DOES HOMOPHOBIA AFFECT PROSECUTORIAL DISCRETION IN AMBIGUOUS STATUTORY RAPE CASES?

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ABSTRACT

Age gap provisions exempt or mitigate teenagers who are close in age from statutory rape liability. But age gap provisions can be ambiguous, leading to discriminatory enforcement against LGBTQ+ people. We hypothesize that prosecutors would be more likely to prosecute young "offenders" who have oral sex with an underage partner of the same sex compared to opposite-sex partners. We mailed surveys to prosecutors across the United States with a between-subject design such that each respondent was exposed to one of four vignette conditions in which the sexes of the "offender" and "victim" varied. All vignettes presented conditions in which either a male or female high school junior—who had reached the age of consent—engaged in oral sex with either a male or a female in the first year of high school study who, therefore, would be too young to grant effective consent. Seventy prosecutors responded to the survey. Only thirteen (18.5%) indicated they would file charges. Manipulations of "offender" sex and "victim" sex did not appear to affect charging decisions; however, these manipulations did alter the prosecutors' negative perceptions of the

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"offender" in same-sex couplings in ways that significantly influenced the severity of the punishment that respondents articulated they would seek in such cases.

Keywords: statutory rape; prosecutorial discretion; homophobia; queer criminology.

I. INTRODUCTION

According to the late Yale historian John Boswell, most historians agree that "no Western legal or moral tradition—civil or ecclesiastical, European, English, or Anglo-American—has ever attempted to penalize or stigmatize a 'homosexual person' apart from the commission of external acts."[5] In contrast to sexual identity, however, sexual activity between members of the same sex—especially acts of oral or anal sex—have been proscribed in Western civilizations by either civil or ecclesiastical laws for centuries, often subsumed under the general term *sodomy*.[6]

About half of U.S. state laws criminalizing oral sex and anal sex between consenting adults were repealed or declared unconstitutional by state courts between the late 1960s and the early 2000s.[7] The remaining laws criminalizing such private, consensual sex acts were ultimately invalidated by the U.S. Supreme Court's 2003 decision in *Lawrence v. Texas*.[8] The decriminalization of sexual activity between members of the same sex helped to usher in greater social acceptance of lesbian, gay, and bisexual people.[9]

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5 John Boswell, *AFFIDAVIT I: On the History of Social Attitudes toward Homosexuality from Ancient Greece to the Present*, *in* GAYS AND THE MILITARY: THE UNITED STATES V. JOSEPH STEFFAN 40, 40 (Marc Wolinsky & Kenneth S. Sherrill, eds. 1993).

6 Henry F. Fradella, *Legal, Moral, and Social Reasons for Decriminalizing Sodomy*, 18 J. CONTEMP. CRIM. JUST. 279 (2002).

7 *Id.* at 285–86.

8 Lawrence v. Texas, 539 U.S. 558 (2003).

9 *See* Pew Research Center, *A Survey of LGBT Americans: Chapter 2: Social*

For example, gays and lesbians have been permitted to serve openly in the U.S. military since 2011.[10] And marriage between members of the same sex was recognized nationwide by the U.S. Supreme Court's 2015 decision in *Obergefell v. Hodges*.[11]

On the other hand, it remains legal in more than half the states to discriminate against lesbian, gay, bisexual, and transgender ("LGBTQ+")[12] people in employment, housing, and places of public accommodation.[13] And in just the past few years, hundreds of bills have been introduced in legislatures across the United States seeking either to preempt local nondiscrimination protections for LGBTQ+ people,[14] or to grant "a broad

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Acceptance, PEW RESEARCH CENTER SOCIAL & DEMOGRAPHIC TRENDS (June 13, 2013), http://www.pewsocialtrends.org/2013/06/13/chapter-2-social-acceptance/.

[10] Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515-3517 (2011) (codified as 10 U.S.C. § 654 (2012)); *see also* Brandon Alford & Shawna J. Lee, *Toward Complete Inclusion: Lesbian, Gay, Bisexual, and Transgender Military Service Members after Repeal of Don't Ask, Don't Tell*, 61 SOC. WORK 257, 257 (2016) (arguing that although "public policy has shifted toward greater inclusion of lesbian, gay, and bisexual (LGB)" people, the repeal of Don't Ask, Don't Tell did not address "a number of cultural and institutional inequities that continue to hinder full inclusion of sexual minority service members," especially for those who are transgender).

[11] Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

[12] For the sake of inclusivity, we add a "Q" and the plus sign to the acronym "LGBT" to include people who self-identify as something other than gay, lesbian, bisexual, or transgender (e.g., queer, nonbinary, intersex, asexual, and pansexual). For a discussion on the evolution of the LGBTQ+ acronym, see Patrick Englert & Elizabeth G. Dinkins, *An Overview of Sex, Gender, and Sexuality*, *in* SEX, SEXUALITY, LAW, AND IN(JUSTICE) 1 (Henry F. Fradella & Jennifer Sumner eds., 2016).

[13] *See*, *e.g.*, *Non-Discrimination Laws*, MOVEMENT ADVANCEMENT PROJECT, http://www.lgbtmap.org/equality-maps/non_discrimination_laws (last visited Aug. 12, 2019).

[14] *See*, *e.g.*, *Past LGBT Nondiscrimination and Anti-LGBT Bills Across the Country* (2016), ACLU, https://www.aclu.org/other/past-lgbt-nondiscrimination-and-anti-lgbt-bills-across-country; *Legislation Affecting LGBT Rights Across the Country*, ACLU, https://www.aclu.org/legislation-affecting-lgbt-rights-across-country (last visited Aug. 12, 2019).

range of religious exemptions to individuals, companies, and public and private institutions from non-discrimination laws that are already on the books."[15] Moreover, the Trump Administration has advocated numerous anti-LGBTQ+ positions, including: arguing in court that federal law does not prohibit discrimination against LGBTQ+ people;[16] advocating to the U.S. Supreme Court that people should be able to discriminate against LGBTQ+ people on religious grounds;[17] issuing a formal memorandum from the U.S. Attorney General directing all administrative agencies, executive departments, and federal contractors to take positions to maximize religious liberty, even if that could result in discrimination against LGBTQ+ people (among others);[18] and publishing a U.S. Department of Health and Human Services final rule that allows hospital officials, staff, and insurance companies to deny care to LGBTQ+ patients based on religious or moral

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[15] Rich Bellis, *Here's Everywhere in America You Can Still Get Fired for Being Gay or Trans*, FASTCOMPANY (Mar. 3, 2016), www.fastcompany.com/3057357/heres-everywhere-in-america-you-can-still-get-fired-for-being-lgbt.

[16] Brief for the United States as Amicus Curiae Supporting Defendant-Appellees, Zarda v. Altitude Express, Inc., 855 F.3d 76 (2017) (No. 15-3775), http://www.washingtonblade.com/content/files/2017/07/Zarda-DOJ-brief.pdf.

[17] Brief for the United States as Amicus Curiae Supporting Petitioners, Masterpiece Cakeshop v. Colorado Civil Rights Comm'n, 138 S. Ct. 1719 (2017) (No. 16-111), http://www.scotusblog.com/wp-content/uploads/2017/09/16-111-tsac-USA.pdf; *see also* Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n, 138 S. Ct. 1719 (narrowly holding that a state antidiscrimination commission violated the Free Exercise Clause's requirement of religious neutrality when holding a bakery liability for refusing to make a wedding cake for a same-sex couple).

[18] U.S. Attorney General, *Memorandum for All Executive Departments and Agencies Re: Federal Law Protections for Religious Liberty* (Oct. 6, 2017), https://www.justice.gov/opa/press-release/file/1001891/download?utm_medium=email&utm_source=govdelivery.

beliefs.[19]

The continued oppression of LGBTQ+ people is not limited to the civil law realm. Prejudice against LGBTQ+ people often manifests in violence against people perceived to be gay, lesbian, bisexual, transgender, or queer.[20] Yet, "[p]olice are only rarely trained" to deal with LGBTQ+ issues; indeed, some law enforcement officers are so homophobic that they harass sexual minorities and transgender people.[21] Indeed, a nationwide survey of more than 2,300 LGBTQ+ people found that three-quarters of respondents had some face-to-face encounters with police in the five years preceding the study, a quarter of whom reported "at least one type of misconduct or harassment such as verbal assault, being accused of an offense they did not commit, sexual harassment, or physical assault."[22]

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[19] Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, 84 Fed. Reg. 23170-01 (May 21, 2019) (amending 45 C.F.R. pt. 88).

[20] For official statistics, see U.S. DEP'T OF JUSTICE, UNIF. CRIME REPORTING PROGRAM, HATE CRIME STATISTICS, 2017 (2018), https://ucr.fbi.gov/hate-crime/2017. For a comprehensive report, see Brian Levin & John David Reitzel, *Hate Crimes Rise in U.S. Cities and Counties in Time of Division and Foreign Interference* (May 2018), https://csbs.csusb.edu/sites/csusb_csbs/files/2018%20Hate%20Final%20Report%205-14.pdf.

[21] Henry F. Fradella, Stephen S. Owen, & Tod W. Burke, *Integrating Gay, Lesbian, Bisexual, and Transgender Issues into the Undergraduate Criminal Justice Curriculum*, 20 J. CRIM. JUST. EDUC. 127, 131 (2009); *see also* Tod W. Burke, Stephen S. Owen, & April L. Few-Demo, *Law Enforcement and Transgender Communities*, FBI LAW ENFORCEMENT BULL. (June 11, 2015), https://leb.fbi.gov/articles/featured-articles/law-enforcement-and-transgender-communities; Stephen S. Owen, Tod W. Burke, April L. Few-Demo, & Jameson Natwick, Perceptions of the Police by LGBT Communities, 43 AM. J. CRIM. JUST. 668 (2018); Andrea J. Ritchie & Delores Jones-Brown, *Policing Race, Gender, and Sex: A Review of Law Enforcement Policies*, 27 WOMEN & CRIM. JUST. 21 (2017).

[22] Lambda Legal, *Protected and Served? Survey of LGBT/HIV Contact with Police, Courts, Prisons, and Security*, 6 (2015), https://www.lambdalegal.org/sites/default/files/publications/downloads/ps_executive-summary.pdf.

Research suggests that LGBTQ+ people may also be victimized by court actors:

> One public defender in Philadelphia … witnessed prosecutors "routinely reduce charges in serious cases—often encouraged by judges—whenever a gay complainant had prior arrests for solicitation." She also observed that [LGBTQ+] people are "Notoriously badly treated throughout the criminal justice system: police are nasty to them; marshals, court officers and other court personnel often mock them; it is the rare judge or magistrate who treats these defendants with dignity or respect."[23]

Disparate impact based on race, ethnicity, and sex in the criminal justice system—if not outright discrimination—is well-documented.[24] Although

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[23] Fradella et al., *supra* note 21, at 132 (quoting Abbe Smith, *The Complex Uses of Sexual Orientation in Criminal Court*, 11 AM. U. J. GENDER SOC. POL'Y & L. 101, 103–04 (2002)) (internal citations omitted); *see also*, *e.g.*, Sterling v. Borough of Minersville, 232 F.3d 190 (3d Cir. 2000). The *Sterling* case illustrates how anti-LGBTQ+ bias from law enforcement officers can have significant negative impacts on teenagers who engage in consensual sexual encounters with member of the same sex. In that case, a police officer found a seventeen- and an eighteen-year-old boy in a parked car in which the officer found condoms. *Id.* at 192–93. After being joined by a second police officer, they arrested the two boys for underage drinking and, after lecturing the boys about the Biblical condemnation against homosexual activity, threatened to "out" them to their families. *Id.* Upon their release from police custody, one of the boy's committed suicide. *Id.* at 193. The boy's surviving mother filed a civil lawsuit claiming that officers' threat to reveal her son's sexual orientation violated his privacy rights. *Id.* at 193. When she prevailed at the trial court level, the officers appealed, arguing that they enjoyed qualified immunity against the judgment. *Id.* at 193. The Third Circuit ruled against them, holding that their conduct violated the boy's clearly established right to privacy as protected by the U.S. Constitution. *Id.* at 197–98.

[24] *See generally* SAM WALKER, CASSIA C. SPOHN, & MIRIAM DELONE, THE COLOR OF JUSTICE: RACE, ETHNICITY, AND CRIME IN AMERICA (6th ed. 2018) (exploring a multiplicity

significantly less well-studied than race, ethnicity, and sex, the same is true for sexual orientation.

> For instance, gay or lesbian defendants have received more harsh penalties than heterosexual defendants for acts such as statutory rape . . . and solicitation . . . . Conversely, gay and lesbian victims may have to contend with the gay panic defense . . . for which there is no heterosexual analogue.[25]

Some of these observations were made more than decade ago. The current research explores whether such biases still persist in ways that might manifest in state criminal courts in the United States by assessing prosecutors' willingness to charge close-in-age teenagers who engage in oral sex with each other while one participant is under the age of consent and the other has reached the age of majority to grant effective legal consent to engage in sexual activity.

In Part II of this Article, we summarize the legal and social scientific literature that provides context to the law of statutory rape, the manner in which that law has been misused—especially with regard to LGBTQ+ youth,

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of racial and ethnic disparities in the criminal justice system).

[25] Fradella et al., *supra* note 21, at 132 (citing Kansas v. Limon, 122 P.3d 22 (Kan. 2005); State v. Baxley, 633 So.2d 142 (La. 1994); Christina Pei-Lin Chen, *Provocation's Privileged Desire: The Provocation Doctrine, "Homosexual Panic," and the Non-violent Unwanted Sexual Advance Defense*, 10 CORNELL J.L. & PUB. POL'Y 196 (2000)).

and the ways in which moral outrage concerning sexual activity between LGBTQ+ teenagers close in age might shape criminal justice system responses to ambiguous cases of statutory rape. In Part III, we summarize the methods used to conduct the present study. Part IV presents our results and Part V discusses our findings. Finally, in Part VI, we make legal and public policy suggestions for addressing the potential for anti-LGBTQ+ bias in statutory rape cases involving close-in-age partners.

II. LITERATURE REVIEW

Despite the decriminalization of sodomy and the legal recognition of same-sex marriage, stigma against LGBTQ+ people is still alive and well in the United States.[26] Consider that although Gallop reported in 2018 that 67% of respondents in a nationwide poll expressed views that gay and lesbian relations are morally acceptable, 30% of respondents disagreed with that premise; moreover, one year later, moral approval slipped five percentage points while moral disapproval rose by 5%.[27]

The stigma resulting from social views that condemn homosexuality often manifests in ways that are discriminatory. For example, sexual

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[26] *See generally* HENRY F. FRADELLA & JENNIFER SUMNER, SEX, SEXUALITY, LAW, AND (IN)JUSTICE (2016); Gregory M. Herek, *Sexual Stigma and Sexual Prejudice in the United States: A Conceptual Framework*, *in* CONTEMPORARY PERSPECTIVES ON LESBIAN, GAY, AND BISEXUAL IDENTITIES 65 (Debra A. Hope ed., 2009).

[27] Gay and Lesbian Rights, GALLOP, https://news.gallup.com/poll/1651/gay-lesbian-rights.aspx (last updated May 2019).

orientation is an extralegal factor that can affect how police, prosecutors, juries, and judges act in criminal cases, although it should have no bearing on these processes.[28] Consider cases involving oral or anal intercourse between members of the same sex. *Lawrence v. Texas* invalidated the broad scope of most sodomy laws in the United States in 2003, but the Supreme Court was careful to limit the scope of its decision to acts of oral or anal sex that occur in private between consenting adults.[29] Thus, non-consensual acts of sodomy remain illegal and may be properly prosecuted as rapes.[30] Similarly, voluntary acts of oral or anal sex may also be criminally prosecuted if they occur in public or if an underage minor is a participant.[31] But such prosecutions do not appear to be even-handed, as LGBTQ+ people appear to be disproportionally charged and more harshly punished than their non-LGBTQ+ counterparts.[32] As a public defender explained about the

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[28] Heather C. Brunelli, Note, *The Double Bind: Unequal Treatment for Homosexuals Within the American Legal Framework*, 20 B.C. THIRD WORLD L.J. 201 (2000).

[29] Lawrence v. Texas, 539 U.S. 558 (2003).

[30] Henry F. Fradella & Kenneth Grundy, *The Criminal Regulation of Sex: The Limits of Morality and Consent*, *in* SEX, LAW, AND (IN)JUSTICE 183 (Henry F. Fradella & Jennifer Sumner eds., 2016).

[31] *Lawrence*, 539 U.S. at 578 ("The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution."); *see also* Fradella & Grundy, *supra* note 30, at 190; Steve James, *Romeo and Juliet Were Sex Offenders: An Analysis of Age Consent and a Call for Reform*, 78 UMKC L. REV. 241 (2009).

[32] *See* Michael J. Higdon, *Queer Teens and Legislative Bullies: The Cruel and Invidious Discrimination Behind Heterosexist Statutory Rape Laws*, 42 U.C. DAVIS L. REV. 195 (2008); Kate Sutherland, *From Jailbird to Jailbait: Age of Consent Laws and the Construction of Teen-Age Sexualities*, 9 WM. & MARY J. WOMEN & L. 313, 316 (2003); *cf.* Jessica M. Salerno, Mary C. Murphy & Bette L. Bottoms, *Give the Kid a Break – But Only If He's Straight: Retributive Motives Drive Biases against Gay Youth in Ambiguous Punishment*, 20 PSYCHOL., PUB. POL'Y, & L. 398 (2014) (explained in detail in Part II,

unevenness of prosecutorial discretion in statutory rape cases: "If it's two boys and they're both young or it's two girls, there's a tendency to assume it's abuse. With opposite genders, they're more likely to say 'Well, you know, they're experimenting.'"[33] Indeed, not only are criminal penalties for same-sex violations of age of consent laws often harsher than for opposite-sex violations of statutory rape laws, but also, prosecutors are more likely to file charges against LGBTQ+ teens in the absence of coercion—even when parties are very close in age.[34]

> Beatrice Dorn, legal director of the Lambda Legal Defense and Education Fund, asserts that where the age gap between the parties is narrow, charges for violations of age of consent laws are much more likely to be filed when the partners are of the same sex. In these circumstances, once again, it is often outraged parents who bring cases to the attention of the authorities. "[P]arents go nutso when they find out their kid has been having gay sex."[35]

The notorious case of *Kansas v. Limon* illustrates how anti-LGBTQ+

Section E; *see infra* notes 94–113 and accompanying text).

[33] Fradella & Grundy, *supra* note 30, at 202 (quoting Michael H. Meidinger, *Peeking under the Covers: Taking a Closer Look at Prosecutorial Decision-Making Involving Queer Youth and Statutory Rape*, 32 B.C. J.L. & SOC. JUST. 421, 421 (2012)).

[34] James, *supra* note 31, at 253 (citing Sutherland, *supra* note 32, at 316).

[35] Sutherland, *supra* note 32, at 327–28 (quoting Donna Minkowitz, *On Trial: Gay? Straight? Boy? Girl? Sex? Rape?*, OUT, (Oct. 1995), at 99, 145).

attitudes underlie the selective prosecution of minors in cases that turn on the age of consent.[36] Before turning to that example, however, we summarize basic principles of statutory rape law to provide background for the present study.

A. *Statutory Rape and the Age of Consent*

Statutory rape laws criminalize sexual acts between persons who are over the age at which the law deems them capable of granting effective legal consent (adults) and those who are under that age. "The crime of statutory rape is 'at least as ancient as the 4000-year-old Code of Hammurabi.'"[37] The first age of consent provision in the common law tradition appeared in England in 1275.[38] Violations of the law were punishable by up to two years of imprisonment and a fine.[39] The law was aimed at preserving a girl's chastity for her future husband.[40] The age of consent was first set to twelve since that was when girls were old enough to marry—an age that

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[36] Kansas v. Limon, 122 P.3d 22 (Kan. 2005).

[37] James, *supra* note 31, at 244 (citing Michelle Oberman, *Turning Girls Into Women: Re-Evaluating Modern Statutory Rape Law*, 85 J. CRIM. L. & CRIMINOLOGY 15, 24 (1994)).

[38] *Id.* at 245; J. B. Lowder, *16 Going on 17: Age of Consent Laws, Explained*, SLATE, Feb. 21, 2011, https://slate.com/news-and-politics/2011/02/age-of-consent-laws-since-when-does-sex-have-an-age-requirement.html.

[39] Lowder, *supra* note 38.

[40] *Id.*

> The 1275 statute and comparable laws from that era were not predicated on the desire to protect female children per se. Rather, their chastity was at issue, since defiled women were not considered fit to marry. That this social code motivated the first age of consent laws is made clear by the fact that girls "known" to be promiscuous were exempt from protection—once ruined, fair game.

Id.

corresponded to when some young women experienced their first menstrual cycle.[41] The age of consent was subsequently lowered to ten—the same age set in early laws in the American colonies.[42]

> Since that time, age-based consent regulations have been established around the world for a number of reasons: to protect the virginity of women from predatory men, to keep predatory women from entrapping older men, to limit sex before marriage, to disrupt colonial subjects' traditionally young marriage practices (e.g. the British in India), and, more recently in the [United States], to combat teenage pregnancy.[43]

Today, although age of consent laws differ from state to state, the standard age of consent typically falls between sixteen and eighteen as a result of "conservative," "anti-vice" moral-reform movements that began around the turn of the nineteenth to the twentieth century, having successfully increased the age at which a female could legally consent to sexual acts.[44]

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41 *Id.*; *see also* James, *supra* note 31, at 245.

42 James, *supra* note 31, at 244 (citing Oberman, *supra* note 37, at 24); *see also* Rita Eidson, Comment, *The Constitutionality of Statutory Rape Laws*, 27 UCLA L. REV. 757, 762 (1980).

43 Lowder, *supra* note 38.

44 Frances Olson, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387, 403 (1984); *see also* J. Shoshanna Ehrlich, *From Age of Consent Laws to the "Silver Ring Thing": The Regulation of Adolescent Female Sexuality*, 16 HEALTH MATRIX 151, 151–60 (2006) (tracing the history of moral crusaders' efforts to regulate sex and sexuality, especially for teenage girls); Lowder, *supra* note 38.

For most of its existence as a criminal offense, statutory rape has been a strict liability crime.[45] This means that liability turned on the commission of the act without regard to the perpetrator's criminal intent. "In fact, 'it did not matter whether the victim looked older than the age of consent, that she consented, or even that she initiated sexual contact.'"[46] But starting in the 1960s, a few U.S. jurisdictions changed their statutory rape laws to require some proof as to *mens rea*. Although the majority of states have maintained a strict liability approach to the crime, an honest and reasonable mistake regarding the age of the victim can be a complete defense to statutory rape in approximately thirteen states and the District of Columbia.[47]

As with their early English common law counterparts, for most of their history, statutory rape laws in the United States penalized only males for having sex with underage females because "girls were viewed as 'special property in need of special protection.'"[48] Although the U.S. Supreme Court upheld the constitutionality of this gender-based difference over an Equal

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[45] Fradella & Grundy, *supra* note 30, at 201.

[46] *Id.* (quoting Oberman, *supra* note 37, at 120).

[47] *Id.* at 202; *see also, e.g.*, ARIZ. REV. STAT. § 13–1403(B) (2019) ("A person commits public sexual indecency to a minor if the person intentionally or knowingly engages in any of the acts listed in subsection A of this section and such person is reckless about whether a minor who is under fifteen years of age is present."); 18 PA. CON. STAT. § 3102 (2018) ("When criminality depends on the child's being below a critical age older than 14 years, it is a defense for the defendant to prove by a preponderance of the evidence that he or she reasonably believed the child to be above the critical age."); WYO. STAT. ANN. § 6-2-308(a) (2018) ("Except as provided by subsection (b) of this section, if criminality of conduct in this article depends on a victim being under sixteen (16) years of age, it is an affirmative defense that the actor reasonably believed that the victim was sixteen (16) years of age or older.").

[48] Fradella & Grundy, *supra* note 30, at 201 (quoting Oberman, *supra* note 37, at 120).

Protection Clause challenge in 1981,[49] starting in the 1970s, many states moved to gender-neutral age of consent laws in an effort to protect teens of both sexes "from confusing and possibly abusive relationships with more powerful adults."[50] Thus, the statutory rape laws of most U.S. states today are gender-neutral.[51]

B. *Kansas v. Limon*

Kansas, like the majority of U.S. states, sets the age of consent for sexual activity at sixteen; thus, sex with a minor under the age of sixteen constitutes the crime of statutory rape.[52] Such statutory rape laws can be used to punish relatively normative teenage sexual experimentation if one partner is over the age of consent and the other is under the age of consent, even though both are close in age.[53] To prevent that from occurring, approximately forty-five U.S.

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[49] Michael M. v. Superior Court of Sonoma County, 450 U.S. 464 (1981).

[50] Fradella & Grundy, *supra* note 30, at 201–02 ("these laws persist today, largely because society has a compelling interest in protecting youth, especially those with raging hormones during puberty, from exploitative or predatory relationships"); Lowder, *supra* note 38, para 6; *see also* Nancy Findholt & Linda C. Robrecht, *Legal and Ethical Considerations in Research with Sexually Active Adolescents: the Requirement to Report Statutory Rape*, 34 PERSP. ON SEXUAL & REPROD. HEALTH 250 (2002).

[51] Fradella & Grundy, *supra* note 30, at 202; Sutherland, *supra* note 32, at 319.

[52] KAN. STAT. ANN. § 21-3505.

[53] *See* James, *supra* note 31, at 248–49. James presents the following examples:

> In Florida, the state prosecuted a sixteen-year-old for having sex with his consenting sixteen-year-old partner. In California, the court of appeals upheld the conviction of another sixteen-year-old for having sex with his consenting fourteen-year-old girlfriend. An Arizona court charged a thirteen-year-old boy who had consensual sex with a fifteen-year-old girl. Another Arizona court found a sixteen-year-old boy guilty of sexual abuse after he touched the breasts of a fourteen-year-old girl with her consent. Furthermore, a Wisconsin investigator told a fifteen-year-old girl, who had consensual sex with her fifteen-year-old boyfriend, that both she and her boyfriend would face prosecution for having sex with a minor.

Id. at 248 (internal citations omitted).

states enacted age-gap provisions that are sometimes referred to as "Romeo and Juliet" laws.[54] Age gap provisions often exempt teenagers within a certain number of years (typically fewer than four) of each other's ages from being prosecuted for sexual activity with each other.[55] Alternatively, these laws provide for significantly mitigated criminal sanctions, reducing what would otherwise be a high-level felony to a lower-level offense.[56] Kansas opted for this latter approach, setting the maximum penalty for sexual activity between teenagers close in age to fifteen months incarceration, rather than seventeen years.[57] But the Kansas age gap provision specified that it applies

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[54] Fradella & Grundy, *supra* note 30, at 202; James, *supra* note 31, at 256–57.

[55] *E.g.*, N.J. REV. STAT. 2C:14-2(c)(4) (2019) ("An actor is guilty of sexual assault if he commits an act of sexual penetration with another person … [and the] victim is at least 13 but less than 16 years old and the actor is at least four years older than the victim"). As this New Jersey law illustrates, the age-gap provisions in some state's statutory rape laws include a broad range of sex acts (e.g., manual stimulation, oral sex, anal sex, and vaginal intercourse, whereas other states limit their age-gap provisions such that they apply only to penile-vaginal penetrative sex. *E.g.*, GA. CODE ANN. § 16-6-3 (2006).

[56] *E.g.*, GA. CODE ANN. § 16-6-3 (2006) (defining statutory rape as a felony, but reducing the crime to a misdemeanor if "the victim is at least 14 but less than 16 years of age and the person convicted of statutory rape is 18 years of age or younger and is no more than four years older than the victim").

[57] KAN. STAT. ANN. § 21-3522 (2000), *repealed by* Laws 2010, ch. 136, § 307, eff. July 1, 2011, *recodified as amended at* KAN. STAT. ANN. § 21-5507 (2011); *see also* Kansas v. Limon, 122 P.2d 22, 29 (2005).

> [T]he presumptive terms of imprisonment for a severity level 3 felony, as noted earlier, are approximately 15 times that of a severity level 9 felony. As also discussed earlier, for Limon, whose criminal history score was a B, this classification means the difference between a 13–, 14–, or 15–month prison sentence and a 206–month prison sentence. . . . For a defendant with no criminal history, a conviction of criminal sodomy (as charged in this case) entails a sentencing range of 55–59–61 months' presumptive imprisonment while a conviction of unlawful voluntary sexual relations under the Romeo and Juliet statute entails a sentencing range of 5–6–7 months with the presumption of probation.

Limon, 122 P.2d at 29 (internal citations omitted).

only to sex acts between members of the opposite sex.[58] Put differently, the Kansas law was purposefully written to apply to "Romeo and Juliet," but not "Romeo and Romeo" or "Juliet and Juliet," thereby illustrating the continued stigma and discrimination that gays and lesbians face under the law.[59] And this caused quite a problem for Matthew Limon.

At the relevant time, Matthew Limon was a football player in his senior year of high school. Shortly after his eighteenth birthday, he engaged in a non-coercive act of oral sex with a fourteen-year-old boy who was also a student at the same high school.[60] Limon's attorneys argued that limiting the age gap exception to opposite-sex encounters violated the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.[61] The lower courts of Kansas rejected this argument and, as a result, Limon was sentenced to more than seventeen years in prison, rather than the fifteen-month maximum sentence that could be imposed if Limon had engaged in oral sex with a female.[62] The Kansas intermediate court of appeals affirmed Limon's

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[58] *Limon*, 122 P.2d at 32–34 (summarizing the legislative history of the relevant Kansas statute to illustrate how the age-gap provision came to apply only to sexual acts between members of the opposite sex).

[59] Higdon, *supra* note 32, at 226–52; *see also* Shulamit H. Shvartsman, *"Romeo and Romeo": An Examination of* Limon v. Kansas *in Light of* Lawrence v. Texas, 35 SETON HALL L. REV. 359 (2004).

[60] *Limon v. Kansas*, ACLU.ORG, https://www.aclu.org/other/limon-v-kansas-case-background?redirect=lgbt-rights_hiv-aids/limon-v-kansas-case-background (last updated Oct. 21, 2005), at para. 2 [hereinafter "ACLU, *Limon*"].

[61] *Limon*, 122 P.2d at 24; *see also* ACLU, *Limon*, *supra* note 60, para. 5.

[62] *Limon*, 122 P.2d at 25; *see also* ACLU, *Limon*, *supra* note 60, para. 6.

conviction.[63] Limon served three years in prison before the Kansas Supreme Court reversed his conviction, holding that the state's age gap provision could not be limited to sex acts between opposite-sex partners without violating equal protection.[64]

The Kansas statute was discriminatory on its face. But anti-LGBTQ+ bias can also manifest under camouflage when explicitly gender- and sexuality-neutral laws are applied disproportionally against LGBTQ+ defendants, especially in sentencing.[65] For example, social psychologists found that

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[63] State v. Limon, No. 85,898 (Kan. Ct. App. filed Feb. 1, 2002), *rev. denied*, 274 Kan. 1116 (2002), *vacated*, 539 U.S. 955 (2003), *remanded to* 83 P.3d 229 (Kan. Ct. App. 2004), *rev'd*, 122 P.3d 22 (Kan. 2005); *see also* ACLU, *Limon*, *supra* note 60.

[64] *Limon*, 122 P.2d at 38.

> We conclude that . . . the Kansas unlawful voluntary sexual relations statute, does not pass rational basis scrutiny under the United States Constitution Equal Protection Clause or, because we traditionally apply the same analysis to our state constitution, under the Kansas Constitution Equal Protection Clause. The Romeo and Juliet statute suffers the same faults as found by the United States Supreme Court in *Romer* and *Eisenstadt*; adding the phrase "and are members of the opposite sex" created a broad, overreaching, and undifferentiated status-based classification which bears no rational relationship to legitimate State interests. Paraphrasing the United States Supreme Court's decision in *Romer*, the statute inflicts immediate, continuing, and real injuries that outrun and belie any legitimate justification that may be claimed for it. Furthermore, the State's interests fail under the holding in *Lawrence* that moral disapproval of a group cannot be a legitimate governmental interest. As Justice Scalia stated: "If, as the [United States Supreme] Court asserts, the promotion of majoritarian sexual morality is not even a legitimate state interest," the statute cannot "survive rational-basis review." 539 U.S. at 599. . . (Scalia, J., dissenting).

Id.

[65] Of course, anti-LGBT sentiment is not always masked. In situations where moral outrage runs high, bias that may have otherwise been masked can manifest itself in readily apparent ways, such as when prosecutors articulate reasons in support of particularly harsh penalties. *See* Christian S. Crandall, Amy Eschelman & Laurie O'Brien, *Social Norms and the Expression and Suppression of Prejudice: The Struggle for Internalization*, 82 J. PERSONALITY & SOC. PSYCHOL. 359 (2002).

"decisions for juveniles in consensual peer sex resulted in more severe punishment of gay, compared to heterosexual youth . . . ."[66]

C. *Juvenile Sanctions in Sex Crime Cases*

At the time Matthew Limon engaged in oral sex with his "victim," he was eighteen years of age—an adult in the eyes of the law. But the harsh sentence he received until his conviction was overturned on appeal is not unique for young sex offenders. Consider the case of Georgia African-American teenager, Genarlow Wilson.

When Wilson was seventeen years of age, he engaged in multiple sex acts with two girls, ages fifteen and seventeen.[67] The younger girl could not grant effective legal consent to sex because she was under the age of sixteen.[68] Wilson was convicted of aggravated child molestation for having oral sex with a minor. He was sentenced to ten years in prison—the required minimum mandatory sentence for that offense.[69] Yet, had he been convicted of engaging in vaginal sexual intercourse with the fifteen-year-old, the state's age gap exception would have reduced Wilson's crime to a misdemeanor punishable by a maximum period of incarceration of twelve months.[70] After

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66 Salerno et al., *supra* note 32, at 402.

67 Angela Tuck, *Genarlow Wilson's Journey from Prison to Morehouse*, ATLANTA J.-CONST., May 18, 2013, https://www.ajc.com/news/crime--law/genarlow-wilson-journey-from-prison-morehouse/BSmOzTV5gU4sjRvAgsuEBM/.

68 *See* GA. CODE. ANN. § 16-6-3(a).

69 Tuck, *supra* note 67.

70 Georgia's age-gap provision at that time did not include protections for acts of oral or anal sex, just like in Kansas at the time of Matthew Limon's prosecution. These laws illustrate the continued vestiges of legalized discrimination against LGBTQ+ people through

Wilson served nearly two-and-a-half years in prison, the Georgia Supreme Court overturned his conviction, calling it "grossly disproportionate to his crime" and, therefore, "cruel and unusual punishment."[71]

Sentencing juveniles to the same punishments as adults is commonplace under a variety of circumstances.[72] Juvenile sex offenders, in particular, are often waived into adult court and subjected to the same types of sanctions applied to adult offenders, including being required to register as a sex offender.[73] Sex offender registration for juvenile offenders, however, often fails to consider the characteristics that separate juvenile from adult sex offenders, such as much lower recidivism rates and a superior disposition to rehabilitative services.[74] Although some might argue that adult sanctions might be suitable for juveniles who engage in certain acts of sexual violence, there are normative legal, psychological, and philosophical arguments that call into question the appropriateness of such sanctions in cases like Limon's

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their effective removal of the protections of age gap mitigating provisions for LGBTQ+ youth. It took Wilson's case—one involving heterosexual activity—to prompt the Georgia state legislature to revise their Romeo and Juliet provision to apply to sex acts other than penile-vaginal sexual intercourse. *See* GA. L. 2006, pp. 379, 413, § 30(a).

[71] Wilson v. State, 652 S.E. 2d 501, 532 (Ga. 2007).

[72] *See generally* Andrea Wood, *Cruel and Unusual Punishment: Confining Juveniles with Adults after* Graham *and* Miller, 61 EMORY L.J. 1445 (2012) (critiquing the harsh sentences often imposed on juvenile offenders).

[73] *See* Elizabeth Garfinkle, *Coming of Age in America: The Misapplication of Sex-Offender Registration and Community-Notification Laws to Juveniles*, 91 CAL. L. REV. 163, 177–97 (2003) (critiquing the application of Megan's Law to juveniles); *see generally* THE JUVENILE SEX OFFENDER (Howard E. Barbaree & William L. Marshall, eds., 2d ed. 2008) (exploring many dimensions of the commission of sex crimes by juveniles and justice system responses to them).

[74] *See* KAREN J. TERRY, SEXUAL OFFENSES AND OFFENDERS: THEORY, PRACTICE, AND POLICY 118–37 (2nd ed. 2013).

or Wilson's that turn, in large part, on arguably "normal" teenage sexuality.[75] But Limon's case involved sexual activity between two males and Wilson's case involved an African-American teenager engaged in a "three-way." Both situations may have caused prosecutors to view the boys' actions as particularly worthy of criminal sanction, perhaps as a result of homophobic implicit bias, moral outrage, or both.

D. *Homophobia as a Focal Concern?*

The most common framework for understanding the interplay between legally relevant (e.g., offense type, prior record, etc.) and legally irrelevant (e.g., race, sex, age, sexual orientation) case characteristics is the focal concerns perspective.[76] This theory posits that charging decisions by prosecutors and sentencing decisions by judges are constrained by time, resources, and limited information about the defendant. So, these decisions are often based on certain social stereotypes as part of perceptual short-hands that promote efficient case processing by connecting stereotypes to key offender characteristics vis-à-vis three focal concerns: the blameworthiness or culpability of the offender, the protection of the

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[75] *See* Daniel C. Murrie, *Placing Sexual Behavior Problems in Context: What Is "Normal" Sexual Behavior Among Juveniles?*, *in* JUVENILE SEX OFFENDERS: A GUIDE TO EVALUATION AND TREATMENT FOR MENTAL HEALTH PROFESSIONALS 21 (Eileen P. Ryan, John A., Hunter & Daniel C. Murrie eds., 2012).

[76] Darrell J. Steffensmeier, John H. Kramer, & Jeffery T. Ulmer, *Age Differences in Sentencing*, 12 JUST. Q. 583 (1995); Darrell J. Steffensmeier, Jeffery T. Ulmer, & John H. Kramer, *The Interaction of Race, Gender, and Age in Criminal Sentencing: The Punishment Cost of Being Young, Black, and Male*, 36 CRIMINOLOGY 763 (1998).

community, and the practical constraints and consequences concerning a particular sentencing decision.[77] Because these focal concerns rely heavily on extralegal factors, discretionary decisions can be heavily influenced by both conscious prejudice and implicit bias.[78]

Furthermore, the schemas that prosecutors may develop can produce decisions that are driven by stereotypes associated with fear of symbolic assailants.[79] Although such fear is usually associated with younger males from racial or ethnic minority backgrounds, like Genarlow Wilson, sexual activity between same-sex partners was criminalized for so long that many people came to view LGBTQ+ people as criminals who are sexually promiscuous or even sexually aggressive predators.[80] These beliefs may motivate some people to view LGBTQ+ people as a particularly dangerous class of sex offenders who deserve severe punishments.[81] Indeed, "antigay activists have routinely asserted that gay people are child molesters."[82]

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[77] Steffensmeier, Ulmer, & Kramer, *supra* note 76, at 766–69.

[78] For an in-depth discussion of implicit bias in the courtroom and what might be done about it, see Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124 (2012).

[79] *See* JEROME H. SKOLNICK, JUSTICE WITHOUT TRIAL 39–44 (1966) (discussing the "working personality" of police officers and the associated culture of viewing certain people as would-be assailants); *see also* Delores Jones-Brown, *Forever the Symbolic Assailant: The More Things Change, the More They Remain the Same*, 6 CRIMINOLOGY & PUB. POL'Y 103 (2007) (arguing that in the decades since Skolnick wrote about symbolic assailants, police have not changed their views that people who are visibly identifiable as being from racial and ethnic minority backgrounds as still viewed as symbolic assailants).

[80] *See* Fradella, *supra* note 6, at 292–93.

[81] *See*, *e.g.*, ANITA BRYANT, THE ANITA BRYANT STORY: THE SURVIVAL OF OUR NATION'S FAMILIES AND THE THREAT OF MILITANT HOMOSEXUALITY (1977).

[82] Gregory M. Herek, *Facts About Homosexuality and Child Molestation,* http://psychology.ucdavis.edu/rainbow/html/facts_molestation.html (last visited Aug. 13, 2019).

Although the percentage of the general public in the United States who equate homosexuality to child molestation has declined substantially, this false belief nonetheless persists.[83] Consider, for example, that the Catholic Church continues to insinuate this dubious link as a justification for preventing gay men from becoming priests.[84] And such beliefs may have motivated the Kansas officials who prosecuted Matthew Limon to seek harsh punishment in spite of the fact that Limon's "victim" consistently maintained that the oral sex between the two teens was "consensual."[85]

E. *Moral Outrage and Prosecutorial Discretion in Sex Crime Cases*

The cases of Matthew Limon and Genarlow Wilson illustrate several important realities related to sex offenses in contemporary U.S. culture. First, and most generally, although statutory rape is qualitatively different from sexual assault, it is nonetheless a sex crime. As a result, those who commit the offense—even those like Limon and Wilson who were close in age to their voluntarily participating "victims"—can be subjected to harsh punishments aimed at a broad yet ambiguous class of criminals. These

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[83] *Id.*

[84] *Id.*; Michael J. O'Loughlin, *Vatican Reaffirms Ban on Gay Priests*, AMERICA: THE JESUIT REV., Dec. 7, 2016, http://www.americamagazine.org/faith/2016/12/07/vatican-reaffirms-ban-gay-priests.

[85] Nadia Pflaum, *A Boy's Life*, THE PITCH (Jan. 22, 2004), https://www.thepitchkc.com/a-boys-life/. Technically, the fourteen-year-old boy with whom Matthew Limon engaged in oral sex was too young to grant lawful consent. But he nonetheless expressed to authorities that he was a willing participant who voluntarily engaged in the sex act without any coercion from Limon. *Id.*

"criminals" are lumped into the category of *sex offenders*—a class of offenders that have been singled out for particularly harsh sanctions since seven-year-old Megan Kanka was sexually assaulted and killed in 1994 by a previously convicted sex offender who lived down the street from the Kanka family.[86] Media coverage of the case (and some other high-profile cases) fueled a public outcry for tougher sentences for sex offenders, the creation of state-sponsored registries to track sex offenders after their release from prison, community notification programs, and even restrictions on where offenders may live.[87] Demographic, conviction, and residence information are often included within the registry for anyone with access to a computer to see.[88]

Sex offender punishments typically involve long periods of incarceration followed by involuntary institutionalization or sex offender registration.[89] These sanctions do not emphasize rehabilitation, especially when applied to juveniles; rather, they generally serve retributive and incapacitative ends.[90]

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[86] Rose Corrigan, *Making Meaning of Megan's Law*, 31 LAW & SOC. INQUIRY 267, 267–68 (2006). For a critique of Megan's Law, see Joel B. Rudin, *Megan's Law: Can It Stop Sexual Predators—and at What Cost to Constitutional Rights?*, 11 CRIM. JUST. 3 (1996).

[87] *See* Marcus A. Galeste, Henry F. Fradella, & Brenda L. Vogel, *Sex Offender Myths in Print Media: Separating Fact from Fiction in U.S. Newspapers*, 13 W. CRIMINOLOGY REV. 4 (2012).

[88] For a comprehensive review, see David P. Connor & Richard Tewksbury, *Public and Professional Views of Sex Offender Registration and Notification*, 18 CRIMINOLOGY, CRIM. JUST., L. & SOC'Y 1 (2017).

[89] TERRY, *supra* note 74, at 213–74, 276–91.

[90] Elizabeth J. Letourneau, Dipankar Bandyopadhyay, Kevin S. Armstrong, & Debajyoti Sinha, *Do Sex Offender Registration and Notification Requirements Deter Juvenile Sex Crimes?*, 37 CRIM. JUST. & BEHAV. 553, 566 (2010) (arguing that because community notifications concerning juvenile sex offenders does not promote public safety,

Indeed, because sexual offenses are viewed as particularly despicable, they often elicit strong punishment motivations.[91] Such motivations can be heightened when extralegal factors, like anti-LGBTQ+ prejudice, produce high levels of moral outrage, which can produce higher certainty in a guilty verdict.[92]

Second, the *Limon* and *Wilson* cases illustrate the fact that prosecutors hold a substantial amount of discretionary power in the criminal justice system.[93] Indeed, they "exercise virtually unfettered discretion relating to initiating, conducting, and terminating prosecutions"—so much so that their decision-making is largely unreviewable, even when widely viewed as unnecessarily harsh or unfair.[94] Prosecutors also wield significant influence on the punishments doled out to criminal defendants after conviction through

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it serves a primarily retributive purpose even through that is not the stated goal of such programs).

[91] Consider, for example, the opening narration to the long-running, popular television show, *Law and Order: Special Victims Unit*, which begins with this sentence: "In the criminal justice system, sexually based offenses are considered especially heinous." *Law & Order: Special Victims Unit Quotes*, QUOTES.NET, https://www.quotes.net/mquote/782874 (last visited Aug. 13, 2019).

[92] Jessica M. Salerno & Liana C. Peter-Hagene, *The Interactive Effect of Anger and Disgust on Moral Outrage and Judgments*, 24 PSYCHOL. SCI. 2069, 2074 (2013) (reporting that moral outrage—a combination of anger and disgust—decrease cognitive processing when making judgments about guilt and associated punishment); Craig A. Smith & Phoebe C. Ellsworth, *Patterns of Cognitive Appraisal in Emotion*, 48 J. PERSONALITY & SOC. PSYCHOL. 813 (1985) (same).

[93] As U.S. Supreme Court Justice Jackson remarked, "The prosecutor has more control over life, liberty, and reputation than any other person in America." Robert H. Jackson, *The Federal Prosecutor*, 24 J. AM. JUDICATURE SOC. 18, 18 (1940).

[94] DAVID W. NEUBAUER & HENRY F. FRADELLA, AMERICA'S COURTS AND THE CRIMINAL JUSTICE SYSTEM 171 (13th ed. 2019).

punishment recommendations.[95] Although this discretion is instrumental to the operation of the criminal justice system, this discretion also leaves the door open for extralegal factors to impact decision-making.[96] This bias can be sparked by anything from the demeanor of the defendant to strong political ideologies and may even be subconscious, which makes this bias difficult to realize and extract from the decision-making process.[97] Put differently, extralegal factors such as race, ethnicity, gender, age, and sexual orientation may influence prosecutorial decision-making, even unintentionally.[98]

Third, the *Limon* case, like many criminal cases involving sex crimes, evoked strong levels of moral outrage. But high school students engaging in voluntary sexual activity with each other would not normally evoke such emotional tensions that would cause a prosecutor to press charges and seek

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[95] Richard S. Frase, *Is Guided Discretion Sufficient? Overview of the State Sentencing Guidelines*, 44 ST. LOUIS U. L.J. 425, 440 (2000) ("Prosecutors in every American jurisdiction wield enormous 'sentencing' power because they have virtually unreviewable discretion to select the initial charges and decide which charges to drop as part of plea bargaining.").

[96] *E.g.*, Joshua C. Cochran & Daniel P. Mears, *Race, Ethnic, and Gender Divides in Juvenile Court Sanctioning and Rehabilitative Intervention*, 52 J. RES. CRIME & DELINQ. 181 (2015) (documenting sentencing disparities along racial, ethnic, and general lines).

[97] *See* Cassia C. Spohn, Dawn Beichner, & Erika Davis-Frenzel, *Prosecutorial Justifications for Sexual Assault Case Rejection: Guarding the Gateway to Justice*, 48 SOC. PROBS. 206 (2001) (documenting the complexity of accounting for all of the legal and extra-legal variables that go into charging decisions in sexual assault cases).

[98] *Id.* at 228; NEUBAUER & FRADELLA, *supra* note 94, at 176–77 (summarizing the conflicting empirical research on the effects that extra-legal factors have on prosecutorial charging decisions); *cf.* Joanna Amirault & Eric Beauregard, *The Impact of Aggravating and Mitigating Factors on the Sentence Severity of Sex Offenders: An Exploration and Comparison of Differences Between Offending Groups*, 25 CRIM. JUST. POL'Y REV. 78 (2014) (reporting that differences in sentence severity for sex offenders who target children varied more by offender-based characteristics than offense-based ones).

the maximum sentence allowable under law. Such actions beg the question, "Why?" Perhaps the moral outrage elicited by the case was caused, in part, by the fact that Limon was a senior in high school and the other student was a freshman who was four years younger than Limon. But because the Kansas statute lessens the punishment for a defendant age nineteen or younger who engaged in sexual activity with someone between the ages of fourteen and sixteen, the age difference, per se, does not appear to be the primary cause of moral approbation.[99] Rather, the fact that the oral sex occurred between two teenage boys appears to have caused significant moral outrage. This conclusion is supported by the brief filed on behalf of the state of Kansas when defending against Limon's equal protection challenge to its age gap provision in which the state's attorney cautioned that granting equal protection to same-sex acts would open the door to "combinations as three party marriages, incestuous marriages, child brides, and other less-than-desirable couplings."[100]

Social psychological research supports the notion that strong moral condemnation may be linked to exercising discretionary decision-making,[101] such as those involved in charging and sentencing decisions. Moreover, this

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[99] *See supra* notes 53–60 and accompanying text.

[100] Pflaum, *supra* note 85.

[101] *See* D. Herbert Saltzstein, *The Relation Between Moral Judgment and Behavior: A Social-Cognitive and Decision-Making Analysis*, 37 HUM. DEV. 299 (1994).

phenomenon appears to be heightened in sexual assault cases.[102] Thus, ambiguous sex offense cases that might tap into biases that produce moral condemnation are particularly sensitive and in need of study to determine the extent to which anti-LGBTQ+ prejudice affects decision-making in these criminal cases.

Social psychologists Jessica Salerno, Mary Murphy, and Bette Bottoms conducted groundbreaking research in this area.[103] They began their article by relaying the story of Kailyn Hunt, an eighteen-year-old high school senior who pled no contest to a series of charges for having engaged in voluntary sexual activity with her then fourteen-year-old girlfriend.[104] After serving nearly four months in jail, Hunt agreed to spend two years on house arrest and three years on probation to avoid the potential of being placed on the sex offender registry.[105] Salerno and colleagues joined other scholars who have questioned the appropriateness of using the sex offender registry for such teenage sexual experimentation by asking, "Is public, and perhaps lifelong, stigmatization as a sex offender an appropriate punishment in a case like Kaitlyn's?"[106] To investigate that question, Salerno and colleagues surveyed

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[102] Salerno & Peter-Hagene, *supra* note 92, at 2076, n. 2.

[103] Salerno et al., *supra* note *passim*.

[104] *Id.* at 398 (citing Carlos Harrison, *Florida Student, 18, Arrested for Sex with Teammate, 14*, N.Y. TIMES, May 21, 2013, https://www.nytimes.com/2013/05/22/us/florida-18-year-old-arrested-for-encounters-with-friend-14-gets-online-support.html).

[105] *See* Peter Burke, *Kaitlyn Hunt, Released from Indian River County Jail*, WPBF NEWS (Dec. 20, 2013), https://www.wpbf.com/article/kaitlyn-hunt-released-from-indian-river-county-jail/1320164.

[106] Salerno et al., *supra* note 32, at 398; *see also* Lisa C. Trivits, L. & N. Dickon

167 adults from the general public.[107] Their survey asked respondents about their beliefs concerning the appropriateness of punishment in a vignette based on Genarlow Wilson's case.[108] The researchers manipulated the age of the defendant (age sixteen vs. age thirty-five) videotaping a fourteen-year-old performing oral sex on the defendant, thereby creating an ambiguous case of sex between peers of roughly the same age and an unambiguous case of statutory rape.[109] The researchers also manipulated the sex of the fourteen-year-old so that vignette versions presented respondents with sexual activity between same- and opposite-sex partners.[110]

The researchers reported that their respondents indicated utilitarian motives, "i.e., concern about protecting society," in imposing harsh punishments on adult offenders who engaged in oral sex with a minor more than twenty years their junior, regardless of sexual orientation.[111] But when applying statutory rape laws in ambiguous situations—when both the "offender" and "victim" were teenagers within two years of each other's age, anti-LGBTQ+ prejudice became apparent in sanctioning. Respondents were significantly more supportive of placing juveniles on the sex offender registry for engaging in oral sex with another juvenile of the same sex than they were

Reppucci, *Application of Megan's Law to Juveniles*, 57 AM. PSYCHOL. 690 (2002).

[107] Salerno et al., *supra* note 32, at 401.

[108] *Id.*

[109] *Id.*

[110] *Id.*

[111] *Id.* at 403.

for juveniles who engaged in the same sexual activity with members of the opposite sex.[112] Their analyses indicated not only that "participants' prejudice against gay individuals affected their judgments," but also that such biases were "driven by increased moral outrage toward the gay (vs. heterosexual) juvenile offender rather than believing the gay juvenile offender was more of a threat to society."[113] The present research builds on that study by surveying prosecutors since, unlike members of the general public who participated in Salerno and colleagues' study, they are the actual decision-makers in such cases.

F. *The Present Study*

Based on the forgoing literature, we hypothesize that prosecutors will be more likely to prosecute statutory rape between teenagers who are close in age for oral sex performed by a male on someone of the same sex in comparison to oral sex performed by a male on someone of the opposite sex. Additionally, we seek to understand what role, if any, age gap exemptions to statutory rape laws might play when worded with sufficient ambiguity to allow differential enforcement against close-in-age teenagers who engage in oral sex with someone of the same sex compared to someone of the opposite sex.

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112 *Id.*
113 *Id.*

III. METHODS

A. Sampling Frame

We ran Google searches using phrases such as "state prosecutors," "district attorneys," or "county attorneys" to identify prosecutors' offices in each state. Using the information we found, we identified a sampling frame comprising those prosecutors' offices that identified either mailing addresses or P.O. boxes on their websites. We subsequently mailed surveys to 982 prosecutors' offices from all fifty states in order to recruit a representative sample from which generalizations might be made.

To maximize our potential response rate, the mailing consisted of a double-sided, single-page survey that contained both open- and closed-ended questions.[114] To preserve anonymity, no survey questions asked for any data that could be used to identify respondents. In addition, the mailing included a cover letter on university stationary that was signed by the researchers and a self-addressed stamped envelope with first-class prepaid postage for the return of completed surveys, all of which are factors that have shown to improve response rates.[115]

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[114] Richard J. Fox, Melvin R. Crask & Jonghoon Kim, *Mail Survey Response Rate: A Meta-Analysis of Selected Techniques for Inducing Response*, 52 PUB. OPINION Q. 467 (1988).

[115] *Id.* at 482–84; Shawn R. Mcmahon et al. *Comparison of E-Mail, Fax, and Postal Surveys of Pediatricians*, 111 PEDIATRICS e299 (2003); Marshall Snyder & David Lapovsky, *Enhancing Survey Responses from Initial Non-Consenters*, 24 J. ADVERT. RES. 17 (1984).

In spite of these efforts, only seventy prosecutors from twenty-seven states completed and returned the survey, representing a return rate of 7%. The low survey return rate is clearly a limitation of this study. Fortunately, though, we received at least ten surveys from each of the four vignette groups,[116] allowing us to conduct comparison of means tests on the attribution scale between groups. Additionally, responses to open-ended questions from seventy prosecutors provided interesting qualitative insights into their decision-making in an ambiguous juvenile sex-offender case.

B. Participants

Of the prosecutors who returned completed surveys, forty-eight (69.5%) were male and sixty-eight (97.1%) were White. The average age of respondents was forty-five years old (*SD*=11). These characteristics roughly mirror the same demographics of prosecutors in the Unites States, 95% of whom are White, 89% of whom are male, with an average age of forty-nine—although the sample in the present study presents the views of more women, proportionally speaking, than there are in practice.[117] Thirty-eight (54.2%) of our sample identified as politically conservative, whereas

[116] Female offender with member of the opposite sex = twenty-four; female offender with member of the same sex = fifteen; male offender with member of the opposite sex = eighteen; and male offender with member of the same sex = eleven.

[117] *See Justice for All?*, REFLECTIVE DEMOCRACY CAMPAIGN (2015), https://wholeads.us/justice/wp-content/themes/phase2/pdf/key-findings.pdf.

seventeen (24.2%) identified as being politically liberal, and 15 (21.4%) identified as being politically moderate.

C. Procedure

Respondents received one of four versions of a survey. Each version consisted of a single vignette and thirty previously validated questions taken directly or adapted from the study by Salerno, Murphy, and Bottoms that investigated similar constructs of negative attributions toward juveniles in ambiguous sex offense cases.[118] All four vignettes presented a short fact pattern in which a high school junior (who had reached the age of consent) and a first-year high school student (who was under the age of consent) voluntarily engaged in oral sex with each other while at a party at a friend's house. The biological sex of each actor varied in each vignette: first year male performing oral sex on junior year male; first year female performing oral sex on junior year male; first year male performing oral sex on junior year female; first year female performing oral sex on junior year female. In each vignette, the parents of the younger high school student learned of the incident and sought to have statutory rape charges filed against the older high school student, even though both teenagers made it clear that both parties were willing participants in the sex act. All four vignette versions specified that the incident occurred in a state that has an age gap provision

[118] Salerno et al., *supra* note 32, at 401.

for contact between minors who were similar in age that would reduce statutory rape liability to a misdemeanor offense for acts of sexual intercourse, but is silent with regard to acts of oral sex, thereby creating ambiguity regarding whether same-sex activity was beyond the scope of the age gap provision.

D. Independent Variables

The biological sex of the "offender" (the older of the two teenagers) and the "victim" (the younger of the two teenagers) dichotomized as either "male" or "female" are the independent variables in this study. The pairings by sex represent the key extralegal factors that are supposed to lie beyond the scope of the law, namely the sexes of the victim and offender and the imputed sexual orientation of the participants based on whether the oral sex occurred between members of the same or opposite sex.

E. Measured Dependent Variables

There are two dependent variables in this study. The first, decision to prosecute, concerns each prosecutor's expressed desire to move forward with formal prosecution of the case. It was coded as a dichotomous outcome (yes/no) regarding whether a survey respondent would elect to prosecute the case presented in the vignette.

Second, negative attributions refer to a respondent's moral attributions toward the fictional defendant. This variable was based on previously

validated scale items (Cronbach's alpha = .77) of offender attributions related to sexually based offending assembled from six-point Likert-scale responses (from strongly disagree to strongly agree) to a variety of questions.[119] Higher scores on the attributions scale indicate higher levels of the attribution being measured. Some questions included measures of attributions related to utilitarian motives for punishment, such as whether respondents believed the putative defendant "poses a danger to society" and is a "cold and calculating 'child molester.'"[120] Other questions included measures of attributions related to retributive motives for punishment, include whether the prosecutor was "morally outraged" by what the offender did to the alleged victim, experienced a compelling need to punish the offender, and believed the offender was "evil."[121]

F. Demographic Variables

Participants indicated their sex (male or female); race/ethnicity (White, Black, Hispanic, Asian, Other); their political orientation on a seven-point scale (ranging from extremely liberal to extremely conservative); whether they specialized in any particular type of criminal prosecution (such as

[119] Salerno et al., *supra* note 32, at 401; *see also* Jessica M. Salerno, et al., *Psychological Mechanisms Underlying Support for Juvenile Sex Offender Registry Laws: Prototypes, Moral Outrage, and Perceived Threat*, 28 BEHAV. SCI. & L. 58 (2010).

[120] Survey questions 11(e) and 11(f), respectively, derived from Salerno et al., *supra* note 32, at 401.

[121] Survey questions 11(c), 11(a), and 11(b), respectively, derived from Salerno et al., *supra* note 32, at 401.

being in a sex crimes unit); and the number of years in law practice as a prosecutor.

G. Qualitative Inquiry

This survey provided opportunities for participants to explain the reasons underlying their decision whether or not they would prosecute the case. We also asked them to indicate what additional information would be important to them in deciding whether to move forward with prosecution. These responses were reviewed by two of the researchers and analyzed using ethnographic content analysis.[122] This method is particularly appropriate since responses were reviewed in an attempt to discover emergent patterns and differing emphases among and between the cases reviewed. Consistent with the research method as set forth by Altheide and Schneider, we compared and contrasted responses without predefined content analysis categories, thereby allowing for the emergence of central themes, operationalized as those for which four or more respondents reported as a reason for their decision to decline or move forward with prosecution.[123] We report these recurring themes in the qualitative results section of this paper.

[122] DAVID L. ALTHEIDE & CHRISTOPHER J. SCHNEIDER, QUALITATIVE MEDIA ANALYSIS (2d ed. 2013).

[123] *Id.* at 39–73.

IV. RESULTS

A. Quantitative Findings

1. Decisions to Prosecute

Table 1 presents a summary of how the decisions to prosecute varies by the sex of the offender and the victim. Chi-square results could not be reliably computed because some cells did not have expected values greater than five. Fisher Exact Tests, however, revealed no significant associations. Similarly, nonparametric correlations between demographic variables—such as respondents' sex, race, ethnicity, political orientation, years in law practice—and the likelihood of prosecuting a case were not statistically significant. It is possible that these null effects are a function of the low response rate which yielded only seventy responses to analyze.

Table 1: Variations in Decisions to Prosecute by Gender of Offender and Victims

Offender	Victim	Would Not Prosecute	Would Prosecute	Total
Male	Opposite Sex	15 (83.3%)	3 (16.7%)	18 (100%)
	Same Sex	9 (81.8%)	2 (18.2%)	11 (100%)
	Total	24 (82.8%)	5 (17.2%)	29 (100%)
Female	Opposite Sex	20 (83.3%)	4 (16.7%)	24 (100%)
	Same Sex	11 (73.3%)	4 (26.7%)	15 (100%)
	Total	31 (79.30%)	8 (20.5%)	39 (100%)
Total	Opposite Sex	35 (83.30%)	7 (16.7%)	42 (100%)
	Same Sex	20 (76.9%)	6 (23.10%)	26 (100%)
	Total	55 (80.9%)	13 (19.1%)	68 (100%)

2. **Negative Attributions**

In contrast to the decision to prosecute, significant differences were identified in how prosecutors perceived the juvenile "offenders." As Table 2 reveals, there was a significant interaction between the offender's gender and presumed sexual orientation, such that prosecutors made the most negative attributions about male offenders who engaged in oral sex with another male relative to all other combinations.

Table 2. Comparison of Negative Attributions by Gender and Sexual Orientation

Offender Gender	Victim	Mean	Std. Error	95% Confidence Interval	
				Lower Bound	Upper Bound
Male	Opposite Sex	1.765	.153	1.459	2.070
	Same Sex	2.440	.199	2.042	2.838
Female	Opposite Sex	1.687	.131	1.424	1.950
	Same Sex	1.508	.175	1.158	1.857

Source	Type III Sum of Squares	df	Mean Square	*F*	Sig.
Corrected Model	5.516[a]	3	1.839	4.636	.006
Intercept	196.080	1	196.080	494.429	.000
Offender Gender	3.654	1	3.654	9.213	.004
Offender's Presumed Sexual Orientation	.881	1	.881	2.222	.141
Offender Gender by Offender's Presumed Sexual Orientation	2.615	1	2.615	6.595	.013
Error	23.398	59	.397		
Total	230.880	63			
Corrected Total	28.914	62			

[a] R Squared = .191 (Adjusted R Squared = .150)

B. Qualitative Findings

1. Reasons for Declinations

Of the fifty-five respondents who indicated they would decline prosecution of the case, thirteen explained that in their opinion, the sex act was "consensual" even though the law of statutory rape technically operates to render consent by an underage person legally ineffective. One explained, "We try and limit prosecution to cases where there is coercion, force, or some type of fear." Another prosecutor stated that the facts did "not show predatory or victimization behavior (force or undue influence because of age, relative sophistication, occupational position)" and, therefore, prosecution was not warranted. Another mirrored such sentiments, adding, "In the absence of any aggravating factors or a past pattern of conduct … , prosecution would not serve a rehabilitative purpose or be necessary to protect the community."

An even larger number of respondents (seventeen) explained that they would not move forward with prosecution because they felt that the offender and victim were close enough in age to suggest the actions involved sexual experimentation rather than exploitation. One prosecutor exclaimed, "They are in the same peer group!" And other explained, "[If] I prosecuted this case, I would have to prosecute many male juniors in high school. Common sense [needs] to apply in the courtroom. I am very tough on rapists, but to prosecute this junior with the facts given, would be very unjust!" Another similarly stated that the participants were simply "too

close in age" and, therefore, the "morally right thing" was not to prosecute the case.

Forty-three respondents indicated that the presence of an age gap provision in state law would bar them from moving forward with formal prosecution of the case. Other reasons for declining prosecution included a belief that the potential punishment would be unnecessarily harsh in light of the underlying facts (four), and personal moral beliefs that prosecuting a young person did not "seem like the right thing to do" (twelve). One prosecutor explained, "The likely collateral consequences of being found to be a sex offender are too high for this behavior, which would be the principal reason I would likely not charge."

In contrast to those whose articulated reasons for declining prosecution were unqualified, a handful of prosecutors expressed some reservations about their decision and indicated that other factors might change their minds. One said, "I would not prosecute this case unless I was put under extreme pressure by the parents of the boy." Other explained, "I would prosecute if the offender had a prior history of inappropriate sexual behavior." Another stressed that the teenagers' use "of alcohol and/or drugs could change my view." And another noted that "this case is troubling" because the applicable age gap provision did not specifically include an oral sex component, yet, "the spirit of the exemption would apply." Five

respondents offered the caveat that their decision to decline prosecution would depend on the outcome of a formal psychological evaluation of the older student. And one stated the declination would depend on the younger student's psychological functioning: "Is the victim functioning, intellectually and emotionally, at his chronological age? If the boy is significantly delayed, the delay would affect his ability to give 'consent.'"

2. Reasons for Prosecutions

The thirteen respondents who indicated they would prosecute the case explained their reasoning by offering minor variations on three primary themes. First, six prosecutors offered a strict constructionist view of statutory rape law as illustrated by one prosecutor's response that "according to the letter of the law, this behavior is illegal, and it's my job to enforce the law regardless of my personal feelings." Another stated, "even if both boys say it was 'consensual,' the freshman is not of age to consent so it is illegal." And another said, this "violates the statute" because one is a junior and the other is a freshman.

Second, four other prosecutors cited that their jurisdictions had age gap provisions that were silent on whether oral sex would be encompassed. It was unclear, however, if these respondents were strictly construing the term "sexual intercourse" or if they interpreted that term to be limited to heterosexual penile-vaginal sex.

Third, notions of legal paternalism led four respondents to decide to prosecute the case, but seek rehabilitative or therapeutic sanctions in lieu of criminal punishment. One said,

"Because the suspect is a juvenile, the options for pursuing this case are great. We could just have him attend a class and do an 'informal adjustment' so he would have no 'conviction' or 'adjudication' and would not be required to register. The consequences are minimal."

Another explained, "The minor is not a true 'sex offender' who needs intervention via the juvenile justice system. She is unlikely to reoffend. If the boy's parents were insistent on pursuing the case, I would refer the girl for a diversion program."

And other stated, "I would prosecute in juvenile court where the goals of the system are much different than in superior court. Services clearly need to be provided to prevent future delinquent behavior or possibly STDs, unplanned pregnancies, etc."

Fourth, four respondents who reported they would prosecute the case revealed a troubling reason in support of their decisions from the standpoint of equal protection under law. Specifically, these four prosecutors explained that although there were age gap provisions that would exempt opposite-sex teenagers from criminal prosecution for statutory rape in their jurisdictions, they would not apply such age gap provisions to oral sex between two

teenagers of the same sex. None of these four respondents offered any reasoning that explicitly targeted same-sex participants, but instead offered explanations that implied homophobic reasoning as evidenced by this response concerning a vignette with a male "offender" and a male "victim": "This scenario is not what, in my opinion, the [age gap] statute was intended to prevent."

V. DISCUSSION

A. Hypothesis Unsupported

The data do not support our hypothesis that prosecutors would be more likely to prosecute statutory rape between teenagers who are close in age for oral sex performed by a male on someone of the same sex in comparison to oral sex performed by a male on someone of the opposite sex. This could be a function of the fact that the decision to prosecute did not vary by respondents' personal beliefs and opinions concerning sex and sexual orientation, but there are at least three other possible explanations.

First, it is possible that given the low response rate and, further, the small number of prosecutors who indicated they would prosecute the case (thirteen, constituting 18.5% of the survey respondents), the study lacked sufficient statistical power to detect such differences. Second, social desirability bias may have impacted respondents insofar as prosecutors could have guessed the purpose of our study and altered their decisions in

order to not appear biased against LGBTQ+ people.[124] Third, the qualitative responses offer good insight into why we found no significant differences regarding the decision to prosecute across prosecutors' sex, race. ethnicity, political orientation, and years of experience. Specifically, many respondents told us that they did not believe such a case warranted prosecution because the teenagers were close in age and decided voluntarily to engage in nonforcible oral sex (even though one teenager was technically too young to grant legally effective consent). Without there being any compulsion or exploitation, most respondents thought their limited resources should be used to prosecute other cases.

Even though most prosecutors did not express interest in pursuing the case, the data reveal that prosecutors held significantly more negative attributions towards male "offenders" who engaged in oral sex with another male relative to all other combinations—including females engaging in sexual activity with other females. This suggests that there may not be a general bias against LGBTQ+ youth, but rather one specific to gay male youth. This could have consequences for how they decide to handle the cases that they actually prosecute in real life (when not feeling under scrutiny as they might have while participating in this experiment), ranging from the types of pleas they would be willing to accept to the punishments

[124] Pamela Grimm, *Social Desirability Bias*, *in* 2 WILEY INT'L ENCYCLO. MARKETING 263 (Jagdish N. Sheth & Naresh Malhotra eds., 2010).

they might seek.

B. Does Masked Homophobia Answer the Research Question?

Prejudice theories posit that social suppression of undesirable views are often kept in check when bias would be noticeably apparent, but bias is more likely to be expressed in situations in which alternative justifications or excuses may be offered to mask bias.[125] The ability of prosecutors to point to statutory ambiguity regarding the scope of age-gap exceptions falls squarely within what theories of prejudice would predict insofar as such ambiguity provides an opportunity to mask homophobic attitudes. Consider that when explaining that a same-sex pairing of "offender" and "victim" constituted a scenario that age-gap provisions were not intended to encompass, prosecutors lent support to Higdon's observations that age gap provisions like the one in Kansas under which Matthew Limon was charged should only provide mitigation for opposite-sex couples.[126]

Qualitative responses from prosecutors also give rise to concern that anti-LGBTQ+ bias from others could change their declination decisions. Specifically, several prosecutors noted that they would change their minds and move forward with criminal prosecution if they were pressured to do so by the parents of the "victim." Although parental pressure might manifest in any case regardless of the sex and perceived sexual orientation of the

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[125] Crandall et al., *supra* note 65, at 374–75.
[126] Higdon, *supra* note 32, at 226–52.

teenagers in question because parents can be alarmed when they discover their teenager is engaging in sexual activity, this alarm is often exacerbated if the sexual activity involves same-sex relations.[127] This is problematic because age gap provisions in statutory rape laws are intended to shield close-in-age teenagers from criminal liability for sexual experimentation, even if parents are unhappy with the nature of a sexual relationship. But in light of how few prosecutors were willing to move forward with a criminal case, perhaps current attitudes have changed with regard to consensual sexual activity, even between members of the same sex who are close in age. The differences in our negative attribution scale ascribed to same-sex dyads in the current research call that conclusion into question. Still, given that only seventy prosecutors responded to our survey, future research should investigate this question further. Future research might also vary race and gender identity of close-in-age sexual couplings to see if these factors impact prosecutorial discretion in such cases.

VI. CONCLUSION

Given the limitations of the present study, especially the low response

[127] Sutherland, *supra* note 32, at 327–28 (quoting Minkowitz, *supra* note 35, at 99, 145); *see also*, *e.g.*, Brian A. Feinstein, Matthew Thomann, Ryan Coventry, Kathryn Macapagal, Brian Mustanski, & Michael E. Newcomb, *Gay and Bisexual Adolescent Boys' Perspectives on Parent–Adolescent Relationships and Parenting Practices Related to Teen Sex and Dating*, 47 ARCHIVES SEX. BEHAV. 1825 (2018) (reporting how parents of children who identify as LGBTQ+ are less likely to talk with their children opening about dating and sexual activity).

rate to the survey, caution should be taken when inferring conclusions from the data. Nonetheless, both common sense and the themes that emerged from the prosecutors' stated reasons for moving forward with criminal cases against the juveniles in the vignettes suggest that ambiguous statutory rape laws—including unclear age-gap provisions—should be amended.

Approximately forty-five U.S. states currently have some form of an age gap provision to protect juveniles from criminal punishments for engaging in age-normative sexual activity.[128] The exact number of states with protections of this sort is hard to pinpoint because these laws differ from state to state and are sometimes written ambiguously. Such ambiguity has the potential to result in the denial of equal protection under law. To address this concern and guard against the influence of extralegal factors like sexual orientation impacting charging decisions in statutory rape cases, we should stop referring to age gap provisions as "Romeo and Juliet" exceptions because such a moniker reifies heteronormativity. More importantly, age gap provisions should be rewritten in a gender-neutral manner that specifically includes oral sex, anal sex, penile-vaginal sexual intercourse, and manual stimulation. Such a change would promote equality under law by being explicitly inclusive of sex acts in which LGBTQ+ people typically engage.

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[128] *Age Gap Provisions*, NAT'L JUV. DEFENDER CTR. (2015), https://njdc.info/wp-content/uploads/2015/11/AgeGapProvisions.pdf (last visited Oct. 27, 2019).

Finally, like all lawyers, prosecutors must take continuing legal education courses each year. State prosecutors should be required to take courses on diversity and inclusion every so frequently in order to satisfy their continuing education requirements, just as the U.S. Department of Justice began to require of federal prosecutors in 2016.[129] In addition to bias training that commonly focuses on race and ethnicity, such diversity courses must also incorporate bias training on homophobia and heterosexism in an effort to reduce the negative attributions prosecutors reported regarding the same-sex sexual activity investigated in this study. The field of medicine has been at the forefront of including LGBTQ+ bias training.[130] The law needs to catch up.

[129] Victor Li, *DOJ Mandates Implicit Bias Training for Prosecutors and Agents*, A.B.A. J. (June 28, 2016), http://www.abajournal.com/news/article/doj_mandates_implicit_bias_training_for_prosecutors_and_agents/.

[130] Jacob J. Mayfield, Emily M. Ball, Kory A. Tillery, Cameron Crandall, & Julia Dexter, *Beyond Men, Women, or Both: A Comprehensive, LBGTQ-Inclusive, Implicit-Bias-Aware, Standardized-Patient-Based Sexual History Taking Curriculum*, 13 MEDEDPORTAL: J. TEACHING & LEARNING RESOURCES 10634 (2017), https://www.mededportal.org/publication/10634/.