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A MINOR EXCEPTION?: THE IMPACT OF *LAWRENCE V. TEXAS* ON LGBT YOUTH

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I. INTRODUCTION

In our nation's cities, tens of thousands of teenagers live on the streets.[1] In major urban centers like New York, San Francisco, and Chicago, up to half of all of these teens may self-identify as lesbian, gay, bisexual, or transgender (LGBT).[2] Nationally, between eleven and forty

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[1] Estimates of the incidence of youth homelessness vary, but considerable numbers of youth annually experience short- or long-term homelessness due to running away or being kicked out of their homes. A Department of Justice report estimated that in 1999 nearly 1.7 million youth had a runaway or "throwaway" episode, 71 percent of whom were at significant risk of physical harm during that period of homelessness. *See* HEATHER HAMMER, DAVID FINKELHOR & ANDREA J. SEDLAK, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, RUNAWAY/THROWNAWAY CHILDREN: NATIONAL ESTIMATES AND CHARACTERISTICS 5-6 (2002), *available at* http://www.ncjrs.org/pdffiles1/ojjdp/196469.pdf. Other studies have estimated that up to 2.8 million youth have experienced homelessness. *See* Bob Reeg, *The Runaway and Homeless Youth Act and Disconnected Youth*, *in* LEAVE NO YOUTH BEHIND: OPPORTUNITIES FOR CONGRESS TO REACH DISCONNECTED YOUTH 53, 56 (Jodie Levin-Epstein & Mark H. Greenberg eds., 2003), *available at* http://www.clasp.org/publications/Disconnected_Youth.pdf.

[2] JASON CIANCIOTTO & SEAN CAHILL, NAT'L GAY AND LESBIAN TASK FORCE POLICY INST., EDUCATION POLICY: ISSUES AFFECTING LESBIAN, GAY, BISEXUAL, AND TRANSGENDER YOUTH 24 (2003), *available at* http://www.thetaskforce.org/downloads/ educationpolicy.pdf; RANDI FEINSTEIN ET AL., JUSTICE FOR ALL?: A REPORT ON LESBIAN, GAY, BISEXUAL AND TRANSGENDERED YOUTH IN THE NEW YORK JUVENILE JUSTICE SYSTEM 17-18 (2001), *available at* http://www.urbanjustice.org/publications/pdfs/lesbianandgay/justiceforallreport.pdf. In New York City, for example, up to 50 percent of homeless youth self-identify as LGBT. Jenny Casciano et al., *Client-Centered Advocacy on Behalf of At-*

percent of homeless youth are thought to be LGBT.[3] Like their non-LGBT counterparts in the homeless population, most homeless LGBT youth have been kicked out of or have run away from home, frequently cycling through the child welfare and foster care systems.[4] Many have been abused or harassed by parents, family members, child welfare workers and foster parents, and even classmates and teachers.[5]

Consequently, for many homeless LGBT youth, the only "safe" space they can find is on the streets.[6] Not surprisingly, homelessness exposes LGBT youth to a host of troubling problems, including increased risk of becoming victims of crime and assault,[7] as well as a greater likelihood of committing crimes themselves—like theft, prostitution, and drug dealing—in order to survive.[8] They also face police harassment for minor infractions like loitering, public drinking, or subway turnstile jumping—or for nothing at all.[9] Committing such offenses may usher them back into the same system that failed them the first time.[10] LGBT youth offenders' experiences in the juvenile justice system—when they are arrested, tried in juvenile court, sentenced, and ultimately incarcerated—are plagued by intentional and unintentional discrimination because of their real or perceived sexual orientation.[11]

Risk LGBT Youth, 26 N.Y.U. REV. L. & SOC. CHANGE 221, 231 (2001) (quoting a New York City legal advocate for LGBT youth).

[3] Bryan N. Cochran et al., *Challenges Faced by Homeless Sexual Minorities: Comparison of Gay, Lesbian, Bisexual, and Transgender Homeless Adolescents with Their Heterosexual Counterparts*, 92 AM. J. PUB. HEALTH 773, 773 (2002); FEINSTEIN ET AL., *supra* note 2, at 17-18; Laurie Schaffner, *Violence and Female Delinquency: Gender Transgressions and Gender Invisibility*, 14 BERKELEY WOMEN'S L.J. 40, 61 (1999).

[4] *See infra* Part II.A.3.

[5] *Id.*

[6] *See generally* FEINSTEIN ET AL., *supra* note 2, at 11-20; Colleen A. Sullivan, *Kids, Courts & Queers: Lesbian & Gay Youth in the Juvenile Justice and Foster Care Systems*, 6 LAW & SEXUALITY 31 (1996).

[7] *See* Cochran et al., *supra* note 3, at 773 (noting that homeless young people are at high risk of robbery, rape, and assault).

[8] *See infra* Part II.A.3.

[9] *See, e.g.*, Casciano et al., *supra* note 2, at 223-24.

[10] *See* FEINSTEIN ET AL., *supra* note 2, at 11, 18-20; Miriam Aviva Friedland, *Too Close to the Edge: Lesbian, Gay, Bisexual and Transgender Youth in the Child Welfare System*, 3 GEO. J. GENDER & L. 777, 794-95 (2002); Sullivan, *supra* note 6, at 40-41.

[11] *See generally* FEINSTEIN ET AL., *supra* note 2, at 25-41 (describing the discrimination, lack of institutional awareness, and harassment that LGBT youth face in sentencing and detention in the New York juvenile justice system); Elvia R. Arriola, *The Penalties for Puppy Love: Institutionalized Violence Against Lesbian, Gay, Bisexual and Transgendered Youth*, 1 J. GENDER RACE & JUST. 429 (1998); Sullivan, *supra* note 6, at 46-47.

While at-risk and disenfranchised LGBT youth continue to face severe discrimination—in their homes, schools, child welfare placements, and the juvenile justice system—the gay and lesbian community as a whole achieved a significant legal advance in its quest for equality in the United States Supreme Court's 2003 decision in *Lawrence v. Texas*,[12] which invalidated states' statutory prohibitions of homosexual sodomy.[13] Generally considered the most gay-friendly decision ever issued by the Court, many commentators view *Lawrence* as a tall stepping-stone toward increased legal and social equality for sexual minorities.[14] The immediate effect of *Lawrence* was to decriminalize sexual conduct between individuals of the same sex—itself a historic, landmark advance for gays and lesbians. By finding that sodomy statutes violated the Due Process Clause of the Fourteenth Amendment,[15] however, the Court acknowledged that its decision extended beyond only legalizing gay sex.[16] The decision also lifted a major legal stigma associated with being homosexual.[17] As

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[12] 539 U.S. 558 (2003).

[13] *Id.* The state statute at issue, the Texas Homosexual Conduct Law, only banned same-sex sodomy, but not opposite-sex sodomy. TEX. PENAL CODE ANN. § 21.06 (1994) ("A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex."). Other state sodomy statutes facially applied to both homosexual and heterosexual couples, although as enforced, sodomy statutes were rarely enforced against consenting adults and were commonly known to be proscriptions only on homosexual sex, or as a secondary tool to prosecute other crimes, like prostitution, child molestation, and sex with animals. *See Lawrence*, 539 U.S. at 569-71, 573 ("Laws prohibiting sodomy do not seem to have been enforced against consenting adults acting in private. A substantial number of sodomy prosecutions and convictions for which there are surviving records were for predatory acts against those who could not or did not consent, as in the case of a minor or the victim of an assault.").

[14] *See, e.g.*, William N. Eskridge, Jr., Lawrence*'s Jurisprudence of Tolerance: Judicial Review to Lower the Stakes of Identity Politics*, 88 MINN. L. REV. 1021, 1022 (2004) ("As had been widely expected among legal experts, the Court overruled *Bowers v. Hardwick* . . . . No one, however, anticipated the breadth of the Court's opinion.") (footnote omitted); Katherine M. Franke, *The Domesticated Liberty of* Lawrence v. Texas, 104 COLUM. L. REV. 1399, 1401 ("While it was widely expected that the Court would find the Texas sodomy law unconstitutional, the sweeping—indeed moving—language that Justice Kennedy uses in the majority's opinion came as quite a surprise. . . . This soaring language recognizes the dignity and respect that gay men and lesbians are due.").

[15] *Lawrence*, 539 U.S. at 564.

[16] *Id.* at 567 (noting that although the challenged sodomy laws "purport to do no more than prohibit a particular sexual act[, t]heir penalties and purposes . . . have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home").

[17] *Id.* at 575. The majority itself recognized the stigmatizing effect of criminal laws, stating, "[w]hen homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres" and that the Court's prior decision in *Bowers*,

long as sodomy statutes remained on the books, gay and lesbian adults bore the presumption of criminality because of the illegality of the sexual acts associated with their sexual identity.[18] Laurence Tribe has noted that *Lawrence* lifted this stigma of criminalization from all gays and lesbians, writing:

> *Lawrence* quickly becomes a story about how the very *fact* of criminalization, even unaccompanied by any appreciable number of prosecutions, can cast already misunderstood or despised individuals into grossly stereotyped roles. . . . The outlawed acts . . . come to represent human identities, and this reductionist conflation of ostracized identity with outlawed act in turn reinforces the vicious cycle of distancing and stigma that preserves the equilibrium of oppression . . . .[19]

This presumption remained alive and well until June 2003, when with the abolition of sodomy statutes, gays and lesbians were able to shed—as individuals and as a community—this subjugated outlaw status.[20] For the first time, *being gay* was not a criminal act.

In decriminalizing gay and lesbian adults' sexual behavior,[21] the Supreme Court effectively legitimized the status of being gay. The sex act had been used for so long to define gay people solely by the "criminal" sex

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upholding such laws "demeans the lives of homosexual persons," concluding, "[t]he stigma this criminal statute imposes . . . is not trivial." *Id.*

[18] *See generally* Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws*, 35 HARV. C.R.-C.L. L. REV. 103 (2000) (describing how "the very existence of sodomy laws creates a criminal class of gay men and lesbians, who are consequently targeted for violence, harassment, and discrimination because of their criminal status"). While sodomy statutes remained constitutional, courts used this presumption of criminality to deny LGBT people certain rights. *See, e.g.*, Bottoms v. Bottoms, 457 S.E.2d 102, 107-08 (Va. 1995) (denying child custody to a lesbian mother, in part, because the "[c]onduct inherent in lesbianism" is "'illegal,' and constitutes a felony"); *see also* Ruthann Robson, *The Missing Word in* Lawrence v. Texas, 10 CARDOZO WOMEN'S L.J. 397, 404-08 (2004) (describing other instances in which sodomy statutes were held by courts to justify discrimination against gays and lesbians).

[19] Laurence H. Tribe, Lawrence v. Texas*: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1896 (2004).

[20] In her concurring opinion in *Lawrence*, Justice O'Connor discussed this presumption of criminality, writing "the effect of Texas' sodomy law is not just limited to the threat of prosecution or consequence of conviction. Texas' sodomy law brands all homosexuals as criminals, thereby making it more difficult for homosexuals to be treated in the same manner as everyone else." 539 U.S. at 581 (O'Connor, J., concurring). Though most states had already abolished sodomy bans prior to 2003, the remaining sodomy laws still justified discrimination against all LGBT people. *Id.* at 570-71. Moreover, for those individuals actually convicted of sodomy, a permanent criminal record and its attendant disadvantages would attach to them, both in their home states and in others recognizing other states' criminal convictions. *Id.* at 575-76.

[21] *Id.* at 578-79.

in which they were likely to engage.[22] Through *Lawrence*, the gay community was able to toss off that reductionist shackle—and to define itself more wholly in terms of the full range of emotions, attractions, and, indeed, sexual preferences, that constitute the core human identity of a gay or lesbian person.[23]

Unfortunately, for many LGBT young people, their sexual identity still bears the stigma of criminality.[24] Correctly interpreted, *Lawrence* should, however, offer relief both to adult gays and lesbians and to the most marginalized, invisible, and ill-treated subpopulation of the LGBT community—its homeless and incarcerated youth. *Lawrence* bolsters the Court's previous holding in *Romer v. Evans*[25] that a more searching form of rational basis review is required when addressing discriminatory policies targeted against LGBT people as a group.[26] Since *Lawrence*, however, some courts have misunderstood and wrongly applied one seven-word phrase in Justice Anthony Kennedy's majority opinion, "[t]he present case

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[22] *See* Leslie, *supra* note 18.

[23] *See* Eskridge, *supra* note 14, at 1025 ("[T]raditionalists can no longer deploy the state to hurt gay people or render them presumptive criminals . . . ."); Tribe, *supra* note 19, at 1948-51 (rejecting the narrow view that *Lawrence* only legalized private homosexual sex, in favor of a broader interpretation that the decision renders illegitimate many forms of state-sanctioned discrimination against gays based on their former criminal status).

[24] As this comment will discuss later, *see infra* Part II.A.2., the cycle of events that leads LGBT youth into the homeless population and juvenile justice system often starts with trouble at home caused when the youth comes out as LGBT, is "outed" to his or her parents, or exhibits gender non-conforming behavior that leads to physical and verbal abuse, ejection from the home, or both. Simply stated, "being gay" instigates this cycle, not any criminal behavior on the part of the youth. Nevertheless, as these young people continue to face discrimination within the system and their options become more limited, homelessness can often seem like the last resort. Non-violent survival crimes are thus related more to their sexual orientation or gender-role conformity than to any propensity for crime. Although, of course, being gay or lesbian does not make one a *per se* criminal, for those LGBT adolescents who reach the juvenile justice system, their delinquent behavior is linked to past discrimination and harassment based on their sexual orientation or gender expression. *See* FEINSTEIN ET AL., *supra* note 2, at 20 ("[T]he crimes that LGBT youth commit are often directly tied to their emotional or physical needs stemming from rejection based on sexual orientation or gender identity.").

[25] 517 U.S. 620 (1996).

[26] *Id.* at 634-36 (holding that "a bare desire to harm a politically unpopular group cannot constitute a legitimate governmental interest" and finding unconstitutional a state law that "classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else"). Justice O'Connor, in her concurring opinion in *Lawrence*, referred to the Court's reasoning in *Romer* and other equal protection cases, noting, "[w]hen a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause." 539 U.S. at 580 (O'Connor, J., concurring).

does not involve minors,"[27] which this comment will refer to as "the minor exception." This phrase has been incorrectly interpreted to limit the reach of *Lawrence* by excluding LGBT youth from the decision's scope, since its proper application is to preclude adult sex offenders from seeking a liberty interest to engage in sexual conduct with children—an issue unrelated to sexual orientation.[28] Further, although the Court in *Lawrence* recognized that gays and lesbians are a distinct class of people who face societal discrimination, it failed to take the next step and conclusively hold that sexual orientation is a suspect classification for purposes of constitutional review.[29] Under this narrow view, by just decriminalizing the sex act, but not formally extending protections on the basis of sexual identity, it could be argued that youth (and others) who are not sexually active may be found to fall outside the scope of the holding.

The central questions posed by this comment are (1) how *Lawrence* affected the status of sexual minority youth as a class, if at all; and (2) whether the decision will be useful in seeking expanded legal protections for at-risk LGBT youth. Since *Lawrence*, a judicial and public backlash against LGBT rights has emerged.[30] In 2004, voters in thirteen states approved ballot measures creating state constitutional amendments banning same-sex marriage.[31] Several state and federal courts have issued decisions narrowly construing *Lawrence* and attempting to restrict its scope,[32] raising questions of how other courts will apply *Lawrence* to cases involving LGBT youth. This comment will argue that *Lawrence* decriminalized not

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[27] *Lawrence*, 539 U.S. at 578.

[28] *See* discussion *infra* Part III.A.3.

[29] Andrew Koppelman writes,

> The Court determined that certain sexual privacies were protected, but it emphasized that "[t]he petitioners were adults at the time of the alleged offense," and later emphasized that "[t]he present case does not involve minors." . . . The Court did not hold that there was anything wrong per se with classifications on the basis of sexual orientation, much less that discrimination against gays was constitutionally suspect under the Equal Protection Clause . . . .

Andrew Koppelman, Lawrence*'s Penumbra*, 88 MINN. L. REV. 1171, 1173-74 (2004) (alterations in original). Nevertheless, Koppelman notes that "*Lawrence* is full of language that demonstrates the Court's concern with the subordination of gays as a group," such that "all antigay laws are now under suspicion." *Id.* at 1177, 1183.

[30] *See generally* A. Jean Thomas, *The Hard Edge of* Kulturkampf*: Cultural Violence, Political Backlashes and Judicial Resistance to* Lawrence *and* Brown, 23 QUINNIPIAC L. REV. 707 (2004) (describing the political backlash to gay rights after *Lawrence* and comparing it to the similar resistance to blacks' civil rights after the Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954)).

[31] NAT'L GAY & LESBIAN TASK FORCE, VOTING TALLIES: STATE ANTI-GAY MARRIAGE BALLOT INITIATIVES (2005), http://www.thetaskforce.org/downloads/StateBallotPollingData2004.pdf.

[32] *See infra* Part III.B.

just consensual sodomy between homosexual adults, but also the very status of being gay or lesbian, and as such, should also be interpreted to include gay youth in its protections.

Part II of this paper will describe the discrimination faced by LGBT young people on the basis of their sexual identity, including special risks of homelessness and exposure to the juvenile justice system; review empirical data on children's sexual identity formation and contrast it with stereotypes still used to abridge gay rights; and discuss courts' conceptions of the existence and rights of LGBT youth prior to *Lawrence.*

Part III will argue that a correct reading of *Lawrence* should render any discrimination against youth on the basis of sexual orientation constitutionally suspect. *Lawrence* recognized that gays and lesbians are a distinct class of citizens, whose liberty interests include the rights to realize their human and sexual identity free from state-sanctioned interference based on the majority's animus or ignorance. While it stops short of labeling LGBT people a protected class in constitutional terms, the decision implicitly recognizes that gay people are something more than the sexual acts in which they engage. This comment will analyze two 2004 decisions, *Lofton v. Secretary of Department of Children & Family Services*[33] in the Eleventh Circuit and *State v. Limon*[34] from the Kansas Court of Appeals, both of which incorrectly construed *Lawrence* to categorically exclude LGBT youth from any legal protections, relying on grounds *Lawrence* itself made irrational. It will argue that the "minor exception" in the decision's caveat paragraph cannot be read to justify discriminatory policies against LGBT adults and minors.

This comment will conclude that *Lawrence* should be used by advocates for LGBT youth who are homeless, at risk of entering the juvenile justice system, or already confined in detention or prison facilities. Specifically, policies, practices, and conditions of confinement that treat LGBT youth differently and detrimentally do not, in light of *Lawrence*, bear any rational relation to legitimate state interests.

II. BACKGROUND

The United States Supreme Court declared in *Lawrence v. Texas*[35] that state sodomy statutes violated gay and lesbian individuals' liberty interests under the Due Process Clause of the Fourteenth Amendment.[36] In

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[33] 358 F.3d 804 (11th Cir. 2004).

[34] 83 P.3d 229 (Kan. Ct. App. 2004), *rev'd*, No. 85,898, 2005 WL 2675039 (Kan. Oct. 21, 2005).

[35] 539 U.S. 558 (2003).

[36] *Id.* at 564.

Lawrence, the Court overturned its 1986 decision in *Bowers v. Hardwick*,[37] in which the Court found such statutes constitutionally permissible and rejected the gay plaintiffs' equal protection claims as "facetious."[38] In reversing *Bowers*, the Court not only legalized same-sex sexual activity, but also removed one of the most significant legally-sanctioned justifications for discrimination against LGBT people as a class.[39] The *Lawrence* decision, which implicitly recognized a growing social acceptance and understanding of gays and lesbians,[40] was issued during a historic moment when LGBT youth were also starting to become increasingly visible in communities across the country.[41]

This section will first review the research on youth sexuality and the cultural shifts which have led to LGBT youth acknowledging their homosexuality or gender identity earlier than in generations past. Next, it will discuss the still-pervasive discrimination against youth who are gay or perceived to be gay, despite these positive cultural shifts. Third, it will describe how this discrimination puts significant numbers of LGBT youth at risk of entering the child welfare system, becoming homeless, engaging in delinquent behavior, and entering the juvenile justice system. Finally, it will analyze the pre-*Lawrence* legal context for LGBT youths' rights, and discuss how courts have traditionally dealt with the existence of LGBT youth and the problems faced by this marginalized subpopulation of the LGBT population. Although *Lawrence* did not bear directly on LGBT youth,[42] the ways in which it has been interpreted in subsequent lower court decisions have directly impacted LGBT minors. The long-term legacy of *Lawrence* will be measured, in part, by whether it extends legal protections against discrimination to homosexual and gender non-conforming minors.

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[37] *Id.* at 578 (overturning Bowers v. Hardwick, 478 U.S. 186 (1986)).

[38] *Bowers*, 478 U.S. at 191-94, 196.

[39] The Court itself acknowledged the lasting stigma imposed on LGBT people by sodomy laws. *See Lawrence*, 539 U.S. at 575 ("The stigma this criminal statute imposes, moreover, is not trivial."). A number of commentators have noted that since *Bowers* reinforced a presumptive "outlaw" status on gays and lesbians, in overturning *Bowers*, social stigmas based on the formerly presumed criminality will decline. *See, e.g.*, Eskridge, *supra* note 14, at 1022; Darren Lenard Hutchinson, *The Majoritarian Difficulty: Affirmative Action, Sodomy, and Supreme Court Politics*, 23 LAW & INEQ. 1, 39 (2005).

[40] *See Lawrence*, 539 U.S. at 573, 576-77; *see also* Tribe, *supra* note 19, at 1901-02.

[41] Studies in the late 1990's found that the average age when gay and lesbian teenagers self-identify was sixteen, compared to nineteen to twenty-three in the 1980s, and that LGBT youth are voluntarily "coming out" as teenagers in increasing numbers. *See* CIANCIATTO & CAHILL, *supra* note 2, at 6, 25.

[42] *Lawrence*, 539 U.S. at 578.

A. LGBT YOUTH: AN INVISIBLE MINORITY WITHIN A MINORITY

1. Openly LGBT Young People Are Becoming Increasingly Visible in Society

Lesbian, gay, bisexual, and transgender adolescents have long suffered from legal and social invisibility.[43] First, many LGBT teenagers—like many LGBT adults—are not "obviously" gay, and parents, peers, teachers, society, and courts tend to presume their heterosexuality.[44] Indeed, society's tendency to ignore or downplay juvenile sexuality in general leads many to have trouble believing children *can* be gay.[45] Second, many LGBT teenagers have not come out to themselves and are still struggling with or even just beginning to recognize their own sexual identity.[46] Unlike children in every other minority group, most gay teens' families are not also gay.[47] Whereas other minority children enjoy support in confronting discrimination from their parents and communities—who share their experiences—most LGBT adolescents lack a comparable built-in support network.[48] Consequently, LGBT youth frequently confront these issues alone or, worse, lose family support when they come out as LGBT.[49] Third,

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[43] *See, e.g.*, FEINSTEIN ET AL., *supra* note 2, at 26-27 (discussing LGBT youths' invisibility within the juvenile justice system); Arriola, *supra* note 11, at 430; Teemu Ruskola, *Minor Disregard: The Legal Construction of the Fantasy That Gay and Lesbian Youth Do Not Exist*, 8 YALE J.L. & FEMINISM 269, 270-71 (1996).

[44] *See* Vanessa H. Eisemann, *Protecting the Kids in the Hall: Using Title IX to Stop Student-on-Student Anti-Gay Harassment*, 15 BERKELEY WOMEN'S L.J. 125, 149 (2000); Ruskola, *supra* note 43, at 293.

[45] *See, e.g.*, Ruskola, *supra* note 43, at 274-75 ("The notion of juvenile sexuality is fundamental to our notion of adolescence, yet we are constantly striving to desexualize adolescents. . . . [A]ttempts to redefine or reinterpret juvenile sexuality often elicit reactions bordering on hysteria.").

[46] *See* Miye A. Goishi, *Unlocking the Closet Door: Protecting Children from Involuntary Civil Commitment Because of Their Sexual Orientation*, 48 HASTINGS L.J. 1137, 1159-60 (1997) (noting that gay adolescents typically receive less support than their peers in dealing with sexual identity issues).

[47] COLLEEN SULLIVAN ET AL., LAMBDA LEGAL DEF. & EDUC. FUND, YOUTH IN THE MARGINS: A REPORT ON THE UNMET NEEDS OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER ADOLESCENTS IN FOSTER CARE 13-14 (2001), *available at* http://www.lambdalegal.org/ cgi-bin/iowa/news/publications.html?record=899 (noting that unlike other minority children, LGBT youth do not typically grow up in families or communities that share their minority status, who can "act as buffers against stigmatization and present affirming role models").

[48] *Id.*; Sonia Renee Martin, Note, *A Child's Right to Be Gay: Addressing the Emotional Maltreatment of Queer Youth*, 48 HASTINGS L.J. 167, 168 (1996) ("Queer teens may not only endure painful harassment from their parents, but are also denied the familial support that is essential to coping in a society that refuses to accept them.").

[49] One study, for example, found that LGBT youth whose parents are aware of their sexual orientation are significantly more likely to suffer verbal abuse from their parents than

while some gay and lesbian teenagers are sexually active, for most, attraction to members of the same sex and homosexual identity far predate any sexual encounters.[50] Finally, LGBT youth have long been ignored by LGBT adults, in part due to fears of gay adults that they will be accused of trying to "convert" children to homosexuality.[51]

(a) Presumption of Youth Heterosexuality Renders "Gay Youth" an Impossibility

Society has been reluctant to recognize that adolescents can be gay.[52] Ruskola identified "a central cultural fantasy that gay and lesbian youth do not exist," which results in "the discursive and material violence that gay kids confront in their lives."[53] Under this presumption, "an authentically gay adolescent is simply a contradiction in terms" because "adolescents are denied the ability to define themselves as gay, and a non-conforming child is, by definition, not gay but 'confused.'"[54] While such experimentation and confusion is a part of many LGBT youths' adolescent experiences,[55]

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those whose parents are unaware of their sexual identity. Anthony R. D'Augelli, Arnold H. Grossman & Michael T. Starks, *Parents' Awareness of Lesbian, Gay, and Bisexual Youths' Sexual Orientation*, 67 J. MARRIAGE & FAMILY 474, 479 (2005).

[50] *See* Leslie, *supra* note 18, at 175-76.

[51] *See, e.g.*, Martin, *supra* note 48, at 168 ("[T]he gay and lesbian community has tragically failed to address the needs of queer youth, due largely to the community's fear of the stereotype that it 'recruits' teenagers to homosexuality."); Ruthann Robson, *Our Children: Kids of Queer Parents & Kids Who Are Queer: Looking at Sexual Minority Rights from a Different Perspective*, 64 ALB. L. REV. 915, 947 (2001) ("For many sexual minority youths, the knowledge that sexual minority adults exist and survive can be life-saving, but adults who form relationships with young people risk being branded as child molesters."). Some conservative groups continue to actively perpetuate the myth that the LGBT community targets children to become homosexual. *See, e.g.*, ALAN SEARS & CRAIG OSTEN, THE HOMOSEXUAL AGENDA: EXPOSING THE PRINCIPAL THREAT TO RELIGIOUS FREEDOM TODAY 45-47, 50-54 (2003) (describing, in an Alliance Defense Fund pamphlet, the efforts of "homosexual activists" to "reach young children . . . during the earliest, most impressionable ages" and to engage in "indoctrination of children . . . as early as kindergarten.").

[52] *See* Craig Lind, *Law, Childhood Innocence and Sexuality*, *in* LEGAL QUEERIES: LESBIAN, GAY AND TRANSGENDER LEGAL STUDIES 81, 82, 84 (Leslie J. Moran et al. eds., 1998) (noting that "modern Western tradition dictates that childhood should be a period when sex and sexuality are irrelevant" and "legal regulation of childhood sexuality . . . is, arguably, the sphere in which the passion for the promotion of heterosexuality is most striking").

[53] Ruskola, *supra* note 43, at 270.

[54] *Id.* at 280-81; *see also* Martin, *supra* note 48, at 174 (discussing how many parents believe their gay children's homosexual tendencies are a mere phase or "mutable" and changeable).

[55] *See* Goishi, *supra* note 46, at 1159-60.

such presumptions effectively rule out the possibility of being an "LGBT youth." By ignoring the existence of gay adolescents, society and courts are less able to ensure those youth equality, respect, freedom from harassment, and freedom from institutionalized discrimination that many of them face because of their sexual identity. Put one way, "unless one is a walking embodiment of the queer stereotype, the presumption of heterosexuality is all but irrebuttable."[56]

(b) Many Adolescents Do Not Come Out or Self-Identify Until Later

Many gay and lesbian teenagers—or those who will ultimately self-identify as such—tend to get through adolescence without publicly adopting the label of "gay" or "lesbian."[57] On one hand, the formation and realization of sexual identity is a long-term process that, for many individuals, is only just beginning during adolescence.[58] For this group, a definitive label may make little sense. On the other hand, for the many adolescents who do recognize their same-sex attractions or transgender identity, a range of factors may prevent them from self-identifying as LGBT. These factors include a fear of stigmatization associated with being gay, a lack of support structures in addressing the social and psychological challenges involved with coming out, and uncertainty about what degree of weight to attach to internal emotional attractions and sexual feelings.[59] All of these factors lead many LGBT teenagers to resist coming out to either themselves or others. These internalized struggles, compounded by actual or feared intolerance by family members,[60] peers, teachers, and others, are often linked to greater susceptibility to depression, behavioral problems, and emotional issues.[61]

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[56] Ruskola, *supra* note 43, at 304.

[57] *See, e.g.*, Cochran et al., *supra* note 3, at 773 (discussing a survey of homeless youth that found most who reported same-sex attractions self-identified as "bisexual"); *see* Mark S. Friedman et al., *Adolescents Define Sexual Orientation and Suggest Ways to Measure It*, 27 J. ADOLESCENCE 303, 304 (2004) ("[F]ar fewer individuals identify as a sexual minority than claim same-sex attractions, fantasies, and behaviors.").

[58] CIANCIOTTO & CAHILL, *supra* note 2, at 11-12. *See generally* RITCH C. SAVIN-WILLIAMS, THE NEW GAY TEENAGER (2005) (reviewing extensive empirical evidence on homosexual youths' sexual identity formation).

[59] *See, e.g.*, Ritch C. Savin-Williams, *The Disclosure to Families of Same-Sex Attractions by Lesbian, Gay, and Bisexual Youths*, 8 J. RES. ON ADOLESCENCE 49, 51, 59-60 (1998) (discussing gay teenagers' reluctance to come out to their parents).

[60] SULLIVAN ET AL., *supra* note 47, at 13-14; D'Augelli et al., *supra* note 49, at 480 (illustrating that for both LGBT boys and girls, the main reasons they do not disclose their sexual orientation to their parents include general fear or hesitancy, fear of rejection or eviction, and fear of relationship deterioration).

[61] Goishi, *supra* note 46, at 1159-60.

With these factors in mind, it is little surprise that many adolescents do not outwardly label themselves as homosexual. Although the contours of the LGBT youth population are impossible to rigidly define for all of these reasons, the existence of sexual minority youth cannot be denied. For juveniles who are either openly LGBT or perceived to be so because of gender non-conforming behavior, discrimination based on their sexual identity is as real as it is for gay adults—and in many instances, even more severe and pervasive.

(c) Sexual Identity Precedes Sexual Conduct

Our social and legal traditions have long defined homosexuality by same-sex sexual acts, rather than as a core, immutable emotional identity. The fact that LGBT individuals, like their heterosexual counterparts, first recognize sexual and emotional attractions to others at a young age[62] exposes the flaw in only equating homosexuality with same-sex sexual conduct. Due in part to the long-standing association between same-sex sodomy and the identity of being gay or lesbian, a sexual identity apart from sexual acts may still appear to be a paradox to many.[63] Moreover, because society tends to ignore the reality that teenagers—gay and straight alike—are having sex,[64] it systematically ignores the fact that some teenagers are sexually active with individuals of the same sex.[65] Finally,

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[62] A survey of various studies of children's sexual development indicates a consensus that same-sex sexual attraction begins to form in mid-childhood, and children's subjective awareness of these attractions begins to take hold at approximately age ten, with boys growing aware of and acting upon these tendencies slightly earlier than girls. These patterns mirror those of children who develop opposite-sex attractions. *See* Gilbert Herdt & Martha McClintock, *The Magical Age of 10*, 29 ARCHIVES SEXUAL BEHAV. 587, 597-99 (2000). A study of gay, lesbian, and bisexual, predominantly racial/ethnic minority youths from inner-city communities in New York City found that these youths first became aware of their same-sex attractions at age ten, first considered that they might be gay, lesbian, or bisexual at ages 12-13, and conclusively decided they were gay, lesbian, or bisexual at ages 14-15 (boys, on average, reached these realizations earlier than girls). *See* Margaret Rosario et al., *The Psychosexual Development of Urban Lesbian, Gay, and Bisexual Youths*, 33 J. SEX RES. 113, 117-18 (1996).

[63] As Ruskola commented, "[O]ur culture first reduces gay men and lesbians to sex—anonymous, meaningless, loveless, demeaning sex—and then proceeds to complain that homosexuality is only about sex . . . . [O]nly homosexuals 'practice,' whereas heterosexuals simply are." Ruskola, *supra* note 43, at 287-88.

[64] *Id.* at 274-76. Approximately 50 percent of all teenagers are sexually active. James McGrath, *Abstinence-Only Adolescent Education: Ineffective, Unpopular, and Unconstitutional*, 38 U.S.F. L. REV. 665, 677 (2004).

[65] Several studies of sexual minority youths' sexual development patterns have found that gay, lesbian, and bisexual adolescents have their first same-sex sexual experiences, on average, between ages thirteen and fifteen. *See* Ritch C. Savin-Williams & Lisa M.

even when LGBT teenagers' sexual activity is acknowledged, it is often dismissed as "experimentation" or "a phase" that will pass.[66] Underlying these common sentiments is the false presumption that a conclusive sexual identity cannot be formed until adulthood.[67] As this comment will address later, the corresponding desire to "protect" children from becoming homosexual has been cited by courts as a legitimate state interest;[68] faced with empirical data that contradicts this presumption, reliance on such stereotypes arguably amounts to just one form of anti-gay prejudice.

(d) Isolation from Mainstream LGBT Community

Not only are LGBT youths' struggles with their sexual identity development often invisible to their families and communities, one community uniquely able to provide support mechanisms to struggling adolescents—LGBT adults—has long kept a distance from minors.[69] Since society has historically conflated homosexuality with sexual perversity,[70] ignorance of gay people's lives fueled widespread, irrational fears that homosexuals had a propensity to molest children and to actively recruit juveniles to become gay.[71] One commentator described the pervasiveness of this invalid stereotype: "[T]he mythical specter of 'homosexual recruitment' accompanies every conversation about gay and lesbian youth.... The myth grows out of the first axiom of heterosexual logic: homosexuals *must* resort to recruitment [since they] cannot have children and [need] to transmit the homosexual 'culture'... by converting heterosexual(s') children...."[72] Such fallacies have caused many gay adults to keep their distance from children, lest they be branded sexual predators.[73] More harmful still, courts have cited a desire to "protect"

Diamond, *Sexual Identity Trajectories Among Sexual-Minority Youths: Gender Comparisons*, 29 ARCHIVES SEXUAL BEHAV. 607, 610 (2000).

[66] *See* Martin, *supra* note 48, at 174.

[67] *Id.*

[68] *See infra* note 74 and accompanying text.

[69] Martin, *supra* note 48, at 167-68.

[70] *See* WILLIAM N. ESKRIDGE, JR., GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET 60-61, 298 (2002).

[71] *Id.* At one point, even Justice Rehnquist implied that homosexuality could be treated like a contagious condition, arguing that a gay student group's challenge to a university decision to not recognize it was analogous to measles suffers seeking a right not to be "quarantined." *See* Eskridge, *supra* note 14, at 1050 n.99 (citing Ratchford v. Gay Lib, 434 U.S. 1080, 1084 (1978) (Rehnquist, J., dissenting)).

[72] Ruskola, *supra* note 43, at 275-76.

[73] *See* Robson, *supra* note 51, at 947-48 ("For many sexual minority youths, the knowledge that sexual minority adults exist and survive can be life-saving, but adults who form relationships with young people risk being branded as child molesters.").

children from homosexuality as a legitimate justification for discriminating against LGBT people, particularly in the parenting context.[74]

2. LGBT and Gender Non-Conforming Minors Confront Severe Discrimination

By choice or from lack of full self-awareness, many LGBT adolescents are not open about their sexuality and "pass" as the societal default: heterosexual. By virtue of their heteronormative behavior, they are less likely to confront the discrimination faced by their openly LGBT and gender non-conforming peers.[75] The rules change for those teenagers who come out voluntarily, who are "outed" as gay, or who exhibit gender non-

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[74] There are numerous examples of courts finding that shielding children from adults' homosexuality is a legitimate interest. *See, e.g.*, Boy Scouts of Am. v. Dale, 530 U.S. 640, 650-51 (2000) (upholding the Boy Scouts' right to exclude openly gay scout leaders because of the Organization's position that "scoutmasters and assistant scoutmasters inculcate [scouts] with the Boy Scouts' values-both expressly and by example" and accepting the group's position that such exclusions were rationally related to the interest of "not want[ing] to promote homosexual conduct as a legitimate form of behavior"); Marlow v. Marlow, 702 N.E.2d 733, 737-38 (Ind. Ct. App. 1998) (upholding a trial court's restrictions on a gay father's child visitation rights and finding it in the children's best interest to be shielded from their father's homosexuality); J.L.P.(H.) v. D.J.P., 643 S.W.2d 865, 872 (Mo. Ct. App. 1982) (also upholding restrictions on a gay father's visitation rights because "exposing the child to the presence of persons who aggressively promote the practice of homosexuality" could result in harm to the child); Roe v. Roe, 324 S.E.2d 691, 691-94 (Va. 1985) (holding that an "award of custody to a parent who carries on an active homosexual relationship in the same residence as the child . . . is not in the child's best interests and that an award of custody to such a parent constitutes *an abuse of judicial discretion*," and noting that "the conduct inherent in the father's relationship is punishable as a class six felony" and that "the conditions under which this child must live daily are not only unlawful but also impose an intolerable burden upon her by reason of the social condemnation attached to them, which will inevitably afflict her relationships with her peers and with the community at large") (emphasis added).

[75] All children, however, are affected by homophobic epithets and visible anti-gay sentiments in their homes and schools, regardless of their sexual orientation. *See generally* JEAN M. BAKER, HOW HOMOPHOBIA HURTS CHILDREN 4-7 (2002). Homophobia produces feelings of inferiority which become internalized by children and youth who come to recognize same-sex attractions. *Id.* at 6-7. The perceived stigma of "being gay" may make that child more reluctant to accept his or her own same-sex attractions or to come out publicly, which may carry its own set of harms. For discussions of LGBT individuals' internalized homophobia, see, for example, Friedland, *supra* note 10, at 784 ("After years of being exposed to school-yard name calling and disparaging remarks that often occur about LGBT people around the dinner table, for example, LGBT youth are aware of the risks involved with sharing their sexual identity—with 'coming out' and daring to be honest about what they feel."); Leslie, *supra* note 18, at 116-17; Amy D. Ronner, *Homophobia: In the Closet and in the Coffin*, 21 LAW & INEQ. 65, 69 (2003) ("[B]eing in the closet can be an internalization of societal homophobia or an acceptance of one's sexual identity as something shameful . . . .").

conforming behavior that, regardless of their actual sexuality, leads others to perceive them as gay.[76] These teens are more likely to have family problems,[77] be harassed at school,[78] and enter foster care or the child welfare system.[79] Suicide attempt and success rates are disproportionately higher among LGBT kids.[80] Flowing from these problems, LGBT youth are disproportionately likely to experience periods of homelessness and, while homeless, to engage in delinquent activities that lead them to the juvenile justice system.[81] Those LGBT minors that enter public custody in group homes or juvenile detention centers continue to face discrimination, physical and sexual abuse, verbal harassment, and social isolation because of their real or perceived sexual orientation.[82]

(a) Problems at Home

LGBT youth often first confront discrimination in their homes. Half of all LGBT youth experience some form of parental rejection because of their sexual orientation.[83] Verbal abuse by parents is common.[84]

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[76] Powerful anecdotal evidence of the discrimination faced by LGBT young people has been documented in numerous books, journal articles, websites, and other media. *See, e.g.*, Paul Schindler, *Homelessness and Hope: Building Safe Housing Alternates for Queer Youth*, GAY CITY NEWS, Dec. 4-10, 2003, *available at* http://www.gaycitynews.com/gcn_249/homelessnessandhope.html (profiling three homeless LGBT youth in New York City and describing social service agencies serving this population). *See generally* GERALD P. MALLON, WE DON'T EXACTLY GET THE WELCOME WAGON (1998) (chronicling the anecdotal experiences of fifty-four LGBT youth in the child welfare system); SULLIVAN ET AL., *supra* note 47; Daphne Scholinski, *After-Wards*, 48 HASTINGS L.J. 1195 (1997) (providing a first-person account by a lesbian artist and writer about being institutionalized because of her gender non-conforming behavior).

[77] *See generally* FEINSTEIN ET AL., *supra* note 2, at 13-14; Martin, *supra* note 48, at 170-75; Robson, *supra* note 51, at 933-36. Parental abuse rates, for example, are significantly higher for openly gay teenagers than for their closeted counterparts. Martin, *supra* note 48, at 169-70.

[78] *See generally* MICHAEL BOCHENEK & A. WIDNEY BROWN, HUMAN RIGHTS WATCH, HATRED IN THE HALLWAYS: VIOLENCE AND DISCRIMINATION AGAINST LESBIAN, GAY, BISEXUAL, AND TRANSGENDER STUDENTS IN U.S. SCHOOLS (2001); CIANCIOTTO & CAHILL, *supra* note 2, at 29-40.

[79] *See* FEINSTEIN ET AL., *supra* note 2, at 15-16.

[80] Ruskola, *supra* note 43, at 271 ("Gay and lesbian teenagers are two to three times more likely to attempt suicide, and to accomplish it, than their heterosexual peers."). Some estimates conclude that just under one-third of all youth suicides are committed by LGBT youth. *See* Sullivan, *supra* note 6, at 57.

[81] FEINSTEIN ET AL., *supra* note 2, at 11, 17-20.

[82] *See generally id.*; Friedland, *supra* note 10; Sullivan, *supra* note 6.

[83] Martin, *supra* note 48, at 169 (citing two empirical studies).

Approximately one-third of LGBT youth were victims of physical violence by a family member after they came out or their sexual orientation was revealed.[85] Additionally, many LGBT teens are kicked out of their homes because of parental conflicts about their sexual identity.[86] Abuse rates against LGBT youth are highest for those that are also racial minorities.[87] Many LGBT minors in the child welfare system are victims of parental neglect or abuse.[88] Additionally, parental abuse is frequently linked to the high LGBT youth runaway rate.[89]

(b) Experiences at School

Abuse against LGBT youth is not confined to the home. Over two-thirds of all LGBT youth have been verbally or physically harassed on the basis of their sexual orientation;[90] additionally, nearly 90 percent have "sometimes or frequently hear[d] homophobic remarks" in school.[91] Marking improving societal attitudes toward gays and lesbians, including in the school context, many adolescents are now voluntarily coming out during high school.[92] Significant numbers of high school students self-identify as gay.[93] Nearly half of high schools students know a gay classmate, and two-thirds of today's high school students know someone who is gay.[94] Increasing numbers of LGBT teenagers are publicly open

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[84] D'Augelli et al., *supra* note 49, at 481 ("Parents who suspect their children to be LGB may make more antigay comments, which may lead to learning that they have an LGB child. Gender atypical children may provoke more negative parental comments.").

[85] NAT'L CTR. FOR LESBIAN RIGHTS, LGBTQ YOUTH IN THE JUVENILE JUSTICE SYSTEM 1, http://nclrights.org/publications/pubs/lgbtqjuvenilejustice.pdf (last visited Sept. 16, 2005).

[86] *Id.*

[87] Martin, *supra* note 48, at 170.

[88] Sullivan, *supra* note 6, at 45 (discussing parental violence against LGBT children and citing statistics provided by a California social service agency that three-fourths of gay and lesbian children in child welfare were abused or neglected by their parents).

[89] Martin, *supra* note 48, at 176 ("Many abused queer youth escape abuse by running away from home. Another portion of them are kicked out of home because of their sexual orientation.").

[90] HETRICK-MARTIN INST., LGBTQ YOUTH STATISTICS (2005), http://www.hmi.org/ (scroll to bottom of homepage; then follow "LGBTQ Youth Statistics" hyperlink under "F.A.Q's" heading).

[91] *Id.*

[92] A national poll of students in grades 9-12 conducted in April 2004 found that 5% of high school students self-identified as gay (6% of boys and 4% of girls). GAY, LESBIAN, & STRAIGHT EDUC. NETWORK, DETAILED TABLES: HIGH SCHOOL ATTITUDES ON SEXUAL ORIENTATION 2 (2004), http://www.glsen.org/binary-data/GLSEN_ATTACHMENTS/file/411-2.pdf [hereinafter GLSEN POLL].

[93] *Id.*

[94] *Id.*

about their sexual orientation.[95] Nevertheless, they continue to face similar obstacles and challenges as those faced by their predecessors in years past: children "are often victims of the high visibility of, and widely divergent attitudes toward, gay issues."[96] Greater visibility brings both broader acceptance of homosexuality and an increased risk of discrimination:

> While there are indications that greater societal tolerance and visibility of gay issues has resulted in children "coming out" at an earlier age, these children may be subjected to open hostility; hatred in arenas which ought to provide a safe and secure environment; and intolerance, often within their homes, schools, and communities.[97]

Gay teens' increasing outness makes it more difficult for their parents, classmates, teachers, and others to deny the existence or legitimacy of their sexual identity; as long as homophobia exists, however, many LGBT teens will also continue to confront discrimination in their daily lives.

3. At-Risk LGBT Youths' Path to Homelessness

In addition to comprising up to half of the homeless population in major cities,[98] LGBT youth are believed to be grossly overrepresented in state child welfare and juvenile justice systems.[99] Under a typical path, family problems associated with LGBT adolescents' sexual identity lead them to be kicked out of or run away from home.[100] If they enter the child welfare system, they often continue to be harassed and abused—by foster parents, group home workers, and other youth.[101] When these other options are exhausted, homelessness may appear to be the only option.[102] Running away from home, foster care, or group homes is the most frequent path to

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[95] *See, e.g.*, John Cloud, *The Battle Over Gay Teens*, TIME, Oct. 10, 2005, at 44 (reporting recent studies that "[k]ids are disclosing their homosexuality with unprecedented regularity—and they are doing so much younger"); John Caldwell, *Ahead of Their Class*, ADVOCATE, June 22, 2004, at 90.

[96] Goishi, *supra* note 46, at 1149. *See generally,* Franke, *supra* note 14, (describing the public's response to *Lawrence* and the evolution of public opinion on LGBT people and issues).

[97] *See, e.g.*, Goishi, *supra* note 46, at 1149.

[98] *See supra* note 2 and accompanying text.

[99] *See* FEINSTEIN ET AL., *supra* note 2, at 1. LGBT youth are estimated by some to make up between four and ten percent of youth in the juvenile justice system. *Id.* Since even liberal estimates of the adult LGBT population fall in that same general range, *see supra* note 5, self-identified LGBT youth, whose percentage of their age group population is smaller since many teens are still in early stages of coming out, *see* discussion *supra* Part II.A.1, are therefore necessarily overrepresented in the juvenile justice population.

[100] FEINSTEIN ET AL., *supra* note 2, at 11.

[101] *Id.*

[102] *Id.*

homelessness for these disenfranchised youths.[103] Delinquent and criminal behavior associated with homelessness leads them into the juvenile justice system, where they again experience discrimination, lack of awareness of their special needs, and harassment by police, lawyers, judges, and the staff and fellow juveniles in detention centers.[104]

Where does this vicious cycle begin? Generally speaking, "minors come into the care of the state either by committing a crime or due to some breakdown in the parent-child relationship."[105] LGBT youth are disproportionately more likely to experience the latter and profound troubles at home, and thus end up under the state's care in the child welfare system.[106] Parental abuse of gay children—in many instances, inspired or worsened by the child's real or perceived sexuality[107]—can also provide state officials incentive to place these children in the child welfare system for their own protection.[108] Behavioral problems associated with sexuality issues, like acting out, defiant behavior, sexual promiscuity, and school performance issues, are also linked to troubles at home for both LGBT and other disenfranchised youth.[109] For some racial and ethnic minority LGBT youth, the problems of familial and community acceptance may be markedly worse.[110]

Unfortunately, however, the problems of harassment and abuse commonly continue for LGBT children placed in foster care or group

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[103] For a discussion of the foster care runaway problem, see Kevin M. Ryan, *Stemming the Tide of Foster Care Runaways: A Due Process Perspective*, 42 CATH. U. L. REV. 271 (1993). Ryan noted that up to half of homeless youth were previously in foster care. *Id.* at 275-76.

[104] *See id.* (documenting the experiences of LGBT youth in the New York juvenile justice system, with findings and recommendations drawn with both New York-specific and national implications); SULLIVAN ET AL., *supra* note 47; Friedland, *supra* note 10, at 777; Sullivan, *supra* note 6, at 31.

[105] Sullivan, *supra* note 6, at 35-36; *see also* Robson, *supra* note 51, at 933-94 ("The overwhelming majority of youths who leave their homes do not go because they are ready to have adult lives of independence and adventure; they are evicted or constructively evicted by their parents or guardians because of the adults' intolerance.").

[106] Sullivan, *supra* note 6, at 41.

[107] *Id.*

[108] *Id.*; *see also* Goishi, *supra* note 46.

[109] *See* Laurie Schaffner, *Female Juvenile Delinquency: Sexual Solutions, Gender Bias, and Juvenile Justice*, 9 HASTINGS WOMEN'S L.J. 1, 3-4 (1998). The behavioral problems that Schaffner attributes to girls in the juvenile justice system are shared by many LGBT youth who experience family problems. *See also* Goishi, *supra* note 46, at 1159-60 (attributing "acting out" behavior to emotional difficulties, depression, and feelings of lack of acceptance associated with the coming out process).

[110] *See* SULLIVAN ET AL., *supra* note 47, at 14.

homes.[111] In group home settings, LGBT youth are frequently victimized by both peers and staff, experiencing verbal harassment, physical violence, and sexual assault.[112] In many instances, even well-meaning staff simply do not know what to do with sexual minority youth under their supervision.[113] While some cities have LGBT-only group homes, such facilities are rare and unlikely to have the capacity to meet actual need.[114]

Statistics bear out that homeless LGBT youth are compelled to commit certain "survival crimes" such as prostitution and theft in order to maintain their existence.[115] "Approximately two-thirds of adolescent male prostitutes are gay," and homeless LGBT youth "are often forced into prostitution because of a lack of other alternatives" for financial or emotional support.[116] Child prostitution is more frequently punished as a crime rather than as a symptom of victimization or survival.[117] Since the incarceration of juveniles is often more punitive than rehabilitative,[118] the underlying problems faced by youths who engage in prostitution are left unresolved.

4. LGBT Youth Encounter Widespread Discrimination in the Juvenile Justice System

Those at-risk sexual minority youth who enter the juvenile justice system are more likely than their heterosexual counterparts to encounter discrimination and mistreatment on the basis of their sexual orientation once they are in the system.[119] From the point of arrest, in juvenile court proceedings, and in detention centers, LGBT youth are disadvantaged by explicit discrimination and widespread ignorance of their special needs.[120]

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[111] *Id.*; *see also* Friedland, *supra* note 10.

[112] *See* Friedland, *supra* note 10, at 802-04.

[113] *Id.*; Casciano et al., *supra* note 2, at 226-27.

[114] Friedland, *supra* note 10, at 803-04.

[115] *See* FEINSTEIN ET AL., *supra* note 2, at 18-20; *see also* Libby Adler, *New Perspectives on Labor and Gender: An Essay on the Production of Youth Prostitution*, 55 ME. L. REV. 191, 192-94 (2003); Arriola, *supra* note 11, at 452-53; Friedland, *supra* note 10, at 794-95; Alecia Humphrey, *The Criminalization of Survival Attempts: Locking Up Female Runaways and Other Status Offenders*, 15 HASTINGS WOMEN'S L.J. 165, 175-78 (2004) (on runaway girls); Sullivan, *supra* note 6, at 41 (describing frequent arrests of homeless youth for theft of food and clothing items, as well as trespassing in abandoned buildings).

[116] Martin, *supra* note 48, at 177.

[117] *See* Humphrey, *supra* note 115, at 178; Pantea Javidan, Comment, *Defining Feminism: Invisible Targets: Juvenile Prostitution, Crackdown Legislation, and the Example of California*, 9 CARDOZO WOMEN'S L.J. 237, 239-40 (2003).

[118] *See generally* Stacey Gurian-Sherman, *Back to the Future: Returning Treatment to Juvenile Justice*, 15 CRIM. JUST. 30 (2000).

[119] *See* FEINSTEIN ET AL., *supra* note 2, at 35-40.

[120] *Id.*

LGBT youth are a double legal minority; childhood and sexual orientation independently impact individuals' legal rights,[121] and together they create unique questions in courts of law.[122] As one commentator observed, "[j]ust as society and its laws regard sexual minorities with ambivalence, society and its laws also regard children with mixed feelings."[123] Coupled with lawyers' and judges' lack of awareness of the special needs of LGBT children,[124] courts can be unfriendly places for LGBT youth offenders who enter the juvenile justice system. Specific forms of discrimination frequently faced by gay and transgender youth in juvenile justice facilities are described below.

(a) At-Risk LGBT Youth, Already Harmed By the System, Encounter Problems in Juvenile Courts and Juvenile Detention Centers

As they do in their homes, schools, and communities, LGBT youth face pervasive "invisibility" in courts. It is impossible to truly assess judicial treatment of sexual minority youth, because only a handful of decisions explicitly mention or attempt to deal with the sexual orientation of LGBT youth.[125] The reasons for this are two-fold. First, by nature, family and juvenile court are often closed proceedings with unpublished decisions, limiting the ability of outsiders to assess courts' treatment of LGBT minors. Second, many judges are unaware that specific children before them are LGBT,[126] or, in fact, that *any* children that appear in their courtrooms are sexual minorities.[127] This ignorance is often shared by the lawyers who

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[121] *See generally* David D. Meyer, *The Modest Promise of Children's Relationship Rights*, 11 WM. & MARY BILL RTS. J. 1117 (2003) (discussing children's constitutional rights and the "shadowy ground" they occupy in privacy law); Kate Sutherland, *From Jailbird to Jailbait: Age of Consent Laws and the Construction of Teenage Sexualities*, 9 WM. & MARY J. WOMEN & L. 313 (2003).

[122] *See* Goishi, *supra* note 46, at 1150.

[123] *Id.*

[124] *See* FEINSTEIN ET AL., *supra* note 2, at 35-39, 40-41 (special needs of LGBT youth in these facilities include mental health services and counseling related to their sexual orientation and gender identity, support in coming out, placement in facilities consistent with their gender expression, and staff appropriately trained to protect them from harassment and assault because of their sexual orientation).

[125] Martin, *supra* note 48, at 179.

[126] FEINSTEIN ET AL., *supra* note 2, at 26-27. Gender non-conforming youths may be misidentified as LGBT, and receive discriminatory treatment on that basis, while youth who can "pass" as straight are presumed to be heterosexual. *Id.*

[127] *Id.* A Lambda Legal Defense and Education Fund report printed a remarkable example of public officials' lack of awareness of the existence of LGBT youth, quoting a child welfare official as asserting "her state had no need for policies, training, and programs to protect LGBT youth because there simply were none in the state's foster care system." SULLIVAN ET AL., *supra* note 47, at 11-12. Beth Barrett argues that this invisibility in the

represent juvenile sexual minorities.[128] If attorneys and judges are aware of a juvenile's sexual orientation, they often have no idea what to make of that fact, and largely ignore a child's sexuality in advocating for or making legal decisions about these youth.[129]

In the juvenile detention system itself, LGBT youth experience significant levels of discrimination and harassment from both officials and other detained youth. Although juvenile detention center conditions for all youth offenders are notoriously inadequate,[130] LGBT youth face additional challenges that their non-LGBT counterparts do not. LGBT youth offenders' experiences in the juvenile justice system and detention centers mirror those that adult gay criminals have long had in the criminal justice system and in prison.[131] Anti-gay verbal harassment by other detainees is commonplace and physical assault is also a common problem.[132] Homophobic epithets are infrequently punished.[133] LGBT youth also face social isolation, especially since LGBT youth also lack family support structures.[134] Poorly trained staff compound all these problems.[135] Sexual assault by staff and nonconsensual sex with other juveniles is also a problem in many juvenile facilities across the country.[136]

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courtroom, and ignorance of the underlying homophobia relevant to LGBT parties' cases, extends to LGBT adults as well. Beth Barrett, *Defining Queer: Lesbian and Gay Visibility in the Courtroom*, 12 YALE J.L. & FEMINISM 143, 149 (2000). Barrett advocates for increased awareness-raising of judges and juries of LGBT-specific issues. *Id.* at 160.

[128] SULLIVAN ET AL., *supra* note 47, at 11-12.

[129] FEINSTEIN ET AL., *supra* note 2, at 28-32 (discussing few juvenile sentencing options that can take sexual orientation into account).

[130] *See generally* Gurian-Sherman, *supra* note 118. The most common problems in juvenile facilities include a lack of treatment and rehabilitative services; unhealthy, overcrowded, and dangerous living conditions; inadequate supervision and harassment by staff; and pervasive violence and sexual assault. *Id.* at 31-32.

[131] *See, e.g.*, Leslie, *supra* note 18, at 129 (discussing that among prisoners who are openly gay, outed as gay, or perceived to be gay, physical, verbal, and sexual abuse by other inmates, police, and prison officials is commonplace).

[132] *See* FEINSTEIN ET AL., *supra* note 2, at 32-35. It bears noting that many non-LGBT youth in juvenile detention centers have been placed there because they have committed offenses against LGBT people. Schaffner, *supra* note 3, at 61.

[133] FEINSTEIN ET AL., *supra* note 2, at 39.

[134] *Id.* at 34-35.

[135] *Id.* at 36-39.

[136] A recent Department of Justice study found that staff sexual misconduct and nonconsensual sex occurs more frequently in state-operated juvenile facilities than in state or federal prisons. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS: SEXUAL VIOLENCE REPORTED BY CORRECTIONAL AUTHORITIES, 2004 (2005).

(b) Judicial Discrimination Against LGBT Youth Is Often Justified as a "Protective" Mechanism

Some scholars speculate that courts' inability to appropriately deal with the unique situations faced by LGBT youth offenders is rooted in homophobia and misunderstanding of youth sexuality.[137] In juvenile proceedings, even judges who seek to act in LGBT youths' best interests are often constrained by systemic limitations that can further harm these youth.[138] These include sentencing LGBT offenders to "protective custody" where they are segregated from other youth or in more restrictive settings, like secure facilities, normally reserved for juveniles who commit severe crimes.[139] Both sentencing options socially isolate LGBT youth and imply that they are being punished more gravely because of their sexual orientation, rather than addressing underlying problems in the general detention facilities.[140] In most instances, attorneys and judges are not trained to identify or deal with LGBT-specific issues.[141]

In pre-*Lawrence* decisions involving sexual orientation, LGBT youth, and family law, a dominant legal theme was that youth can (and should) be protected from homosexuality, lest they fall "victim" to it.[142] This doctrine has perpetuated a long-standing and unfounded societal fear that gay people seek to "convert" children to homosexuality. According to William Eskridge, for example, "[m]any traditionalists also consider homosexuality contagious in some way. Unless the polity takes a strong moral (and criminal) stance against bad conduct, it will spread to vulnerable Americans, especially young people."[143] This unsubstantiated fear has been used by courts to continue to justify discriminatory policies against both LGBT youth and LGBT adults who interact with children.[144]

B. PRE-*LAWRENCE* LEGAL DOCTRINE, AND ITS IMPACT ON THE RIGHTS OF LGBT YOUTH

Prior to *Lawrence*, one of the most troubling aspects of anti-gay sodomy laws was that they conflated homosexual sex acts with homosexual

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[137] *See, e.g.*, Martin, *supra* note 48, at 184-86.

[138] *See* FEINSTEIN ET AL., *supra* note 2, at 28-32.

[139] *Id.*

[140] *Id.*

[141] *Id.* at 35.

[142] *See* ESKRIDGE, *supra* note 70, at 3-4, 298.

[143] Eskridge, *supra* note 14, at 1049-50.

[144] *See supra* note 73.

sexual identity, linking the act to status.[145] The flaw in this logic is exposed when one considers the experiences of LGBT youth, whose sexual identity usually precedes—and is often completely independent of—any actual sexual conduct.[146] The full range of emotions, attractions, feelings, and common experiences of "growing up different" and confronting the world as a minority shapes the full experience of what it means to be a gay person. Those feelings can start years, even decades, before one first has sex; for most gay people, it is demeaning to think that their identity as a sexual minority is reduced only to certain sexual acts. Although sodomy laws helped, in part, to shape the class of "homosexuals" by the sexual acts in which they were likely to engage, it became less obvious over time that gay people could be defined solely in terms of sex acts.[147] As LGBT people became increasingly visible and formed a cognizable community in the latter half of the twentieth century, the depth and texture of gay peoples' lives evolved away from tired, caricatured stereotypes.[148]

This conflation of status and act, however, was problematic, particularly in creating a "criminal class" based on assumed sexual behavior.[149] Until *Lawrence* was decided, a "persistent myth" existed that because sodomy laws were largely unenforced, they created no injury to gays and lesbians.[150] Sodomy laws, Leslie argued, did "not merely define the fluid boundaries of a social class; rather, they achieve[d] indirectly what the states cannot do directly: criminalize homosexuals."[151]

The criminal class was overbroad, sweeping many who did not fit this assumption, including youth, into the realm of presumptive criminality.[152] As Leslie describes,

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[145] *See* Leslie, *supra* note 18, at 110-12 (arguing that while sodomy laws proscribed same-sex sexual conduct, they had the effect of oppressing LGBT people on the basis of sexual identity). For an example of how this conflation of sexual conduct with homosexual identity has impacted individual LGBT people, see Barrett, *supra* note 114, at 173-74 ("the homophobic myth that gays and lesbians are nothing more than sexual beings").

[146] *See supra* notes 162-68 and accompanying text.

[147] Eskridge, *supra* note 14, at 1055.

[148] *Id.* As Eskridge observed, sodomy laws "were originally not at odds with the anti-caste principle because they were not associated with any class of people. It was not until well into the twentieth century that sodomy became a metonym for a new category of person, the 'homosexual' . . . ." *Id.*; *see also* Leslie, *supra* note 18, at 168 ("Although men and women have practiced homosexual conduct for millennia, homosexuality as a status is of relatively recent vintage.").

[149] Leslie, *supra* note 18, at 175-76.

[150] *Id.* at 108.

[151] *Id.* at 110.

[152] *Id.* at 175-76.

> Because identity and conduct are conflated, the contours of the criminal class are also overinclusive in several ways.... Desire precedes action. In the same way that heterosexual teenage boys are heterosexual even before they lose their virginity, gay youth are, by the same standard, gay even if they have never acted upon their same-sex attraction. In short, sexual identity is broader than sexual conduct....[153]

Regardless, whether sexually active or not, all gays and lesbians bore the stigma associated with the presumption that homosexuals engaged in criminal conduct, and that stigma resulted in discrimination, including against LGBT youth.

Over the past two decades, evolving legal doctrine on the rights of LGBT individuals has shaped the legal status of sexual minority youth, and informed the understanding of *Lawrence*, the Supreme Court's most recent gay rights decision. Between the mid-1980s and the late 1990s, the status of LGBT people before the law evolved from a criminal class defined only by sodomy and sexual deviancy[154] to a class of people with rights worth protecting.[155] This evolution has been uneven and based on ambiguous Supreme Court doctrine; nevertheless, by the time *Lawrence* was decided in 2003, it was apparent that the Court had been moved by the nascent societal and legal acceptance of LGBT people.[156]

1. Romer v. Evans *Eliminated Animus Against Gays as a Rational State Interest*

In its 1996 decision in *Romer v. Evans*,[157] the Supreme Court struck down the State of Colorado's Amendment 2,[158] a state constitutional amendment which prohibited local municipalities from passing non-discrimination laws that included sexual orientation.[159] The *Romer* Court invalidated the Colorado amendment under the Equal Protection Clause of the Fourteenth Amendment, holding that "[a] State cannot so deem a class of persons a stranger to its laws" by passing laws against homosexuals "not to further a proper legislative end but to make them unequal to everyone

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[153] *Id.*

[154] *See* Bowers v. Hardwick, 478 U.S. 186, 193 (1986) (calling the claim that the right to engage in private, consensual homosexual sex is fundamental "at best, facetious").

[155] *See, e.g.*, Romer v. Evans, 517 U.S. 620 (1996) (invalidating a state constitutional amendment denying equal protections to LGBT citizens); Nabozny v. Podlesny, 92 F.3d 446 (7th Cir. 1996) (upholding a high school student's equal protection discrimination claim of discriminatory treatment by school administrators based on sexual orientation after school district failed to protect plaintiff from harassment and assault).

[156] *See* Hutchinson, *supra* note 39, at 18.

[157] 517 U.S. 620 (1996).

[158] *Id.* at 635-46.

[159] *Id.* at 623-24.

else."[160] Finding the amendment "inexplicable by anything but animus toward the class it affects,"[161] gays and lesbians, Justice Kennedy wrote for the majority that even under rational basis review, the classification created by the amendment bore no reasonable relation to a legitimate state interest.[162]

Romer was significant for two key reasons. First, it found that hatred or moral disapproval of homosexuality is not a rational basis for discrimination against gays and lesbians as a class.[163] Second, and more importantly, for the first time in the Supreme Court's history, the Court in *Romer* found that homosexual people do, indeed, form a "class" that can and does face invidious discrimination.[164] Implicit in this holding was that being gay was something more than being a sodomite. In contrast to its earlier holding in *Bowers*, the status of homosexuality did transcend the mere sexual act associated with it.[165]

2. *Courts Expressed New Willingness to Protect LGBT Youth from Harm*

The equal protection themes articulated in *Romer* have also appeared in lower court decisions involving LGBT youth. The Seventh Circuit decided *Nabozny v. Podlesny*,[166] in which the plaintiff was a gay high school student, shortly after *Romer*.[167] Jamie Nabozny, the gay student, sued his Wisconsin school district after enduring years of verbal harassment and severe physical violence by other students because of his sexual orientation.[168] School district officials failed to respond to this ongoing abuse, even after becoming aware of it.[169] At one point, the school principal told Nabozny and his parents "that 'boys will be boys' and . . . if

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[160] *Id.* at 635-36.

[161] *Id.* at 632.

[162] *Id.*

[163] *Id.*

[164] *Id.*

[165] Justice Scalia's dissent reacts to the majority's notion that sexual orientation is broader than the underlying sexual acts involved, maintaining the synonymity of "orientation" and "conduct": "If it is rational to criminalize the conduct, surely it is rational to deny special favor and protection to those with a self-avowed tendency or desire to engage in the conduct. Indeed, where criminal sanctions are not involved, homosexual 'orientation' is an acceptable stand-in for homosexual conduct." *Id.* at 642 (Scalia, J., dissenting).

[166] 92 F.3d 446 (7th Cir. 1996).

[167] *Romer* was decided after oral arguments in *Nabozny*. The Seventh Circuit noted that "[a]lthough *Romer* bolsters our analysis in this case to some extent, we do not rely on it," predicting further that "[o]f course *Bowers* will soon be eclipsed in the area of equal protection by . . . *Romer*." *Id.* at 458 n.12.

[168] *Id.* at 449.

[169] *Id.* at 451-52.

he was 'going to be so openly gay,' he should 'expect' such behavior from his fellow students."[170]

The Seventh Circuit found that Nabozny stated a valid Fourteenth Amendment equal protection claim because school district officials denied him the protections afforded other harassed students on the basis of his sexual orientation.[171] The court found that there was "little doubt that homosexuals are an identifiable minority subjected to discrimination in our society."[172] It held that the district's intentional inaction amounted to invidious discrimination against Nabozny because of his sexual orientation.[173] While the court stopped short of deciding whether "homosexuals are a suspect or quasi-suspect class,"[174] it nevertheless held that even under minimal rational basis review, discrimination against a high school student on the basis of sexual orientation had no valid justification.[175]

Nabozny is important for two reasons. First, it not only articulated the notion that LGBT people form an identifiable class who may invoke equal protection review, it also included LGBT youth in this class. In so doing, it recognized that minors can be sexual minorities, and that they do face state-enforced discrimination on the basis of their sexual orientation. Second, it reinforced the *Romer* doctrine that animus or prejudice against LGBT people cannot serve as a rational basis for discriminatory practices or policies disfavoring them. It also spurred action by school districts to prevent similar lawsuits and a series of similar lawsuits by gay students in other states.[176]

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[170] *Id.* at 451.

[171] *Id.* at 454.

[172] *Id.* at 457.

[173] *Id.* at 458.

[174] *Id.*

[175] *Id.*

[176] *See* David S. Buckel, *Legal Perspective on Ensuring a Safe and Nondiscriminatory School Environment for Lesbian, Gay, Bisexual, and Transgendered Students*, 32 EDUC. & URBAN SOCIETY 390, 392 (2000) (describing the promising legacy of Nabozny several years after the decision). Such suits continue in 2005. An administrative law judge in New Jersey found chronic anti-gay harassment against a public school student violated the state's non-discrimination law. L.W. v. Toms River Reg'l Sch. Bd. of Educ., No. CRT 8535-01 (N.J. Dep't of Law & Public Safety, July 26, 2004) (admin. action, findings, determinations and order), *available at* http://www.nj.gov/lps/dcr/downloads/orders/LW-v-Toms_River.pdf. The case has been appealed to the New Jersey appeals court.

III. DISCUSSION

The Supreme Court's decision in *Lawrence v. Texas*[177] further strengthened the doctrine first articulated in *Romer* that gays and lesbians, as a distinct class of people, can find relief in the Constitution from discriminatory public policies that are grounded solely in homophobia and animus.[178] In *Romer*, the Court took the important step of finally recognizing gays and lesbians as an identifiable group, moving beyond the former view that sexual orientation was defined solely by sexual conduct, and in so doing articulated the principle that mere moral disapproval of gays would no longer be a legitimate justification for discrimination against them. *Lawrence* went one step further, finding that gays' and lesbians' ability to individually define their core human identity—including their sexual orientation—is a liberty interest protected from state interference.

It is this holding in *Lawrence*—that courts must take a closer look at policies which treat gays differently before holding them "rational"—that offers the most promise to LGBT youth who face discrimination on the basis of their sexual orientation. Despite the broad and irrefutable equality principles articulated in *Lawrence*, some courts have attempted to narrow the scope of *Lawrence* by picking up on ambiguous language—including the "minor exception" language in the caveat paragraph—to exclude LGBT youth from constitutional protections from discrimination. After discussing the promise of *Lawrence*, this section will analyze two such decisions, *Lofton v. Secretary of the Department of Children and Family Services* in the Eleventh Circuit and the Kansas state appellate court's ruling in *State v. Limon*, and conclude that those courts misread *Lawrence* and misapplied the minor exception, which arguably has nothing to do with LGBT youth at all. Finally, this section will conclude that the "rational basis with bite" standard of review that emerged in *Romer* and was bolstered by *Lawrence* can be used by LGBT youth challenging discriminatory confinement conditions in juvenile justice facilities under the Fourteenth Amendment.

A. WHAT *LAWRENCE V. TEXAS* MEANS FOR LGBT YOUTH

Lawrence overturned the 1986 decision in *Bowers v. Hardwick*[179] that found anti-gay sodomy statutes constitutionally permissible.[180] Although many expected a departure from *Bowers*, the forcefulness with which the Court reversed its own precedent was stunning since *Bowers* had been

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[177] 539 U.S. 558 (2003).

[178] *See supra* notes 157-65 and accompanying text.

[179] 478 U.S. 186 (1986).

[180] *Id.*

decided less than two decades earlier.[181] More significantly, *Lawrence* confirmed the notion first suggested in *Romer* that gays' and lesbians' sexual orientation forms a core part of their identity. Unfortunately, *Lawrence* contains ambiguous language that may limit its ultimate scope, including the caveat paragraph at the conclusion of the majority decision,[182] in which it seemingly excluded certain groups—including minors—from its holding.[183] What this caveat paragraph ultimately means for LGBT youth is an open question, as the Court itself has not yet clarified its positions in *Lawrence* in any subsequent decisions. Nevertheless, it is an incorrect reading of the caveat paragraph to deny LGBT youth protections from invidious discrimination that LGBT adults now enjoy in light of *Lawrence.*

1. In Reversing Bowers, *the Court Rejected That Decision's Discriminatory Core Premises*

Lawrence, by holding anti-sodomy statutes unconstitutional and affirming the right of all adults to engage in consensual sexual acts in the privacy of their homes, decriminalized gay and lesbian sexual identity. In so doing, it wholeheartedly rejected its previous decision in *Bowers*,[184] and recognized that gays and lesbians, as a class, have liberty interests protected by the Fourteenth Amendment of the Constitution.[185]

Bowers stood for four basic premises. First, it held that homosexuals are not a class, and implied that gay sexual orientation is nothing more than homosexual conduct.[186] Second, it held that discriminatory policies against individuals who engage in that conduct are permissible.[187] Third, it stood

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[181] Eskridge, *supra* note 14, at 1022. In the eighteen page majority opinion in *Lawrence*, Justice Kennedy devoted thirteen full pages to deconstructing *Bowers* and categorically rejecting the flawed historical and constitutional bases of that decision. *See* 539 U.S. at 566-78.

[182] *Id.* at 578; *see* discussion *infra* Part III.A.3.

[183] *Id.* (also excluding persons likely to be coerced or unable to give consent, prostitution, and public sex).

[184] *See supra* note 161 and accompanying text.

[185] *Lawrence*, 539 U.S. at 578-79. Tribe argues that "[t]he 'liberty' of which the Court spoke was as much about equal dignity and respect as it was about freedom of action—more so, in fact." Tribe, *supra* note 19, at 1898.

[186] The *Bowers* majority addressed only homosexual sodomy and referred to Hardwick as a "practicing homosexual," suggesting that one is only gay if one engages in gay sex acts. Bowers v. Hardwick, 478 U.S. 186, 187 (1986). The Court ignored any equal protection concerns in this focus on act rather than status. *See also* ANDREW KOPPELMAN, THE GAY RIGHTS QUESTION IN CONTEMPORARY AMERICAN LAW 51-52 (2002) (describing the Court's misplaced focus on homosexual sodomy and failure to address "unsettled" Equal Protection questions of anti-gay discrimination as the "central defect of the [*Bowers*] opinion").

[187] *Bowers*, 478 U.S. at 191-93.

for the notion that advancing the morality of the majority is a rational basis for discrimination.[188] Finally, it tagged all gays and lesbians with a presumption of criminality based on the proscriptions against the sexual conduct associated with them, a presumption that stigmatized LGBT people and permitted wide-ranging discrimination against LGBT people.[189]

Lawrence, in overturning *Bowers*, explicitly or implicitly rejected each of these premises. First, it recognized that gay people are a class with constitutional interests.[190] Second, it found that invidious discrimination aimed at oppressing gays' and lesbians' basic human liberties is not permissible.[191] Third, it held that morality cannot trump these basic liberty interests.[192] Finally, by lifting the presumption of criminality, it eliminated a significant basis of state-enforced discrimination against LGBT people that was approved in *Bowers*.[193] Since *Bowers* itself formed a significant part of that long history of legal discrimination, the Court's reversal of the decision represented its own contribution to repudiating discrimination the Court itself had sanctioned.

2. Lawrence *Is Undergirded by Broad Equality Themes for Gays and Lesbians*

In the majority opinion in *Lawrence*, Justice Kennedy generously used language reflecting a refined and sensitive recognition of gay people's sexual and human identity.[194] Remarkably, in addition to its legal

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[188] *Id.* at 196.

[189] *See* discussion *supra* notes 17-21.

[190] The *Lawrence* Court held, "When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice." 539 U.S. at 567-68. In the first sentence, the Court distinguishes sexuality from sexual conduct, suggesting its subsequent reference to "homosexual persons" who can make the "choice" to engage in such conduct are a class no longer defined by their sexual acts. *Id.*

[191] *Id.* at 578-79.

[192] *Id.* at 571.

[193] The Court explicitly acknowledged that anti-gay sodomy laws functioned as "an invitation to subject homosexual persons to discrimination both in the public and in the private spheres" and rejected *Bowers* in part because "[i]ts continuance as precedent demeans the lives of homosexual persons." *Id.* at 575.

[194] *Id.* at 576-77. The Court had previously acknowledged this shift in *Boy Scouts v. Dale*, 530 U.S. 640 (2000). In the majority opinion in that case by Justice Rehnquist, the Court noted that "Justice Stevens' dissent makes much of its observation that the public perception of homosexuality in this country has changed. Indeed, it appears that homosexuality has gained greater societal acceptance." *Id.* at 660. In *Lawrence*, the Court acknowledged that the "foundations of *Bowers* have sustained serious erosion from our recent decisions in *Casey* and *Romer*." 539 U.S. at 576.

significance, *Lawrence* ushered in a period of hopeful optimism by the LGBT community that the decision marked a cultural shift toward increased societal acceptance of sexual minorities' rights.[195] Before George W. Bush's 2004 reelection victory was partially credited to a triumph of "traditional values" among the American electorate,[196] in the year following *Lawrence* something remarkable happened: stimulated by *Lawrence*, the Massachusetts Supreme Court legalized same-sex marriage in that state[197] and the mayor of San Francisco and other communities acted temporarily to grant marriage licenses to gay and lesbian couples in their jurisdictions.[198] In a matter of months, the gay rights movement had shifted from seeking to strike down prohibitions on consensual same-sex sexual activity to using the newfound decriminalized status to seek full equality before the law.

So, although the *Lawrence* decision was based on the Due Process Clause and not on equal protection grounds,[199] the net effect was to

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[195] *See, e.g.*, Hutchinson, *supra* note 39, at 39.

[196] After the 2004 elections, the media credited Bush's victory in Ohio and elsewhere to a strong turn-out of Christian voters motivated by "moral" issues including abortion and same-sex marriage. *See, e.g.*, Paul Nussbaum & Marcia Gelbart, *The Values Vote: For Some, It Became a Matter of Faith*, PHILADELPHIA INQUIRER, Nov. 4, 2004, at A1; Kate Zernike & John M. Broder, *The 2004 Elections: The Electorate—The Mood of the Electorate; War? Jobs? No, Character Counted Most to Voters*, N.Y. TIMES, Nov. 4, 2004, at 1. In the aftermath of the elections, even some gay rights advocates blamed themselves for Democrats' losses at the polls. *See, e.g*, Mickey Wheatley, *Gay Marriage: Unions Less Perfect, But . . . After the Repudiation of Election Day, It's Time for Homosexuals to Get What They Need, Not What They Want*, NEWSDAY, Nov. 10, 2004, at A51. But others have argued that the media misreported exit poll data that found "moral values" was the most important issue to 2004 voters. *See, e.g.*, Kenneth Sherrill, *Did Same-Sex Marriage Doom Kerry?*, GAY & LESBIAN REV., Jan. 1., 2005, at 14 (arguing that "the notion that the issue of same-sex marriage cost the election to the Democratic Party has been uncritically accepted as the common wisdom," despite data indicating a majority of 2004 voters supported gay civil unions and that "same-sex marriage had little net effect on the outcome of the election"). More comprehensive polling data suggests that voters motivated by "moral values" were not primarily motivated by same-sex marriage. *See* Thomas Hargrove & Guido H. Stempel III, *Poll: Moral Values a Diverse Concept*, PITT. POST-GAZETTE, Feb. 19, 2005, at A2 (reporting on a poll finding child abuse, spousal abuse, and hunger as the most-cited moral issues, with gambling, homosexuality, and same-sex marriage the least important to poll respondents).

[197] *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003).

[198] *See* Carolyn Marshall, *Dozens of Gay Couples Marry in San Francisco Ceremonies*, N.Y. TIMES, Feb. 13, 2004, at A24; Tatsha Robertson, *Civil Disobedience Adds to Battle Over Same-Sex Marriage*, BOSTON GLOBE, Mar. 15, 2004, at A1 (discussing decisions by local officials in six states to follow San Francisco's lead and issue marriage licenses to same-sex couples).

[199] *See generally* Andrew J. Seligsohn, *Choosing Liberty Over Equality and Sacrificing Both: Equal Protection and Due Process in* Lawrence v. Texas, 10 CARDOZO WOMEN'S L.J. 411 (2004).

decriminalize the behavior of gay people and thus legitimize their sexual orientation as a class.[200] While some courts are distinguishing *Lawrence* to its most narrow grounds, the cultural statement made by the decision sparked a new trajectory for the gay rights movement in seeking full legal equality on the basis of sexual orientation.[201] Despite increased political resistance to gay rights issues, especially same-sex marriage, LGBT advocates' legal agenda is broader and stands on more solid ground with the equality principles articulated in *Lawrence*.

Nevertheless, because of the uneasy traditional association between sodomy and sexual orientation,[202] the new *Lawrence*-protected class of LGBT people is still defined in terms of the former "criminal" class. The Supreme Court in *Lawrence* did not start from a blank slate and create rights for gays out of whole cloth. To the contrary, by negating the discrimination previously permitted by *Bowers*, the ostensible scope of *Lawrence* was cabined by the contours of the class as it had existed. Where *Bowers* had reduced gays to sodomy, *Lawrence*'s articulation of liberty interests for gays was still couched in terms of decriminalized sodomy. This allows *Lawrence* to be interpreted narrowly as just about sodomy, rather than about an explicit granting of equal rights to LGBT people. Without question, *Lawrence* freed homosexual *adults* from the shackles of criminality. Because gay and lesbian adults are the largest and most visible segment of the LGBT population, it might be easy to forget less visible segments of the population, like youth, who were not so clearly brought along with this changing legal tide.[203] By decriminalizing sodomy, then, *Lawrence* effectively advanced gay and lesbian adults as a *class* (a class formerly defined by *Bowers* by the underlying sexual acts assigned to this population).

When *Lawrence* is considered together with *Romer*,[204] which less than a decade earlier had found in the equal protection context that animus towards a defined group of people is not a rational basis for discrimination

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[200] *See* Eskridge, *supra* note 14, at 1025 ("[T]raditionalists can no longer deploy the state to hurt gay people or render them presumptive criminals . . . ."); Tribe, *supra* note 19, at 1902-03 ("The *Lawrence* Court's blend of equal protection and substantive due process themes was neither unprecedented nor accidental.").

[201] *See* Tribe, *supra* note 19, at 1945-51.

[202] *See supra* notes 15-21 and accompanying text.

[203] For a discussion on the independence of sexual identity from sexual conduct, see *supra* Part II.A.1.c. Besides LGBT youth, *Lawrence*'s language of sodomy also leaves out transgender people, for whom gender identity (not sexual behavior) is the primary defining trait. Virgins and celibate homosexual adults also do not fit comfortably in this construct. *See* Leslie, *supra* note 18, at 175-76.

[204] Romer v. Evans, 517 U.S. 620 (1996).

against that group,[205] it becomes more apparent that the Court reaffirmed the doctrine that discriminatory laws against gays are suspect. Those state actions intended systematically to hurt gays, or to deprive them as a class of due process liberty interests, cannot be sustained by the will of a majority.[206] No longer, then, can states and courts get away with a cursory review of a supposed rational basis that only fronts for pure animus. The Court, strikingly, takes the first step in remedying the history of animus against gays by cleaning its own house and discarding *Bowers*, a prominent symbol of legally-sanctioned homophobia.

3. *Why* Lawrence*'s Ambiguity is Legally Problematic for LGBT Youth*

(a) The "Minor Exception" in *Lawrence*

Justice Kennedy's majority opinion in *Lawrence v. Texas* concluded with one powerful paragraph describing what the case did not involve.[207] In five brief sentences, it is possible that Kennedy sought to deflect the inevitable criticism from the right that would be inspired by his sweeping rejection of the Court's earlier holding in *Bowers v. Hardwick*, and perhaps to calm conservatives' nerves that the end of the social order as they knew it was not in fact in sight.[208] In putting his argument to rest, Kennedy wrote:

> 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. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle.[209]

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[205] *Id.* at 634-35.

[206] *Id.*

[207] *See* 539 U.S. 558, 578 (2003).

[208] *See, e.g.*, Koppelman, *supra* note 29, at 1180 (recognizing that while the majority decision "can easily be denounced as poor judicial craftsmanship . . . the Court had very good political reasons for avoiding transparency in both its reasoning and its rule"); *see also* Thomas, *supra* note 30, at 722 (hypothesizing that the Court included the list of exceptions "to avoid being accused of judicial activism"). As an indication of the conservative response Kennedy undoubtedly anticipated, Justice Scalia's scathing dissent trotted out a parade of horribles he feared would become permissible in light of *Lawrence*, including "bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity . . . ." 539 U.S. at 590 (Scalia, J., dissenting).

[209] *Lawrence*, 539 U.S. at 578 (emphasis added).

This caveat paragraph has been frequently cited by state and lower federal courts seeking to limit the scope of the holding.[210] Read in context with the entire decision, the most likely intent of the minor exception was to deny adults who sexually molest children a new "privacy" defense to their criminal behavior, a limitation that bears no relation to sexual orientation. Unfortunately, courts are misconstruing this caveat to conclude, quite wrongly, that anti-gay policies against adults can be justified by "child protection" rationales.

It bears noting that Kennedy opted here to use the imprecise phrasing, "The present case does not involve," rather than a more concrete statement such as "the present holding does not apply to" the list of articulated exceptions.[211] Of course, the case only involved the two plaintiffs—two adult men—but in dramatically overturning *Bowers* and rejecting its underlying constitutional doctrine,[212] the majority could not credibly purport to be narrowly limiting its holding to the facts of the case, nor does it attempt to do so. Indeed, in the sentence preceding the caveat paragraph, Kennedy wrote the most famous passage of the decision, "*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled."[213]

Despite the *Lawrence* majority's broad themes of equality and dignity for gay men and lesbians, several commentators have argued that the decision's scope is much less expansive.[214] Indeed, in several early decisions applying *Lawrence*, courts have interpreted the decision quite

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[210] *See* discussion *infra* Part III.B. (noting the Kansas and Eleventh Circuit decisions that narrowly construed *Lawrence*).

[211] Justice Kennedy's pervasive use of vague grammar throughout the majority opinion in *Lawrence* has been noted by some scholars. In one analysis, Mary Ann Case postulates that Kennedy's use of ambiguous modifiers was purposeful in order to, at best, "avoid say[ing] something tacky or offensive" and to placate both LGBT activists and the religious right. *See* Mary Ann Case, *Of "This" and "That" in* Lawrence v. Texas, 2003 SUP. CT. REV. 75 (2003). Case argues that "[t]he majority decision's ambiguity of referents creates—and may be meant to create—a politics of possibility," while at the same time these "ambiguities and evasions . . . make fixing a meaning difficult" and could be used to limit the decision's scope later. *Id.* at 76-77.

[212] *See Lawrence*, 539 U.S. at 563, 574-78.

[213] *Id.* at 578.

[214] Katherine Franke, for example, argues that despite the "soaring language recogniz[ing] the dignity and respect that gay men and lesbians are due. . . . [T]he liberty principle upon which the opinion rests is less expansive, rather geographized, and, in the end, domesticated." Franke, *supra* note 14, at 1401. Thus, "Kennedy's privatized liberty leaves a wide range of homosexual and heterosexual behaviors and 'lifestyles' subject to criminalization." *Id.* at 1407.

narrowly.[215] The Court itself has thus far declined to weigh in on the correct reach of *Lawrence*.[216]

(b) Minor Exception: Minimal Impact

As applied to LGBT youth, the decision's broader themes of equality and dignity arguably trump the "minor exception." Eskridge, for example, argued that "*Lawrence* gives us nothing less than, but also nothing more than, a jurisprudence of tolerance. This means that traditionalists can no longer deploy the state to hurt gay people or render them presumptive criminals . . . ."[217] If Eskridge is correct, the decision's statement against discrimination on the basis of sexual orientation must apply to LGBT youth. Moreover, the *Lawrence* Court seemingly adhered to rational basis review when considering Fourteenth Amendment claims involving sexual orientation.[218] Consequently, as in *Romer*, the Court found no rational basis for depriving gays of their liberty interests—including forming one's own sexual identity—leading some to point out that *Lawrence* is essentially an equal protection decision cloaked in Due Process language.[219] The Court granted gays and lesbians rights much broader than the right to have sex in private, but rather to define their existence in accordance with their sexual orientation:

> At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these

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[215] *See* discussion *infra* Part III.B.

[216] In early 2005, the Court denied certiorari to two Eleventh Circuit cases in which *Lawrence* was narrowly interpreted. *See* Lofton v. Sec'y of Dep't of Children & Family Servs., 377 F.3d 1275 (11th Cir. 2004) (upholding Florida's statutory ban on adoption by homosexuals), *cert. denied*, 125 S. Ct. 869 (2005); Williams v. Attorney Gen. of Ala., 378 F.3d 1232, 1238 (11th Cir. 2004) (holding that *Lawrence* did not create a fundamental right to sexual privacy in a challenge to a statutory ban on the sale of sex toys), *cert. denied*, 125 S. Ct. 1335 (2005).

[217] Eskridge, *supra* note 14, at 1025.

[218] The standard of review applied by the Court is murky. *See* Nan D. Hunter, *Sexual Orientation and the Paradox of Heightened Scrutiny*, 102 MICH. L. REV. 1528, 1530 (2004). By deciding the case under the Due Process Clause rather than the Equal Protection Clause, the Court was not forced to define its standard of review. Nevertheless, as Nan Hunter points out, "the extreme deference of old-fashioned rational basis review has now been complicated by the Court's recognition that at least some adverse treatment of gay people is invidious and disfavored." *Id.* at 1529.

[219] *See* Miranda Oshige McGowan, *From Outlaws to Ingroup:* Romer, Lawrence, *and the Inevitable Normativity of Group Recognition*, 88 MINN. L. REV. 1312, 1313 (2004) ("*Lawrence* is more of an equal protection case than a substantive due process case. Justice Kennedy's opinion does not talk about the rights of persons generally as against the state. Rather, the opinion constantly refers to the rights of '*homosexual* persons' and the right of *gays* to make 'choices central to personal dignity and autonomy.'").

> matters could not define the attributes of personhood were they formed under compulsion of the State.
>
> Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do. The decision in *Bowers* would deny them this right.[220]

Lawrence bolstered the Court's message: discrimination against gays and lesbians based on hate, animus, the morality of the majority, or political unpopularity is not a legitimate state interest.[221] This "rational basis with bite" approach now prevents states from relying on any justification—no matter how illogical, tenuous, or empirically disproved—to pass the rational basis test for policies that harm gays, if they are in fact merely cloaking animus. This part of the holding applies to all gay people—including youth.

To date, there exists little scholarly analysis of the minor exception itself, although several commentators have briefly considered its implications. Koppelman, for example, predicted that it will not be a bar to LGBT youths' rights.[222] He noted that although the Court did not explicitly hold "that there was anything wrong *per se* with classifications on the basis of sexual orientation,"[223] the decision was nonetheless "full of language that demonstrates the Court's concern with the subordination of gays as a group."[224] This expansive language, Koppelman argued, created a "penumbra" of rights that should prevent discriminatory treatment of LGBT youth on the basis of sexual orientation.[225] Other commentators have echoed Koppelman's contention that despite the "minor exception" in the caveat paragraph, there is no rational basis to discriminate against LGBT youth.[226] Indeed, the warning that "this decision does not involve minors" was targeted not at LGBT youth at all, but to adult sex offenders (heterosexual and homosexual alike) who would use *Lawrence* to argue they had a privacy right to engage in unlawful sexual behavior with

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[220] Lawrence v. Texas, 539 U.S. 558, 574 (2003).

[221] *Id.* at 577 (applying Justice Stevens's dissent in *Bowers* as controlling reasoning); *id.* at 583 (O'Connor, J., concurring) (noting that "moral disapproval" of a group is not a legitimate state interest).

[222] *See* Koppelman, *supra* note 29, at 1181 ("The singling out of gay youth for such remarkably harsh treatment would seem to pose a severe equal protection problem.").

[223] *Id.* at 1174.

[224] *Id.* at 1177.

[225] *Id.* at 1177, 1181-82.

[226] *See, e.g.*, McGrath, *supra* note 64, at 684 (noting the exclusion paragraph, but concluding that no rational basis exists to exclude LGBT students from school sexual education programs).

children.[227] Nothing in the language of the exception suggests that because *Lawrence* granted gays the liberty to engage in consensual sex, that criminal child molestation statutes could punish gay defendants more than straight defendants in child abuse cases because the case did "not involve minors." In short, the caveat paragraph was intended only to keep *Lawrence* a gay rights decision, to prevent claims by sex offenders, rapists, prostitutes, and other groups who had, as the Court pointed out earlier in the decision, also been frequently subjected to sodomy prosecutions.[228]

B. EARLY POST-*LAWRENCE* DECISIONS CALL LGBT YOUTHS' LEGAL RIGHTS INTO QUESTION

Some initial post-*Lawrence* decisions in both state and federal courts have narrowly interpreted the holding in *Lawrence* based, in part, on the exceptions listed in this "caveat paragraph."[229] In other words, what *Lawrence* was *not* has been used by courts to limit the decision's applicability to contexts other than private consensual sex between adults of the same sex.[230]

So far, several decisions have explicitly applied the "minor exception" in the caveat paragraph to deny certain rights to both LGBT children and adults, rather than to the separate class of sex offenders the phrase was actually intended to exclude. Based on age-old, unsubstantiated myths about homosexuality, sexual identity, and adolescents' sexual development, this early set of decisions would appear to suggest that LGBT youth have garnered no new legal protections in the post-*Lawrence* world. These cases are incorrect for two reasons. First, each misinterprets and misapplies the minor exception to uphold blatantly discriminatory policies where sexual orientation is the targeted classification. Second, each case uses traditional rational basis review to find that homophobic stereotypes can be "legitimate" state interests, whereas under the "rational basis with bite"

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[227] In one recent case, the Minnesota Supreme Court correctly drew this distinction, holding that "[a]s the Court specifically pointed out, *Lawrence* did not involve minors or others 'who might be injured or coerced,' and the conduct protected there was very different from that [in this case, in which the adult defendant] . . . took pictures of a sixteen year old boy masturbating and engaging in oral sex, kept the pictures and then transmitted one of them over the internet." United States v. Bach, 400 F.3d 622, 628-29 (8th Cir. 2005) (citation omitted).

[228] Lawrence v. Texas, 539 U.S. 558, 569-70 (2003) (distinguishing early in the decision between sodomy prosecutions for consensual sex and those for non-consensual or coerced sex, which included "relations between men and minor girls or minor boys").

[229] *See* Thomas, *supra* note 30, at 728-34.

[230] *See* Hutchinson, *supra* note 39, at 49-55; Seligsohn, *supra* note 199; Thomas, *supra* note 30, at 728-34.

standard that emerges from *Romer* and *Lawrence*, such stereotypes must be found to be irrational.

1. Lofton v. Secretary of the Department of Children and Family Services

In a 2004 case, *Lofton v. Secretary of the Department of Children and Family Services*,[231] the Eleventh Circuit ignored the holding and spirit of *Lawrence* to uphold a Florida law prohibiting gays and lesbians from adopting children. In *Lofton*, the court held that Florida's statutes prohibiting adoptions by any gay person on the basis of their sexual activity withstood rational basis review.[232] The Eleventh Circuit applied the rational-basis standard, finding that no fundamental right or suspect class was implicated.[233] The decision denied the plaintiffs, two gay men, the ability to adopt HIV-positive children they had raised for many years as foster parents, which was permitted by Florida law.[234]

In Florida, the legal definition of a "homosexual" is an individual who engages in homosexual sexual conduct.[235] This definition, according to the Eleventh Circuit, "distin[guishes] between homosexual orientation and homosexual activity."[236] One prominent "rational" basis relied upon by the court was protecting children from homosexuality and its ills.[237]

> Florida courts have defined the term "homosexual" as being "limited to applicants who are known to engage in current, voluntary homosexual activity," thus drawing "a distinction between homosexual orientation and homosexual activity."[238]
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> . . . .

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[231] 358 F.3d 804 (11th Cir. 2004), *cert. denied*, 125 S. Ct. 869 (2005).

[232] *Id.* at 817-20.

[233] *Id.* at 815.

[234] Florida's contradictory foster care and adoption policies refute its own purported "legitimate aim" in protecting children's best interests. Christopher D. Jozwiak, Lofton v. Secretary of the Department of Children & Family Services*: Florida's Gay Adoption Ban Under Irrational Equal Protection Analysis*, 23 LAW & INEQ. 407, 414 (2005) ("Florida's placement of children in the foster homes of gays and lesbians demonstrates the state's confidence that homosexual families can serve the best interests of children.") (footnote omitted); *see also* Mark Strasser, *Rebellion in the Eleventh Circuit: On* Lawrence, Lofton, *and the Best Interests of Children*, 40 TULSA L. REV. 421, 428 (2005) (commenting that in *Lofton*, "the state's classification *undermined* rather than promoted the welfare of the child at issue, so it was especially difficult to understand why the policy passed muster").

[235] *Lofton*, 358 F.3d at 807.

[236] *Id.*

[237] *Id.* at 818-20.

[238] *Id.* at 807 (quoting Fla. Dep't of Health & Rehab. Servs. v. Cox, 627 So. 2d 1210, 1215 (Fla. Dist. Ct. App. 1993), *aff'd in relevant part*, 656 So. 2d 902, 903 (Fla. 1995).

> In formulating its adoption policies and procedures, the State of Florida acts in the protective and provisional role of *in loco parentis* for those children who . . . have become wards of the state. Thus, adoption law is unlike criminal law, for example, where the paramount substantive concern is not intruding on individuals' liberty interests.[239]

Because of *Lawrence*, the court faced the central issue of whether a denial of rights to gays and lesbians on the basis of conduct, not identity, could withstand scrutiny.[240] The court recognized that, as a general matter, state discrimination on the basis of a classification is constitutionally problematic.[241] Nevertheless the court held that "[b]ecause of the primacy of the welfare of the child, the state can make classifications for adoption purposes that would be constitutionally suspect in many other arenas."[242] In essence, the court held, policies that discriminate against gays and lesbians could still be justified on child protection rationales.

In *Lofton*, the Eleventh Circuit explicitly cited the "minor exception" to deny adoption rights to LGBT parents. The Court of Appeals held that simply because *Lofton* "involved" children at all, no part of the *Lawrence* holding was relevant. Twisting the meaning of the exception beyond any reasonable interpretation, the court effectively turned *Lawrence* against the best interests of all children, including LGBT ones.[243] As the majority held in finding one more reason why *Lawrence* did not bind them to invalidate Florida's statute that discriminated on the basis of potential gay parents' sexual acts:

> [T]he holding of *Lawrence* does not control the present case. Apart from the shared homosexuality component, there are marked differences in the facts of the two cases. Court itself stressed the limited factual situation it was addressing in Lawrence: "The present case does not involve minors." . . . Here, the involved actors are not only consenting adults, but minors as well.[244]

The minor exception, intended to protect children from sexual abuse, was used instead to deny HIV-positive children the love and care of parents who had raised them because the parents were gay. In *Lawrence*, Justice Kennedy explicitly granted gays and lesbians the liberty, like that enjoyed by heterosexuals, to autonomously make "the most intimate and personal choices a person may make in a lifetime," which included forming family

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[239] *Id.* at 809.

[240] *Id.*

[241] *Id.* at 810.

[242] *Id.*

[243] *Id.* at 817.

[244] *Id.* (quoting Lawrence v. Texas, 539 U.S. 558, 578 (2003)).

relationships.[245] It is unlikely that he intended to bar formation by gay couples of the most meaningful family relationships, including child adoption, by including the minor exception.

The Supreme Court has previously held that the Equal Protection Clause prohibits discrimination against "all persons similarly situated" without a legitimate governmental interest.[246] The *Lofton* appellants argued "that the state has not satisfied [the] threshold requirement that it demonstrate that homosexuals pose a unique threat to children that others similarly situated in relevant respects do not."[247] The court found that "homosexuals and heterosexual singles are not 'similarly situated in relevant respects.'"[248] Namely, "the legislature could rationally act on the theory that heterosexual singles, even if they never marry, are better positioned than homosexual individuals to provide adopted children with education and guidance relative to their sexual development throughout pubescence and adolescence."[249]

Illustrating the presumption that all children are heterosexual, the court added lengthy commentary on the importance of heterosexual role modeling.[250] It found that Florida acted rationally in promoting a "broader adoption policy . . . designed to create adoptive homes that resemble the nuclear family as closely as possible," such that the state "emphasizes a vital role that dual-gender parenting plays in shaping sexual and gender identity and in providing heterosexual role modeling."[251] The court, in an awkward attempt to label Florida's adoption policy "rational," spun this unlikely scenario of adolescents' sexual education:

> Statistically, the state does know that a very high percentage of children available for adoption will develop heterosexual preferences. As a result, those children will need education and guidance after puberty concerning relationships with the opposite sex. In our society, we expect that parents will provide this education to teenagers in the home. These subjects are often very embarrassing for teenagers and some aspects of the education are accomplished by the parents telling stories about their own adolescence and explaining their own experiences with the opposite sex. It is in the best interests of a child if his or her parents can personally relate to the child's

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[245] *Lawrence*, 539 U.S. at 574 (quoting Planned Parenthood of Se. Pa. v. Casey, 506 U.S. 833, 851 (1992)).

[246] City of Cleburne v. Cleburne Learning Ctr., Inc., 473 U.S. 432, 439 (1985).

[247] *Lofton*, 358 F.3d at 821.

[248] *Id.* at 821-22.

[249] *Id.* at 822.

[250] *Id.* at 818-23.

[251] *Id.* at 818. The court found that "it is rational for Florida to conclude that it is in the best interests of adoptive children, many of whom come from troubled and unstable backgrounds, to be placed in a home anchored by both a father and a mother." *Id.* at 820 (citing Paris Adult Theater I v. Slaton, 413 U.S. 49, 63 (1973)).

> problems and *assist the child in the difficult transition to heterosexual adulthood.* Given that adopted children tend to have some developmental problems arising from adoption or from their experiences prior to adoption, *it is perhaps more important for adopted children than other children to have a stable heterosexual household during puberty and the teenage years.*[252]

Remarkable about this purported reasoning, aside from the mythical parent-child bonding experience the court paints, is the implicit recognition that some percentage of adopted children will *not* become heterosexual. In acknowledging that some children will become gay, it proceeds to ignore that they too may have a "difficult transition" to adulthood. By ignoring their "developmental problems" and needs, the court implies: discrimination against LGBT adoptive youth is also rational, as they must have no interest in having a chance to be adopted by LGBT parents who can "personally relate" to their specific needs. Thus, the minor exception was used, absurdly, to justify discrimination against LGBT parents and children alike.[253]

According to the court, these rationales justified blanket discrimination against all potential homosexual parents.[254] Under both *Romer* and *Lawrence*, the "closer look" at the state policies discriminating against gays would have revealed that the discrimination resulting from Florida's adoption policy against potential LGBT adoptive parents and against LGBT adoptive children bears no relation to a legitimate interest, but instead is cloaked in homophobic myths about gays and child-rearing that are not rational. Since these myths bear no weight (and Florida's own foster care policy reveals that the state itself agrees that gays pose no threat to children), the policy creates a classification solely to discriminate against gays as a group. This was not rational prior to *Lawrence*, and it cannot be made rational by invoking the irrelevant minor exception.

2. State v. Limon

In its 2004 holding in *State v. Limon*,[255] a Kansas state appellate court joined the Eleventh Circuit in narrowly interpreting *Lawrence*, holding that

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[252] *Id.* at 822 (emphasis added) (quoting Fla. Dep't of Health & Rehabilitative Servs. v. Cox, 627 So.2d 1210, 1220 (Fla. Dist. Ct. App. 1993)).

[253] The fallacy of this application was noted by one commentator, who argued that "to say that *Lawrence* does not stand for the proposition that the Federal Constitution protects the right to have sexual relations with minors is not to say, for example, that those with a same-sex orientation can be precluded from having any contact with minors or, for that matter, adopting." Strasser, *supra* note 235, at 435.

[254] *Id.*

[255] 83 P.3d 229 (Kan. Ct. App. 2004), *rev'd*, No. 85,898, 2005 WL 2675039 (Kan. Oct. 21, 2005).

the "minor exception" in the caveat paragraph excludes LGBT youth from the decision's protections. In that decision, the court upheld a 17-year prison sentence for a young man in a state mental health facility who, shortly after his eighteenth birthday, engaged in voluntary oral sex with a 14-year-old boy who also lived in that facility.[256] If the younger boy had been female, Kansas's so-called "Romeo and Juliet" law would have applied, subjecting the defendant to a sentence of just thirteen to fifteen months.[257] The Romeo and Juliet statute provided that in statutory rape cases involving voluntary sexual relations between two "members of the opposite sex" where the defendant is nineteen or under and less than four years older than the other youth, the defendant would face significantly shorter prison terms and more lenient attendant penalties, such as reduced post-release supervision periods and sex offender registration requirements.[258] Because the defendant, Matthew Limon, was of the same sex as the younger boy, however, the Romeo and Juliet law's shortened presumptive sentence did not apply, subjecting Limon instead to the severely long prison sentence and to sex offender registration requirements.[259] Limon served more than five years of this sentence before the Kansas Supreme Court overturned the lower court's ruling in October 2005, finding the disparate sentencing requirements unconstitutional.[260]

On original appeal, Limon's criminal sodomy conviction was upheld by the Kansas courts, based on the U.S. Supreme Court's decision in *Bowers*, which was subsequently overturned in *Lawrence*.[261] The U.S. Supreme Court withheld consideration of Limon's petition for certiorari until it decided *Lawrence* in 2003, after which point it granted the petition, vacated the decision, and remanded the case to the Kansas Court of Appeals "for further consideration in light of *Lawrence v. Texas*."[262]

On remand, the Kansas Court of Appeals held that *Lawrence* was inapplicable to Limon's case, contending that the "major premise" of *Lawrence* was that "[a]ll adults may legally engage in private consensual sexual practices common to a homosexual lifestyle."[263] On LGBT minors'

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[256] *Id.* at 232-33.

[257] State v. Limon, No. 85,898, 2005 WL 2675039, at *2 (Kan. Oct. 21, 2005) (discussing the contested Kansas unlawful voluntary sexual relations statute, Kan. Stat. Ann. § 21-3522 (2004), commonly referred to as "the Romeo and Juliet statute").

[258] KAN. STAT. ANN. § 21-3522 (2004).

[259] *Limon*, 83 P.3d at 243 (Pierron, J., dissenting).

[260] Adam Liptak, *Kansas Law on Gay Sex by Teenagers Is Overturned*, N.Y. TIMES, Oct. 22, 2005, at A15.

[261] *Limon*, 2005 WL 2675039, at *3.

[262] *Id.* at *4 (quoting Limon v. Kansas, 539 U.S. 955 (2003)).

[263] *Limon*, 83 P.3d at 234 (majority opinion).

rights, the court proceeded to find that "children are excluded from the class that 'may legally engage in private consensual practices common to a homosexual lifestyle,' and all persons who 'may legally engage in private consensual sexual practices common to a homosexual lifestyle' are excluded from the class of children."[264]

Applying rational basis review,[265] the appellate court held that in drafting the Romeo and Juliet statute to apply only to heterosexual youths, the state reasonably acted to "prevent the gradual deterioration of the sexual morality approved by a majority of Kansans."[266] Further, it suggested sexuality during adolescence was mutable, such that Kansas had a rational interest in preventing children from developing into homosexuals:

> During early adolescence, children are in the process of trying to figure out who they are. A part of that process is learning and developing their sexual identity. As a result, the legislature could well have concluded that homosexual sodomy between children and young adults could disturb the traditional sexual development of children.[267]

In other words, "protecting" children from homosexuality was deemed a rational basis[268] despite ample literature demonstrating that sexual behavior between teenagers will not impact sexual orientation. The court continued to postulate a number of other possible bases that could have motivated the state legislature, all of which it found rational despite citing no factual findings to support them.[269]

Perhaps anticipating that these rational bases might not be rational at all and could thus be found to be discriminatory policies solely based on animus towards LGBT people, the court explicitly sought to distinguish *Romer* and its holding that animus alone is not a rational basis.[270]

> [T]he *Romer* Court focused on the apparent animosity toward gay people in enacting the amendment. The Court stated that the amendment drew a classification "for the purpose of disadvantaging the group burdened by the law." . . . This subsection of the statute does not disadvantage gay teenagers burdened by the law. [The statute] is gender neutral. . . . [The statute] is based on the conduct of engaging in sodomy with a

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[264] *Id.*

[265] *Id.* at 236-37.

[266] *Id.* at 236.

[267] *Id.*

[268] *Id.* The concurring opinion similarly noted that "at this age a child's sexual orientation is more than likely not fully developed." *Id.* at 242. (Malone, J., concurring).

[269] These included, curiously, the theory that "lessening the penalty for heterosexual activity between adults and children may reduce the spread of sexually transmitted diseases. The legislature could well have considered that same-sex sexual acts between males might increase their risk of contracting certain infectious diseases." *Id.* at 237 (majority opinion).

[270] *Id.* at 239-40.

> child and not based on the offender's sexual orientation or gender. On the other hand, in *Romer*, the challenged legislation concerned the sexual orientation of the class.[271]

In essence, the appellate court used the illogical *Bowers*-like reasoning that specially burdening homosexual conduct need not burden gay people—so long as they do not act upon their sexual identity.[272] This reasoning was flatly rejected by *Lawrence*: despite the appellate holding, courts can no longer deem rational criminal penalties that would imprison one eighteen-year-old man for a generation and free another for engaging in similar conduct, where the fundamental distinction is their sexual orientation.

The dissenting judge rejected the distinctions the majority drew between the present case and both *Lawrence* and *Romer*. Recognizing that "there are obviously different facts in *Lawrence*," the dissent found that, nevertheless, "there are principles that serve as the basis for *Lawrence* and the overruling of *Bowers* which appear to be applicable to Limon's case,"[273] namely, that public morality is no longer a legitimate rational basis.[274] The *Romer* doctrine, the dissent found,

> appears to stand for the proposition that legislation impacting on sexuality is subject to analysis for constitutionality when it discriminates between different classes or groups of citizens. This is particularly true in a criminal justice context where the stakes can be quite high, even when the penalties may not seem great. In the instant case, where we are talking about many years of incarceration, it is certainly true.[275]

The dissent concluded that the "the argument that this statute is not aimed at homosexuals cannot be made with a straight face."[276]

In the first major gay rights decision to extend *Lawrence*'s equality principles, the Kansas Supreme Court in October 2005 unanimously reversed the appellate court's decision and held that the state Romeo and Juliet law unconstitutionally discriminated against homosexual youth in violation of the Fourteenth Amendment's Equal Protection Clause.[277] The court found that *Lawrence* "requires us to hold that the State does not have a rational basis for the statutory classification created in the Romeo and Juliet statute"[278] against gay teenagers, and emphasized that after *Lawrence*, moral disapproval of homosexuality "cannot be a legitimate governmental

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[271] *Id.*

[272] *See* discussion *supra* notes 180-84 and accompanying text.

[273] *Limon*, 83 P.3d at 244 (Pierron, J., dissenting).

[274] *Id.* at 246.

[275] *Id.* at 245 (citations omitted).

[276] *Id.* at 249.

[277] State v. Limon, No. 89,858, 2005 WL 2675039, at *1-2 (Kan. Oct. 21, 2005).

[278] *Id.* at *2.

interest" in creating status-based classifications.[279] Most strikingly, the court recognized the harmful effects of anti-gay criminal laws on gay youth, noting that "the demeaning and stigmatizing effect upon which the *Lawrence* Court focused is at least equally applicable to teenagers, both the victim and the offender, as it is to adults and, according to some, the impact is greater upon a teen"[280] and rejecting the lower court's determination that the minor exception rendered *Lawrence* inapplicable to a case involving children.[281] Finally, the court found that there was no credible evidence "justifying the position that homosexual sexual activity is more harmful to minors than adults" or "that public health risks for minors engaging in same-gender sexual relations is greater than the risk for adults."[282] The court concluded that, even under rational basis review, the Romeo and Juliet statute "created a broad, overreaching, and undifferentiated status-based classification which bears no rational relationship to legitimate State interests" and was thus unconstitutional under the Fourteenth Amendment's Equal Protection Clause.[283]

Lofton and the lower court decision in *Limon* fabricated rational bases rooted only in old biases[284]—not actual legitimate interests. With anything more than a superficial analysis, the child protection interests asserted by those courts as "rational" are found to be quite the opposite. Instead, they play into homophobic biases and reach conclusions unsupported by empirical research and the consensuses of professional communities.[285]

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[279] *Id.* at *19. The court found that although *Lawrence* was decided on due process grounds, the equality principles articulated in the decision also applied to the equal protection context, noting "the *Lawrence* decision recognized that the substantive due process analysis at issue in that case and the equal protection analysis necessary in this case are inevitably linked." *Id.* at *14.

[280] *Id.* at *8.

[281] *Id.* at *15.

[282] *Id.* at *16, *17.

[283] *Id.* at *19.

[284] *See* discussion *supra* notes 124-29 and accompanying text.

[285] Two amicus briefs on behalf of Matthew Limon were submitted to the Kansas Supreme Court by medical and psychological groups. The first, submitted by the Kansas Public Health Association, American Public Health Association, and five AIDS research groups. Brief of Amici Curiae Kansas Pub. Health Ass'n et al., State v. Limon, No. 00-85898-S (Kan. Aug. 9, 2004) [hereinafter Public Health Brief]. The second was submitted by the National Association of Social Workers and its Kansas state chapter. Brief of Amici Curiae Nat'l Ass'n. of Soc. Workers, State v. Limon, No. 05 85898-S (Kan. Aug 9, 2004) [hereinafter Social Workers' Brief]. The Public Health Brief urged the court to reject the exclusion of gay individuals from the Kansas Romeo and Juliet law, concluding,

> An objective evaluation of medical science concerning the transmission of sexually transmitted diseases (STDs), particularly the human immunodeficiency virus (HIV), vitiates any argument that the Romeo and Juliet law, itself, or the distinction confining its reach to "opposite sex"

While protecting children and preserving public health are certainly rational interests of the state, arbitrary classifications against LGBT people to achieve them based on animus and not on fact bear no reasonable relationship to securing those interests. At worst, they can undermine those interests by missing real threats to child safety and public health.[286] The Kansas Supreme Court's powerful rejection of these arguments in *Limon* offers hope that future courts will similarly reject these harmful justifications to discriminate against LGBT young people.

C. IMPACT OF *LAWRENCE* ON AT-RISK LGBT YOUTH

For those disenfranchised LGBT youth who confront anti-gay discrimination in their schools, in child welfare, and in the juvenile justice systems, *Lawrence v. Texas* offers hope, not despair. The ambiguity of the minor exception, unfortunately, does provide courts an excuse to deny LGBT minors rights and protections.[287] A reasonable reading of that exception, however, is that the Court leaves regulation of all youth sexual activity to the states. This was an issue not explicitly before the Court in this case and it is unsurprising the Court would have wanted to cabin its holding to avoid opening the door to broader questions of children's rights.[288]

Nevertheless, the minor exception in *Lawrence* cannot reasonably be read to justify state-enforced discrimination against youth on the basis of their sexual orientation that harms them as a class of people. If read in this way, the decision would effectively provide the already-marginalized sub-

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partners, is rationally related to preventing disease. The restriction/exclusion is both so over- and under-inclusive as a means of preventing the spread of HIV, and is so far removed from any purported public health objective, that it would be impossible to credit HIV prevention—or prevention of any other STDs—as its legitimate legislative purpose.

Public Health Brief at 3.

Similarly, the Social Workers' Brief rejected the State's claim that "the Romeo and Juliet law protects traditional sexual developments" citing "decades of social research and clinical experience indicate that the law cannot achieve that ostensible purpose." Social Workers' Brief at 5.

[286] *See* Public Health Brief, *supra* note 285, at 9-12 (describing the Romeo and Juliet law's over- and under-inclusiveness, such that the law actually advantages heterosexual couples engaging in high-risk conduct while disadvantaging same-sex couples for whom no health risk is present).

[287] *See* discussion *supra* Part III.B.

[288] For an overview of the complex constitutional status of children's rights, see generally Meyer, *supra* note 121, at 1117, 1120 (observing that courts are only beginning to "ready[] themselves at last to deal seriously with the knotty questions posed by the idea of children's rights"). No doubt, a gay rights decision only involving adult actors is not the ideal forum for addressing these broader issues.

class of the LGBT population—youth—fewer protections from discrimination than LGBT people generally. As the Court labored to address the history of discrimination against gays and lesbians,[289] it does not logically follow that the Court would endorse such discrimination against *children* in the same holding.

Correctly interpreted, *Lawrence* provides explicit recognition that LGBT people exist and confront societal discrimination as a class. For at-risk youth in state child welfare and juvenile justice systems, ample empirical evidence links the discrimination and harassment they face to their sexual identity.[290] Discriminatory actions by state actors—including overt anti-gay harassment in detention facilities, differential treatment of LGBT youth on the basis of their sexual orientation, and placement of LGBT youth offenders in socially isolated or more restrictive settings—are all intentional actions made specifically on the basis of juveniles' sexual orientation. As such, individualized claims of discrimination and systemic challenges to the maltreatment of LGBT youth in public custody may seek relief in the Fourteenth Amendment in seeking to vitiate these conditions.

Since *Lawrence* recognizes that gay people—and, by definition, gay youth—exist, ignorance of their existence can no longer serve as a valid excuse for denying equal protection of the laws. Further, *Lawrence* undermines the pervasive rationale that discriminatory treatment against LGBT youth is based on a desire to "protect" them from the ills of homosexuality. Before *Lawrence*, gays and lesbians were still presumptive criminals under the law,[291] and "saving" children from a lifestyle presumed to be criminal could have been construed to be a rational state interest. With *Lawrence*, gays and lesbians are no longer criminal and have thus become legitimate and equal citizens. The past illusion of protecting children from criminal homosexuals, if ever "rational" at all, has now been rendered meaningless.

After *Lawrence*, courts must consider more carefully whether anti-gay actions are rooted in animus and societal prejudice. Allowing already stigmatized minors to experience a tortured adolescence—from taunting, beatings, homelessness, sexual assault, and inappropriate sentencing when these experiences lead them to crimes of survival—can bear no reasonable relation to any rational state interest. Even at the most narrow application of *Lawrence*'s holding—that it applies to adult sex and nothing more—the decision cannot be used to justify harm to LGBT youth. The language of equality and the distinction drawn between sexual behavior and sexual

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[289] Lawrence v. Texas, 539 U.S. 558, 568-71 (2003).

[290] *See* discussion *supra* Part II.A.

[291] *See supra* notes 17-21 and accompanying text.

orientation stands on its own to suggest how sexual minorities will be treated in future cases. A searching analysis of history and expert literature demonstrates long-standing discrimination faced by gay youth, and this is no more justified (and, indeed, arguably more loathsome) than the historical discrimination against adults decried in *Lawrence*.

So what relief can homeless and incarcerated LGBT youth find in *Lawrence*?

First, the decision has helped chip away at societal animus towards gays and lesbians, and in the long term, improving social attitudes will make it less likely that gay and transgender youth will be ostracized by their families and prematurely forced from their homes. The increasing awareness of gay rights issues, drawn into focus by the attention paid to the equality principles articulated in *Lawrence*, may also make child welfare and juvenile justice agencies more sensitive to the issues facing LGBT youth under their care.

Specifically, however, *Lawrence* justifies increased judicial scrutiny of policies and practices that treat LGBT youth in child welfare and juvenile justice facilities differently on the basis of their sexual orientation. To the extent that LGBT youth are victimized by systemic harassment and assault by staff and other youth, harmed by inappropriate placement in facilities where they are likely to encounter such harassment, or who do not receive necessary mental health care, agencies will have an increasingly difficult time linking such practices to legitimate interests and may be subject to lawsuits challenging these conditions and seeking damages.[292] Finally, to the extent that homeless LGBT youth were previously denied the opportunity to be placed with LGBT foster parents because of discriminatory state policies justified by criminal sodomy statutes, *Lawrence* removes that barrier and, despite the discouraging holding in *Lofton*, makes it more likely that the most vulnerable LGBT youth may be placed in caring families and out of the system altogether. While these possibilities are not exhaustive, they illustrate that *Lawrence*'s legacy for youth should be a positive one.

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[292] In September 2005, the ACLU sued Hawaii state officials on behalf of LGBT teenagers who were confined in a state correctional facility, alleging they were "subjected to a campaign of unrestrained harassment, abuse and other maltreatment" by staff and other youth, in violation of the Fourteenth Amendment. Complaint at 3, 6, R.G. v. Koller, No. 05-566 (D. Haw. Sept. 2, 2005). The lawsuit seeks injunctive relief and damages. *Id.* at 59-62.

IV. CONCLUSION

The Supreme Court's 2003 decision in *Lawrence v. Texas*, the most significant legal advance for gay and lesbian rights in American history, put into jeopardy many forms of state-sanctioned discrimination on the basis of sexual orientation. Although it fell short of conferring full equality rights on sexual minorities in the United States, *Lawrence* was significant for recognizing that gays and lesbians, as a class, must be accorded dignity and the right to lead their lives with minimal interference from the state.

While *Lawrence* has likely done much to advance the basic right to be gay or lesbian, early decisions interpreting *Lawrence* have provided mixed signals on its long-term legacy, particularly as applied to LGBT youth. The last few years have seen significant advances to combat discrimination and harassment against LGBT youth, but significant challenges remain, particularly in the child welfare and juvenile justice systems, where sexual minority youth still face pervasive and persistent discrimination.

The most discouraging prospect raised by the "minor exception" in *Lawrence*'s caveat paragraph is that it could continue to justify myriad policies used to discriminate against LGBT teenagers and to prevent them from forming critical support networks. As the Kansas Supreme Court recently held in *Limon*, however, the equality principles carefully articulated in *Lawrence* must apply to both adults and youth. Other courts should find the reasoning in *Lofton* and the earlier *Limon* decisions unpersuasive when analyzing future cases involving LGBT youths' rights.

Instead, courts should recognize that *Lawrence* stands for more than merely striking down antiquated sodomy laws. It signifies, together with the Court's other gay rights jurisprudence, that sexual identity is a core part of human existence, and that discrimination on the basis of that identity must be carefully justified. With the Court's recognition that sexual identity is part of human life, it becomes impossible to deny that it is also part of the life of adolescents—adolescents who, in many contexts of their lives, bear the most harmful brunt of society's animus towards gays.

There can be no rational basis for "protecting" youth from themselves, when such protections actually cause them more harm than good. There can be no rational basis for ignoring the special needs of LGBT youth in courts and in the juvenile detention system. There can be no rational basis for subjecting LGBT youth to severe abuse and harassment, and ignoring that their sexual orientation has anything to do with it. Since *Lawrence* rejected these justifications for anti-gay discrimination, they necessarily apply to all LGBT people—including youth. The decision bolsters youth advocates' ability to fight discrimination against LGBT youth because of their sexual orientation.