEENS AND LEGISLATIVE BULLIES: THE CRUEL AND INVIDIOUS DISCRIMINATION BEHIND HETEROSEXIST STATUTORY RAPE LAWS

*Michael J. Higdon**

“Lesbian and gay youth are the most invisible and outcast group of young people with whom you will come into contact” – U.S. Department of Health¹

I. INTRODUCTION

A number of commentators have drawn compelling parallels between current laws that discriminate against homosexuals and Jim Crow laws of the post-Civil War South.² Both were designed to brand a discrete class of Americans “as immoral, inferior, and not deserving of society’s tolerance and protection.”³ At the heart of Jim Crow laws was the concept of “separate but equal,” which persisted until the Supreme Court’s decision in *Brown v. Board of Education*, where, largely because of the stigmatizing impact that these laws had on African-American children, the Court unanimously struck down racial segregation.⁴

Unfortunately, for the lesbian, gay, bisexual and transgender (LGBT) community, the equivalent of Jim Crow laws still exist today. For example, in contrast to heterosexuals, homosexuals cannot marry, cannot openly serve in the military, and, in some

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¹ Paul Gibson, *Gay and Lesbian Youth Suicide*, in 3 U.S. Department of Health and Human Services Youth Suicide Report 110-42 (1989), reprinted in LESBIANS, GAY MEN, AND THE LAW 163 (William B. Rubenstein, ed. 1993).

² See, e.g., Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by “Unenforced” Sodomy Law*, 35 HARV. C.R.-C.L. REV. 103114-15 (2000); Devon W. Carbado, *Black Rights, Gay Rights, Civil Rights*, 47 UCLA L. REV. 1467 (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).

³ Leslie, *supra* note 2, at 114.

⁴ 347 U.S. 483 (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* notes 211-214 and accompanying text.

instances, cannot even adopt. 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 youth, particularly in light of that fact that such youth are not only politically powerless but are already extremely marginalized within American society.⁵

In essence, these 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 relations,⁶ some states have retained such prohibitions as part of their criminal statutes relating to statutory rape. Of course, this retention, in and of itself, likely poses no Constitutional impediment given that states have broad powers to protect minors.⁷ However, recognizing the fact that sexual experimentation is common among adolescents, most states have created exceptions to their statutory rape laws for consensual adolescent sexual activity involving an adolescent below the age of consent when the sexual partner is another adolescent close in age.⁸

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.⁹ Unfortunately, some states have decided that such an exception should apply only to heterosexual activity and, thus, have written their Romeo and Juliet laws to explicitly exclude adolescents who engage in homosexual activity with someone below the age of consent.¹⁰ 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 below the age of consent, instead face the prospect of a felony conviction simply because their sexual partner was the same gender as the defendant.

To see the inequities in punishment that result because of discriminatory Romeo and Juliet laws, consider the case of

⁵ See, *infra* Section II.C.

⁶ 539 U.S. 653 (2003).

⁷ See, *Carey v. Population Services, Intern.*, 431 U.S. 678, 694 (1977) (noting that “in the area of sexual mores . . . the scope of permissible state regulation is broader as to minors than as to adults”).

⁸ See, *infra*, note 181 and accompanying text.

⁹ See, *infra*, note 183 and accompanying text.

¹⁰ See, *infra*, note Section III.

Matthew Limon.¹¹ In February of 2000, just after Matthew Limon had just turned 18, Limon violated the state's statutory rape law when he engaged in oral sex with M.A.R., who was less than four years younger than Limon.¹² Had Limon fallen under the Kansas Romeo and Juliet exception, the maximum sentence he would have received would have been 15 months.¹³ Furthermore, he would not have had to register as a convicted sex offender.¹⁴ However, Kansas' Romeo and Juliet provision required that the two actors be of the opposite gender.¹⁵ Solely as a result of that requirement, Limon did not qualify for the Romeo and Juliet exception given that both he and M.A.R. were male.¹⁶ Accordingly, Limon was convicted of a felony, sentenced to over 17 years in prison, subjected to 60 months post-release supervision, and required to register as a sexual offender.¹⁷

It is the contention of this Article that such discriminatory Romeo and Juliet provisions are unconstitutional violations of 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 are already suffering daily from harassment, violence, homelessness and a myriad of psychological problems simply because they fail to conform to the heterosexual norm.¹⁸ Accordingly, these discriminatory Romeo and Juliet laws are a particularly invidious form of discrimination that cannot satisfy even the lowest level of Constitutional review.¹⁹

Part II of this Article will first detail the nature of LGBT adolescents, including the process by which sexual orientation develops, the incidence of homosexual activity during adolescence, and the problems that LGBT adolescence face as a result of the societal stigma associated with homosexuality. Part III will then look, in more detail, at how some state legislatures are using their states' statutory rape laws as a means of exacerbating the stigma with which LGBT adolescents must already contend. Finally, against that background, Part IV will chart Supreme Court jurisprudence relating to the application of the Equal Protection

¹¹ See *State v. Limon*, 122 P.3d 22 (Kan. 2005).

¹² *Id.* at 24.

¹³ *Id.* at 25 (citing K.S.A. 1999 Supp. 21-4704).

¹⁴ *Id.* at 25 (citing K.S.A. 1999 Supp. 22-4902).

¹⁵ *Id.* at 24.

¹⁶ *Id.*

¹⁷ *Id.* at 25.

¹⁸ See, *infra*, Section II.C.

¹⁹ See, *infra*, Section IV.

Clause on stigmatizing legislation and examine how, in light of those cases, discriminatory Romeo and Juliet laws are unconstitutional given the extremely stigmatizing impact they have on LGBT adolescents.

II. 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 to abide by gender and heterosexual norms. As aptly stated in the book *Youth and Sexualities*: “[T]hose 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.”²⁰

Indeed, LGBT youth face a whole host of difficulties in a variety of settings simply as a result of their nonconformity. However, to fully appreciate this level of stigma and the ensuing harm it often produces, it is first necessary to 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 identity²¹ is purely a product of adulthood,²² “adolescent homosexuals” simply do not exist.²³

²⁰ Susan Talburt, Eric Rofes, & Mary Louise Rasmussen, *Transforming Discourses of Queer Youth and Educational Practices Surrounding Gender, Sexuality, and Youth*, in *YOUTH AND SEXUALITIES: PLEASURE, SUBVERSION, AND INSUBORDINATION IN AND OUT OF SCHOOLS* 5 (Mary Louise Rasmussen, Eric Rofes & Susan Talburt eds., 2004).

²¹ By way of terminology, psychologists define sexual identity as “an enduring sense of oneself as a sexual being fitting into a culturally prescribed category.” See, e.g., Ritch C. Savin-Williams & Richard G. Rodriguez, *A Developmental, Clinical Perspective on Lesbian, Gay Male, and Bisexual Youths*, in *ADOLESCENT SEXUALITY* 80 (Thomas P. Gullota, Gerald R. Adams & Raymond Montemayor eds, 1993).

²² As one commentator has noted, 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).

As one commentator noted: “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 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 truth is that 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 until adulthood, many agree that sexual orientation actually 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

²³ See, Youth Comm’n and City and County of San Francisco, San Francisco Human Rights Comm’n, Public Hearing: Lesbian, Gay, Bisexual, Transgender, Queer and Questioning Youth 13 (1996) (testimony of Jesse Costello-Good, San Francisco Youth Commission Co-Chair) (“The idea persists that gay people jump into existence at age 18.”).

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 21, 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.”).

²⁷ Savin-Williams & Rodriguez, *supra* note 21, 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 22, at 1373.

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, *infra* note 79 and accompanying text.

³⁰ Wardenski, *supra* note 22, 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.”).

still being debated, but most of the debate is about how *early*.”³¹ Green goes on to describe his own research which reveals that many 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, however, the relevant inquiry becomes not at what age a person’s sexual orientation becomes fixed, but the process that a person goes through before ultimately accepting his/her identity as a homosexual. After all, “people are not born with perceptions of themselves as heterosexual, bisexual, or homosexual in relation to sexual or romantic settings.”³⁴ Instead, these perceptions come about gradually and, in focusing on that process, social science reveals that it is one 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 However, given that the focus of this Article is on adolescent homosexuality and because the commitment stage does not generally occur until adulthood, the remainder of Part III will focus on the first three stages and the corresponding age at which each generally takes place.³⁷

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 *BISEXUAL AND HOMOSEXUAL IDENTITIES: CRITICAL CLINICAL ISSUES* 6 (John P. De Cecco ed, 1984) (theorizing that “sexual orientation is acquired in early childhood which determines adult behavior”).

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

³⁵ *Id.*; see also, RICHARD R. TROIDEN, *GAY AND LESBIAN IDENTITY: A SOCIOLOGICAL ANALYSIS* (1988); Richard R. Troiden, *The Formation of Homosexual Identities*, 17 *GAY AND LESBIAN YOUTH* 43 (1989).

³⁶ See PERRIN, *supra* note 26, at 76.

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,

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 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 age.⁴⁰

As this quote makes clear, these feelings often emanate, not from any sexual feelings, but simply from gender nonconformity.⁴¹

up-and-down fashion.” Troiden, *supra* note 34, at 105.

³⁸ Troiden, *supra* note 35, at 50-53.

³⁹ Susanne M. Stronski Huwiler & Gary Remafedi, *Adolescent Homosexuality*, 33 REV. JURIDICA U. INTER. P. R. 151, 160 (1999); *see also*, Savin-Williams & Rodriguez, *supra* note 21, 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.”).

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

Of course, many children, including those who will ultimately identify as heterosexual, experience feelings of being different.⁴² However, research proves that this feeling is much more common among homosexuals. Specifically, research on adults reveals that, among gays and lesbians, 75 to 85% report 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 not fitting in 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 “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

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 21, 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. OF ADOLESCENCE 51, 54 (2001) (noting that the negativity that many gay men report having felt during adolescence “stems from the surrounding social context that provides powerful expectation of heterosexuality”).

⁴⁶ PERRIN, *supra* note 26, at 75; However, it’s important to note that “neither feelings of differentness nor childhood gender atypicality correlate as strongly with same-sex orientations among women as they do among me.” *Id.* at 60-61.

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

⁴⁸ *Id.*

⁴⁹ Savin-Williams & Rodriguez, *supra* note 21, at 85.

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 terms of derision: “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 such these feelings were very important.⁵²

2. Late Childhood/Early Adolescence – Identity Confusion

As “prehomosexual” children get older, but generally some time before age 15⁵³, they begin to develop same-sex attractions, and that sense of being different starts to “crystallize into a sense of 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 assumed heterosexual identity. The resulting

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

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

⁵² See, Savin-Williams & Rodriguez, *supra* note 21, at 85; A. Damien Martin, *Learning to Hide: The Socialization of the Gay Adolescent*, 10 ADOLESCENT PSYCHIATRY 52 (1982)

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 PSYCHOLOGY 1389 (1999) (putting the age at 8-11 years-old); see also, PERRIN, *supra* note 26, at 76 (noting that the age has dropped over the past few decades).

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

dissonance leads to, what Troiden describes as, “identity confusion.”⁵⁵ However, this stage is a bit 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 of those “dykes” or “faggots” that they have frequently heard their peers speak of with such contempt.⁵⁸ Indeed, social condemnation of homosexuality has much to do with this resulting identity confusion.⁵⁹

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 For those who choose *denial*, they actively try and ignore all

⁵⁵ Troiden, *supra* note 34, at 107.

⁵⁶ 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* note 106 and accompanying text. Thus, the stigma resulting from these attractions are likely to befall far 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. OF ADOLESCENT RESEARCH 259 (1988).

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

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, furthermore, can result in additional problems. Aside from the obvious self-esteem issues that can easily result,⁶³ denial may also “include promiscuous heterosexual activity and include the risk of pregnancy.”⁶⁴ Additionally, as Mondimore notes, “[e]scape into alcohol and drug abuse 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 who deal 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, “there 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 and what they may mean in terms of sexual orientation.⁷⁰ Additionally, teens who exercise avoidance may also attempt to avoid activities that

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.

⁶⁹ See generally, 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); Douglas C. Haldeman, *Sexual Orientation Conversion Therapy: A Scientific Examination*, in HOMOSEXUALITY: RESEARCH IMPLICATIONS FOR PUBLIC POLICY 149 (John C. Gonsiorek & James D. Weinrich eds, 1991).

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 conform these inclinations.”).

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 to take up dance.”⁷¹ A fourth approach to identity confusion is *redefining*, where a young homosexual simply classifies her feelings as temporary, experimental or somehow justified based on circumstances.⁷² Finally, some teens “are coming to a successful resolution of identity and finding *acceptance*.”⁷³ Looking at the acceptance approach to identity confusion, many posit that, 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, a LGBT adolescent suffering from identity confusion must accept, as a reality, her differences before she will be able to move into the third stage of sexual identity development.⁷⁵

3. Mid to Late Adolescence – Identity Assumption

Having worked through identity confusion, the next stage in an adolescent’s development of sexual identity is that of “identity

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 *Id.* (“Redefinition . . . involves redefining the behavior, feelings, or context along more conventional lines.”); *see also*, MONDIMORE, *supra* note 40, at 167.

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, supra* note 37 and accompanying text.

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.”)

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 However, even at this point, sexual identity is still a work-in-progress given that, during this stage, homosexual adolescents would typically be characterized as more tolerant of than actually 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 However, what is somewhat clearer is the age at which most LGBT adolescents tend to reveal their sexual orientation to others, a process that is frequently referred to as “coming-out.”⁸⁰ Of course, this “coming-out” process happens for different individuals at different times.⁸¹

⁷⁶ See, Troiden 34, at 109.

⁷⁷ *Id.*; see also, PERRIN, *supra* note 26, at 77 (“[t]his 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 at 34, 109; see also, Vivienne C. Cass, *Homosexual Identity Formation: Testing a Theoretical Model*, 20 J. OF SEX RESEARCH 143, 156 (1984): (“You feel sure you’re a homosexual and you put up with, or tolerate this. You see yourself as homosexual for *now* but are not sure about how you will be in the future.”)

⁷⁹ See, Ruskola, *supra* note 24, at 282-83. 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 22, at 1373. In addition, one scholar attributes the “tardiness of self-identification” to the “unavailability of the label ‘gay adolescent.’” Ruskola, *supra*, 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.”); see also, Caitlin C. Ryan & Donna Futterman, *LESBIAN AND GAY YOUTH: CARE AND COUNSELING* 14-15 (1998) (noting that ethnic minorities may be less likely to self-identify given that, “[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.”)

⁸¹ See, MONDIMORE, *supra* note 40, at 172 (“Many individuals quickly and

Studies reveal, however, that the age at which adolescents are starting to self-identify as homosexual has gone down. For example, studies in the 1970s and 80s found that the average age of “coming-out” was somewhere in the early to mid-20s.⁸² In contrast, more recent research has put that age somewhere in the late teens.⁸³ Furthermore, one study found that the average age of self-identification as homosexual is 16.⁸⁴ These statistics are relevant given that, as psychologist Anthony R. D’Augelli points out “[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, as many have noted, 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 number of adolescents are expelled or run away from home to escape intolerable family conflict.”⁸⁸

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 (1971); Gary J. McDonald, *Individual Differences in the Coming Out Process for Gay Men: Implications for Theoretical Models*, 8 J. OF HOMOSEXUALITY 47 (1982).

⁸³ See, e.g., Ritch C. Savin-Williams, *GAY AND LESBIAN YOUTH: EXPRESSIONS OF IDENTITY* (1990); Gary Remafedi, *Male Homosexuality: The Adolescent’s Perspective*, 79 PEDIATRICS 326 (1987).

⁸⁴ Gilbert Herdt & Andrew Boxer, *CHILDREN OF HORIZONS* 181 (1993). As noted earlier, however, it is difficult to get accurate statistics on this issue given that stigma can retard self-identification. See, *supra* note 79 and accompanying text.

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* 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.”).

⁸⁸ *Id.* at 161.

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

B. Homosexual Activity During Adolescence

Although many might prefer to pretend otherwise,⁹⁰ the reality is that many teenagers do 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 not uncommon to find that many of their experiences are homosexual.⁹³ More specifically, in terms of men, “homosexual

⁸⁹ PERRIN, *supra* note 26, at 77.

⁹⁰ See, JOHN D’EMILIO & ESTELLE B. FREEDMAN, *INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA* 16 (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 normative—and, heaven forbid, positive—part of adolescent life is unutterable in America’s public forum.”).

⁹¹ Committee on Adolescence, *Homosexuality and Adolescence*, 92 *PEDIATRICS* 631 (“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 JUDITH LEVINE, *HARMFUL TO MINORS: THE PERILS OF PROTECTING CHILDREN FROM SEX* (2002)) (“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, 137 (2000). Furthermore, a 2003 study found that 47 percent of all teens were sexually active. ROBERT L. MADDEX, *ENCYCLOPEDIA OF SEXUAL BEHAVIOR AND THE LAW* 344 (2006); see also, Levine, *supra* note 90, 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 percent of female respondents reported having had vaginal intercourse by age fifteen. EDWARD O. LAUMANN, JOHN H. GAGNON, ROBERT T. MICHAEL & STUART MICHAELS, *THE SOCIAL ORGANIZATION OF SEXUALITY: SEXUAL PRACTICES IN THE UNITED STATES* 327 (2000). By age nineteen, the percentage rose to 71. *Id.* Additionally, data reveals that more than 50 percent of Americans between the ages of fifteen and nineteen have engaged in oral sex. MADDEX, *supra* 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 percent of females and 17 percent 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 percent of boys and 17 percent 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 percent reported some homosexual contact during adolescence, yet only 6.7 percent experienced such contacts after age 19.⁹⁸ 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, at the same time, “two out of five men one passes on the street have had

⁹⁴ Bolton & MacEachron, *supra* note 59, at 265 (pointing out that “homosexual 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 Committee on Adolescence, *supra* note 91, at 631 (citing ROBERT C. SORENSON, *ADOLESCENT SEXUALITY IN CONTEMPORARY AMERICA* (1973)).

⁹⁶ See PERRIN, *supra* note 26, at 73. Incidentally, only 4% of the men in Kinsey’s study practiced homosexuality exclusively from adolescents 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.”).

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

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

¹⁰⁰ See, 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 ADOLESC. PSYCHIATRY* 297 (1999); Committee on Adolescence, *supra* note 91, at 631.

orgasmic sex with men.”¹⁰¹

In looking then at what contributes to this practice of homosexual experimentation among adolescents, most agree that one of the biggest causes is merely 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 adolescents, both gay and straight. Furthermore, social science also 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 the “real” man who is infused with sexualized masculinity.¹⁰³

Finally, for adolescents without access to the opposite gender, homosexuality can also be situational. Thus, it is not uncommon to find heterosexual adolescents engaging 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

¹⁰¹ Richard D. Mohr, *Gay Basics*, in *Sex, MORALITY, AND THE LAW* 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 homosexuality.”).

¹⁰² *See*, MORRIS PLOSCOWE, *SEX AND THE LAW* 206 (1951) (Much homosexual activity is due to adolescent curiosity and sex experimentation)

¹⁰³ Bolton & MacEachron, *supra* note 59, at 265.

¹⁰⁴ Elisabeth Young-Bruehl, *Are Human Beings “By Nature” Bisexual?*, 2 *STUDIES IN GENDER & SEXUALITY* 179, 202 (2001); *see also*, MORRIS 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* 97 (1965).

“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 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

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

¹⁰⁶ *Id.*; *see also*, Bolton & MacEachron, *supra* note 59, at 265 (“Experience with homosexuality is not identical to self-identification as homosexual.”).

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 21, 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.”).

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 21, at 81 *see* (“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.”).

in sexual activity, it is not uncommon for this activity to involve 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, the stigma associated with homosexuality can be a very difficult thing with which to contend. 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 models view homosexual identity formation as taking place against a backdrop of stigma, which heavily influences identity development and personal adjustment.”¹¹⁰

Much of this stigma arises from societal homophobia, which is generally defined as an irrational fear or hatred of homosexuality.¹¹¹ In terms of what causes homophobia, it “is thought to emerge from a complex interplay of sociocultural and historical factors, individual defenses, and experiential learning. An important societal contributing factor is *heterosexualism*, the widespread and often unconscious tendency to interpret human experience in strictly heterosexual terms, thus ignoring and invalidating homosexuality.”¹¹² However, regardless of the cause, the sad reality is that homophobia is not only widespread but, in many instances, socially acceptable. As Gerald Unks states in his book *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

¹¹⁰ Troiden, *supra* note 34, at 106.

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

¹¹² *Id.* at 163; *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*, *supra* note 20, at 227 (“To be called a ‘nancy,’ ‘poof,’ ‘fudge-tunneller,’ among others, is still an experience of vilification, but is also an experience, by its very quality as hate speech, that calls forth and into view aspects of heteronormative and masculine world still threatened by male-to-male sexual desire and sexual practice.”).

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.¹¹³

This stigma and the resulting homophobia begin in childhood, where, as noted earlier, children who do not conform to gender norms quickly find themselves shunned by peers.¹¹⁴ However, the stigma continues through adolescence and, in fact, even continues into the stage of development when the individual fully accepts and integrates his or her homosexuality into that person’s self-identity.¹¹⁵ 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 noted, “[g]ay and lesbian youth are constantly exposed to environmental and internal stressors that stem from homophobia.”¹¹⁶

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.”¹¹⁷ Thus, “[f]or teenagers who feel ‘different’ and marginalized, the intensity of this common and normal worry is even more dramatic.”¹¹⁸ Accordingly, some have equated the difficulty that homosexuals face when confronted with societal stigma to that experienced by other groups that have been

¹¹³ Gerald Unks, “Thinking about the Gay Teen,” in *THE GAY TEEN: EDUCATIONAL PRACTICE AND THEORY FOR LESBIAN, GAY AND BISEXUAL ADOLESCENTS* 3 (Gerald Unks ed, 1995).

¹¹⁴ See, *supra* notes 49-51 and accompanying text.

¹¹⁵ 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.”).

¹¹⁶ 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.”).

¹¹⁷ PERRIN, *supra* note 26, at 72.

¹¹⁸ *Id.*

subjected to oppression and discrimination: “The 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.”¹¹⁹

However, what makes adolescence particularly onerous for LGBT teens is the profound sense of isolation with which they must frequently contend. Specifically, unlike most ethnic and racial minorities, gay and lesbians teens generally lack access to others like them and, thus, 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 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 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.¹²⁰

¹¹⁹ Savin-Williams & Rodriquez, *supra* note 21, at 88.

¹²⁰ Flowers and Buston, *supra* note 45, at 52. However, for those adolescents who are both homosexual and a member of an ethnic minority, this

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 exists in many different contexts, the contexts in which it is most often visited upon gay and lesbian teens is in their primary environments of home and school, both of which result in their own fairly discrete set of problems. However, beyond those 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

For many gay and lesbian teens, homophobia often begins at home.¹²¹ Sadly, aside from increasing a gay or lesbian teen's stress and sense of isolation, homophobia at home can also quite frequently result in abuse and, in some cases, parental rejection.¹²² 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 as a result of their sexual orientation.¹²³ Unfortunately, for many the abuse does not end there. In fact, one-third of gay and lesbian teens have suffered physical violence at the hands of a family member as a consequence of coming out or having their orientation revealed.¹²⁴ Thus, as one commentator put it, "[f]or many gay youth, the closet is the only safe home."¹²⁵

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.").

¹²¹ Wardenski, *supra* note 22, at 1377 ("LGBT youth often first confront discrimination in their homes.").

¹²² 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).

¹²³ Paul Gibson, *Gay Male and Lesbian Youth Suicide*, in U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES REPORT OF THE SECRETARY'S TASK FORCE ON YOUTH SUICIDE 110, 127 (1989). Sadly, such verbal abuse is not limited to those adolescents who have disclosed their sexual orientation. See, Anthony D'Augelli, Arnold H. Grossman & Michael T. Starks, *Parents' Awareness of Lesbian, Gay, and Bisexual Youths' Sexual Orientation*, 67 J. MARRIAGE & FAMILY, 474, 481 (2005) ("Parents who suspect their children to be LGB may make mor antigay comments, which may lead to learning that they have an LGB child.").

¹²⁴ Wardenski, *supra* note 22, at 1378. Furthermore, "[a]buse rates against LGBT youth are highest for those that are also racial minorities." *Id.*

¹²⁵ Ruskola, *supra* note 24, at 270. Of course, any teen, regardless of sexual

Beyond physical and verbal abuse, homophobia can also lead to parental rejection of LGBT teens. In fact, half of all gay and lesbian youth experience some form of parental rejection simply because of their sexual orientation.¹²⁶ For many such teens, the consequence of this rejection is homelessness.¹²⁷ In fact, one survey reports that 1 gay male out of every 4 is forced to leave home once his parents learn of the child's sexual orientation.¹²⁸

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,¹²⁹ the percentage of homeless teens that are gay or lesbian is extremely high.¹³⁰ Although it is difficult to accurately gauge the numbers, social service agencies estimate that between 25 and 35% of homeless youth in large urban centers are gay or lesbian.¹³¹ However, in some areas the percentage is higher. For example, in New York City, up to 50 percent of homeless youth self-identify as gay, lesbian, bisexual or transgender.¹³²

In addition to the trauma that results from merely being

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." See, Renee Martin, *supra* note 122, at 169.

¹²⁶ See, BENNETT L. SINGER & DAVID DESCHAMPS, *GAY AND LESBIAN STATS: A POCKET GUIDE OF FACTS AND FIGURES* 77 (1994).

¹²⁷ Wardenski, *supra* note 22, at 1377 ("Flowing from these problems, LGBT youth are disproportionately likely to experience periods of homelessness. . .").

¹²⁸ 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).

¹²⁹ Renee Martin, *supra* note 122, at 176 ("Many abused queer youth escape abuse by running away from home.").

¹³⁰ See, Huwiler & Remafedi, *supra* note 39 at 164 ("Among the 2 million U.S. adolescents who are living on the streets, homosexual youth are clearly overrepresented."); Renee Martin, *supra* note 122, at 176 ("[Q]ueer youth comprise a drastically disproportionate number of the homeless youth in this country.").

¹³¹ Gabe Kruks, *Gay and Lesbian Homeless/Street Youth: Special Issues and Concerns*, 12 J. ADOLESCENT HEALTH 515 (1991).

¹³² 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, Renee Martin, *supra* note 122, at 176 (noting that the percentage of LGBT homeless adolescents in San Francisco, Seattle and Los Angeles is estimated to be 50%, 40% and 30%, respectively).

homeless, gay and lesbian teens who are forced to live on the streets are also much more susceptible to a variety of additional problems. Indeed, as one commentator noted “[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.”¹³³ Specifically, one study found that up to 50% of gay and bisexual male teens who are ejected from their homes support themselves by engaging in prostitution;¹³⁴ this, of course, typically brings with it other problems. As Huwiler and Remafedi have noted, “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, substance abuse and risky sexual behavior.”¹³⁵ Not surprisingly, the rate of HIV infection among homeless gay teens is quite high.¹³⁶

Obviously, not all homophobic households will result in homelessness and its attendant risks. However, even if parental abuse does not rise to the level of rejection, any psychological abuse by a parent can be extremely devastating to LGBT teens. Indeed, any child who has endured such abuse “has not only the burden of his distress to bear, but that of being left with extremely inadequate mental resources to cope with a degree of pain which would overwhelm the most favorably brought up child.”¹³⁷

¹³³ Huwiler & Remafedi, *supra* note 39, at 165.

¹³⁴ SINGER & DESCHAMPS, *supra* note 126, at 77; *see also*, Eli Coleman, *The Development of Male Prostitution Activity Among Gay and Bisexual Adolescents*, 17 J. HOMOSEXUALITY 137 (1989) (study finding that approximately two-thirds of all adolescent male prostitutes are 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 AND CLINICAL PSYCH. 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.”).

¹³⁵ Huwiler & Remafedi, *supra* note 39, at 165. 10; *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.”).

¹³⁶ *See*, Huwiler & Remafedi, *supra* note 39, at 165; PERRIN, *supra* note 26, at 90 (noting that “homeless youth are at particularly very high risk for HIV”).

¹³⁷ Rolene Szur, *Emotional Abuse and Neglect*, in CHILD ABUSE: THE EDUCATIONAL PERSPECTIVE 121 (Peter Maher ed, 1987).

However, for a gay and lesbian youth, such abuse can be even more costly. In fact, some have characterized the resulting consequences as “morbid.”¹³⁸ Thus, it should come as little surprise that, in at least one study, most gay and lesbian teens who had attempted suicide cited family troubles as the biggest contributing factor.¹³⁹

2. School Bullying and Educational Consequences

As one commentator has aptly noted, “[h]igh school is one of the most intensely and often anti-gay sites in our culture and a central institution in the socialization of youth into homophobia.”¹⁴⁰ Of course, most youth spend about half their waking hours at school.¹⁴¹ As a result, for gay and lesbian teens, the school setting, which is frequently laced with extreme homophobia,¹⁴² can be an incredibly traumatic environment. Additionally, as a consequence of this abuse, “academic underachievement, truancy, and dropout are prevalent among homosexual youth.”¹⁴³

In terms of school bullying, statistics reveal that almost 90% of LGBT youth “sometimes or frequently hear homophobic remarks” in school.¹⁴⁴ However, what is more troubling is that over two-thirds of that same population report having been verbally or physically harassed on the basis of their sexual orientation.¹⁴⁵ Another study found that, in general and among different communities, 80% of homosexual youth have experienced verbal abuse.¹⁴⁶ In that same study, 43% of those surveyed had had items thrown at them; 17% had been physical assaulted, and 10% had been assaulted with a weapon.¹⁴⁷ Regardless of the specific kind

¹³⁸ Savin-Williams & Rodriguez, *supra* note 21, at 90.

¹³⁹ Gary Remafedi, James A. Farrow & Robert W. Deisher, Risk Factors for Attempted Suicide in Gay and Bisexual Youth, 87 PEDIATRICS 869, 874 (1991).

¹⁴⁰ Ruskola, *supra* note 24, at 271.

¹⁴¹ Hillier & Rosenthal, *supra* note 116, at 3.

¹⁴² See, Unks, *supra* note 113, 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.”).

¹⁴³ Huwiler & Remafedi, *supra* note 39, at 164.

¹⁴⁴ Wardenski, *supra* note 22, at 1378.

¹⁴⁵ *Id.*

¹⁴⁶ Anthony R. D’Augelli & Scott L. Hershberger, *Lesbian, Gay and Bisexual Youth in Community Settings: Personal Challenges and Mental Health Problems*, 21 AM. J. COMMUNITY PSYCHOL. 421 (1993)

¹⁴⁷ *Id.*

of abuse, all of the abuse that the respondents reported was a direct result of the sexual orientation of the victim.¹⁴⁸

Furthermore, in looking at who is responsible for this bullying, within the school setting, “peers, students, and roommates” are usually responsible for this abuse.¹⁴⁹ In addition, studies on violence towards LGBT youth reveal that the typical assailant is another teenager.¹⁵⁰ Finally, and perhaps most disturbing, is the fact that the “violent homophobes are not atypical, anti-social, self-destructive, easily identifiable students”¹⁵¹ 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 military¹⁵²

However, regardless of the demographics associated with most teenage assailants, it would be a mistake to say that, within the school setting, peers are the sole source of homophobia and abuse directed toward LGBT youth. Instead, school officials and administrators must frequently share much of that responsibility. As an initial matter, many administrators simply refuse to acknowledge the existence of gay teens.¹⁵³ As a result, teen bullies

¹⁴⁸ *Id.*

¹⁴⁹ Anthony R. D’Augelli, *Lesbians’ and Gay Men’s Experiences of Discrimination and Harassment in a University Community*, 17 AM. J. COMMUNITY PSYCHOL. 317 (1989); *see also*, GARY DAVID COMSTOCK, VIOLENCE AGAINST LESBIANS AND GAY MEN 58 (1991) (following unknown assailants, “[f]ellow students are the next most frequently reported perpetrators”).

¹⁵⁰ 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 “[t]he motivation for antigay violence is male insecurity over one’s masculinity and the fear of peer rejection for not being sufficiently masculine.” *Id.*

¹⁵¹ Ruskola, *supra* note 24, at 310.

¹⁵² COMSTOCK, *supra* note 149, at 106.

¹⁵³ Ruskola, *supra* note 24, at 303-04 (“[A]dministrators, teachers and other professional helpers are hellbent on not seeing gay kids and not acknowledging their abuse, whether subtle or brutal.”).

As one school administrator has stated, “I’ve been a guidance counselor at

often “act with impunity in schools that do nothing to curb teens from calling other teens ‘fags,’ ‘homos,’ and ‘lezzies’ because they dress and/or behave differently from other kids.”¹⁵⁴ However, LGBT youth sometimes face more than mere neglect at the hands of school administrators. As one commentator noted, “[i]n many schools it is simply too ‘dangerous mentally and physically to come out,’ especially since school administrators and teachers typically not only ‘refuse to protect gay youth from peer violence’ but themselves ‘harass, misinform, and unfairly punish gay students.’”¹⁵⁵ In fact, one study found that 55 to 72% of gay and lesbian college students had reported being the victims of violence. While 64 % of the perpetrators were peers, 23% were faculty of staff.¹⁵⁶

All of these statistics and findings greatly undermine the popular notion that school “is one place where all young people will be safe.”¹⁵⁷ Instead, as a result of the homophobia and abuse that exist in many schools, 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.”¹⁵⁸

3. Societal Stigma, Psychological Harm and Suicide

In addition to parental abuse, homelessness and school

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 (Kevin Jennings ed., 1994).

¹⁵⁴ Arriola, *supra* note 150, at 447-48; *see also*, Ruskola, *supra* note 24, at 311 (“While teachers typically do not beat up gay and lesbian students, they almost invariably let homophobic acts by other go unchallenged and often engage in them themselves.”); 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.”).

¹⁵⁵ Ruskola, *supra* note 24, at 271.

¹⁵⁶ *See*, PERRIN, *supra* note 26, at 86. 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?*, 3-4 J. HOMOSEXUALITY 29 (1991).

¹⁵⁷ Hillier & Rosenthal, *supra* note 116, at 3.

¹⁵⁸ *See* Arriola, *supra* note 150, at 448.

bullying, the compound effect of the stigma and homophobia that many LGBT youth encounter from society in general can also result in serious harm which, all too frequently, prove deadly.

Of course, much of this harm may be attributed to anti-gay violence. 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.¹⁵⁹

However, aside from actual violence, even the stigma of not conforming to heterosexual norms can be quite a catalyst for psychological harm. As one commentator noted, “[p]eer pressure and harassment become a primary source of emotional stress that produces alienated, isolated, and depressed LGBT teenagers.”¹⁶⁰ Indeed, a number of studies indicate the relatively high prevalence of anxiety and mood disorders that exists among homosexual adults.¹⁶¹ Furthermore, such depression and anxiety is also quite common among LGBT adolescents.¹⁶²

For many of these adolescents, these psychological conditions prove fatal. In fact, one of the oft-cited statistics concerning LGBT youth is that they are two to three times more likely than heterosexual youth to commit suicide.¹⁶³ Indeed, of the various

¹⁵⁹ PERRIN, *supra* note 26, at 86-87.

¹⁶⁰ Arriola, *supra* note 150, at 448.

¹⁶¹ 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 (2000); Theo G. Standfort, Ron de Graaf, Rob V. Bijl, & Paul Schnabel, *Same Sex Sexual Behavior and Psychiatric Disorders*, 58 ARCHIVES OF GENERAL PSYCHIATRY 85 (2001).

¹⁶² 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.”).

¹⁶³ Lock & Steiner, *supra* note 100, at 297.

studies that have looked at this issue, most found that between 30 to 50% of LGBT youth have attempted suicide, generally within the past year and with several attempts.¹⁶⁴ Furthermore, a 1989 report by the U.S. Department of Health and Human Services found that, among all adolescent suicides, 30% were committed by LGBT youth.¹⁶⁵ Although alarming, these findings are consistent with the sociological theory of suicide, which posits that “one of the main reasons people kill themselves is a lack of integration into the dominant culture.”¹⁶⁶ 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.”¹⁶⁷

Furthermore, suicidal tendencies among LGBT youth are particularly hard to combat given that studies find that, like many other Americans, a large number of psychologists and social workers hold homophobic and heterosexist views.¹⁶⁸ Furthermore, many such health professionals simply lack the required knowledge to deal with LGBT youth. As one psychologist notes:

[I]n mental health care providers, there is a demonstrated lack of knowledge about GLB [Gay, Lesbian and Bisexual] issues and life-styles, differential assessment and treatment of clients based on sexual orientation, a lack of awareness of oppression as it relates to GLB clients, and the pathologizing and denigration of GLB person simply because of their sexual orientation.¹⁶⁹

Finally, the rate of suicide among LGBT youth is further compounded by the fact that many who are at risk are unlikely to

¹⁶⁴ See, 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%.”).

¹⁶⁵ See, Paul Gibson, *Gay and Lesbian Youth Suicide*, in 3 U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES YOUTH SUICIDE REPORT 110-42 (1989).

¹⁶⁶ Morrison & L’Heureux, *supra* note 154, at 39.

¹⁶⁷ “Gary, 17,” in TWO TEENAGERS IN 20 73 (Ann Heron ed, 1994).

¹⁶⁸ See, Morrison & L’Heureux, *supra* note 154, at 43.

¹⁶⁹ *Id.*

even seek help. As Pediatrician Gary Remafedi notes, “youth that are at the greatest risk for suicide are the ones who are the least likely to reveal their sexual orientation to anyone.”¹⁷⁰ According to Dr. Remafedi, “[s]uicide may be the way of being sure that no one ever knows.”¹⁷¹

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

As noted earlier, sexual activity among all adolescents, whether homosexual or heterosexual, is relatively common.¹⁷² Furthermore, few would deny that all teens, regardless of whether they are acting upon them, experience sexual desires. Accordingly, given these adolescent propensities as well as 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.”¹⁷³ One of the primary ways in which legislatures attempt to accomplish this goal is through statutory rape laws.

In essence, statutory rape laws criminalize sexual activity with a child who is below the statutorily defined age of consent.¹⁷⁴ 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.¹⁷⁵ As a result, in most instances,¹⁷⁶ engaging in a sexual act with someone below the age of consent is a criminal act, given that the child was incapable of legally consenting.¹⁷⁷ As one

¹⁷⁰ Chris Bull, *Suicidal Tendencies: Is Anguish over Sexual Orientation Causing Gay and Lesbian Teens to Kill Themselves?*, THE ADVOCATE, Apr. 5, 1994, at 38.

¹⁷¹ *Id.*

¹⁷² See, *supra* Section II.B.

¹⁷³ CAROLYN E. COCCA, *JAILBAIT: THE POLITICS OF STATUTORY RAPE LAWS IN THE UNITED STATES 2* (2004).

¹⁷⁴ MADDEX, *supra* note 92, at 274-75.

¹⁷⁵ *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 prescribed by statute and who is therefore presumed to be incapable of consenting to sexual activity.”).

¹⁷⁶ One notable exception is when the the two parties are married. 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 (1997).

¹⁷⁷ MADDEX, *supra* note 92, at 275.

commentator states: “The law conceives as 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.”¹⁷⁸ In most states, the offense of statutory rape is a felony.

At one point, most statutory rape laws criminalized, at the felony level, all sexual activity with a person under the age of consent regardless of the age of the “perpetrator.”¹⁷⁹ 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.”¹⁸⁰ However, recognizing that sexual experimentation with peers is relatively common during adolescence, many states today have enacted, what are referred to as, “Romeo and Juliet” laws, which provide for either a mitigated penalty or complete exculpation when both actors are close in years yet one party is below the age of consent.¹⁸¹ 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,

¹⁷⁸ 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 173, at 11 (“The idea behind such laws at the time was less about the ability or lack thereof to consent to such activity of the part of the female, and more about protecting white females and their premarital chastity – a commodity – as property.”).

¹⁷⁹ COCCA, *supra* note 173, at 29.

¹⁸⁰ *Id.*

¹⁸¹ See Shulamit H. Shvartsman, “Romeo and Juliet”: An Examination of *Limon v. Kansas* in Light of *Lawrence v. Texas*, 35 SETON HALL L. REV. 359, 361 (2004). This change in the law was largely the result of feminist lobbying efforts during the 1970s and 80’s. See, COCCA, *supra* note 173, 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.”).

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.¹⁸²

Of course, this is not to suggest that all states freely permit sexual acts between older adolescents and those 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.¹⁸³ 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.¹⁸⁴

Now, in looking at the various incarnations of Romeo and Juliet laws as they exist in different states, most of these laws are applicable to both heterosexual and homosexual couplings. 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 states follow a much different approach. These states are Texas, Alabama, and California.

1. 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.”¹⁸⁵ Anyone who violates this provision is guilty of “a felony of the second degree.”¹⁸⁶ The penalty for such a felony is imprisonment for at least two years and no more than twenty.¹⁸⁷ In addition, anyone convicted can be fined up to \$10,000.¹⁸⁸ Finally, those guilty of violating the Texas statute are required by state law to register as a convicted sex offender.¹⁸⁹

¹⁸² COCCA, *supra* note 173, at 29.

¹⁸³ *Id.* at 34.

¹⁸⁴ *See, e.g., infra* notes 189, 197 & 203 and accompanying text.

¹⁸⁵ TEX. PENAL CODE ANN. § 21.11(a) (Vernon 2001).

¹⁸⁶ *Id.* at . § 21.11(c).

¹⁸⁷ TEX. PENAL CODE ANN. § 12.33(a).

¹⁸⁸ *Id.* at § 12.33(b).

¹⁸⁹ 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

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*.”¹⁹⁰ Thus, under this statute, an eighteen year-old male who has consensual sex with a sixteen year-old would be guilty of a felony if the sixteen year-old were male but no crime whatsoever if the sixteen year-old were female.

2. 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.”¹⁹¹ Alabama law provides the following definition for “sexual intercourse”: “Such term has its ordinary meaning and occurs upon any penetration, however slight; emission is not required.”¹⁹² 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.”¹⁹³ 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.”¹⁹⁴ Both crimes are considered class B felonies, the commission of which requires at least a two year and up to a twenty year sentence.¹⁹⁵ In addition, anyone convicted may be fined up to \$30,000.¹⁹⁶ Finally, state law requires any defendant convicted of either crime to register as a sex offender.¹⁹⁷

conviction of statutory rape can petition “for an order exempting the person from registration.” *See, Id.* at 62.301. However, the court is only required to grant such a petition if proven, by a preponderance of the evidence, that such an exemption would not “threaten public safety.” *Id.* at 62.301 (d)(1). Not only does this rather loose standard provide judges with quite a bit of 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.

¹⁹⁰ TEX. PENAL CODE ANN. § 21.11(b).

¹⁹¹ ALA. CODE § 13A-6-62 (1975).

¹⁹² ALA. CODE § 13A-6-60(1) (1975).

¹⁹³ ALA. CODE § 13A-6-64 (1975).

¹⁹⁴ ALA. CODE § 13A-6-60(2) (1975).

¹⁹⁵ ALA. CODE § 13A-5-6(a)(2) (1975).

¹⁹⁶ ALA. CODE § 13A-5-11(a)(2) (1975).

¹⁹⁷ ALA. CODE § 13A-11-200 (1975).

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 liable unless “the actor is at least two years older than the member of the opposite sex.”¹⁹⁸ 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. Thus, although the Alabama statutes are not as explicit as the Texas’ statutes in limiting the Romeo and Juliet exception to heterosexual activity, the rigid definitions of “intercourse” versus “sodomy” in the Alabama scheme, along with the lack of any Romeo and Juliet exception for the latter, essentially operates the same as the Texas statute, imposing a much a harsher penalty on adolescents who engage in homosexual acts than those who engage in heterosexual acts.

3. 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.”¹⁹⁹ This is a reduced penalty given that if there age difference were more than three year the perpetrator could face a felony conviction.²⁰⁰ In contrast, however, 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.”²⁰¹ 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.”²⁰²

¹⁹⁸ ALA. CODE § 13A-6-62 (1975).

¹⁹⁹ CAL. PENAL CODE § 261.5(b) (West 2000).

²⁰⁰ CAL. PENAL CODE § 261.5(c) (West 2007).

²⁰¹ CAL. PENAL CODE § 286(b)(1) (West 2007).

²⁰² CAL. PENAL CODE § 286(a) (West 2007).

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.”²⁰³ 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.”²⁰⁴

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

As outlined in Section II, within American culture and society, GLBT adolescents are an extremely stigmatized and bullied group.²⁰⁵ Again, for these teens, much of that stigma arises and is perpetuated within the home and school.²⁰⁶ Of course, sociologists have noted that stigma can arise from a number of sources, including, in addition to school and home, religion and the media.²⁰⁷

Furthermore, as many commentators have noted, the law is also one of the forces behind the social construction of stigma.²⁰⁸ As Professor Thomas Healy has described: “[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.”²⁰⁹

To see this principle in play, one need only consider the states discussed in Section III, *infra*, that have added discriminatory Romeo and Juliet provisions to their statutory rape laws. In so doing, those states have not only contributed to the stigma felt by

²⁰³ See, CAL. PENAL CODE § 2910(b) (West 2007).

²⁰⁴ See, CAL. PENAL CODE § 290.006 (West 2007).

²⁰⁵ See, *supra* Section II.C.

²⁰⁶ See, *supra* Section II.C.1 & II.C.2.

²⁰⁷ See, Thomas Healy, *Stigmatic Harm and Standing*, 92 IOWA L. REV. 417, 450-51 (“[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.”).

²⁰⁸ See, e.g., 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 (2000); Scott Burris, *Disease Stigma in U.S. Public Health Law*, 30 J.L. MED. & ETHICS 179 (2002).

²⁰⁹ Healy, *supra* note 207, at 451.

LGBT adolescents but have added a legal stamp of approval to this discrimination and stigma. As detailed in this Section, these statutes are not only stigmatizing and cruel but, under the Fourteenth Amendment, unconstitutional as well.

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

“The concept of stigma is at the heart of equal protection analysis.”²¹⁰ Nowhere has the Supreme Court been more explicit on this point than in the case of *Brown v. Board of Education*.²¹¹

In *Brown*, the court was presented with 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?”²¹² 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.”²¹³ In support of its holding and rationale, the Court relied on the earlier case of *Sweatt v. Painter*, which set forth the following observations about the Equal Protection Clause:

The words of the amendment, 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

²¹⁰ 2 RODNEY A. SMOLLA, SMOLLA & NIMMER ON FREE SPEECH § 17:38 (2007).

²¹¹ 347 U.S. 483 (1954).

²¹² *Id.* at 493.

²¹³ *Id.* at 494.

condition of a subject race.²¹⁴

Of course, *Brown* dealt with racial discrimination, which is subject to strict scrutiny, the most searching form of review that a federal court will apply to an alleged violation of the Equal Protection Clause.²¹⁵ Nonetheless, it is important to note that the court has never confined its consideration of stigmatizing harm to cases involving strict scrutiny. In fact, the court has looked at stigma, and invalidated laws on that basis, even when applying rational basis, the least searching form of judicial review under the Equal Protection Clause.²¹⁶

However, the rational basis I refer to is not the traditional form of rational basis, which allows all governmental action so long as “the classification drawn by the statute is rationally related to a legitimate state interest.”²¹⁷ 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 conceivable state of facts that could provide a rational basis for the classification.²¹⁸

Looking at this language, it would be difficult to imagine a law

²¹⁴ *Id.* at 492 (quoting, *Strauder v. West Virginia*, 100 U.S. 303, 307-08 (1880)).

²¹⁵ *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.”

²¹⁶ *See*, *Regan v. Taxation with Representation*, 461 U.S. 540, 548 (1997) (classifications reviewed under rational basis are presumptively valid unless “the one attacking the legislative arrangement [negates] every conceivable basis which might support it”).

²¹⁷ *See*, *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985)

²¹⁸ *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993)

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, all the while adhering to the term “rational basis.” Professor Gerald Gunther referred to this level of review as rationality “with bite.”²¹⁹ As Gunther explained, the Court, even when unwilling to employ strict or intermediate level scrutiny, has sometimes used rational basis “plus” as an “interventionist tool” to strike laws that the Court feels are unfair or unjust.²²⁰

To be more specific, all laws, of course, discriminate to some extent.²²¹ For example, speed limits discriminate against individuals who like to drive at excessive speeds. The Equal Protection Clause, however, is not concerned with such discrimination but is instead designed to protect against discrimination that is deemed invidious. Although the Court has never specifically defined what is meant by “invidious,”²²² the term generally refers to “any systematic or purposeful deprivation, marked by ill will, of identifiable segments of our population of valuable goods and opportunities.”²²³ When confronted with invidious discrimination, even when such discrimination is targeted at groups not part of a suspect or quasi-suspect class, the Court has nonetheless employed rational basis plus review to strike down the governmental action at issue.

Furthermore, in applying this heightened version of rational basis review, the Court, given the lack of any explicit test for determining when state action equals invidious discrimination, has frequently looked to the stigma that results from the state action as a proxy for determining when such action violates the Fourteenth Amendment. Indeed, as noted by Professor Peter Bayer, the Court has routinely found government action to be irrational when that

²¹⁹ Gerald Gunther, *The Supreme Court, 1971 Term – Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 9 (1972).

²²⁰ *Id.*

²²¹ See, *Romer v. Evans*, 517 U.S. 620 (1996) (noting that “most legislation classifies for one purpose or another, with resulting disadvantages to various groups or persons”).

²²² 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 & 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.”).

²²³ George Gray, *Benign Preference as a Course to Equality: Its Morality, Efficacy and Constitutionality*, 30 HOW. L.J. 807, 808-09 (1987).

action “is designed primarily to inflict harm or otherwise disadvantage a politically weak group.”²²⁴

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 noted, “[f]or 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.”²²⁵ The policy behind the Court’s concern is that it is the “politically disenfranchised and socially marginalized [that] are more vulnerable to the majoritarian tyranny against which equal protection guards.”²²⁶ 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*, 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.²²⁷ In so ruling, the Court essentially affirmed the earlier judgment of the Fifth Circuit Court of Appeals. However, the Court disagreed with the Fifth Circuit’s ruling that governmental action directed at the mentally retarded was subject to heightened scrutiny.²²⁸ 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.²²⁹ 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

²²⁴ 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).

²²⁵ *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”].

²²⁶ *Id.* at 2742 (citing *Plyler v. Doe*, 457 U.S. 202 (1982)).

²²⁷ 473 U.S. 432 (1985).

²²⁸ *Id.* at 442-43.

²²⁹ *Id.* at 444.

unprotected from invidious discrimination.”²³⁰ 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.”²³¹ 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 homes, 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.”²³²

Next, in *Plyler v. Doe*, the Court struck down a state statute that denied public education to the children of illegal immigrants.²³³ As an initial matter, the court found that illegal immigrants, similar to the mentally retarded in *Cleburne*, do not constitute a suspect class.²³⁴ In so holding, the Court noted that undocumented status is not an immutable characteristic given that “it is the product of conscious, indeed, unlawful action.”²³⁵ Nonetheless, the Court found that the governmental action here 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

²³⁰ *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.”).

²³¹ *Id.* at 448.

²³² *Id.* at 448.

²³³ 457 U.S. 202 (1982).

²³⁴ *Id.* at 219, fn19 (“We reject the claim that ‘illegal aliens’ are a ‘suspect class.’”).

²³⁵ *Id.* at 220.

basis of a legal characteristic over which children can have little control.”²³⁶

Nonetheless, even after drawing this distinction between illegal immigrants and their children, the Court still applied rational basis scrutiny.²³⁷ Even so, however, the Court ultimately struck down the legislation given the stigma this legislation 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.”²³⁸ Furthermore, in so ruling, the Court was unwilling to give automatic deference to any colorable basis that the state might put forward 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.”²³⁹ 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.”²⁴⁰

Finally, the Court has also applied this more searching form of rational basis to laws that adversely impact homosexuals. Specifically, in *Romer v. Evans*, the Court struck down an amendment to the Colorado Constitution which prevented homosexuals from being included in any state anti-discrimination laws.²⁴¹ In 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

²³⁶ *Id.*

²³⁷ *Id.* (“It is thus difficult to conceive of a rational justification for penalizing these children for their presence within the United States.”).

²³⁸ *Id.* at 223 (noting that this case involved more than merely whether the state action “discriminates against a suspect class or whether education is a fundamental right”).

²³⁹ *Id.* at 223-24.

²⁴⁰ *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 those children, the State, and the Nation.” *Id.*

²⁴¹ 517 U.S. 620 (1996).

these laws and policies.”²⁴²

Unlike it did in *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.²⁴³ Specifically, the Court invalidated the Colorado amendment on two grounds. First, the Court noted that the amendment “imposes a special disability upon [homosexuals] alone”²⁴⁴:

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.”²⁴⁵

Second, the Court ruled that the amendment also failed rational basis review given that the amendment’s “sheer breadth is so discontinuous with the reasons offered for that the amendment seems inexplicable by anything but animus toward the class it affects.”²⁴⁶ 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 upon them immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for

²⁴² *Id.* at 627.

²⁴³ *Id.* at 632.

²⁴⁴ *Id.* at 631.

²⁴⁵ *Id.* at 633 (quoting, *Sweatt v. Painter*, 339 U.S. 629, 635 (1950)).

²⁴⁶ *Id.* at 632.

it.²⁴⁷

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.”²⁴⁸

Of course, our understanding of the Equal Protection Clause as it applies to homosexuals cannot rest entirely on *Romer* but must also take into account the Court’s decision in *Lawrence v. Texas*, which invalidated Texas’ anti-sodomy statute, which criminalized homosexual but not heterosexual sodomy.²⁴⁹ Although the majority in *Lawrence* based its decision on substantive due process grounds, *Lawrence* nonetheless helps inform the equal protection analysis that attaches 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.”²⁵⁰ In fact, one commentator has described Justice Kennedy’s majority opinion as seemingly using “rational basis on steroids for analyzing a substantive due process claim.”²⁵¹ In applying this standard, the Court invalidated the state statute, as well as anti-sodomy statutes nationwide, on the basis that the “State cannot demean [homosexuals’] existence or control their destiny by making their private sexual conduct a crime.”²⁵²

Justice O’Connor concurred in the judgment but noted that she would have decided the case using, not the due process clause of the Fourteenth Amendment, but the Equal Protection Clause.²⁵³ 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.”²⁵⁴ Given the stigmatizing impact this statute imposed on homosexuals, Justice O’Connor, relying on *Plyler v. Doe*, saw no

²⁴⁷ *Id.* at 635.

²⁴⁸ *Id.*

²⁴⁹ 539 U.S. 558 (2003).

²⁵⁰ *Id.* at 575.

²⁵¹ See, Nan D. Hunter, *Living with Lawrence*, 88 MINN. L. REV. 1103, 1129 (2004).

²⁵² *Lawrence*, 539 U.S. at 578.

²⁵³ *Id.* at 579.

²⁵⁴ *Id.* at 581.

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.”²⁵⁵ 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.”²⁵⁶ Furthermore, Justice O’Connor saw no saving grace in the fact that Texas’ 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.”²⁵⁷

Although the majority, again, decided the case on the basis of substantive due process and not equal protection grounds, the majority nonetheless declared O’Connor’s approach to be “a tenable argument.”²⁵⁸

Finally, both the majority opinion and O’Connor’s concurrence relied in part on the fact that a violation of the Texas statute resulting not only in a criminal conviction but had collateral impacts such as disqualifying a convicted individual from entering certain professions and also requiring that person to register as a sex offender in both Texas as well as in other states, should a convicted individual choose to relocate.²⁵⁹

²⁵⁵ *Id.* at 584.

²⁵⁶ *Id.*; As Professor Hunter points out, the state, in *Romer*, “did not claim morality as a state interest” to justify the state’s action and, thus, “the Court had no occasion to declare whether morality could comprise a proper basis for such a law.” Hunter, *supra* note 251, at 1129.

²⁵⁷ *Lawrence*, 539 U.S. at 583 (quoting, *Romer v. Evans*, 517 U.S. 620, 641 (Scalia, J., dissenting)).

²⁵⁸ *Id.* at 574.

²⁵⁹ *Id.* at 575, 581.

*B. Discriminatory Romeo and Juliet Exceptions:
Invidious, Cruel and, thus, 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 GLBT adolescents “belong to at least two politically powerless groups, children and homosexuals.” As a result, it seems quite evident that the “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.”²⁶⁰ Furthermore, as evidenced by *Plyler* and *Romer/Lawrence*, the Court has already applied this level of review to state actions directed at children and homosexuals, respectively.²⁶¹

However, LGBT teens are likely even more deserving of rational basis plus given that LGBT teens are BOTH homosexual and children. Thus, LGBT youth experience the political isolation of children on top of the political isolation homosexuals, as a class, already experience. Furthermore, as noted earlier, LGBT youth are considered one of the most isolated and invisible minorities within the United States.²⁶² 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 lack any such access to the democratic process.

Because of this greater level of political isolation, one could certainly argue that laws directed at LGBT youth deserve a higher level of scrutiny beyond even rational basis plus. However, it is the position of this Article, that a Court would need not reach this issue given that “rationality with bite,” as the Supreme Court has defined and applied the term, is more than sufficient to invalidate laws, like the Romeo and Juliet exceptions identified earlier, which discriminate between homosexual and heterosexual youth.

Specifically, what one can seemingly glean from *Cleyburne*,

²⁶⁰ Hunter, *supra* note 251, at 1131.

²⁶¹ See, *supra* notes 233-259 and accompanying text.

²⁶² See, *supra* notes 117-120 and accompanying text.

Plyler and *Romer/Lawrence*, is that the government is constitutionally prohibited from attempting to “make members of a particular group second-class citizens even when that group is not considered a suspect classification”²⁶³ if the benefits of the governmental action are outweighed by the harm inflicted on the affected group. Although this approach was most explicitly put forth in *Plyler* when the Court 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,”²⁶⁴ as explained above, the Court nonetheless followed this same principle in both *Cleyburne* and *Romer* as it weighed the government’s purported interest against the resulting stigmatic harm on the targeted groups.²⁶⁵

Thus, with this understanding that discriminatory Romeo and Juliet exceptions would most likely be subject to a higher level of rational basis review, it then becomes necessary to first look at the states’ expected justifications for drawing distinctions between homosexual and heterosexual teenage activity and then compare that to the harm these laws inflict upon LGBT youth.

1. State Justifications for Criminalizing LGBT Sexuality

Interestingly, the legislative histories behind discriminatory Romeo and Juliet exceptions fail to shed light on why the legislatures in those states thought sexual acts between adolescents of the same sex warranted harsher penalties than similar acts between adolescents of the opposite sex.²⁶⁶ However, these omissions are not surprising given that legislatures are rarely explicit when enacting legislation that discriminates against an unpopular group.²⁶⁷ Fortunately for our purposes, however, the Supreme Court of Kansas has already struck down its state’s discriminatory Romeo and Juliet provision on equal protection

²⁶³ Diana Hasse, *The Use of Criminal Sodomy Laws in Civil Litigation*, 79 TEX. L. REV. 813, 826 (2001).

²⁶⁴ *Plyler v. Doe*, 457 U.S. 202, 224 (1982).

²⁶⁵ See, *supra* notes 227-232 & 241-248 and accompanying text.

²⁶⁶ See, e.g., *State v. Limon*, 122 P.2d 22, 33 (Kan. 2005) (concluding, after a review of the relevant legislative history that “there is nothing in the legislative record regarding the legislative purpose for adding the opposite sex requirement”).

²⁶⁷ 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.”).

grounds and, through that litigation, the state was forced to “show its cards” and, thus, delineate its reasons for discriminating between homosexual and heterosexual adolescents.²⁶⁸ However, before moving on to Kansas’ purported justifications for such a statute, some background on the case is necessary.

In *State v. Limon*, Matthew Limon had been 18 years-old for one week when he engaged in consensual oral sex with M.A.R., who turned 15 in the month following the encounter.²⁶⁹ In Kansas, the Romeo and Juliet statute allowed for a much reduced penalty for violating the statutory rape laws provided that (1) the victim was 14 or 15 years of age; (2) the defendant was both less than 19 years of age and less than four years older than the victim; (3) the victim and the defendant are the only ones involved in the sexual act; and (4) the victim and the defendant are of the opposite sex.²⁷⁰ 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.²⁷¹ However, Limon did not qualify for the Romeo and Juliet statute solely because he and M.A.R. were both male. Accordingly, Limon was convicted and sentenced to over seventeen years (206 months) in prison, followed by five years of post-release supervision, and was required to register as a persistent sexual offender.²⁷²

After being convicted and sentenced, Limon appealed to the Kansas Court of Appeals. However, in its 2002 opinion,²⁷³ the court affirmed the conviction relying on the U.S. Supreme Court’s decision in *Bowers v. Hardwick*.²⁷⁴ 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.²⁷⁵ The day after it issued *Lawrence v. Texas*, 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*.²⁷⁶ In a “fractured” opinion, the Kansas Court of Appeals again affirmed Limon’s

²⁶⁸ See, *Limon*, 122 P.2d 22.

²⁶⁹ *Id.* at 24.

²⁷⁰ *Id.*

²⁷¹ *Id.* at 25.

²⁷² *Id.*

²⁷³ *State v. Limon*, 41 P.3d 303 (2002), *rev. denied* 274 Kan. 1116 (2002).

²⁷⁴ 478 U.S. 186 (1986).

²⁷⁵ *Limon*, 122 P.3d at 25.

²⁷⁶ *Limon v. Kansas*, 539 U.S. 955 (2003).

conviction and sentence, distinguishing *Lawrence* on the grounds that the latter 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.²⁷⁷ 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 that required that the defendant and the victim be of the opposite sex, gave 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 the potential state rationales that had been posited by the Kansas Court of Appeals.²⁷⁸ The list of plausible state interests was as follows:

(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 procreation.²⁷⁹

As the Kansas Supreme Court correctly found, the first potential justification, i.e., sexual morality, is also 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.'"²⁸⁰ Furthermore, this same principle can be found in the majority opinion in *Lawrence* where the Court discussed its rationale for overruling *Bowers v. Hardwick*:

[T]he Court in *Bowers* were making the broader point that for centuries there have been powerful

²⁷⁷ State v. Limon, 83 P.3d 229 (2004); see also, Limon, 122 P.3d at 26 (describing the Court of Appeals' decision as "fractured" given that each member of the three judge panel filed a separate opinion).

²⁷⁸ *Id.* at 33.

²⁷⁹ *Id.* at 33-34.

²⁸⁰ 539 U.S. 558, 583 (2003).

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 us.²⁸¹

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) 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, there are numerous studies indicating that sexual orientation is acquired long before adolescence and that sexual experiences during adolescence are quite independent of a person’s ultimate sexual orientation.²⁸² In fact, it was because of such research that the Kansas Supreme Court rejected this purported state interest.²⁸³ “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.”²⁸⁴

Third, in addressing the states’ purported concern with “the coercive effect often existing in a relationship between adult and child,” the Kansas Supreme Court found that such a rationale would undermine the whole point behind the Romeo and Juliet exception:

²⁸¹ *Id.* at 571.

²⁸² *See, supra* notes 106-109 and accompanying text.

²⁸³ *Limon*, 122 P.3d at 35 (pointing out one of the amicus briefs filed in the case which “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”).

²⁸⁴ *Id.*

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 than 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.²⁸⁵

In light of that motivating policy, the Kansas Supreme Court found no rational basis to distinguish between a class of those 18 years old and younger who engage in voluntary, heterosexual activity with minors aged 14 or 15 and a class of those 18 years old and younger who engage in voluntary, homosexual activity with such minors.²⁸⁶ "We see no basis to determine that as a class one group or the other would have a higher tendency to be coercive. A distinction on that basis has no factual support."²⁸⁷

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."²⁸⁸ Specifically, in putting forth this potential state interest, the state appeared to be talking about its concern over the spread of HIV.²⁸⁹ 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.²⁹⁰ Second, an adolescent involved in oral sex, i.e., the activity that resulted in Limon's arrest, has a "near-zero chance of acquiring the HIV infection."²⁹¹ Finally, the Kansas court cited to one of the dissenting judges from the Kansas Court of Appeals whose dissent demonstrated the faulty logic behind a "public health" justification:

[U]nder the law a female infected with every

²⁸⁵ *Id.* at 36.

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ *Id.* at 37.

²⁸⁹ *Id.* at 36.

²⁹⁰ *Id.* at 37 (relying on statistics from the United States Centers for Disease Control and Prevention).

²⁹¹ *Id.*

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 present will receive a much heavier sentence. Perversely, under the law, a male with venereal disease who infects and impregnates an underage female will also receive a much lighter sentence.²⁹²

As a result, the Kansas Supreme Court held that the “statute’s superficial earmarks as a health measure” fail the rational basis test.²⁹³

Finally, the Kansas 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 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.”²⁹⁴ However, such a concern would not apply to homosexual pairings as such activity cannot result in pregnancy. The Kansas Supreme Court, however, 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 which does not result in pregnancy.”²⁹⁵

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 and, thus, *State v. Limon* is a helpful case for understanding those potential arguments and their inherent weaknesses.

²⁹² *Id.* (quoting, *Limon*, 83 P.3d 229 (Pierron, J., dissenting)).

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ *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.*

2. Stigmatic Harm to LGBT Youth

In employing rational basis plus scrutiny, the Supreme Court has made clear that any weight given to the state's purported justifications will be diminished by the corresponding harm to the target group. Despite the thorough job that the Supreme Court of Kansas did in fleshing out all the potential colorable state interests underlying the state's discriminatory Romeo and Juliet provision, what the court failed to do was fully consider the stigmatic impact such laws have on LGBT adolescents.

Given that it is the potential for the harm to the targeted group that underlies the more searching form of rational basis, it is important to fully understand just how harmful these laws are to GLBT adolescents. Furthermore, 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 caused by those statutes will guide future courts which are 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.

As an initial matter, it is important to understand that these 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 noted, "unenforced sodomy laws are the chief symptomatic way that society as a whole tells gays they are scum."²⁹⁶ As Professor Christopher R. Leslie described when writing about the injuries that are caused by unenforced sodomy laws:

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 morality by passing laws and perpetuate

²⁹⁶ Richard D. Mohr, *Mr. Justice Douglas at Sodom: Gays and Privacy*, 18 COLUM. HUM. RTS. L. REV. 43, 53 (1986).

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.²⁹⁷

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.”²⁹⁸

Although the sodomy statutes to which Professor Leslie referred are now extinct thanks to *Lawrence v. Texas*, these same arguments exist as to those states that maintain 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 below the age of consent yet it no offense whatsoever (or, in California, merely a misdemeanor), to do the exact same thing with someone of the opposite sex.²⁹⁹

Furthermore, these consequences flow not only to those who may violate those laws but 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, “its

²⁹⁷ Leslie, *supra* note 2, at 114.

²⁹⁸ *Id.* at 110.

²⁹⁹ 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 placed the Romeo and Juliet exception in the statute relating to “sexual intercourse” with someone below the age of consent, yet left 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* Section III.

As O'Conner 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' sodomy law is targeted at more than conduct. It is instead directed toward gay persons as a class.” *Lawrence*, 539 U.S. at 583.

continuance as precedent demeans the lives of homosexual persons.”³⁰⁰

In many ways, however, 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.³⁰¹ Thus, given that, for most LGBT teens, adolescence is a time of severe conflict and self-doubt,³⁰² laws that criminalize sex between two teens of the same gender but not sex between two teens of the opposite gender, can only exacerbate the psychological problems already experienced by a number of LGBT adolescents.³⁰³ Second, the existence of such statutes may also, in fact, increase the incidence of violence targeted at LGBT youth. Finally, those adolescents convicted under these discriminatory statutes will continue to face stigma throughout their lives in a number of contexts given the collateral consequences that arise from being convicted as a statutory rapist.

a. Psychological Harm

In describing how sodomy laws, even when unenforced, inhibited sound emotional and mental development among homosexuals, Professor Leslie identified three ways, all of which 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.”³⁰⁴ As indicated earlier, internalized homophobia and feelings of isolation are fairly common among LGBT youth and it is these feelings that are often to blame for many of the tragic endings that befall these adolescents.³⁰⁵ Thus, discriminatory Romeo and Juliet provisions, are only likely to increase the incidence of such harm. This is because, given that the state now cannot apply such laws to adult

³⁰⁰ *Lawrence*, 539 U.S. at 575.

³⁰¹ *See, supra* Section II.A.2 – Section II.A.3.

³⁰² *Id.*

³⁰³ *See, supra* Section II.C.3.

³⁰⁴ Leslie, *supra* note 2, at 117.

³⁰⁵ *See, supra* notes 163-171 and accompanying text.

homosexuals, LGBT adolescents, many of whom are already extremely isolated in their home and school environments,³⁰⁶ are then also 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.”³⁰⁷ As the American Psychological Association and the American Public Health Association argued in *Bowers v. Hardwick*, “research 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.”³⁰⁸ Of course, if taken to an extreme, this rationale could be used to make the argument that states should never be allowed to criminalize sexual activity between adolescents, even if one is below the age of consent. However, the point here is merely that those states that continue to adhere to discriminatory Romeo and Juliet provisions are effectively permitting heterosexual teens to obtain the developmental and psychological benefit that is associated with sexual expression yet, at the same time, are 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.’”³⁰⁹

Finally, many health experts believe that the existence of these laws could discourage someone in need 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.³¹⁰ Such potentiality is not to be taken lightly given, again, the high susceptibility that LGBT adolescents have to psychological disorders and the tragic consequences that those

³⁰⁶ See, *supra* Section II.C.1 – Section II.C.2.

³⁰⁷ Leslie, *supra* note 2, at 119.

³⁰⁸ Brief of Amici Curie Psychological Association and the American Public Health Association in Support of Respondents at 7, *Bowers v. Hardwick*, (No. 85-140) (U.S. January 31, 1986) (Westlaw, U.S. Supreme Court Briefs).

³⁰⁹ Leslie, *supra* note 2, at 120.

³¹⁰ See, e.g., Louis B. Schwartz, *Morals, Offenses, and the Model Penal Code*, 63 COLUM. L. REV. 669, 676 (1963).

disorders may produce.³¹¹ Instead, states should be doing all they can to make it more likely that LGBT adolescents in need 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.³¹² However, as one commentator has noted “the criminalization of homosexual sodomy and crimes of homophobic violence mutually reinforce one another.”³¹³ Additionally, even non-criminal laws directed at homosexuals may translate into an increase in violence towards homosexuals. For example, after Colorado passed Amendment Two, i.e., the amendment struck down in *Romer*, reports of violence in Colorado against gays and lesbians tripled.³¹⁴

In fact, some commentators have noted that “gay bashers” may even use the existence of such laws as justification for their acts of violence. As Professor Kendall Thomas notes, “homosexual 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.”³¹⁵ 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.”³¹⁶

Thus, states that continue to perpetuate discriminatory Romeo and Juliet exceptions could, in effect, only enhance the risk of anti-gay violence that LGBT teens already face. Furthermore, given the attention that the national media typically devotes to statutory

³¹¹ See, *supra* Section II.C.3.

³¹² See, *supra* Section II.C.

³¹³ See, Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431, 1490 (1992).

³¹⁴ See, e.g., Charlene L. Smith, *Undo Two: An Essay Regarding Colorado’s Anti-Lesbian and Gay Amendment*, 32 WASHBURN L.J. 367, 369 (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.”).

³¹⁵ Thomas, *supra* note 313, at 1485-86.

³¹⁶ Leslie, *supra* note 2, at 124-25. Additionally, it has been estimated that 80% of violent crime directed at the LGBT population goes unreported. See, Thomas, *supra* note 313, at 1464.

rape cases,³¹⁷ 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 even enforced.³¹⁸ Furthermore, these consequences flow not only to those who may violate those laws but the entire LGBT adolescent community nationwide. However, for those adolescents who are convicted under discriminatory statutory rape laws, they face a whole host of additional penalties beyond just the disproportionately greater criminal sentence that accompanies these crimes. 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, moreover, is not trivial.”³¹⁹

One of the most obvious collateral consequences that befalls those adolescents convicted for statutory rape (and who fail to qualify for the Romeo and Juliet exception given the gender of their “victim”) is the fact that those individuals are required to register as convicted sex offenders with all the resulting penalties that registration brings.³²⁰ A number of commentators have criticized state statutes that require registration as a sex offender.³²¹ 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

³¹⁷ See, e.g., Levine, *supra* note 90, at 69-70 (Detailing a 1997 incident where a 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”)

³¹⁸ See, *supra* notes 296-298 and accompanying text.

³¹⁹ *Lawrence*, 539 U.S. at 575.

³²⁰ See, *supra* note 184 and accompanying text.

³²¹ See, e.g., *Making Outcasts*, *supra* note 225; Catherine L. Carpenter, *The Constitutionality of Strict Liability in Sex Offender Registration Laws*, 86 B.U. L. REV. 295 (2006); Britton Guerrina, *Mitigating Punishment for Statutory Rape*, 65 U. CHI. L. REV. 1251, 1255 (1998).

immediately inspire caution given that they require individuals who are not even adults to register as a sex offender. This punishment is a particularly cruel punishment to impose on juveniles given that, because of their youth, they may be less equipped to deal with the public disclosure that automatically accompanies sex offender registration.³²² For LGBT adolescents, this concern is particularly acute given that, as noted earlier, it is those adolescents who are least likely to reveal their sexual orientation to others that are the most likely to attempt suicide.³²³

Second, the requirement that the convicted teen register as a sex offender goes well-beyond the state where the “crime” was convicted. Indeed, a LGBT teen convicted of statutory rape in Texas, Alabama or California would not only have to register as a sex offender in her respective state but also in a number of other states simply by virtue of the conviction in the original state.³²⁴ Of course, adolescents who commit statutory rape but qualify for their state’s Romeo and Juliet exception are spared this indignity. Again, however, when the sexual act was with someone of the same gender, Texas, Alabama and California are not so kind.

Aside from being required 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 looked at how violations of state sodomy laws can subsequently come back 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

³²² See, generally, Suzanne Meiners-Levy, *Challenging the Prosecution of Young “Sex Offenders”*: How Developmental Psychology and the Lessons of Roper Should Inform Daily Practice, 79 TEMPLE L. REV. 499 (2006).

³²³ See, *supra* note 170 and accompanying text.

³²⁴ 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 in their previous domicile. See, *supra* note 259 and accompanying text.

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 laws made him morally unfit.³²⁵

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 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."³²⁶ 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.

Thus, in those states with discriminatory Romeo and Juliet provisions, an older adolescent who commits a 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.³²⁷ 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 2 and 20 years in prison, and must register as a convicted sex offender, with the attendant penalties associated with registration.³²⁸

Furthermore, regardless of how gender neutral these states may attempt to write these discriminatory provisions, it is clear that those most adversely affected such statutes are LGBT adolescents, which are 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 has described gay and lesbian youth as "the most invisible and outcast group of young people with whom you will come into contact."³²⁹

Accordingly, given the fact that there seemingly exists no

³²⁵ Hasse, *supra* note 263, at 813.

³²⁶ *Lawrence*, 539 U.S. at 581.

³²⁷ *See, supra* Section III.

³²⁸ *Id.*

³²⁹ *See, supra* note 1.

legitimate justification for the particular classification these states are making and the disparate penalties accompanying that classification, it becomes clear that 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.”³³⁰

V. 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 making those decisions, what the state cannot do is draw distinctions based on sexual orientation. To give heterosexual adolescents a free or a much-reduced pass under the state’s statutory rape law yet, at the same time, insist on full-fare for a similarly situated homosexual adolescent violates the Equal Protection Clause of the Fourteenth Amendment given the strained relationship this discrimination bears to the purported justifications. 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 dole out its own form of bullying behavior. 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 statutory 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

³³⁰ *Romer*, 517 U.S. at 635.

adolescents, such a message would be, no doubt, a welcome reduction in the amount of societal stigma currently directed at this fragile minority group.