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Peeking Under the Covers: Taking a Closer Look at Prosecutorial Decision-Making Involving Queer Youth and Statutory Rape

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PEEKING UNDER THE COVERS: TAKING A CLOSER LOOK AT PROSECUTORIAL DECISION-MAKING INVOLVING QUEER YOUTH AND STATUTORY RAPE

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Abstract: Queer youth are in a precarious position. In comparison to their heterosexual peers, queer youth are disproportionately punished in the criminal justice system, and they may be more vulnerable to being prosecuted for statutory rape. They may be selectively prosecuted because prosecutors have broad discretion in whom they prosecute, and social norms favoring heterosexuals may be part of their decision-making process. In light of the significant barriers before a statutory rape defendant alleging selective prosecution, especially for juvenile defendants, limited discovery orders like the one at issue in *Commonwealth v. Washington* may be a pragmatic way to make equitable change.

INTRODUCTION

> *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."*
>
> —A juvenile defender[1]

Statutory rape laws vary by state and complications arise when the sexual activity occurs between a juvenile and a person who is close in age but has already reached majority.[2] Prosecutors have discretion in prosecuting statutory rape cases and their decisions often depend on several factors such as the age of consent, whether the sexual activity resulted in pregnancy, the age gap between the parties, and whether

* Executive Comments Editor, BOSTON COLLEGE JOURNAL OF LAW & SOCIAL JUSTICE (2011–2012).

[1] KATAYOON MAJD ET AL., HIDDEN INJUSTICE: LESBIAN, GAY, BISEXUAL, AND TRANSGENDER YOUTH IN JUVENILE COURTS 62 (2009), *available at* http://www.equityproject.org/pdfs/hidden_injustice.pdf (citing Interview by Equity Project with a juvenile defender (Jul. 17, 2007)).

[2] *See* Kate Sutherland, *From Jailbird to Jailbait: Age of Consent Laws and the Construction of Teenage Sexualities*, 9 WM. & MARY J. WOMEN & L. 313, 314–15 (2003).

the parties are of the opposite sex.[3] The parties' sex may invite scrutiny when, for example, a state legislatively carves out a "Romeo and Juliet" exception.[4] This exception precludes prosecution of parties engaging in proscribed sexual activity if they are close enough in age, as defined by the statute.[5] Although this exception may be gender-neutral, some Romeo and Juliet exceptions discriminate against non-heterosexual ("queer youth") because they exempt only opposite-sex sexual activity.[6] For this reason, the heterosexual or homosexual nature of the activity may factor into a decision to prosecute.[7] These discriminatory Romeo and Juliet exceptions place queer youth at a greater risk for statutory rape prosecution.[8]

Even in states without these discriminatory exceptions, prosecutors may still consider sexual orientation when prosecuting.[9] In *Commonwealth v. Washington W.*, a Massachusetts case, two boys under the age of seventeen allegedly had an ongoing sexual relationship.[10] When the younger boy's father discovered the relationship, he reported it to the police.[11] The prosecution subsequently charged the older boy, Washington, with two counts of statutory rape and two delinquency complaints of indecent assault and battery.[12] Although Massachusetts has no Romeo and Juliet exception, Washington argued that the district attorney selectively prosecuted him because of his sexual orientation.[13] Therefore, the trial court granted a limited discovery order compelling

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[3] *See* Michelle Oberman, *Regulating Consensual Sex with Minors: Defining a Role for Statutory Rape*, 48 Buff. L. Rev. 703, 734 (2000); Sutherland, *supra* note 2, at 314–15, 326–27 ("[W]here 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.").

[4] 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, 198 (2008).

[5] *Id.*

[6] *Id.* at 226–27.

[7] *See id.*

[8] *See* Higdon, *supra* note 4, at 226–29; Sutherland, *supra* note 2, at 326–28; *see also* Barbara L. Frankowski et al., *American Academy of Pediatrics, Clinical Report: Sexual Orientation and Adolescents*, 113 Pediatrics 1827, 1828 (2004).

[9] *See* Sutherland, *supra* note 2, at 326–28; *see, e.g.*, Commonwealth v. Washington W., 928 N.E.2d 908, 911–12 (Mass. 2010) (seeking discovery to prove selective statutory rape prosecution based on sexual orientation).

[10] *See Washington W.*, 928 N.E.2d at 910.

[11] *See id.*

[12] *See id.*

[13] *See id.*; *Legislative Alert: H 445: An Act Relative to the Protection of Children*, Citizens for Juv. Just. (Mar. 29, 2011), http://www.cfjj.org/pdf/Romeo%20and%20Juliet%20Leg%20Alert%203.29.11.pdf. In 2011, Massachusetts Representative Kay Khan sponsored a bill to add a Romeo and Juliet exception to Massachusetts statutory rape law. *Legislative Alert: H 445: An Act Relative to the Protection of Children*, *supra*.

the district attorney's office to produce statistical data regarding the prosecution of statutory rape and indecent assault and battery in cases involving similarly aged teenagers of the opposite sex.[14] As Washington argued, even in states where discriminatory Romeo and Juliet exceptions do not exist, sexual orientation may be a factor in prosecutorial decision-making.[15]

Any defendant alleging selective prosecution faces several barriers.[16] In *United States v. Armstrong*, the Supreme Court held that a defendant must first make a threshold showing of selective prosecution before a court will grant discovery.[17] To meet this threshold, defendants must demonstrate that prosecutors targeted them while ignoring other similarly situated individuals.[18] The Court imposed this barrier to discovery for policy concerns, such as facilitating law enforcement and reducing the attorney general's encroachment into Executive territory.[19] Prosecutors retain broad discretion in choosing their defendants and, even if a defendant reaches the threshold necessary for discovery, *Armstrong* remains an arguably insurmountable barrier.[20] Absent clear evidence to the contrary, prosecutorial decision is presumed proper.[21]

In juvenile cases, the confidentiality of juvenile court records creates another barrier to the threshold showing of relevance sufficient to warrant discovery.[22] While adult defendants may access records of simi-

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[14] *See Washington W.*, 928 N.E.2d at 910.

[15] *See id.*; Higdon, *supra* note 4, at 227–29; Sutherland, *supra* note 2, at 322; *see also* Kay L. Levine, *The Intimacy Discount: Prosecutorial Discretion, Privacy, and Equality in the Statutory Rape Caseload*, 55 Emory L.J. 691, 694–95, 739 n.176 (2006); Joseph J. Wardenski, Comment, *A Minor Exception?: The Impact of* Lawrence v. Texas *on LGBT Youth*, 95 J. Crim. L. & Criminology 1363, 1367–68 (2005).

[16] *See* United States v. Armstrong, 517 U.S. 456, 465–66 (1996).

[17] *See id.* at 458, 463–64.

[18] *See id.* at 465.

[19] *See id.* The attorney general is an executive branch official. *See id.* at 464.

[20] *See id.* at 464 (stating "that the showing necessary to obtain discovery should itself be a significant barrier"); Yoav Sapir, *Neither Intent nor Impact: A Critique of the Racially Based Selective Prosecution Jurisprudence and a Reform Proposal*, 19 Harvard Blackletter L.J. 127, 141–42, 176 (2003) (arguing that the intent requirement of a selective prosecution claim is an "insurmountable obstacle"); Robert Heller, Comment, *Selective Prosecution and the Federalization of Criminal Law: The Need for Meaningful Judicial Review of Prosecutorial Discretion*, 145 U. Pa. L. Rev. 1309, 1322–23 (1997) (quoting *Armstrong*, 517 U.S. at 464) (arguing that the "'significant barrier'" erected by *Armstrong* "has effectively mooted an important constitutional protection").

[21] *See Armstrong*, 517 U.S. at 464.

[22] *See Washington W.*, 928 N.E.2d at 912 (noting that no public records are available for Washington to show that he was treated differently by the prosecutor and that there are strong policy reasons for such suppression); *see also* Emily Bazelon, Note, *Public Access to Juvenile and Family Court: Should the Courtroom Doors Be Open or Closed?*, 18 Yale L. & Pol'y

larly situated adults, juvenile defendants may not access records of similarly situated juveniles due to privacy concerns.[23] Because of this lack of access, a defendant like Washington faces an especially significant obstacle in proving selective prosecution.[24]

Another barrier that defendants like Washington face is a lack of legal protection for sexual orientation.[25] America has not yet found an equal place for queers in its legal system.[26] This is evidenced in part by the patchwork of rights for queer Americans—notably, a lack of equal recognition for same-sex relationships.[27] This barrier means that queer youth charged with sexual misconduct face negative social attitudes and community norms, as embedded in prosecutorial decision-making.[28] Therefore, the novelty of legally recognized same-sex relationships will likely remain a barrier for queer youth arguing selective prosecution until the recognition of such relationships is commonplace.[29]

Rev. 155, 155 (1999); William McHenry Horne, Note, *The Movement to Open Juvenile Courts: Realizing the Significance of Public Discourse in First Amendment Analysis*, 39 Ind. L. Rev. 659, 659–60 (2006).

[23] *See Washington W.*, 928 N.E.2d at 914 ("An adult defendant could search court records to determine, from complaints and indictments, the number of prosecutions that have been instituted . . . ."); Bazelon, *supra* note 22, at 155.

[24] *See Washington W.*, 928 N.E.2d at 914; Bazelon, *supra* note 22, at 155; Horne, *supra* note 22 at 659–60.

[25] *See Washington W.*, 928 N.E.2d at 911 ("Massachusetts courts do not recognize sexual orientation as a protected class."); Higdon, *supra* note 4, at 224; Edward Stein, *Evaluating the Sex Discrimination Argument for Lesbian and Gay Rights*, 49 UCLA L. Rev. 471, 482–83 (2001); Kenji Yoshino, *The New Equal Protection*, 124 Harv. L. Rev. 747, 756 (2011). "Lauren Berlant and Michael Warner define heteronormativity as 'the institutions, structures of understanding, and practical orientations that make heterosexuality seem not only coherent—that is, organised as a sexuality—but also privileged.'" Robert S. Chang & Adrienne D. Davis, *Making Up Is Hard to Do: Race/Gender/Sexual Orientation in the Law School Classroom*, 33 Harv. J.L. & Gender 1, 15 n.30 (2010) (quoting Lauren Berlant & Michael Warner, *Sex in Public*, 24 Critical Inquiry 547, 548 n.2 (1998)). Sexual orientation is reviewed under a lower, rational basis standard—unlike classifications such as race. Yoshino, *supra*, at 756. "The few courts that have held that sexual orientation classifications warrant heightened scrutiny have had their decisions overruled or vacated." Stein, *supra*, at 482.

[26] *See* Majd et al., *supra* note 1, at 2; Higdon, *supra* note 4, at 214; Stein, *supra* note 25, at 482–83; Yoshino, *supra* note 25, at 756.

[27] *See, e.g.*, Laurence H. Tribe, Lawrence v. Texas*: The "Fundamental Right" That Dare Not Speak Its Name*, 117 Harv. L. Rev. 1893, 1949–50 (2004) (arguing that *Lawrence v. Texas* has yet to result in equal relationship recognition for same-sex couples); *Marriage Equality & Other Relationship Recognition Laws*, Hum. Rts. Campaign, (Jul. 6, 2011), http://www.hrc.org/documents/Relationship_Recognition_Laws_Map.pdf [hereinafter *HRC Marriage Equality Laws*].

[28] *See Armstrong*, 517 U.S. at 463–65; *Washington W.*, 928 N.E.2d at 912; Levine, *supra* note 15, at 694–95, 721–23, 739 n.176; Wardenski, *supra* note 15, at 1367–68.

[29] *See* Levine, *supra* note 15, at 739 n.176; Tribe, *supra* note 27, at 1949–50; Wardenski, *supra* note 15, at 1367–68.

This Note argues that discovery requests, like the one affirmed in *Washington W.*, may be a means to achieve equitable change in the selective prosecution of queer youth.[30] Part I explains statutory rape laws as applied to teenagers who engage in proscribed sexual activity and highlights some factors in the prosecutorial calculus. Part II discusses historical and recurring attitudes toward queers, emphasizing states' hesitance to equally recognize same-sex adult relationships. Part II also explains that, in light of the challenges queer adults still face, queer youth are disadvantaged and are in a precarious legal position. Part III reviews selective prosecution requirements post-*Armstrong*, and finally, Part IV argues how queer youth may achieve favorable results within the existing framework through discovery requests.

I. Which Teenagers Are Prosecuted for Their Sexual Activity?

A significant number of American teenagers are sexually active.[31] One study states that seventy percent of all teenagers in the United States have had sex by age nineteen.[32] Another study involving adolescents around age fourteen found that approximately twenty percent had already had oral sex, and over thirty percent said they intended to have oral sex within the next six months.[33] Neither sexual intercourse nor oral sex is required to violate the law in most states.[34] Laws proscribing sexual activity with minors under the age of consent are often written broadly to ensnare a range of sexual contact, including nonforcible contact that the participants may think is innocent.[35] Consequently, illegal sexual activity between teenagers, though difficult to precisely quantify, is widespread.[36]

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[30] *See Washington W.*, 928 N.E.2d at 915–16; Anne Bowen Poulin, *Prosecutorial Discretion and Selective Prosecution: Enforcing Protection After* United States v. Armstrong, 34 Am. Crim. L. Rev. 1071, 1090–92 (1997).

[31] *See Facts on American Teens' Sexual and Reproductive Health*, Guttmacher Inst., 1 (Dec., 2011), http://www.guttmacher.org/pubs/FB-ATSRH.pdf.

[32] *Id.*

[33] Bonnie L. Halpern-Felsher et al., *Oral Versus Vaginal Sex Among Adolescents: Perceptions, Attitudes, and Behavior*, 115 Pediatrics 845, 846–47 (2005). The median age of the sample in the study was 14.54 years old. *See id.* at 846.

[34] *See* Oberman, *supra* note 3, at 707; *see, e.g.*, *In re* Pima Cnty. Juvenile Appeal No. 74802-2, 790 P.2d 723, 724–25 (Ariz. 1990) (affirming conviction of sixteen-year-old male for consensual touching of fourteen-year-old girl's breasts).

[35] *See* Oberman, *supra* note 3, at 707; *see, e.g.*, *Pima Cnty. Juvenile Appeal*, 790 P.2d at 730.

[36] *See* Halpern-Felsher et al., *supra* note 33, at 845; Oberman, *supra* note 3, at 704 n.3; *Facts on Teens' Sexual and Reproductive Health*, *supra* note 31. Professor Michelle Oberman points out that, based on estimates of U.S. Census data available in 2000, there were 15 million American residents ages thirteen to sixteen and, even estimating conservatively,

The age combinations that constitute proscribed sexual activity vary by state.[37] Some states forbid sexual contact between a legal adult who is eighteen or older and a minor under sixteen.[38] Other states follow the Model Penal Code and forbid sexual activity between parties who are beyond a specified age gap, such as when the parties are more than four years apart.[39] Others have blanket prohibitions forbidding sexual contact with children under a certain age but mitigate the offense's severity if the parties are within a specified age gap.[40] Despite these state-by-state variations, prosecutorial discretion remains constant.[41] It is impossible for prosecutors to charge every teenager who violates statutory rape laws.[42] Therefore, prosecutors must inevitably choose their defendants and considering which teenagers are prosecuted reveals not only state policies but prosecutorial motives.[43]

Professor Michelle Oberman categorizes contemporary prosecution of statutory rape cases into three groups—cases involving pregnancy, cases that are easily identifiable, and cases perceived as "sick."[44] First, prosecutors pursue cases resulting in pregnancy because single teenage mothers often cost the government more money.[45] Second, prosecutors pursue easily-identifiable cases that are reported by healthcare providers, state agencies, and other mandated reporters when minors use their services.[46] The state has an interest in pursuing these cases, not only because of similar concerns about governmental financial support, but because there is a need to protect children.[47] In this situation, the state exercises its ability to shield children from harmful sexual activity and sexually transmitted diseases (STDs).[48] Finally, prosecutors pursue "sick" cases that involve either a significant age gap or exploitation, such as when there is a notable power differential be-

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there are over 7.5 million annual incidents of statutory rape. *See* Oberman, *supra* note 3, at 704 n.3. Moreover, these estimated incidents do not capture other statutorily proscribed sexual activity. *See id.*

[37] *See* Oberman, *supra* note 3, at 768–69.

[38] *See id.* at 768.

[39] *See* MODEL PENAL CODE § 213.3(1)(a) (1980); Oberman, *supra* note 3, at 769.

[40] *See* Oberman, *supra* note 3, at 769.

[41] *See, e.g.*, United States v. Armstrong, 517 U.S. 456, 463–65 (1996); Commonwealth v. Washington W., 928 N.E.2d 908, 911 (Mass. 2010).

[42] Oberman, *supra* note 3, at 704.

[43] Levine, *supra* note 15, at 692; Oberman, *supra* note 3, at 733.

[44] Oberman, *supra* note 3, at 733.

[45] *See id.* at 734–35.

[46] *See id.* at 733, 739-41.

[47] *See id.* at 710, 739–40.

[48] *See id.* at 730–31, 752.

tween parties.[49] At least one other scholar, however, characterizes this third category as the selective prosecution of "unpopular men," such as older men or men of color who have sex with underage girls.[50]

Prosecutors may also choose to pursue a case between teenagers depending not on Oberman's proffered factors, but on whether they see the relationship as among peers or as predatory.[51] A peer relationship is one where sexual activity generally occurs after the parties have been together for an appreciable amount of time.[52] Prosecutors, however, assess more than the parties' prior relationship, and a study by Professor Kay Levine found that their discretion relied on "signs of commitment, family support, and marriage potential."[53] Intimate relationships with these characteristics are not predatory and are therefore more likely to receive lenity from prosecutors, a practice known as an "intimacy discount."[54] Queer youth, however, may have more difficulty achieving familial support, and local legislatures may deny them the right of marriage.[55] Thus, unlike their heterosexual peers, queer youth may not be afforded an intimacy discount.[56]

II. Emerging Queer Youth and the Maltreatment They Receive

Queer youth are acknowledging their sexuality earlier than before and this poses unique legal challenges as they develop.[57] Foundationally, queer youth must confront the legacy of anti-queer sentiments and laws that do not treat same-sex relationships equally.[58] Beyond these

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[49] *See* Oberman, *supra* note 3, at 743–44. Oberman notes that cases involving a young person and an older person in a position of power or trust, such as those between a student and her or his teacher, are likely to be prosecuted in part because the adults are exploiting their relationships with the young persons. *See id.*

[50] *See* Michelle Oberman & Richard Delgado, *Statutory Rape Laws: Does It Make Sense to Enforce Them in an Increasingly Permissive Society?*, A.B.A. J., Aug. 1996, at 86, 87.

[51] *See* Levine, *supra* note 15, at 694.

[52] *See id.* at 721–22.

[53] *Id.* at 694–95, 706–08.

[54] *See id.* at 694–95, 701, 724 n.127.

[55] *See id.* at 739 n.176.

[56] *See* Levine, *supra* note 15, at 694–95, 739 n.176.

[57] *See* Frankowski et al., *supra* note 8, at 1828; Arthur S. Leonard, Lawrence v. Texas *and the New Law of Gay Rights*, 30 Ohio N.U. L. Rev. 189, 189–190 (2004); John Cloud, *The Battle Over Gay Teens*, Time, Oct. 10, 2005, at 42, 44.

[58] *See* Lawrence v. Texas, 539 U.S. 558, 564 (2003); Edward L. Tulin, Note, *Where Everything Old Is New Again—Enduring Episodic Discrimination Against Homosexual Persons*, 84 Tex. L. Rev. 1587, 1587, 1629 (2006) (explaining that even post-*Lawrence*, homosexuals are still perceived as criminals and remain targets of discriminatory state laws); Wardenski, *supra* note 15, at 1367–68 (arguing that queer youth are still stigmatized as criminals because of their sexuality).

handicaps, queer youth must also contend with the possibility of selective prosecution for sex-based crimes like statutory rape.[59]

A. *Bedrock of Discrimination*

It is instructive to look at queer youth today through the historical lens of recurring animosity toward homosexuals in America, and even a cursory review shows that they do not start with a clean slate.[60] The term "homosexual" emerged in the late nineteenth century with a derogatory connotation.[61] Society considered homosexuality a disgusting disease, a sign of evolutional inferiority, a threat to national security, and even animalistic.[62] Homosexuals have battled with a presumption of being child molesters, unfit parents, and a threat to the American way of life.[63] They have, throughout American history, endured degradation, humiliation, physical torture, and deadly violence.[64]

Yet homophobia and anti-gay sentiments such as these do not dwell in the past; they manifest themselves in the present.[65] Indeed,

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[59] *See* MAJD ET AL., *supra* note 1, at 3; Levine, *supra* note 15, at 694–95, 739 n.176; Sutherland, *supra* note 2, at 327.

[60] *See* Tulin, *supra* note 58, at 1587, 1629; Wardenski, *supra* note 15, at 1367–68.

[61] *See* Tulin, *supra* note 58, at 1591.

[62] *See id.* at 1590–92, 1594, 1597–98; S.E. Cupp, *Conservatives, I'm Begging You: Leave Animals Out of Your Gay Marriage Talking Points*, N.Y. DAILY NEWS, (Mar. 16, 2010, 3:15 PM) http://www.nydailynews.com/opinion/conservatives-begging-leave-animals-gay-marriage-talking-points-article-1.177608.

[63] *See* Tulin, *supra* note 58, at 1594, 1622; Wardenski, *supra* note 15, at 1375.

[64] *Our Story*, MATTHEW SHEPARD FOUND., http://www.matthewshepard.org/our-story (last visited Jan. 20, 2012); *Victims—Hate Crime Statistics, 2009*, FED. BUREAU INVESTIGATION CRIM. JUST. INFO. SERVICES DIVISION. Of the 8336 hate crimes recorded by the Federal Bureau of Investigation in 2009, 1482 were committed based on sexual orientation. *Victims—Hate Crime Statistics, 2009*, *supra*. There are lawmakers, however, who dispute the relationship between some hate crimes and sexual orientation. *See* Ryan Grim, *Virginia Foxx: Story of Matthew Shepard's Murder a "Hoax,"* HUFFINGTON POST (May 30, 2009, 6:12 AM), http://www.huffingtonpost.com/2009/04/29/virginia-foxx-story-of-ma_n_192971.html. For instance, during debates in the U.S. House of Representatives regarding a bill for expansion of federal hate crimes legislation, Representative Virginia Foxx of North Carolina maintained that Matthew Shepard, the young gay man for whom the bill was partially named, was not the victim of a hate crime. *See id.* Instead, Representative Foxx claimed that Shepard's murder occurred after his assailants robbed him. *Id.* The hate crime aspect of the story, she said, was "a hoax that continues to be used as an excuse for passing these bills." *Id.* According to police investigators, local prosecutors, and the *New York Times*, however, Matthew Shepard's story is not a hoax. *See id.* Two men—claiming to be gay—lured Matthew from a bar, tied him to a fence, physically tortured him, and left him to die. *Id.* Despite critics such as Representative Foxx, President Obama signed into law the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act. *See* Pub. L. No. 111-84, 123 Stat. 2835, 2835–44 (2009) (codified at 18 U.S.C. § 249, 28 U.S.C. § 994, and 42 U.S.C. § 3716 (2010)).

[65] *See* Tulin, *supra* note 58, at 1587.

many of these perceptions are plainly visible in twenty-first century American culture.[66] Even if attitudes toward gay people are improving, the recurring rejection of homosexuals indicates that queer youth continue to confront these not-so-past perceptions.[67]

B. *Lack of Legal Recognition for Same-Sex Relationships*

Despite confronting ongoing societal hostility, queer Americans hoped for improved legal protection after the U.S. Supreme Court's 2003 decision in *Lawrence v. Texas*.[68] In *Lawrence*, a judge levied a two hundred dollar fine on each of two adult men—John Geddes Lawrence and Tyron Garner—for having consensual anal sex within the privacy of the home after police entered the residence looking for weapons, but instead arresting them for the Class C misdemeanor.[69] After years of litigation, the Supreme Court reversed the convictions and held unconstitutional a Texas statute criminalizing intimate sexual conduct be-

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[66] *See, e.g.*, Fla. Dep't of Children & Families v. Adoption of X.X.G. & N.R.G., 45 So. 3d 79, 81, 92 (Fla. Dist. Ct. App. 2010) (holding unconstitutional a Florida law prohibiting homosexuals from adopting); Tulin, *supra* note 58, at 1603–04 (arguing that modern ways of depicting homosexuals are "strikingly similar" to past understandings, such as "the Progressive-Era paradigm of homosexuality as a threat to the American family unit" and the modern version of the "Cold War-Era paradigm of homosexuality as a threat to American national security"); Cupp, *supra* note 62 (urging politicians to avoid conflating gay marriage with bestiality); Brian Braiker, *Grocery Store Un-Censors Elton John's Baby Picture*, ABC NEWS (Jan. 26, 2011), http://abcnews.go.com/Entertainment/grocery-store-censors-elton-johns-baby-picture-with-shield/story?id=12770479 (reporting on Harps Food Stores, a grocer that used a "family shield" —usually used to cover pornographic material—to cover a picture of Elton John, his male partner, and their baby); Andrew Harmon, *Arnold Signs Bill Aiding Gay Youths*, ADVOCATE.COM (Oct. 1, 2010, 4:00 PM), http://www.advocate.com/News/Daily_News/2010/10/01/Schwarzenegger_Signs_Bill_Aiding_Gay_Youth (reporting on Governor Schwarzenegger's signing of several bills pertaining to queer youth and adults, including a bill that allows access to mental health services as a response to a wave of gay youth suicides and a repeal of a 1950s law calling for research into the causes of homosexuality and its cures).

[67] *See* Tulin, *supra* note 58, at 1587; Wardenski, *supra* note 15, at 1367–68. Gerald Unks argues that "[h]omosexuals are arguably the most hated group of people in the United States." 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). Unks explains that it is now socially unacceptable to deride people based on classifications such as race, gender, or religion, and that minorities such as these "have gained a modicum of protection and acceptance." *Id.* He points out that "words such as 'nigger,' 'kike,' 'gook,' or 'wop'" are unacceptable but that "'faggot,' 'fairy,' 'homo,' and 'queer' are used by many without hesitation." *Id.*

[68] *See* 539 U.S. 558, 562–63 (2003); Wardenski, *supra* note 15, at 1365.

[69] *See Lawrence*, 539 U.S. at 558, 562–64; Lawrence v. State, 41 S.W.3d 349, 350 (Tex. App. 2001), *rev'd*, 539 U.S. 558.

tween two people of the same sex in the privacy of a home.[70] Memorably, Justice Kennedy concluded his opinion stating that "times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom."[71] Yet, despite this stirring closure, gay rights advocates must toil for equal protection under the law because *Lawrence* has not borne its anticipated fruit.[72] *Lawrence*'s strength will depend on its progeny and it is unclear whether courts will use it to validate more favorable rulings for gay rights.[73]

For instance, the Arizona Court of Appeals declined to apply the *Lawrence* decision to gay marriage after the state denied Harold Standhardt and Tod Keltner a marriage license.[74] Standhardt and Keltner, a gay couple living in Arizona, had been in a committed relationship and, three days after *Lawrence*, a local official denied their request for a marriage license because Arizona had a statutory prohibition against same-sex marriages.[75] The couple sued, arguing that such a prohibition was unconstitutional in light of the Supreme Court's decisions in *Lawrence* and *Loving v. Virginia*.[76] In *Loving*, the Court held that a Virginia statute prohibiting interracial marriage violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment.[77] *Loving* established marriage as a fundamental right, explaining that "[m]arriage

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[70] *See Lawrence*, 539 U.S. at 563, 578–79. The Texas statute at issue defined "deviate sexual intercourse" as "(A) any contact between any part of the genitals of one person and the mouth or anus of another person" or "(B) the penetration of the genitals or the anus of another person with an object." Tex. Penal Code Ann. § 21.01(a) (2009). The *Lawrence* Court did not say that the couple had a fundamental right to engage in their intimate sexual conduct but instead decided the case solely on their due process argument, explaining that private sex is within the "'realm of personal liberty which the government may not enter.'" *Lawrence*, 539 U.S. at 578 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 847 (1992)).

[71] *Lawrence*, 539 U.S. at 579.

[72] *See* Leonard, *supra* note 57, at 189–90; Tribe, *supra* note 27, at 1949–50; Tulin, *supra* note 58, at 1587.

[73] *See* Leonard, *supra* note 57, at 189–90; Tribe, *supra* note 27, at 1945, 1949–50; Wardenski, *supra* note 15, at 1391–94.

[74] *See* Standhardt v. Superior Court, 77 P.3d 451, 456 (Ariz. Ct. App. 2003). Justice Kennedy's decision in *Lawrence* was carefully tailored to avoid formally recognizing homosexual relationships. *See Lawrence*, 539 U.S. at 578. In stating that *Lawrence* did "not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter," Justice Kennedy effectively tethered *Lawrence*'s reach. *See id.*; Leonard, *supra* note 57, at 189; Tribe, *supra* note 27, at 1945, 1949–50.

[75] *See Standhardt*, 77 P.3d at 453–54.

[76] *See id.* at 454, 458.

[77] Loving v. Virginia, 388 U.S. 1, 12 (1967).

is one of the 'basic civil rights of man,' fundamental to our very existence and survival."[78] Standhardt and Keltner argued that, in light of *Lawrence* and *Loving*, the state's refusal to marry them violated the right to marry and equal protection rights under federal and state constitutions.[79] The Arizona court disagreed, stating that they each have a fundamental right to marry but "[they] do not have a right to marry each other."[80] This legacy continues because, despite a small minority, most states do not legally recognize same-sex relationships in marriage.[81]

C. *Queer Youth's Precarious Position in Modern America*

Queer youth may risk disproportionate punishment for their sexual encounters because social norms that do not include same-sex relationships factor into prosecutorial decision-making.[82] This is complicated by the fact that more queer youth are acknowledging their sexual orientation at an earlier age.[83] According to the American Academy of Pediatrics, sexual orientation is likely established during early childhood and

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[78] *Loving*, 388 U.S. at 12 (quoting Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)).

[79] *See Standhardt*, 77 P.3d at 454, 458.

[80] *Id.* at 464–65. Notably, however, in *Goodridge v. Department of Public Health*, the Massachusetts Supreme Judicial Court also did not expressly conclude that there was a fundamental right for people of the same sex to marry each other but nonetheless held that precluding such marriages did "not survive rational basis review . . . ." 798 N.E.2d 941, 961 (Mass. 2003). *Goodridge* is arguably part of *Lawrence*'s trickle down effect. *See id.* at 948, 961. Similar efforts to achieve marriage equality in other states, however, have failed. *See, e.g.*, Citizens for Equal Prot. v. Bruning, 455 F.3d 859, 863, 868 n.3 (8th Cir. 2006); Hernandez v. Robles, 855 N.E.2d 1, 10 (N.Y. 2006) (construing *Lawrence* as addressing "intimate, private activity" and not the "state-conferred benefit" of marriage), *abrogated by* N.Y. Dom. Rel. Law § 10-a (McKinney 2011). *Compare* Varnum v. Brien, 763 N.W.2d 862, 872 (Iowa 2009) (holding Iowa statute limiting marriage to a man and a woman was unconstitutional), *with* A.G. Sulzberger, *Ouster of Iowa Judges Sends Signal to Bench*, N.Y. Times, Nov. 4, 2010, at A1 (explaining "[a]n unprecedented vote to remove three Iowa Supreme Court justices who were part of the unanimous decision that legalized same-sex marriage . . ." in Iowa). New York's legislature disagreed with the outcome of *Hernandez v. Robles* and abrogated it by passing N.Y. Domestic Relations Law § 10-a, which expressly permits same-sex marriage. § 10-a.

[81] *See HRC Marriage Equality Laws*, *supra* note 27.

[82] *See* Majd et al., *supra* note 1, at 1–3; Chang & Davis, *supra* note 25, at 15 n.30 (citing Berlant & Warner, *supra* note 25, at 548 n.2); Levine, *supra* note 15, at 694–95; Wardenski, *supra* note 15, at 1367–68, 1374–75.

[83] *See* Frankowski et al., *supra* note 8, at 1827–28; Leonard, *supra* note 57, at 189–90; Cloud, *supra* note 57, at 44; Caitlin Ryan, *Supportive Families, Healthy Children: Helping Families with Lesbian, Gay, Bisexual & Transgender Children*, Fam. Acceptance Project, 1 (2009), http://familyproject.sfsu.edu/files/English_Final_Print_Version_Last.pdf.

young people are becoming aware of their sexuality earlier than was previously common.[84]

1. Discriminatory Romeo and Juliet Exception

Discriminatory Romeo and Juliet exceptions conditioned on opposite-sex parties may unfairly ensnare queer youth.[85] In Texas, for example, sexual contact with a child under the age of seventeen is felonious, but an affirmative defense exists if the actors are no more than three years apart and the victim is "of the opposite sex."[86] This exception is therefore unavailable to teens engaging in same-sex sexual contact.[87]

Similarly, Alabama bestows an advantage on heterosexual sex.[88] Although rape in the second degree is narrowly defined in Alabama as "sexual intercourse with a member of the opposite sex," the state's sodomy law captures homosexual sex, termed "deviate sexual intercourse."[89] Unlike its rape statute, however, Alabama does not reduce the penalty for parties charged with sodomy who are less than two years apart in age.[90] Thus, as in Texas, youth in Alabama who engage in homosexual sex could be subject to harsher punishment than similarly situated heterosexual teens.[91]

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[84] *See* Frankowski et al., *supra* note 8, at 1827–28. One study "found that the average age that youth realized they were gay was a little over age 13." Ryan, *supra* note 83, at 1. It is difficult to quantify the number of homosexuals in America because fear of homosexuality in respondents hinders the accuracy of the data. *See* Frankowski et al., *supra* note 8, at 1828. The Academy of Pediatrics also explains that human sexuality likely exists on a continuum, noting that many adults who identify as heterosexual report having had sexual encounters with members of the same sex when they were adolescents. *See id.* Therefore, sexual orientation, sexual activity, and laws policing the sexual activity of teens and minors may affect teens of varying sexual identities, regardless of the number of people who actually identify as homosexual. *See id.*

[85] *See* Tex. Penal Code Ann. § 21.11(b)(1) (2011); Oberman, *supra* note 3, at 733.

[86] Tex. Penal Code Ann. § 21.11(a)(1), (b)(1), (d). The statute also requires that the actor did not use such coercive methods as duress, force, or threats; was not required to register as a sex offender at the time of the offense; and did not have another conviction under the statute. *See id.* § 21.11(b)(2)–(3).

[87] *See id.* § 21.11(b)(1).

[88] *Compare* Ala. Code § 13A-6-62(a)(1) (2011) (providing an exculpatory age-based exception for sexual intercourse between members of the opposite sex), *with id.* § 13A-6-64(a)(1) (providing no exculpatory age-based exception for sodomy).

[89] *Id.* §§ 13A-6-60, 13A-6-62(a)(1), 13A-6-63(a)(1). The applicable age range is less than sixteen but more than twelve years old. *Id.* § 13A-6-64(a)(1). Deviate sexual intercourse is defined 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." *Id.* § 13A-6-60(2).

[90] *See id.* §§ 13A-6-62(a)(1), 13A-6-64(a)(1).

[91] *See id.*; Tex. Penal Code Ann. § 21.11(b)(1).

California also treats heterosexual sex more leniently through subtle differences between statutory rape and sodomy laws.[92] While it is felonious for "[a]ny person" to engage in "unlawful sexual intercourse with a minor," the crime is reduced to a misdemeanor if the actors are within three years of age.[93] It is also unlawful for "any person" to engage in sodomy with someone under the age of eighteen, but no similar gradation of offense exists based on the actors' age difference.[94] Although heterosexual teens may engage in sodomy as defined by the statute, penile-anal contact is more commonly characteristic of homosexual male sex.[95] Therefore, queer teens in California may suffer a harsher penalty for their sexual conduct.[96] Moreover, in Texas and Alabama, exculpatory exceptions are made for otherwise illegal sexual contact if the actors are legal spouses—a status which same-sex partners are not granted.[97]

The Kansas case of *State v. Limon* demonstrates the irreparable harm that queer youth may face as a result of these discriminatory statutes.[98] Matthew Limon had oral sex with M.A.R., the male complainant,

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[92] *See* CAL. PENAL CODE § 261.5(a) (2011) (defining unlawful sexual intercourse as "an act of sexual intercourse accomplished with a person who is not the spouse of the perpetrator, if the person is a minor"). *Compare id.* § 261.5(b)–(c) (reducing unlawful sexual intercourse from felony to misdemeanor if actors are not more than three years apart in age), *with id.* § 286(b)(1) (specifying punishment for sodomy with another person under the age of eighteen).

[93] *See id.* § 261.5(a)–(c).

[94] *See id.* § 286(b)(1). The statute 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." *Id.* Sodomy in California is "sexual conduct consisting of contact between the penis of one person and the anus of another person." *Id.* § 286(a).

[95] *See* Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws*, 35 HARV. C.R.-C.L. L. REV. 103, 111 (2000). Professor Christopher Leslie argues that sodomy laws turn homosexuals into a "criminal class." *Id.* at 103, 111.

[96] *See id. Compare* CAL. PENAL CODE § 261.5(b)–(c), *with id.* § 286(b)(1).

[97] *See* ALA. CODE § 13A-6-60(3) (2011) (excluding married parties from definition of sexual contact); CAL. PENAL CODE § 261.5(a) (defining unlawful sexual intercourse as "an act of sexual intercourse accomplished with a person who is not the spouse of the perpetrator, if the person is a minor"); TEX. PENAL CODE ANN. § 21.11(b-1) (2011) (providing that "[i]t is an affirmative defense to prosecution under this section that the actor was the spouse of the child at the time of the offense"); *see also HRC Marriage Equality Laws*, *supra* note 27. Neither Texas nor Alabama offers any relationship recognition for same-sex couples, and California offers limited recognition but not marriage. *See HRC Marriage Equality Laws*, *supra* note 27.

[98] *See* State v. Limon (*Limon I*), 83 P.3d 229, 232 (Kan. Ct. App. 2004), *rev'd*, 122 P.3d 22 (Kan. 2005).

when the boys were approximately three years apart in age.[99] Limon was convicted of criminal sodomy and, because Limon and M.A.R. were both male, he was subject to disparate treatment "based upon the homosexual nature of [his] conduct."[100] The court sentenced Limon to over seventeen years in prison and, upon his release, he faced up to five years of supervision and registration as a persistent sex offender.[101] Had Limon been able to avail himself of the Kansas Romeo and Juliet provision, his sentence would have been drastically reduced.[102]

Limon appealed his initial sentence but the Kansas Court of Appeals affirmed and denied further review.[103] The Supreme Court, after deciding *Lawrence*, granted Limon's petition for certiorari and vacated the Kansas Court of Appeals' judgment as deserving "further consideration in light of *Lawrence* . . . ."[104] This nudge by the U.S. Supreme Court, however, did not move the Kansas court.[105] Even though the court recognized the starkly different fate awaiting teenagers like Limon, it upheld the discriminatory Romeo and Juliet provision.[106] The court explained that *Lawrence* applied only to adults, and that the legislature could "punish those adults who engage in heterosexual sodomy with a child less severely than those adults who engage in homosexual sodomy with a child."[107] The court affirmed Limon's lengthy sentence and required sex-offender registration, holding that disparate treatment of homosexual sexual activity is in the state's interest.[108]

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[99] *See* State v. Limon (*Limon II*), 122 P.3d 22, 24 (Kan. 2005); *Limon I*, 83 P.3d at 232–33. The boys had oral sex shortly after Limon had turned eighteen, one month before M.A.R. turned fifteen. *See Limon II*, 122 P.3d at 24.

[100] *Limon II*, 122 P.3d at 24.

[101] *See id.* at 25. "Sodomy" can include both oral and anal sexual contact. *See* KAN. STAT. ANN. § 21-5501(b) (2011) (defining sodomy in part as "oral contact or oral penetration of the female genitalia or oral contact of the male genitalia; anal penetration, however slight, of a male or female by any body part or object"). *Id.* Professor Michael Higdon warns that Romeo and Juliet provisions such as these "should immediately inspire caution given that they require individuals who are not even adults to register as a sex offender." Higdon, *supra* note 4, at 250. He also points out the potential for serious complications from the required public disclosure component of sex offender registration because queer youth may be closeted. *See id.* at 250–51. In addition to being labeled a sex offender and having their secret identities thrust into the public, outing queer youth in this way could increase the risk that they will commit suicide. *See id.*

[102] *See Limon II*, 122 P.3d at 25.

[103] *See id.*

[104] Limon v. Kansas, 539 U.S. 955, 955 (2003) (mem.).

[105] *See Limon I*, 83 P.3d at 232.

[106] *See Limon I*, 83 P.3d at 237–38 (holding in part that Limon failed to show that his sentence was "unconstitutionally disproportionate").

[107] *See id.* at 235.

[108] *See id.* at 237.

The court credited four interests on which the state could rationally rely in punishing criminal homosexual sodomy with a sentence almost fourteen-times longer than that for criminal heterosexual sodomy.[109] First, the court credited protecting children from consensual homosexual sex as a rational interest, as homosexual sex is contrary to traditional sexual norms.[110] Second, the court mentioned the state's preference for marriage and procreation, as it helps replenish the population.[111] Third, the court credited lenity toward heterosexuals because it facilitates parental responsibility, as freeing the offender from prison would better allow both parents to financially support a child should pregnancy result.[112] Finally, the court imputed the prevention of STDs as a rational basis, because homosexual sex between males is "more generally associated" with a higher risk of STD transmission.[113] In these ways, the court allowed the state to encourage "traditional sexual mores" that could lead to marriage and procreation because it "furnish[es] new workers, soldiers, and other useful members of society."[114] "The survival of society," the court reasoned, "requires a continuous replenishment of its members."[115] The court also reasoned that punishing heterosexual sodomy less severely was akin to punishing first-time offenders of crimes less severely than repeat offenders.[116] The court explained that statutes punishing people based on classifications, such as the sex of the parties, are allowable if the legislature is protecting a class of people, like children.[117]

The Supreme Court of Kansas considered these same interests and found that they were not rationally related to the harsh treatment of criminal homosexual sodomy.[118] In light of *Lawrence*, the Supreme

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[109] *See id.* at 235-37.

[110] *Limon I*, 83 P.3d at 235-36.

[111] *Id.* at 237.

[112] *Id.*

[113] *Id.* at 237. The court also reasoned that anal sex between two males could rationally be punished more severely than anal sex between an adult and a child of the opposite sex because, despite both victims being anally penetrated, sex with a gay male might be more hazardous in transmitting diseases such as HIV. *See id.* at 242 n.2 (Malone, J., concurring).

[114] *Id.* at 237 (majority opinion).

[115] *Limon I*, 83 P.3d at 237.

[116] *Id.* at 240.

[117] *See id.* at 236.

[118] *See Limon II*, 122 P.3d at 32, 38. The court summarized the state's interests in a Romeo and Juliet provision that required the parties to be of the opposite sex as:

> (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)

Court of Kansas held insufficient the state's interest in protecting children from homosexual sex because "moral disapproval of a group cannot be a legitimate governmental interest."[119] Although *Lawrence* did not involve minors, the Supreme Court of Kansas saw no record of scientific evidence that "homosexual sexual activity is more harmful to minors than adults."[120] Thus, there was no justification for a harsher punishment.[121]

The court relied on an amicus brief from the National Association of Social Workers and its Kansas chapter showing that teenagers' sexual experiences do not affect their sexual orientation.[122] The court further noted that the statute offered reduced penalties for heterosexual sexual contact, such as sodomy and lewd contact, that did not actually result in pregnancy.[123] Finally, the court cited Limon's argument that the state should discourage teen pregnancy, and thus, those relationships leading to teenage procreation.[124]

The Kansas Appeals Court incorrectly credited the state's concerns about STDs as a rational basis for punishing homosexual sex more harshly.[125] The Kansas Supreme Court, however, clarified that homosexual teen sex did not pose a greater health concern for spreading HIV.[126] The court credited statistics provided by the Center for Disease Control showing that the majority of HIV positive people between the ages thirteen and nineteen—the same ages affected by Romeo and Juliet provisions—are female.[127] "[T]he gravest risk of sexual transmission for females," the Court concluded, "is through heterosexual intercourse."[128] Moreover, Limon's criminal sodomy conviction stemmed

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> protection of teenagers from the increased health risks that accompany sexual activity; (5) promotion of parental responsibility and procreation; and (6) protection of those in group homes.

Id. at 33–34. Of these arguments, two were not specifically relied upon by the court of appeals—protection from coercive relationships and protection of those in group homes. *See Limon I*, 83 P.3d at 235–37. Regardless, the Supreme Court of Kansas found these arguments unpersuasive. *See Limon II*, 122 P.3d at 38.

[119] *Limon II*, 122 P.3d at 35.

[120] *See id.*

[121] *See id.*

[122] *See id.*

[123] *See id.* at 37.

[124] *See Limon II*, 122 P.3d at 237.

[125] *See id.* at 36; *Limon I*, 83 P.3d at 237.

[126] *See Limon II*, 122 P.3d at 36–37.

[127] *See id.* at 36.

[128] *Id.* at 37.

from oral sex which, as the court noted, has a "near-zero chance" of transmitting HIV.[129]

Under the court's rationale, the state must show that such conduct poses a greater likelihood of spreading disease than heterosexual sodomy.[130] The state could not show this, however, and its purported public health interest did not rationally support the statute's harsher treatment of homosexual sodomy.[131] Therefore, the Supreme Court of Kansas held that the statute failed the rational basis test and violated the Equal Protection Clauses in both the federal and Kansas constitutions.[132]

2. States Without Discriminatory Romeo and Juliet Exceptions

Even in states without discriminatory Romeo and Juliet exceptions, prosecutors may selectively target queer youth for statutory rape.[133] In *Commonwealth v. Washington W.*, a thirteen-year-old boy in Massachusetts allegedly began having sexual encounters with a fifteen-year-old boy named Washington.[134] While the alleged encounters continued, Washington turned sixteen.[135] When the younger boy's father learned of the alleged encounters, he reported the situation to the police and they charged Washington with two delinquency complaints of statutory rape and two delinquency complaints of indecent assault and battery on a child under the age of fourteen.[136]

The Massachusetts Supreme Judicial Court (SJC) affirmed the prosecutor's "wide discretion" in deciding whether to press charges against Washington because a prosecutor's decision is presumed to be in good faith.[137] Nonetheless, the SJC also affirmed a limited version of

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[129] *See id.*

[130] *See id.* at 36.

[131] *See Limon II*, 122 P.3d at 36.

[132] *See id.* at 38.

[133] *See* Levine, *supra* note 15, at 694–95, 739 n.176; Sutherland, *supra* note 2, at 327–28; *see, e.g.*, Commonwealth v. Washington W., 928 N.E.2d 908, 910 (Mass. 2010) (seeking discovery to prove selective statutory rape prosecution based on sexual orientation).

[134] *See Washington W.*, 928 N.E.2d at 910. The court noted that the boys had been diagnosed with Asperger's Syndrome but did not elaborate how this factored into the court's decision. *See id.*

[135] *See id.*

[136] *See id.* Statutory rape of a child under the age of fourteen is punishable by imprisonment for up to ten years in Massachusetts. *See* MASS. GEN. LAWS ch. 265, § 13B (2011). The court noted that, though the prosecution argued that Washington forcibly raped the complainant, for some unstated reason Washington did not face charges for rape by force. *See Washington W.*, 928 N.E.2d at 910 n.1.

[137] *See Washington W.*, 928 N.E.2d at 911 (quoting Commonwealth v. Bernardo B., 900 N.E.2d 834, 842 (Mass. 2009)) (internal quotation marks omitted).

the discovery order granted to Washington by the juvenile court to pursue his selective prosecution claim.[138] The Court reasoned that "the subtleties behind a decision to prosecute just one youth in the context of same-gender sexual relations suggests that a comparison of similarly situated juvenile defendants . . . may provide more telling and relevant statistical information to support the juvenile's claim."[139] According to the court, Washington needed discovery because the prosecution possessed all revealing data.[140]

a. *Parental Prosecution*

Prosecutors may also selectively pursue queer youth because, as in *Washington W.*, parents urge them to do so.[141] This parental push could lead to selective prosecution based on a queer youth's failure to fit social norms.[142] The SJC in *Washington W.* noted that the younger boy involved had "indicated that homosexuality was wrong and that he was not a homosexual, and his parents initiated the criminal complaint."[143] In its relatively short opinion, the court mentioned three times that the younger boy's parents were involved in the decision to prosecute, highlighting the way that parental reactions factor into a prosecutor's decision-making.[144]

Parents often have pronounced reactions when they discover that their child has engaged in same-sex sexual activity.[145] For example,

> Beatrice Dorn, legal director of the Lambda Legal Defense and Education Fund, says statutory rape cases where the defendant is barely older than the victim are more likely to be prosecuted if the partners are of the same sex. 'It happens be-

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[138] *See id.* at 911, 914. The court granted Washington a limited discovery order so that he could potentially make the required threshold showing of relevance and thereby argue for a more expansive discovery order. *See id.* at 915.

[139] *Id.* at 914.

[140] *See id.*

[141] *See id.* at 914; Sutherland, *supra* note 2, at 322, 327–28.

[142] *See* MAJD ET AL., *supra* note 1, at 1–3; Chang & Davis, *supra* note 25, at 15 n.30 (citing Berlant & Warner, *supra* note 25 at 548 n.2); Levine, *supra* note 15, at 694–95, 739 n.176; Sutherland, *supra* note 2, at 314, 322; Wardenski, *supra* note 15, at 1367–68, 1374–75.

[143] *Washington W.*, 928 N.E.2d at 914.

[144] *See id.* at 910, 910 n.2, 914; *see also* Sutherland, *supra* note 2, at 322, 327–28.

[145] *See* Sutherland, *supra* note 2, at 327–28; *cf.* José Gabilondo, *Irrational Exuberance About Babies: The Taste for Heterosexuality and its Conspicuous Reproduction*, 28 B.C. THIRD WORLD L.J. 1, 11 (2008) (discussing parental preference for heterosexual offspring).

> cause parents go nutso when they find out their kid has been having gay sex.'[146]

Age of consent violations are more likely to be filed when the actors are of the same sex.[147] Washington embraced this notion and argued that it would "likely show that underage mutually agreed-to heterosexual actions amongst similarly aged teenagers are not prosecuted, but that homosexual acts *are* prosecuted, especially when the parents of one of the parties insist."[148]

b. *The Ripple Effect*

Queer youth are also more likely to be punished by school officials and local law enforcement officers, and this can have a detrimental ripple effect.[149] According to a 2010 study conducted by the American Academy of Pediatrics, "[n]onheterosexuality consistently predicted a higher risk for sanctions" such as being expelled from school, being stopped by police, being arrested, and being convicted of crimes.[150] This is especially true regarding sex-based offenses.[151] A 2009 study by Legal Services for Children, the National Juvenile Defender Center, and the National Center for Lesbian Rights found that despite opinions by medical and mental health professionals to the contrary, some juvenile justice professionals still consider LGBT people as mentally ill and sexually deviant.[152] As a result, police often selectively target LGBT youth and disproportionately charge them with sex offenses while overlooking similar crimes involving heterosexual offenders.[153] Moreover, the American Academy of Pediatrics study concluded that these "disproportionate educational and criminal-justice punishments . . . are not explained by greater engagement in illegal or transgressive behaviors."[154] Instead, some researchers conclude that the disproportionately

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[146] Donna Minkowitz, *On Trial: Gay? Straight? Boy? Girl? Sex? Rape?*, OUT, Oct. 1995, at 99, 145.

[147] Sutherland, *supra* note 2, at 327–28. Teens may also experience maltreatment in their own homes, such as verbal and physical abuse due to parental rejection of their sexuality. Higdon, *supra* note 4, at 216–17.

[148] *Washington W.*, 928 N.E.2d at 914.

[149] *See* MAJD ET AL., *supra* note 1, at 3, 77–78; Kathryn E. W. Himmelstein & Hannah Brückner, *Criminal-Justice and School Sanctions Against Nonheterosexual Youth: A National Longitudinal Study*, 127 PEDIATRICS 49, 54 (2011).

[150] Himmelstein & Brückner, *supra* note 149, at 49.

[151] *See* MAJD ET AL., *supra* note 1, at 3.

[152] *See id.* at iv, 3.

[153] *See id.* at 3.

[154] Himmelstein & Brückner, *supra* note 149, at 49.

punitive treatment that queer youth experience is a product of the juvenile justice system's "profound lack of acceptance of LGBT identity."[155] This lack of acceptance is "[r]ooted in a lack of understanding of—and sometimes outright bias against—LGBT youth . . . ."[156]

Though queer youth's disproportionately higher rate of punishment is attributable in part to the biases and ignorance of adult officials, it is also a likely consequence of being rejected by peers.[157] The majority of queer youth are harassed by their peers, which can lead to an increased risk of formal punishment both in school and in the juvenile justice system.[158] According to a 2009 report by the Gay, Lesbian and Straight Education Network, almost eighty-five percent of lesbian, gay, bisexual, and transgender middle and high school students reported being verbally harassed in school because of their sexual orientation, and over forty percent reported physical harassment.[159] Peer harassment has led to lowered grade point averages, increased dropout rates, and "a heightened risk for juvenile court involvement" for queer youth.[160]

Harassment has also contributed significantly to arrest and formal truancy charges, as queer youth may skip school out of concern for their personal safety.[161] "In one study, 32.7 percent of LGBT students reported that they had missed school in the past month because they felt unsafe, compared to 4.5 percent of a national sample . . . ."[162] When such harassment occurs, police and school officials may presumptively blame the bullied queer student.[163] In one case, school officials told a bullied queer that, because he wore nail polish, he was "so provocative that the kids couldn't help but pick on him . . . ."[164] When queer youth are truant from school to avoid this type of harassment,

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[155] *See* MAJD ET AL., *supra* note 1, at 2.

[156] *Id.*

[157] *See id.* at 76–78.

[158] *See* GAY, LESBIAN AND STRAIGHT EDUCATION NETWORK, THE 2009 NATIONAL SCHOOL CLIMATE SURVEY EXECUTIVE SUMMARY 3 (2009), *available at* http://www.glsen.org/ binarydata/GLSEN_ATTACHMENTS/file/000/001/1676-2.PDF [hereinafter GLSEN]; MAJD ET AL., *supra* note 1, at 76–78.

[159] *See* GLSEN, *supra* note 158, at 3. The survey sample consisted of a total of 7261 students between the ages of thirteen and twenty-one. *Id.* at i. Students surveyed were from all fifty states and the District of Columbia. *Id.*

[160] *See* MAJD ET AL., *supra* note 1, at 76.

[161] *See id.*

[162] *Id.*

[163] *See id.* at 76–77.

[164] *Id.* at 77 (internal quotation marks omitted).

they may experience a detrimental effect because truancy counts against children in juvenile proceedings.[165]

c. *Social Rejection*

Queer youth are also socially rejected in other ways.[166] For example, in *McMillen v. Itawamba County School District*, a Mississippi school's "opposite sex" prom date policy barred Constance McMillen from bringing her girlfriend to prom as a date.[167] Itawamba Agricultural High School's assistant principal informed McMillen that she could not bring her girlfriend to prom unless they each brought male dates.[168] Even if the girls brought male dates, the school district superintendent required that they wear dresses, forbade them from slow dancing together, and said they would be asked to leave if they made anyone uncomfortable.[169] McMillen sought help from the American Civil Liberties Union in suing the school district, and the U.S. District Court for the Northern District of Mississippi ruled that the school's actions violated McMillen's First Amendment right of free expression.[170]

Instead of respecting the District court's decision and allowing McMillen and her girlfriend to attend, the school invited McMillen to a fake prom attended only by seven other students.[171] Unbeknownst to her, the rest of the students attended a different, secret prom.[172] Because the status quo for queer youth creates harassment by peers, a higher risk of formal punishment, and persistent community rejection, queer youth are in a precarious position.[173] Despite the court's ruling amid public scrutiny, school officials and parents persisted in excluding

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[165] *See* MAJD ET AL., *supra* note 1, at 78.

[166] *See, e.g.*, McMillen v. Itawamba Cnty. Sch. Dist., 702 F. Supp. 2d 699, 705 (N.D. Miss. 2010) (holding that a school's actions based upon a student's sexual orientation infringed on her First Amendment rights, creating a substantial risk that her right to free expression would be "irreparably harm[ed]"); Press Release, American Civil Liberties Union, ACLU Complaint Takes on "Decoy" Prom for Mississippi Lesbian Student (Apr. 21, 2010), *available at* http://www.aclu.org/lgbt-rights/aclu-complaint-takes-decoy-prom-mississippi-lesbian-student [hereinafter ACLU Decoy Prom].

[167] *See McMillen*, 702 F. Supp. 2d at 701.

[168] *See id.*

[169] *See id.*

[170] *See id.* at 701, 705.

[171] *See* ACLU Decoy Prom, *supra* note 166.

[172] *See id.*

[173] *See Limon II*, 122 P.3d at 25; *Limon*, 83 P.3d at 237; *McMillen*, 702 F.Supp.2d at 705; GLSEN: *supra* note 158, at 3; MAJD ET AL., *supra* note 1, at 1–3, 75–78; Himmelstein & Brückner, *supra* note 149, at 49; ACLU Decoy Prom, *supra* note 166.

McMillen to her legal detriment because of her sexual orientation.[174] Just as the Court of Appeals of Kansas resisted change, school officials and parents clung to the status quo despite arguable legal directives to the contrary.[175]

Queer youth's precarious position is compounded by the instability that results from being rejected by family—an experience familiar to a substantial percentage of queer youth.[176] "One study found that 45 percent of parents were angry, sick, or disgusted when first learning of their child's sexual orientation or gender identity," and another found that "approximately 30 percent of LGBT youth were physically abused by family members as a result . . . ."[177] When their families react negatively, queer youth are more prone to engage in criminal activities, especially crimes of necessity like shoplifting and prostitution.[178] More-

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[174] *See* ACLU Decoy Prom, *supra* note 166; Ian Thompson, *Ms. McMillen Goes to Washington!*, ACLU Blog of Rights (June 23, 2010, 5:40 PM), http://www.aclu.org/blog/lgbt-rights/ms-mcmillen-goes-washington (noting that McMillen made headlines and that this controversy eventually brought her to the White House, where President Obama lauded her courage).

[175] *See Limon I*, 83 P.3d at 238 (finding rational basis for different punishment of criminal homosexual sodomy than for criminal heterosexual sodomy despite the case being remanded from the U.S. Supreme Court for reconsideration in light of *Lawrence*). *Compare McMillen*, 702 F. Supp. 2d at 705 (holding that a school violated a lesbian student's First Amendment right of free expression because of its discrimination based on sexual orientation), *with* ACLU Decoy Prom, *supra* note 166 (reporting the school's defiant exclusion of McMillen despite a court ruling that the school district violated McMillen's constitutional rights). The school ultimately settled with McMillen after the ACLU filed an amended complaint that included the "decoy" prom. *See* Press Release, American Civil Liberties Union, Mississippi School Agrees to Revise Policy and Pay Damages to Lesbian Teenager Denied Chance to Attend Prom (July 20, 2010), *available at* http://www.aclu.org/lgbt-rights/mississippi-school-agrees-revise-policy-and-pay-damages-lesbian-teenager-denied-chance-a.

[176] *See* Majd et al., *supra* note 1, at 3, 70, 74. Beyond direct legal peril, when queer youth are rejected by their families, friends, and peers, they have a greater risk of health problems. *See* Tumaini R. Coker et al., *The Health and Health Care of Lesbian, Gay, and Bisexual Adolescents*, 31 Ann. Rev. Pub. Health 457, 458, 468 (2010). A 2009 study found that queer youth who were "highly rejected" by their families were eight times more likely to attempt suicide, six times more "likely to report high levels of depression," and three times more likely to use illegal drugs and be at "high risk" for STDs such as HIV. *See* Ryan, *supra* note 83, at 5. Finally, as Professor Levine explains, "the emphasis on family support and premarriage type commitments leaves no room for gay relationships, which often lack the support of the teen's family and cannot lead to marriage," thus resulting in a denial of the same "intimacy discount" or prosecutorial forbearance that heterosexual youth may receive. Levine, *supra* note 15, at 694–695, 739 n.176.

[177] *See* Majd et al., *supra* note 1, at 70.

[178] *See id.* at 3, 72. "Research shows that leaving home as a result of family rejection is the greatest predictor of future involvement with the juvenile justice system for LGBT youth. In a study of LGBT homeless youth, 39 percent reported they had been 'kicked out' of their home because of their sexual orientation or gender identity, and 45 percent reported involvement with the juvenile justice system." *Id.* (citations omitted).

over, queer children with unsupportive families generally do not fare as well in the legal system.[179]

III. Challenges to Showing Selective Prosecution in Same-Sex Juvenile Statutory Rape Cases

Even though queer youth are more vulnerable in their communities and punished disproportionately, proving their selective prosecution in statutory rape cases poses several challenges.[180] Queer youth must show that they are disfavored enough to merit protection, show prosecutorial bias, and surmount the prosecutor's near-absolute discretion.[181]

A. *Showing Prosecutorial Bias*

Before receiving a discovery order, a defendant must make a threshold showing of selective prosecution.[182] State courts may differ on what meets the threshold, but generally, the defendant must show prosecution based on "'an unjustifiable standard such as race, religion, or other arbitrary classification.'"[183] Making this showing may be difficult when sexual orientation is not a suspect class requiring heightened scrutiny.[184] Courts would likely use the lowest standard of review, the

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[179] *See id.* at 3, 74.

[180] *See* United States v. Armstrong, 517 U.S. 456, 463–64 (1996) (discussing the "background presumption . . . that the showing necessary to obtain discovery should itself be a significant barrier"); Sapir, *supra* note 20, at 141–42 (arguing that racist prosecutors could conceal their biases making showing selective prosecution based on race an "insurmountable obstacle"); Heller, *supra* note 20, at 1322–23 (arguing that the significant barrier erected by *Armstrong* "has effectively mooted an important constitutional protection").

[181] *See* Poulin, *supra* note 30, at 1076 (explaining that the defendant must show "that similarly situated offenders who are not members of the disfavored group have not been prosecuted"); Sapir, *supra* note 20, at 141–42, 173; Stein, *supra* note 25, at 482 ("The few courts that have held that sexual orientation classifications warrant heightened scrutiny have had their decisions overruled or vacated."); Yoshino, *supra* note 25, at 756 (explaining that sexual orientation is reviewed under a lower, rational basis standard unlike classifications such as race); *see, e.g.*, *Armstrong*, 517 U.S. at 465; Commonwealth v. Washington W., 928 N.E.2d 908, 912 n.4 (Mass. 2010) (declining to consider whether sexual orientation is a protected class in Massachusetts).

[182] *See, e.g.*, *Armstrong*, 517 U.S. at 465 (requiring a threshold showing of credible evidence showing that similarly situated persons were not prosecuted); *Washington W.*, 928 N.E.2d at 915 (affirming discovery order to allow Washington to make a threshold showing).

[183] *See Washington W.*, 928 N.E.2d at 911–12 (quoting Commonwealth v. King, 372 N.E.2d 196, 206 (Mass. 1977)).

[184] *See id.* at 912 n.4 (declining to consider whether sexual orientation is a class suspect enough to warrant protection, but noting that selective prosecution could be found under the lower rational basis standard); Higdon, *supra* note 4, at 231–34 (explaining some gradations of standards of review as applied by the courts); Stein, *supra* note 25, at 482; Yo-

rational basis test, to evaluate queer youths' claims of selective prosecution.[185] As exemplified by the Court of Appeals of Kansas in *Limon*, such a standard is highly deferential to the state.[186]

Any defendant arguing selective prosecution faces the "significant barrier" erected by the Supreme Court in *United States v. Armstrong*.[187] In *Armstrong*, the Court explained that selective prosecution claims are rooted in constitutional equal protection standards.[188] To prove selective prosecution, and thus an equal protection violation, a defendant must show (1) the prosecution's discriminatory effect and (2) its motivation by a discriminatory purpose; in other words, the prosecutor must specifically intend to discriminate.[189]

A queer defendant likely faces similar obstacles to revealing a prosecutor's buried bias as those faced by defendants arguing racially-motivated selective prosecution.[190] Prosecutors with racial biases are unlikely to admit them openly.[191] Yoav Sapir explains this phenomenon, stating that "it is very hard to find someone who will admit that she is racist, or who will openly say, 'I think black people are criminals.'"[192] Similarly, prosecutors biased against queers are unlikely to publicly an-

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shino, *supra* note 25, at 756. Rational basis review is a standard that is highly deferential to the government and "[a]lmost any justification is enough to establish rationality." Stein, *supra* note 25, at 483–84. When evaluating laws that classify and what level of review they receive, the U.S. Supreme Court has considered, among other factors, whether "the classification has historically been used to intentionally discriminate against a particular group . . . ." *Id.* at 482 (citing Frontiero v. Richardson, 411 U.S. 677 (1973)). In 2011, the Department of Justice declared that sexual orientation merits "a more heightened standard of scrutiny" due to "a number of factors, including a documented history of discrimination . . . ." Press Release, Department of Justice, Statement of the Attorney General on Litigation Involving the Defense of Marriage Act (February 23, 2011), *available at* http://www.justice.gov/opa/pr/2011/February/11-ag-222.html. Nonetheless, courts have not declared the same. *See* Yoshino, *supra* note 25, at 756.

[185] *See Washington W.*, 928 N.E.2d at 912 n.4; Sapir, *supra* note 20, at 159–60; Yoshino, *supra* note 25, at 756.

[186] *See Limon I*, 83 P.3d at 233–34, 240 (Kan. Ct. App. 2004); Stein, *supra* note 25, at 483–84.

[187] 517 U.S. at 464; *see* Sapir, *supra* note 20, at 141–42; Heller, *supra* note 20, at 1322–23.

[188] *See Armstrong*, 517 U.S. at 465.

[189] *See id.* at 476. A state constitutional claim may also be impeded by *Armstrong* because state courts may look to the federal standard when interpreting their own constitutions. *See, e.g.*, *Washington W.*, 928 N.E.2d at 143.

[190] *See* Stacey M. Brumbaugh et al., *Attitudes Toward Gay Marriage in States Undergoing Marriage Law Transformation*, 70 J. MARRIAGE & FAM. 345, 356 (2008); Chang & Davis, *supra* note 25, at 15 n.30 (citing Berlant & Warner, *supra* note 25, at 548 n.2); Higdon, *supra* note 4, at 214; Sapir, *supra* note 20, at 141–42.

[191] *See* Sapir, *supra* note 20, at 141.

[192] *Id.*

nounce their feelings.[193] Although Sapir argues that disparaging remarks about gay people are more socially acceptable than racism, prosecutors would probably not risk being branded as biased.[194] This difficulty, combined with the judicial deference to a prosecutor's discretion, makes proving discriminatory intent exceptionally challenging.[195]

B. *Near-Absolute Prosecutorial Discretion*

A defendant arguing selective prosecution must also confront the reality that deference to prosecutorial discretion is near-absolute.[196] This practically unchecked power is vulnerable to abuse motivated by a prosecutor's personal biases.[197] As explained in *Armstrong*, courts presume that prosecutorial decisions are proper unless there is "clear evidence to the contrary."[198] Such unfettered discretion led Robert H. Jackson, former U.S. Attorney General and Supreme Court Justice, to comment that "[t]he prosecutor has more control over life, liberty, and reputation than any other person in America."[199]

Despite potential for abuse—or, at a minimum, for questionable choices that greatly affect citizens' lives—the prosecutor retains discretion because the benefits arguably outweigh the potential harm.[200] Those benefits are: "(1) promoting prosecutorial and judicial economy and avoiding delay; (2) preventing the chilling of law enforcement; (3) avoiding the undermining of prosecutorial effectiveness; and (4) adhering to the constitutional principle of separation of powers . . . ."[201] Protecting prosecutorial discretion furthers prosecutorial economy by

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[193] *See id.*

[194] *See id.* at 141–42, 173. Sapir argues that because racist and misogynistic views are less acceptable today, they are more hidden and sometimes remain unconscious. *See id.* at 173 (explaining, for example, that a black person carrying a weapon could be seen as different, more serious, or more dangerous than an armed white person). Biased prosecutors, however, may suppress anti-queer sentiments more as same-sex relationships are becoming increasingly legitimate in the law. *See* Brumbaugh et al., *supra* note 190, at 345 (reporting on the conflict between perceived social values and civil rights). Moreover, an unconscious bias similar to that of racism and sexism arguably exists for queer Americans in a heteronormative society. *See* Chang & Davis, *supra* note 25, at 15 n.30 (citing Berlant & Warner, *supra* note 25, at 548 n.2); Higdon, *supra* note 4, at 214.

[195] *See Armstrong*, 517 U.S. at 465; Heller, *supra* note 20, at 1322–23; Sapir, *supra* note 20, at 141–42.

[196] *See Armstrong*, 517 U.S. at 464–65; Heller, *supra* note 20, at 1325–26.

[197] *See* Robert H. Jackson, 24 J. Am. Judicature Soc'y 18, 18–19 (1940); Heller, *supra* note 20, at 1325–26.

[198] *See Armstrong*, 517 U.S. at 464–65 (internal quotation marks omitted).

[199] Jackson, *supra* note 197, at 18; *see* Heller, *supra* note 20, at 1325.

[200] *See* Heller, *supra* note 20, at 1328.

[201] *Id.* at 1326.

preventing frivolous lawsuits and the need to respond to time-consuming discovery requests.[202] Also, this policy decreases the number of prosecutorial discretion cases, thereby furthering judicial economy and avoiding delays.[203] Limiting prosecutorial discretion claims stops the chilling of law enforcement too, thereby allowing decisive law enforcement.[204] This avoids undermining law enforcement by keeping strategies confidential and free from controversy.[205] Finally, separation of powers is maintained by not encroaching on the province of executive-appointed officials who are in a better position than courts to make effective prosecutorial decisions.[206]

C. *Challenges Unique to Juveniles*

A challenge unique to juveniles arguing selective prosecution is the confidentiality of sensitive juvenile records, as seen in *Commonwealth v. Washington W.*.[207] The standard for showing selective prosecution under the Massachusetts Constitution is parallel to the federal standard, as articulated in *Armstrong*.[208] A defendant making a claim under the Massachusetts Constitution must make a threshold showing of relevance.[209] As the court in *Washington W.* pointed out, however, a juvenile defendant is at a disadvantage because, unlike an adult, this threshold is not satisfied by searching court records for evidence and comparing the number of complaints, indictments, and prosecutions.[210] The juvenile defendant's disadvantage is thus unique because he or she cannot comparatively demonstrate how similarly situated individuals are treated.[211]

Access to juvenile court proceedings and records varies by state, but it is often disallowed when children are accused of certain crimes, and especially when they are victims of abuse.[212] Limiting public access,

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[202] *See id.* at 1328.

[203] *See id.*

[204] *See id.* at 1331.

[205] *See* Heller, *supra* note 20, at 1333–34.

[206] *See id.* at 1338–39.

[207] *See* Bazelon, *supra* note 22, at 155; Horne, *supra* note 22, at 659; *see, e.g.*, *Washington W.*, 928 N.E.2d at 912 (noting that no public records were available for Washington to show he was treated differently by the prosecutor and that there were strong policy reasons for maintaining confidentiality).

[208] *See Armstrong*, 517 U.S. at 463–65; *Washington W.*, 928 N.E.2d at 911–13.

[209] *See Washington W.*, 928 N.E.2d at 913.

[210] *See id.* at 912–13.

[211] *See Armstrong*, 517 U.S. at 463–65; *Washington W.*, 928 N.E.2d at 913; Bazelon, *supra* note 22, at 155; Horne, *supra* note 22, at 659.

[212] *See* Bazelon, *supra* note 22, at 155; Horne, *supra* note 22, at 659; Charles R. Petrof, Note, *Protecting the Anonymity of Child Sexual Assault Victims*, 40 Wayne L. Rev. 1677, 1686–87

especially to court proceedings, when children are victims of abuse may help victims recover without undue public attention and could encourage future victims to report abuse.[213] Some consider this shielding of the minor victim to be important to recovery because sexual assault, specifically rape, is psychologically traumatic and societal reactions may exacerbate the harm.[214] Furthermore, public attention may negatively affect the ability of the child's family to cope with the abuse and, consequently, hinder the child's healing.[215] Safety concerns also prompt a closed record because publicity could lead to further abuse or retaliation from the abuser.[216]

The court in *Washington W.* also noted a characteristic unique to selective prosecution claims when the parties to a statutory rape case are of the same sex.[217] First, gender equality cannot be achieved—and prosecutorial biases neutralized—by simply charging all parties with statutory rape.[218] For example, the heterosexual statutory rape case of *Commonwealth v. Bernardo B.* dealt with a male minor charged with statutory rape of three female minor friends.[219] Bernardo, a fourteen-year-old boy, allegedly engaged in manual and oral sex with three girls, two of whom were twelve and one of whom was about to turn twelve.[220] The court found that he used no force and that all parties under the age of consent mutually "assented-to" the sexual activity, but only Bernardo faced statutory rape charges.[221] The district attorney did not dispute the encounters' "consensual" nature but refused Bernardo's request to also charge the girls with statutory rape.[222] Bernardo therefore argued that he was selectively prosecuted based on his gender.[223] In *Bernardo B.*, the prosecutor's decision relied on gender norms, but in *Washington*

(1994). Statutes that restrict access to juvenile court records, as seen in *Washington*, may nonetheless allow a judge to order discovery. *See, e.g.*, MASS. GEN. LAWS ch. 119, § 60A (2011) (noting that certain juvenile records are closed "except with the consent of a justice of such court").

[213] *See* Petrof, *supra* note 212, at 1686–87.

[214] *See id.* at 1688–89. For instance, victims of sexual assault may not only be embarrassed if their peers learn of the incident, they may be ostracized. *See id.*

[215] *See id.* at 1689–90.

[216] *See id.* at 1690.

[217] *See Washington W.*, 928 N.E.2d at 914.

[218] *See id.*

[219] *See* 900 N.E.2d 834, 837 (Mass. 2009).

[220] *Id.* at 837, 839–40. Bernardo received both oral and "manual" sex, often colloquially described as a "hand job." *Id.* at 838 n.7, 840.

[221] *See id.* at 838–40, 844, 846.

[222] *See id.* at 844.

[223] *See id.*

W., similarly charging all parties would not prevent "the danger of selective prosecution" based on sexual orientation.[224]

IV. More Discovery, Please: Why the Court in *Washington W.* Got It Right

The court in *Commonwealth v. Washington W.* reasoned that, "in light of the constraints imposed by the Juvenile Court, [Washington's] claim [was] sufficiently serious to warrant further inquiry."[225] The court therefore affirmed the limited discovery order, allowing Washington to make the threshold showing necessary for further discovery toward proving selective prosecution.[226] The court credited the experience of two judges in juvenile court who initially issued the discovery orders and concluded that "discovery would not be burdensome for the Commonwealth."[227] Although the SJC limited the scope of the order, the court affirmed it without considering whether sexual orientation is a protected class in Massachusetts.[228] Although "selective prosecution must be based on discriminatory treatment of someone who is a member of a protected class," the SJC granted discovery because Washington could possibly demonstrate violation of his constitutional rights under rational basis review.[229] The court noted that the Commonwealth actually emphasized, "the historic continuing animosity against homosexual[s,]" and that equal protection violations are important because "the desire to effectuate one's animus against homosexuals can never be a legiti-

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[224] *See Washington W.*, 928 N.E.2d at 914 (construing *Bernardo B.*, 900 N.E.2d 834).

[225] 928 N.E.2d 908, 914 (Mass. 2010).

[226] *See id.* at 913–14. Washington originally sought discovery including such things as the number of cases both reported and charged in the last five years for "statutory rape and/or indecent assault and battery where the accused and the complaining witness were under 17 years old, including the age and sex of the accused and the complaining witness," and similarly for "sexual assaults of a person—including but not limited to Rape, Rape of a Child, Statutory Rape, Assault with Intent to Commit Rape, and Indecent Assault and Battery—including the sex of the accused and the sex of the complaining witness." *Id.* at 913. Washington also sought "[a]ny and all written policies by the Norfolk County District Attorney in effect during the last five years concerning the charging of statutory rape" and "[a]ny statistical compilations, reports or studies done by the Norfolk District Attorney's Office concerning sex crimes or sex cases in Norfolk County in the last five years." *Id.* The SJC ruled that the juvenile court judges did not abuse their discretion in granting the orders but limited the order to "cases where statutory rape, indecent assault and battery, or both, were *charged* and the juvenile and the complainant were both under the age of seventeen years." *Id.* at 915.

[227] *See id.*

[228] *See id.* at 912 n.4, 915.

[229] *See id.* at 912 n.4.

mate governmental purpose."[230] As there was a path for Washington to pursue his claim, the court held that the discovery order was warranted.[231]

Regardless of Washington's ultimate success, the preliminary discovery order reveals a potentially problematic breed of selective prosecution and may result in equitable change.[232] Professor Anne Poulin explains that "airing [a] defendant's claim in the legal process may have a more subtle beneficial influence on the future exercise of prosecutorial discretion."[233] Such "soft enforcement" influences the system from within because complying with discovery orders spurs self-regulation and therefore ensures proper future prosecutorial decisions.[234] Soft enforcement can also contribute to public understanding of prosecutorial decision-making, result in heightened public scrutiny, and create "a demand for more careful exercise of prosecutorial discretion."[235] Although concerns exist over the chilling of law enforcement, critics maintain that prosecutors are too powerful and that giving them unfettered discretion leaves some people more vulnerable.[236] Soft enforcement is a less intrusive means for equitable change because it encourages "self-scrutiny," which may effectively "sensitize" the law enforcement community to systemic and individual biases.[237] The juvenile justice system must improve sensitivity to sexual orientation and address biases because "LGBT youth continue to face harmful discrimination in their homes, schools, and communities . . . . [and] juvenile justice pro-

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[230] *Washington W.*, 928 N.E.2d at 912 n.4, 914 n.5 (internal quotation marks omitted).

[231] *See id.* at 912 n.4, 914.

[232] *See* Poulin, *supra* note 30, at 1090–92.

[233] *Id.* at 1091.

[234] *See id.* at 1090.

[235] *Id.* at 1090.

[236] *See id.* at 1090–91; Sapir, *supra* note 20, at 138–40. Sapir notes that

> James Vorenberg raised the concern that broad and almost unchecked discretion of prosecutors will result in a situation in which "society's most fundamental sanctions will be imposed arbitrarily and capriciously and that the least favored members of the community—racial and ethnic minorities, social outcasts, [and] the poor—will be treated most harshly."

Sapir, *supra* note 20, at 138–39 (quoting James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1555 (1981)). Sapir also argues that "[i]n contrast to the legislation process, individuals often make prosecutorial decisions. Presuming that the majority of the population is not racist, the probability that a single prosecutor will be racist is higher than the probability that there will be a racist majority among a group of legislators." *Id.* at 139.

[237] Poulin, *supra* note 30, at 1091–92.

fessionals remain unprepared to effectively serve [and] . . . treat them fairly."[238]

Despite concerns about opening juvenile court records regarding sex and abuse, a court can consider and balance the interests involved to tailor a discovery order without granting unfettered access.[239] Courts may maintain the integrity of public policy concerns behind closed juvenile court records by giving defendants private access only to court records and not the actual proceedings.[240] Balancing interests and tailoring access can also ensure that the discovery does not burden the state.[241]

Furthermore, queer youth and their communities could benefit from the publicity surrounding cases claiming selective prosecution based on sexual orientation.[242] "[C]ourts are public places where society's values, ideas, and concerns are continually tested," and allowing the public to hear more stories involving queer youth in these ways could spur helpful public discussion.[243] Such discourse could contribute to increased soft enforcement, ultimately acting as a check on prosecutorial discretion and resulting in equitable change.[244]

Given the hurdles inherent in selective prosecution claims, discovery orders like the one issued in *Washington W.* could be a pragmatic way to achieve equitable improvements in the juvenile justice system.[245] Queer youth experience disparately higher amounts of formal sanction, especially for sex-based crimes, and the juvenile justice system inadequately responds to their needs.[246] Therefore, queer youth should not shy from difficult selective prosecution claims.[247] Even if such claims are ultimately unsuccessful, merely bringing the claim may improve the juvenile justice system through soft enforcement, and "[t]he key to soft enforcement is often discovery."[248]

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[238] MAJD ET AL., *supra* note 1, at 1.

[239] *See, e.g.*, *Washington W.*, 928 N.E.2d at 915 (limiting the scope of the discovery order requested).

[240] *See id.*; Petrof, *supra* note 212, at 1687–89.

[241] *See, e.g.*, *Washington W.*, 928 N.E.2d at 915.

[242] *See* Horne, *supra* note 22, at 683.

[243] *See id.* at 689.

[244] *See* Poulin, *supra* note 30, at 1090–91; Horne, *supra* note 22, at 689–90.

[245] *See* Poulin, *supra* note 30, at 1090, 93.

[246] *See* MAJD ET AL., *supra* note 1, at 2; Poulin, *supra* note 30, at 1090–91.

[247] *See* MAJD ET AL., *supra* note 1, at 3; Himmelstein & Brückner, *supra* note 149, at 54; Poulin, *supra* note 30, at 1090–93.

[248] Poulin, *supra* note 30, at 1092 (explaining that any useful data is likely in the hands of the prosecution); *see also Washington W.*, 928 N.E.2d at 914 ("All information regarding

Conclusion

Statutory rape laws vary by state, but a prosecutor's broad discretion is constant. As studies reveal, queer youth are quite vulnerable in their communities, and they are more likely to be formally punished. Despite the seemingly insurmountable barriers to claiming selective prosecution, especially for queer youth, defendants in these situations should still challenge the status quo. Even if queer youth are selectively prosecuted and are unsuccessful in their claims, they may nonetheless improve their communities by telling their stories.

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similarly situated juveniles is within the possession of the district attorney's office, and the juvenile has no ability to access that information absent a court order.").