

Prosecutorial Discretion and Punishment Motives
In Ambiguous Juvenile Sex Offense Cases

by

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ABSTRACT

This study hypothesizes that prosecutors would be more likely to prosecute juveniles who engage in sexual activity with an underage same-sex partner than those who engage in underage sexual activity with a member of the opposite sex. To test this hypothesis, surveys were mailed to 1,000 prosecutors around the United States with a between subject design, meaning that each participant was only exposed to one condition in the vignette they read. There were a total of four vignettes, creating four conditions of different “offender” sex and “victim” sex in sexually appropriate relationships. The vignettes contain conditions in which either a male or female junior in high school was videotaped having oral sex with either a male or a female freshman in high school. Prosecutors were asked questions about whether they would prosecute the older student for statutory rape. Results indicated that manipulations of “offender” sex and “victim” sex were not statistically significant on prosecutorial discretion or punishment severity/motives; however, these manipulations did alter the prosecutors’ perceptions of the offender.

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According to the noted, late Yale historian John Boswell (1993), most historians agree that “no Western legal or moral tradition—civil or ecclesiastical, European, English, or Anglo-American—has ever attempted to penalize or stigmatize a ‘homosexual person’ apart from the commission of external acts” (p. 40). In contrast to sexual identity, however, sexual activity between members of the same sex—especially acts of oral or anal sex, have been proscribed in Western civilizations by either civil or ecclesiastical laws for centuries, often subsumed under the general term “sodomy” (Brooks, 1985; Fradella, 2002).

Sodomy was made a crime against the state at common law in the sixteenth century by Henry VIII.... By the Victorian Era, the mass suppression of sexuality of all types led to the criminalization of all acts of sodomy, whether homosexual or heterosexual. The Puritans brought the sodomy laws with them to the colonies. As the country grew, sodomy laws spread as a part of common law and were in effect in all 50 states. Up until the mid-1960s, these sodomy laws facially applied to both heterosexual and homosexual sodomy, although the targets of prosecution were usually homosexuals ..., and judicial construction of the apparently gender-neutral statutes was often targeted at homosexuals. For example, in *Bowers v. Hardwick* (1986), the majority opinion of the U.S. Supreme Court “described the Georgia law solely as a prohibition on ‘homosexual sodomy’ despite the fact that the statute was gender-neutral and applied to all sodomy.” (Fradella, 2002, p. 280, quoting Leslie, 2000, p. 112).

About half of U.S. state laws criminalizing oral sex and anal sex between consenting adults were repealed or declared unconstitutional between the late 1960s and the early 2000s (Fradella, 2002), the remaining laws criminalizing such sex acts were ultimately invalidated by the U.S. Supreme Court’s decision in *Lawrence v. Texas* (2003). Although the decriminalization of sexual activity between member of the same-sex helped to usher in greater social acceptance of lesbian, gay, and bisexual people¹ (Pew Research Center, 2013), there can be no doubt that discrimination on the basis of sexual identity remains one of the last legalized prejudices in the United States. For example, nearly 15 years after the decision in *Lawrence*, it remains legal in more than half the states to discriminate against gays, lesbians, and bisexuals in employment, housing, and places of public accommodation (Movement Advancement Project, 2017). And in just the past two years, hundreds of bills have introduced in legislatures across the United States “aimed at granting a broad range of religious exemptions to individuals,

¹ Lesbians, gays, and bisexuals are often referred to as part of the collective acronym, “LGBT,” which stands for *lesbian, gay, bisexual, and transgender*.

In recent years, the acronym has grown longer to include the letters *Q, I,* and either one or two *As*. The *Q* stands for *queer* (although it can also mean *questioning*); the *I* stands for *intersex*; and at least one *A* stands for *asexual*. When a second *A* is used, it refers to *allies* who do not identify as LGBTQIA, but who support the rights and safety of those who do identify as one of the letters in “the great alphabet soup of queer identify” (Englert & Dinkins, 2016, p. 7, quoting Tobia, 2013, para 1.).

This thesis primarily concerns sexual activity, rather than sexual orientation. Although lesbian, gay, and bisexual people might engage in same-sex acts, other people who do not identify as being lesbian, gay, and bisexual might also engage in same-sex sexual activity. Thus, I make a distinction between same-sex sexual behavior and sexual identity (see Ward, 2015) and avoid using the catch-all acronym that conflates these distinct concepts. Moreover, because this thesis does not test any condition in which a transgender person engaged in any sexual activity, the *LGBT* acronym would be misleadingly over-inclusive to describe the present study.

companies, and public and private institutions from non-discrimination laws that are already on the books” (Bellis, 2016, para. 5).

Fradella, Burke, and Owen (2009) explained that the legal backlash to *Lawrence v. Texas* was not limited to the civil law realm. Prejudice against sexual minorities often manifests in violence against people perceived to be gay, lesbian, bisexual, or transgender. Indeed, for several years running, the FBI (2016) has reported that LGBT people are more likely to be targets of hate crimes than any other minority group in the United States (see also Park & Mykhyalshyn, 2016). Yet, “[p]olice are only rarely trained” to deal with LGBT issues; indeed, some law enforcement officer are so homophobic that they harass sexual minorities (Fradella, Burke, & Owen, 2009, p. 131).

Research suggests that sexual minorities may also be victimized by court actors:

One public defender in Philadelphia (Smith, 2002), witnessed prosecutors “routinely reduce charges in serious cases—often encouraged by judges—whenever a gay complainant had prior arrests for solicitation” (p. 102). She also observed that GLBT people are “Notoriously badly treated throughout the criminal justice system: police are nasty to them; marshals, court officers and other court personnel often mock them; it is the rare judge or magistrate who treats these defendants with dignity or respect.” (Fradella et al., 2009, p. 132, quoting Smith, 2002, pp. 103–104).

And although “Lady Justice” wears a blindfold, it is clear that justice is not blind.

Disparate impact on the basis of race, ethnicity, and sex in the criminal justice system—if not outright discrimination—is well-documented (see Walker, Spohn, & DeLone, 2018).

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

For instance, gay or lesbian defendants have received more harsh penalties than heterosexual defendants for acts such as statutory rape (*State v. Limon*, 2005) and solicitation (*Louisiana v. Baxley*, 1995). Conversely, gay and lesbian victims may have to contend with the gay panic defense (Chen, 2000), for which there is no heterosexual analogue. (Fradella et al., 2009, p. 132),

Some of these observations, however, were made nearly a decade ago. This thesis explores whether such biases persist in ways that might manifest in the criminal courts of the United States.

Literature Review

Explicit prejudice, specifically racial prejudice, in the United States declined significantly in the decades following the Second World War. Researchers who have studied this decline empirically posit that race-based prejudice became socially unacceptable and, in turn, caused others to condemn those who expressed such biases (Campbell, 1947; Dowden, Robinson, 1993; Firebaugh, Davis, 1988; Rokeach & Ball-Rokeach, 1989). This assertion aligns with modern theories of prejudice which maintain that individuals are generally aware of the fact they would come across in socially undesirable ways if they were to express their biases openly, so they limit their explicit expressions to avoid condemnation from others yet continue to exhibit more subtle implicit biases (Crandall, Eshleman, O'Brien, 2002). Accordingly, decreases in expressions of racism might be a function of social suppression of such views, rather than actual reductions in racial prejudice. The increased levels of racist speech and hate-crime

incident following the election of Donald Trump emphasize this important distinction (see, e.g., DeVaga, 2017; Reilly, 2016). This effect in racially prejudice has been witnessed in acceptance rates of sexual orientation, to an extent, in recent decades (Crandall, Eshleman, O'Brien, 2002; Gallop, 2015).

Social acceptance of diverse sexual orientations has grown significantly in the past 20 years (Crandall, Eshleman, O'Brien, 2002; Gallop, 2015). Yet, as with those who continue to espouse racist views, there are still significant segments of contemporary U.S. society who express vitriolically anti-gay sentiments. But in ways that arguably differ from vocal race-based prejudices, those who condemn lesbians, gays, bisexuals, and transgender people (LGBT) are well represented in politics (Stone, 2016)—so much so that more than 100 anti-LGBT bills were introduced in state legislatures during 2016 (Bendery & Signorile, 2016; see also Steinmetz, 2016).

Discrimination Against Homosexual People

Homosexual people have been condemned for acting upon their sexual attractions for hundreds of years, largely as a function of the belief that engaging in non-procreative sex was a sin (Bullough & Bullough, 1977; Fradella & Sumner, 2016). The idea that homosexuality is immoral penetrated many different cultures throughout the world, and was eventually codified in many legal systems (see Brooks, 1985; Fradella, 2002; Johnson & Vanderbeck, 2014). For most of U.S. history, participation in homosexual sex acts constituted a criminal offense that went by a variety of monikers, including “sodomy,” “buggery,” “deviant sexual intercourse,” and “the abominable and detestable crime against nature” (Barnhart, 1981, p. 254; see also Fradella, 2002; Fradella & Grundy, 2016; Salerno, et al., 2014).

Recall that *Lawrence v. Texas* (2003) decriminalized private acts of sodomy between consenting adults. *Lawrence*, in turn, formed part of the key precedent for recognizing a federal constitutional right for same-sex couples to marry in the United States (see *United States v. Windsor*, 2013; *Obergefell v. Hodges*, 2015). Yet, the stigma against homosexual people is still very much present in our country (see Fradella & Sumner, 2016; Herek, 2009; Saewyc et al., 2006). Consider that although Gallop (2015) reports that 63% of respondents in a nationwide poll express views that gay and lesbian relations are morally acceptable, that still leaves more than one in three people disagreeing with that premise. Moreover, disapproval of such relations appears to vary by sex. According to a Pew Research Center survey (2013),

One-in-four LGBT adults say there is a lot of social acceptance of lesbians, while only 15% say there is a lot of acceptance of gay men. Similarly there is a gap in views about social acceptance of bisexual women and men. One-third of all LGBT adults say there is a lot of social acceptance for bisexual women; only 8% say the same about bisexual men. (Ch. 2, paras. 7–8).

The stigma resulting from social views that condemn homosexuality often manifests in ways that are discriminatory. For example, sexual orientation is an extralegal factor that can affect how police, prosecutors, juries, and judges act in criminal cases, although it should have no bearing on these processes (Fradella & Sumner, 2016; see also Brunelli, 2000; for concrete examples, see *Sterling v. Minersville*, 2000; *Kansas v. Limon*, 2005). Furthermore,

While selective prosecution based on gender plagues this area of the law, this is not the only type of bias causing problems for age of consent laws. Biased

functioning and application of age of consent laws in regards to sexual preference also cast doubt on the legitimacy of these laws. The penalties for same-sex violations of age of consent laws may be much harsher and prosecutors are more likely to bring charges even when there is no coercion and the parties are very close in age. (James, 2010, p. 253)

Therefore, it is important to take a closer look at criminal justice officials' perceptions of homosexuality as a variable in criminal justice offending and processes, taking into account that sex might influence discretionary decision-making in this realm (Brunelli, 2000; James, 2010).

Brunelli (2000) explains, "consider a situation in which a homosexual has been accused of rape or sexual assault on a person of the same sex and then uses a defense of consent. This might be used against him or her in a prosecution for homosexual sodomy, even if he or she is acquitted of the rape or sexual assault charges" (p. 3; see also Fradella, 2002). Although *Lawrence v. Texas* (2003) generally invalidated the broad scope of most sodomy laws in the United States, the Supreme Court was careful to limit the scope of its decision to acts of oral or anal sex that occur in private between consenting adults (Fradella & Grundy, 2016). Thus, non-consensual acts of sodomy remain illegal and are often prosecuted as rapes (Fradella & Grundy, 2016). Moreover, voluntary acts of oral or anal sex may also be criminally prosecuted if they occur in public or if an underage minor is a participant (Fradella & Grundy, 2016; James, 2010).

Although prosecutions for non-forcible sodomy or statutory rape are rare when post-pubescent teenagers engage in oral or anal sex, it remains an open question whether moral outrage by prosecutors plays a role in whether such acts are criminally prosecuted

(James, 2010). Brunelli (2002) surveyed jurors after a trial involving an openly homosexual defendant. Although only eight out of the 80 jurors questioned responded that they were bias against homosexuals, more could have easily kept their bias to themselves (Brunelli, 2000). This study adds to the body of knowledge evidencing that discrimination against homosexuals can infiltrate the courtroom.

Additional research further suggests that such discrimination may also affect how someone is criminally sanctioned. For example, Salerno, Bottoms, and Murphy (2014) had 212 participants read a brief description of sex offender registration laws (to provide general context) and then one of several vignettes depicting the case of a male offender (of either 16 or 35 years of age) who videotaped a 14-year-old performing oral sex on the offender. Participants were then asked to indicate whether the person should have to register on a publically-accessible registry of sex offenders; register as sex offender, but not in a manner that was publicly accessible; or not have register as a sex offender at all (Salerno et al., 2014). They found that, “although the legal system requires that laws be applied equally, ambiguity surrounding punishment, decisions for juveniles in consensual peer sex resulted in more severe punishment of gay, compared to heterosexual youth...when the context was normatively unambiguous (i.e. adult-juvenile sex) discrimination against gay offenders did not manifest” (Salerno, et al., 2014, p. 402). In addition to the case outcome, study participants were also asked about their impression of the individual being charged. The researchers reported that “punishment decisions for juveniles engaged in consensual peer sex resulted in more severe punishment of gay, compared to heterosexual, youth” (Salerno et al., 2014, p. 5). These findings, along with

the decision of Kansas state courts in a high-profile, post-*Lawrence* sodomy case, inspired the current study.

Kansas v. Limon

Kansas, like many states, sets the age of consent for sexual activity at 16; thus, sex with a minor under the age of sixteen constitutes the crime of statutory rape (KAN. STAT. ANN. § 21-3505).² Such statutory rape laws can be used to punish normal teenage sexual experimentation if one partner is over the age of consent and the other is under the age of consent, even though both are close in age. To prevent that from occurring, at least 45 states have enacted so-called “Romeo and Juliet” laws (James, 2009). These age-gap provisions often exempt teenagers within a certain number of years (typically fewer than four) of each other’s ages from being criminal prosecuted for sexual activity³ with each other (e.g., ARIZ. REV. STAT. § 13-1047(F); N.J. REV. STAT. 2C:14-2). Alternatively, they provide for significantly mitigated criminal sanction, reducing what would be high-level felony to a lower-level offense. Kansas opted for this latter approach, setting the maximum penalty for sexual activity between teenagers close in age to 15 months incarceration, rather than 17 years (see, KAN. STAT. ANN. § 21-3522). But the Kansas age-gap provision specified that it applies only to sex acts between members of the opposite sex. Put differently, the Kansas law was purposefully written to apply to “Romeo and Juliet,” but not “Romeo and Romeo” or “Juliet and Juliet” (see Higdon,

² Age of consent laws can differ from state to state, however, the standard age of consent typically falls between 16 and 18. Until then, minors cannot legally consent to sexual acts.

³ Some states Romeo and Juliet laws are limited to penile-vaginal penetrative sex, while other states include a broader range of sex acts (e.g., manual stimulation, oral sex, anal sex).

2008), thereby illustrating the continued stigma and discrimination gays and lesbians face, even under the law. And this caused quite a problem for Matthew Limon.

At the relevant time, Limon was a football player in his senior year of high school. Shortly after his eighteenth birthday, he engaged in a non-coercive act of oral sex with a 14-year-old-boy who was also a student at the same high school (ACLU, 2005; *Limon v. Kansas*, 2005). Limon's attorneys argued that limiting the "Romeo and Juliet" exception to opposite-sex encounters violated the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. The lower courts of Kansas rejected this argument and, as a result, Limon was sentenced to more than 17 years in prison (ACLU, 2005; *Kansas v. Limon*, 2005), rather than the 15 months maximum sentence that could be imposed if Limon had engaged in oral sex with a female (ACLU, 2005). Of course, there is reason to believe that had the sexual encounter occurred between a member of the opposite sex, charges might not have been pressed at all because heterosexual teenage sexual activity is considered more normative (ACLU, 2005). The Kansas intermediate court of appeals affirmed Limon's conviction (*State v. Limon*, 2014). Limon served three years in prison before the Kansas Supreme Court reversed his conviction, holding that the state's Romeo and Juliet provision could not be limited to acts between opposite-sex partners without violating equal protection.

However, in situations where this bias can be camouflaged, such as in the punishment portion of the prosecutorial process in cases where moral outrage runs high, this bias can manifest and become apparent (Crandall, Eshleman, O'Brien, 2002). During sentencing, prosecutors have an excuse to punish and this justification factor makes it easier to express these prejudices.

Prosecutorial Discretion

The *Limon* case illustrates several important realities related to sex offense in contemporary U.S. culture. First, and most generally, although statutory rape is qualitatively different from sexual assault, it is nonetheless a sex crime. As a result, those who commit the offense—even those like Matthew Limon who are close in age to their voluntarily participating “victim”—can be subjected to harsh punishments aimed at broad yet ambiguous class of criminals. These “criminals” are lumped into the category of *sex offenders*—a class of offenders that have been singled out for particularly harsh sanctions since seven-year-old Megan Kanka was sexually assaulted and killed in 1994 by a previously-convicted sex offender who lived down the street from the Kanka family (Terry, 2006). Media coverage of the case (and some other high-profile cases) fueled a public outcry for tougher sentences for sex offenders, the creation of state-sponsored registries to track sex offenders after their release from prison, community notification programs, and even restrictions on where offenders may live (Galeste, Fradella, & Vogel, 2012; Terry, 2006). Demographic, conviction, and residence information are often included within the registry for anyone with access to a computer to see (Connor & Tewksbury, 2017; Terry, 2006).

Sex offender punishments typically involve long periods of incarceration, followed by involuntary institutionalization or sex offender registration. These sanctions do not emphasize rehabilitation; they generally serve retributive and incapacitative ends (Garfinkle, 2003; Letourneau et al, 2010). Indeed, sex offender sanctions frequently represent a “just desserts” mentality because sexual offenses are viewed as particularly despicable, eliciting strong punishment motivations (Salerno & Peter-Hagene, 2013;

Salerno, Bottoms, & Murphy, 2014). These motivations can be heightened when extralegal factors, like prejudices, produce high levels of moral outrage, which can produce higher certainty in a guilty verdict, thus making these cases particularly sensitive and in need of study (Salerno & Peter-Hagene, 2013).

Second, the *Limon* case illustrates the fact that prosecutors hold a substantial amount of discretionary power in the criminal justice system (Frase, 2000; Reiss, 1974). Indeed, they “exercise virtually unfettered discretion relating to initiating, conducting, and terminating prosecutions” (Neubauer & Fradella, 2016, p. 162)—so much so that their decision-making is largely unreviewable, even when largely viewed as unnecessarily harsh or unfair, as many perceived it to be in the *Limon* case. Prosecutors also wield significant influence on the punishments doled out to criminal defendants after conviction through punishment recommendations (Albonetti, 1987; Free, 2002; Neubauer & Fradella, 2016; Simon, 2007). Although this discretion is instrumental to the operation of the criminal justice system, this discretion also leaves the door open for extralegal factors to impact decision-making (Spohn, Beichner, & Davis-Frenzel, 2001; Spohn, Spears, 1996). This bias can be sparked by anything from the demeanor of the defendant to strong political ideologies and may even be subconscious, which makes this bias difficult to realize and extract from the decision-making process (Spohn, Beichner, & Davis-Frenzel, 2001). Ideally, the courtroom workgroup functions as a system of checks and balances system in these circumstances (Simon, 2007; Walker, 2015). However, bias, especially implicit bias that is much more difficult to detect than overt animus, can sometimes clog the components of legal machine, preventing it from working the way it should (Spohn, Beichner, & Davis-Frenzel, 2001; Simon, 2007; Walker, 2015). Put

differently, extralegal factors such as race, ethnicity, gender, age, and sexual orientation, may influence prosecutorial decision-making, even unintentionally (Amirault & Beauregard, 2014; Shermer & Johnson, 2010).

Third, the *Limon* case, like many criminal cases involving sex crimes, seemed to have evoked strong levels of moral outrage. But two high-school students engaging in voluntary sexual activity with each other would not normally evoke such emotional tensions that would cause a prosecutor to press charges and seek the maximum sentence allowable under law. Such actions beg the question, “Why?” Perhaps the moral outrage attendant to the case was caused, in part, by the fact that Limon was a senior in high school and the other student was a first-year student who was four years younger than Limon. But since the Kansas statute lessens the punishment for a defendant age 19 or younger who engaged in sexual activity with someone between the ages of 14 and 16, the age difference, per se, does not appear to be the cause of moral approbation. Rather, the fact that the oral sex occurred between two teenage boys appears to have caused significant moral outrage. This conclusion is supported by the brief filed on behalf of the state of Kansas when defending against Limon’s equal protection challenge to its Romeo and Juliet law in which the state’s attorney cautioned that granting equal protection to same-sex acts would open to the door to “combinations as three party marriages, incestuous marriages, child brides, and other less-than-desirable couplings” (as cited in Pflaum, 2004, para. 64). Importantly, social psychological research supports the notion that strong moral condemnation may be linked to exercising discretionary decision-making (such as prosecutorial charging and judicial sentencing decisions) based on the

extra-legal factors causing the moral disapproval (see Saltzstein, 1994; Stuart & Abt, 1979).

Salerno and Peter-Hagene (2013) studied how a combination of anger and disgust can predict moral outrage. From their research, they found that “anger toward moral transgressions (sexual assault, funeral picketing) predicted moral outrage only when it co-occurred with at least moderate disgust, and disgust predicted moral outrage only when it co-occurred with at least moderate anger” (Salerno & Peter-Hagene, 2013, p. 2074). In their study, 102 participants—recruited through Amazon’s Mechanical Turk⁴—were given a vignette about “David” who either sexually assaulted someone or picketed a funeral (Salerno & Peter-Hagene, 2013). Participants were then administered a battery of psychological measures geared to determine the level of disgust and, or anger they felt (Salerno & Hagene, 2013). Within this evaluation were four questions to measure their moral outrage, such as “On a scale of 1-5, I feel morally outraged by the defendant” (Salerno & Peter-Hagene, 2013, p. 2070). The study concluded that anger was a predictor of moral outrage when it co-occurred with disgust, and vice versa. (Salerno & Peter-Hagene, 2013). When using a murder case vignette, the study demonstrated that a “combination of anger and disgust might increase moral outrage, which in turn might increase participants’ confidence in a guilty verdict” (Salerno & Peter-Hagene, 2013, p. 2074). By specifically testing emotionally disturbing cases (e.g. sexual assault and funeral picketing), this study demonstrated that people are swayed by their emotions in cases that illicit high amounts of anger and disgust, equating to moral outrage (Salerno &

⁴ Amazon’s Mechanical Turk is a paid service with many features. As it relates to this study, the Sentiment App was used to determine the opinions of Amazon users in a randomized sample.

Peter-Hagene, 2013). These results strongly suggest that prosecutorial discretion might be influenced by prosecutors' moral outrage in sexual assault cases. Certain extralegal factors, such as sex and implied sexual orientation, may illicit similar moral outrage in cases of sexual assault.

In a 2010 study, prosecutors, among others, were surveyed in order to determine differences in punishment for juveniles and adults in sex offender cases (Salerno, Stevenson, Wiley, Najdowski, Bottoms, & Doran, 2010). The researchers concluded that prosecutors almost equally favor assigning the punishment of online sex offender registration and more traditional sex offender registrations that are not available online regardless of age. This indicates that age does not have enough of a mitigating effect to counteract perceptions of offenders in sexual offense cases regarding the appropriateness of sex offender registration—a particularly damaging and shameful punishment—as a criminal sanction (Salerno et al., 2010; Cook, 2010). Although this survey did not include specific case information, the results are enlightening on the attitudes of prosecutors, and the general public, towards different ages of sex offenders and the severity of punishment personally justified.

Fear as Punishment Motive

The most common framework for understanding the interplay between legally-relevant (e.g., offense type, prior record, etc.) and legally-irrelevant (e.g., race, sex, age, sexual orientation) case characteristics is the focal concerns perspective (Steffensmeier, Kramer, & Ulmer, 1995; Steffensmeier, Ulmer, & Kramer, 1998). This theory posits that charging decisions by prosecutors and sentencing decisions by judges are constrained by time, resources, and limited information about the defendant. So, these decisions are

often made on the basis of certain social stereotypes as part of a ‘perceptual shorthand’ that connects these stereotypes to key offender characteristics, based on three focal concerns: “the blameworthiness and culpability of the offender; a desire to protect the community; and concerns about practical constraints and consequences” (Hartley, 2014, p. 1). Because these focal concerns rely heavily on extralegal factors, discretion decisions can be heavily influenced by both conscious prejudice and implicit bias (see, e.g., Kang et al., 2012).

Furthermore, as stated by Shermer and Johnson (2010), “Prosecutors, like other organizational actors, are faced with uncertainty that may lead them to develop decision-making schema that incorporate past practices and reflect the subtle influences of social and cultural stereotypes in society. These stereotypes emerge through an attribution process that links these “perceptual short-hands” in ways that promote efficient case processing, but at the expense of allowing conscious and unconscious biases to influence discretionary decisionmaking vis-à-vis the stereotypes attached to various extralegal factors (Hawkins, 1981; Kang et al., 2012). Furthermore, the schemas that prosecutors may develop—within the context of crime—can produce decisions that are principally driven by fear and stereotypes. Extralegal characteristics—such as race, sex, or sexual orientation, illicit stereotypes that are usually negative—with the exception of women who, across the board, are treated more leniently in the criminal justice system (Brennan, 2006). Indeed,

In many American communities, particularly those angered by publicized instances of violent crime, some prosecutors have responded directly to the potent fear of crime and passion for punishment they can arouse. In these

communities, the reciprocity underlying the old courtroom “work team” is replaced with a new model in which the prosecutor is clearly a dominant force. (Frisbie & Garrett, 1998, p. 41)

Sexual activity between same-sex partners were criminalized for so long that many people came to view LGBT people as criminals who are sexually promiscuous or even sexually aggressive predators (Barnhart, 1981; Fradella, 2002; Fradella & Sumner, 2016). These beliefs may motivate some people to view LGBT people as a particularly dangerous class of sex offenders who deserve severe punishments (see, e.g., Bryant, 1977). Indeed, “antigay activists have routinely asserted that gay people are child molesters” (Herek, 2013, para. 3). Although the percentage of the general public in the United States who equate homosexuality and child molestation has declined substantially (see Herek, 2013), this false belief persists. Consider, for example, that the Catholic Church continues to insinuate this dubious link as a justification for preventing gay men from becoming priests (see O’Loughlin, 2016). And such beliefs may have motivated the Kansas officials who prosecuted Matthew Limon to seek harsh punishment in spite of the fact that Limon’s “victim” consistently maintained that the oral sex between the two teens was “consensual” (Pflaum, 2004, para. 4).⁵

Adult Time for Adult Crime

At the time Matthew Limon engaged in oral sex with this “victim,” he was 18 years of age—an adult in the eyes of the law. But the harsh sentence he received until his

⁵ Technically, the 14-year-old boy with whom Matthew Limon engaged in oral sex was too young to grant lawful consent. But he nonetheless expressed to authorities that he was a willing participant who voluntarily engaged in the sex act without any coercion from Limon (see Pflaum, 2004).

conviction was overturned on appeal is not unique for young sex offenders. Consider the case of Georgia teenager Genarlow Wilson. When he was 17 years of age, Wilson engaged in multiple sex acts with two girls, ages 15 and 17 (Tuck, 2013). The younger girl could not grant effective legal consent to sex because she was under the age of 16 [GA. CODE. ANN. § 16-6-3(a)]. Wilson was acquitted of rape, but convicted of aggravated child molestation for having oral sex with a minor. He was sentenced to 10 years in prison—the required minimum mandatory sentence for that offense (Tuck, 2013). Yet, had he been convicted of engaging in vaginal sexual intercourse with the 15-year-old, the state’s Romeo and Juliet law would have reduced his crime to a misdemeanor punishable by a maximum period of incarceration of 12 months [GA. CODE. ANN. § 16-6-3(c)].⁶ After Wilson served nearly 2.5 years in prison, the Georgia Supreme Court overturned his conviction, calling it “grossly disproportionate to his crime” and, therefore, unconstitutional, “cruel and unusual punishment” (*State v. Wilson*, 2007, p. 532).

The practice of sentencing juveniles to the same punishment as an adult sanction may be shocking to some, but it is practiced under a variety of circumstances (Salerno, Stevenson, Najdowski, Wiley, Bottoms, & Peter-Hagene, 2013; Wood, 2012). The juvenile court system exists, at least in principle, because our society recognizes that children differ from adults when it comes to their ability to think through the consequences of their actions and that criminal misconduct should be handled separately

⁶ Georgia’s age-gap provision at that time did not include protections for acts of oral or anal sex, just like in Kansas at the time of Matthew Limon’s prosecution. These laws illustrate the continued vestiges of legalized discrimination against LGBT people through their effective removal of the protections of age gap mitigating provisions for LGBT youth. It took Wilson’s case—one involving heterosexual activity—to prompt the Georgia state legislature to revise their Romeo and Juliet provision to apply to sex acts other than penile-vaginal sexual intercourse [Ga. L. 2006, pp. 379, 413, § 30 (a)].

(see Neubauer & Fradella, 2016). Indeed, the juvenile justice system is designed to rehabilitate youth—steering them away from criminal deviance by providing youth with the appropriate resources and support (Champion, Merlo, & Benekos, 2013). Yet, many critics argue that the juvenile justice system is broken and does not accomplish this original intention (see Dowd, 2015; Wood, 2012; Garfinkle, 2003). It has become so harsh—so punitive—that it only serves to facilitate a school-to-prison pipeline, rather than accomplish goals of rehabilitation (Dowd, 2015). Furthermore,

Legislative changes have also given prosecutors a larger role in choosing the fate of juvenile offenders... Today, virtually all states allow prosecutors to place juveniles who are charged with serious or violent crimes in adult court, and states require them to do so for a range of violent crimes. The prosecutor now acts as a gatekeeper determining access to the juvenile process itself.

Indeed, this gatekeeping function, once given largely to judges in the criminal justice system, now ends with the prosecutors. (Simon, 2007, p. 40)

This punitiveness is further exemplified by the way that juvenile sex offenders are treated. Not only are they often waived into adult court, but also are subjected to the same types of sanctions applied to adult offenders including being forced to register as a sex offender (Garfinkle, 2003; see Barbaree & Marshall, 2008). Punishments under Megan's Law shows a lack of consideration to the unique characteristics that separate juvenile criminal offenders from adult criminal offenders, such as low recidivism rates and a superior disposition to rehabilitative services than adult offenders (Terry, 2006; Cook 2006).

Many critics argue that inclusion on a sex offender registry is far too harsh of a punishment for juvenile offenders (e.g., Cook, 2006; Garfinkle, 2003). Sex offenders need to register with state authorities so their names, ages, addresses, crimes, and even photos can be entered into a publically-searchable database (Letourneau, Bandyopadhyay, Armstrong, & Sinha, 2010; Garfinkle, 2003). Depending on the level of threat that the offender is as deemed by the state, authorities may require these individuals notify neighbors in the surrounding area of their status, offense, and physical address (Letourneau et al., 2010; Garfinkle, 2003). In addition, some offenders are required to comply with residency laws that restrict the areas in which they can live (Letourneau et al., 2010; Garfinkle, 2003). And some sex offenders must report to a probation or parole officer for the rest of their lives (Letourneau et al, 2010; Garfinkle, 2003). These restrictions represent only a portion of the legal aspect of sanctions imposed on sex offenders (usually after a period of incarceration), but there are social consequences as well. For example, sex offenders may be ostracized from society; some may even become victims of vigilantism or community prosecution for their crimes (Salerno, et al., 2013; Simon, 2007). These types of sanctions can significantly limit—if not outright impede— offender reintegration into society (Salerno, et al., 2013; Cook 2006). These effects are exacerbated when the full range of sanctions are imposed on juveniles; indeed, these sanctions reduce juveniles’ chances of becoming functional citizens of society because of the labeling effect (Cook, 2006).

Placing juveniles on sex offender registries has not been shown to deter recidivism (Letourneau, Bandyopadhyay, Sinha, & Armstrong, 2010; Terry, 2006; Garfinkle, 2003). A study spanning 15 years determined that there has been an increase in

guilty verdicts in sex offender cases overall, resulting in a corresponding increase in number of people subjected to the collateral consequences of sex crime conviction (Letourneau, et al., 2009). This can be attributed to the fact that fewer sex offender cases are being brought to trial, as the study deduced, and that the few that do proceed up are because they bear a considerable amount of evidence, thus making a conviction more promising. In this study, the courtroom workgroup⁷ was shown to reach a consensus that the policy of sex offender punishment is serious, and therefore, only try the most serious of cases where they believe that the defendant deserves to meet this punishment (Letourneau, et al., 2010). Whether the deservedness of each individual is dependent on solely legal factors or if extralegal factors influence the prosecutorial decision process enough to make an impact has yet to be determined, although some high-profile cases, such as the ones discussed in the previous section, suggest the law is not as even-handed as it is supposed to be. But research has not adequately studied how juvenile offenders are treated, especially in cases where “normal” teenage sexuality, rather than deviant sexual aggression, might explain the underlying conduct (Murrie, 2012). Thus, it is important to study in order to determine if extralegal factors do have an effect on prosecutorial discretion in nonviolent sex crime cases, especially in a special population such as juveniles.

⁷ The courtroom workgroup is a common term referring to the informal processes and agreements that a prosecutor, defense attorney, and judge make regarding laws, cases, and punishments (Eisenstein, Jacob, 1991).

Methods

Hypotheses

Based on the research summarized in the literature review (Letourneau et al., 2009, 2010; Salerno & Hagene, 2013; Salerno et al., 2014; Spohn et al., 2001), I hypothesize as follows:

1. Prosecutors will be more likely to prosecute same-sex⁸ offenders than opposite-sex individuals.
2. Prosecutors are more likely to prosecute males than females.
3. Prosecutors are more likely to prosecute male same-sex offenders than any other sex manipulation combination.
4. Prosecutors will be more likely to punish same-sex offenders more severely than opposite-sex offenders.
5. Prosecutors are more likely to punish males more harshly than females.
6. Prosecutors are more likely to severely punish male same-sex offenders than any other sex manipulation combination

In addition to these hypotheses concerning “offender” sex, “victim” sex, implication from differing sex combinations, I also seek to answer a research question for which no hypothesis is appropriate, given the exploratory nature of the question.

Specifically, I examine whether any effects seen in prosecutorial discretion and punishment motives can be explained through the prosecutor’s interpretation of law. For example, Romeo and Juliet statutes may not specify that they apply to same-sex couples,

⁸ This paper will use “same-sex offender” and “opposite-sex offender” terminology versus homosexual offender and heterosexual offender in order to not assume sexual orientation identification. In certain instances “implied sexual orientation” will be substituted for clarity. In addition, “sex” will replace “gender” so as to also not assume gender self-identification.

thereby opening the potential for prosecuting and punishing someone accused of sexual activity with an underage person of the same-sex.

Pilot Study

I conducted a pilot study in which an electronic survey was emailed to 750 prosecutors across the United States. But very few prosecutors completed the survey. Indeed, because the sample was so small ($n=20$, 2%), running statistical analysis was not viable (Caraveo Parra, 2016). But the low response rate to email-based surveys caused me to reevaluate my sampling strategy for the study that forms the basis of this thesis.

Variables

Table 1. Variables

Variables		
Dependent Variables	<i>Decision to Prosecute</i>	<i>Decision to Prosecute</i> refers to whether or not the prosecutor elected to prosecute the case provided in the vignette (Survey Question 1).
	<i>Length of Time on Sex Offender Registry</i>	<i>Length of Time on Sex Offender Registry</i> refers to the amount of time that the prosecutor recommends the offender be on the sex offender registry (Survey Question 9).
	<i>Attributions</i>	<i>Attributions</i> refers to the attitudes of prosecutors towards the offender (Survey Question 11a-11k).
Independent Variables	<i>Sex of “offender”</i>	<i>Sex of “offender”</i> refers to the sex of the offender, either male or female, in order to see how sex impacted prosecutor’s decision making.
	<i>Sex of “victim”</i>	<i>Sex of “victim”</i> refers to the sex of the victim, either male or female, in order to see how sex impacted prosecutor’s decision making.
Control Variables	<i>Likely Win</i>	<i>Likely Win</i> refers to the prosecutor’s perceived likelihood of winning the case (Survey Question 4).
	<i>Confidence</i>	<i>Confidence</i> refers to the level of confidence that the prosecutor has in his/her decision on the most appropriate outcome for the vignette offender (Survey Question 8).
	<i>Recidivism</i>	<i>Recidivism</i> refers to the prosecutor’s perception that the vignette offender will commit another sex offense through an incremental scale (Survey Question 10).
	<i>Discretion</i>	<i>Discretion</i> refers to the absence or presence of discretion in prosecuting this case on an ordinal scale of 1-5 (Survey Question 11k).
	<i>Presence of Romeo & Juliet Statutes</i>	<i>Presence of Romeo & Juliet Statutes</i> refers to whether the prosecutor, to the best of his/her knowledge, knows of a Romeo and Juliet or similar exemption on the books in their state (Survey Question 24).

The dependent variables in this study are *Decision to Prosecute*, *Length of Time on Sex Offender Registry*, and *Attribution*. *Decision to Prosecute* refers to whether or not the prosecutor elected to prosecute the case provided in the vignette and is measured through the simple yes or no response in Question 1. *Length of Time on Sex Offender Registry* refers to the amount of time that the prosecutor recommends the offender be on the sex offender registry and is measured through an open response question in Question 9). *Attributions* refers to the attitudes of prosecutors towards the offender asked in question 11 and its sub questions such as, “David poses a danger to society” and “I feel a compelling need to punish David.”

The independent variables in the study are *Sex of “Offender”* and *Sex of “Victim.”* *Sex of “offender”* refers to the sex of the offender, either male or female, in order to see how sex impacted prosecutor’s decision making. *Sex of “victim”* refers to the sex of the victim between male and female in order to see how sex impacted prosecutor’s decision making. These variables are measured through the survey code at the bottom of the survey, indicating what the sexes of the victim and offender in the vignette. Manipulating the sex of the “offender” and the “victim”, these signify extralegal factors that are aspects of the case that beyond the scope of the law. Because justice is blind and judicial treatment of all individuals should be equal in terms of due process, these aspects should not be considered.

Control variables that will be included in the analysis that may be highly correlated with the dependent variable of *Decision to Prosecute* include: *Likely Win*, *Confidence*, *Recidivism*, *Discretion*, and *Presence of Romeo & Juliet Statutes*⁹. *Likely*

⁹ Romeo & Juliet statutes are intended to protect juveniles engaging in sexual activities if there is a short age gap between the above age individual and below age individual. Specifics on what

Win refers to the prosecutor's perceived likelihood of winning the case and is measured through an incremental percentage scale in Question 4. *Confidence* refers to the level of confidence that the prosecutor has in his/her decision on the most appropriate outcome for the vignette offender (Question 8). *Recidivism* refers to the prosecutor's perception that the vignette offender will commit another sex offense through an incremental percentage scale of in Question 10. *Discretion* refers to the absence or presence of discretion in prosecuting a case, based on the prosecutor's perception, and measured through an ordinal scale of 1-5 in Question 11k. *Presence of Romeo & Juliet Statutes* refers to whether the prosecutor, to the best of his/her knowledge, knows of a Romeo and Juliet statute—or similar exemption on the books in their state. This variable is measured through a yes or no question, followed by a question asking the statute code in Question 24. These control variables were added into the data analysis in order to obtain better estimates within the regression analysis. Control variables that reveal to not be correlated with our dependent variables do not affect the figures and, or effects reported.

Attributions Scale

Question 11 in our survey (see Appendix A) tested for the participant's moral attributions toward the fictional defendant in the case. The question, which consisted of a series of 11 Likert-scale questions regarding the participant's perception of the offender, sought to measure the prosecutor completing the survey felt about the offender (see Appendix A). The questions were used because they had been previously validated as a measure of offender attributions related to sexually-based offending (Salerno, Bottoms, Murphy, 2014). Questions included measures of whether respondents believed the

these sexual activities are and the width of the age gap differs between states.

offender is “a perverted person” or “a danger to society.” These questions provide us with a more complex and developed determination of the prosecutor’s attitude towards the “offender” in the vignette that may not get weeded out in previous questions regarding legal decisions. Furthermore, the attributions were measured through Likert scale responses to learn to what extent the prosecutor was influenced by the extralegal factors presented in the vignette. These questions, when combined with “offender” sex and “victim” sex manipulations, provide us with the results that answer our previously stated hypotheses. From these responses, an inter-item correlation matrix was created in order to scale these responses and eventually create one measure to relate back to our manipulations.

Sampling Frame

For this study, I surveyed 982 prosecutors from all 50 states in order to ensure a representative sample from which generalizations might be made. Google searches were conducted individually by state using phrases such as “Arizona state prosecutors” or “Arizona state district attorneys” within each state provided the mailing information needed to mail these surveys. Prosecutors were selected out of those who had their mailing addresses online. Only direct office-mailing addresses or P.O. boxes were included in the sampling frame.

Table 2. Prosecutor Sample Demographics

Prosecutor Nationwide Demographics (Women Donors Network, 2015)		
	Male (83%)	Female (17%)
White:	79%	16%
Other:	4%	1%

The Women Donors Network provided the above statistics in 2015, which filled a gap in knowledge of current demographic statistics throughout the U.S. on specifically prosecutors. Other organizations that also collect data into this population, such as the Bureau of Justice Statistics and the American Bar Association, but they do not collect demographic data or do not disaggregate data between sex, race/ethnicity, or by type of law practitioner (Bureau of Justice Statistics, 2007). As of 2007, the BJS found there are just over 2,300 prosecutors in the nation and more recent research from the Women Donors Network indicates that there are over 2,400 prosecutors (Bureau of Justice Statistics, 2007; Women Donors Network, 2015). In general, the average age of all practitioners in law is 49 and I have found no data regarding political inclinations, however, the assumption can be made that prosecutors will lean more towards the conservative side of the political spectrum due to the known demographic data (Pew Research Center, 2015).

Data Collection

I expected a much higher response rate than our pilot study due to the increased data collection methods implemented so that our results can be generalizable to prosecutors in the United States. To accomplish this, I utilized mail paper surveys, rather than email online surveys to prosecutors, primarily because staff at most district attorneys' offices do not open attachments or links from unknown or unsolicited email addresses, a lesson I learned this the pilot study that yielded mere 2% response rate. When compared to emailed and faxed surveys, physical surveys sent via the mail generally yield better response rates, especially when other "best practices" are also

followed, such as a letter from the university stating the legitimacy of the survey, monetary reimbursement for participation, or the color of the paper the survey is printed out on (McMahon et al., 2003; Raziano et al. 2001; King & Vaughan, 2004). With the exception of monetary reimbursement for participation, all of these suggestions for increasing the response rate were incorporated into the present research design.

Survey

There were four different versions of the survey, all having the same questions but with four different vignettes to set up the differing scenarios of oral sex between differing sexes of offender and victim. The survey is a between subject design, meaning that each participant was only exposed to one condition in the vignette they read. The vignettes are as follows:

Vignette 1. David, a high school junior, attended a party at a friend's house. During the party, a freshman boy performed oral sex on David. The boy's parents found out about the incident and decided that they wanted to press criminal charges. Although both teenagers stated that the act was consensual, because the boy was underage, he could not legally provide consent. This incident occurred in a state that has a "Romeo and Juliet" exemption for contact between minors who are similar in age that would lead to a misdemeanor charge in this case if the act had been sexual intercourse, but the exemption does not mention oral sex.

Vignette 2. David, a high school junior, attended a party at a friend's house. During the party, a freshman girl performed oral sex on David. The girl's parents found out about the incident and decided that they wanted to press criminal charges. Although both teenagers stated that the act was consensual, because the girl was underage, she

could not legally provide consent. This incident occurred in a state that has a "Romeo and Juliet" exemption for contact between minors who are similar in age that would lead to a misdemeanor charge in this case if the act had been sexual intercourse, but the exemption does not mention oral sex.

Vignette 3. Jen, a high school junior, attended a party at a friend's house. During the party, a freshman boy performed oral sex on Jen. The boy's parents found out about the incident and decided that they wanted to press criminal charges. Although both teenagers stated that the act was consensual, because the boy was underage, he could not legally provide consent. This incident occurred in a state that has a "Romeo and Juliet" exemption for contact between minors who are similar in age that would lead to a misdemeanor charge in this case if the act had been sexual intercourse, but the exemption does not mention oral sex.

Vignette 4. Jen, a high school junior, attended a party at a friend's house. During the party, a freshman girl performed oral sex on Jen. The girl's parents found out about the incident and decided that they wanted to press criminal charges. Although both teenagers stated that the act was consensual, because the girl was underage, she could not legally provide consent. This incident occurred in a state that has a "Romeo and Juliet" exemption for contact between minors who are similar in age that would lead to a misdemeanor charge in this case if the act had been sexual intercourse, but the exemption does not mention oral sex.

Survey Format

The survey was designed to be a double-sided, single-page survey (i.e., the front and back of one page) that incorporated by closed-ended question for quantitative

analyses and open-ended questions for qualitative analysis. In the pilot study, the survey was twice as long and reiterated the control measures within differently phrased questions to limit interpretation errors as well as to obtain a more accurate picture of the participant's responses. Because it was crucial to the response rate to shorten the survey, and control questions could not be reconsidered, questions were not altered from the original survey in the pilot study to ensure survey reliability. Appendix A contains one version of the survey used for the reader's reference.

To maximize our potential response rate, the mailing consisted of a single page that contained survey questions on both the front and back (Fox, Crask, & Kim, 1988). This design was purposefully selected because research suggests that the more concise a survey is, the more likely attorneys will see completion as an appropriate use of their time (Fox et al., 1988). In addition, the mailing included a cover letter signed by my thesis committee stating the legitimacy of the study, which has shown to improve response rates (Snyder & Lapovsky, 1984). This statement will also appeal to each attorney's pragmatic side to help advance our knowledge through this study. The mailing also contained a self-addressed stamped envelope with first class postage in which to mail the survey back (Snyder & Lapovsky, 1984). By doing this, it reduced the time the participant spends on the mailing part, further incentivizing participation (Snyder & Lapovsky, 1984).

Anonymity

The survey asks for no identifying characteristics, such as name, to protect the opinions and verdict of the prosecutors and reduce the risk of re-identification. Although return addresses from the return envelope were available, many states have multiple prosecutors' mail going to one mailbox making determining ownership difficult. Because

this is sensitive and potentially damaging information, each survey was coded only to identify the state in which the respondent practiced. This procedure guarded against the possibility that a respondent failed to indicate their state—a critical variable for verifying the presence of a Romeo and Juliet statute in that prosecutor’s state.

Validity

Internal validity is secured chiefly in the method in which the data was obtained, the survey. Containing over 30 questions and sub-questions, each data piece has the opportunity to threaten the internal validity of this study because of wording. However, there are two measures that were taken to reduce this threat. First, the questions were either directly taken or adapted from the study by Salerno, Bottoms, and Murphy (2014) that tested similar measures. By taking these from a previously published study, it ensured that they accurately and adequately measure the intended variables and can provide statistically significant results. Second, the full battery of questions was tested out in a pilot study. Since I did adapt several of the questions from the Salerno, Bottoms, and Murphy (2014) study, this pilot testing was necessary to establish the reliability of the edited questions, as well as participant comprehension of the modified phrasing. Our attitudinal scale was further compiled from questions previously used in our pilot study and the Salerno, Bottoms, and Murphy (2014) and was tested for reliability using Cronbach’s Alpha (0.69) which I found to be adequately reliable. Moreover, surveys distributed to our sample of prosecutors were randomized during the mailing process to further ensure internal validity. I attempted to ensure external validity through a nationwide sampling of prosecutors. Sampling prosecutors from every U.S. state increases the generalizability of the results.

Qualitative Methods

This survey had several short-response questions in which participants could expand upon their decisions about this case, as well as provide additional information they identified as important to the case. Because these results provided additional insight into the thought processes and consideration of our participating prosecutors, I decided that a qualitative analysis of these responses would add dimension and understanding into our results. In vivo¹⁰ and open coding strategies¹¹ were used in our analysis. These responses were completely read through several times in order to get an idea of reoccurring trends and notable accounts (Altheide, 1996). During this process, key words or key phrases were weeded out from each response and the frequencies were recorded—i.e. closeness in age, consent, juvenile court has a rehabilitative purpose (Altheide, 1996). In order to be classified within a category, responses had to be a complete or almost complete match and explicitly stated to meet our standard of qualification.¹²

Results

Quantitative Prosecution Discretion Patterns

A total of 982 surveys were sent out throughout the United States and 70 surveys were received for a return rate of 7%. Although this is a much higher sample size than in the pilot study, our overall return rate remained very low; however, this is not too

¹⁰ In vivo coding is the method of assigning a label or code to a section of qualitative data by using a word or short phrase taken directly from the data (Saldana, 2008)

¹¹ Open coding strategies, sometimes referred to as emergent coding, is method of gleaning out codes through themes and phrases repeated throughout a qualitative dataset (Berg, 2014)

¹² Qualification standards were determined prior to qualitative data coding to ensure that reliability within analysis and accurate interpretation of the data.

surprising considering the low return rates associated with mailed surveys (Fox, Crask, & Kim, 1988; McMahon et al 2003). At least 10 surveys were received in each category of vignette; although this is a small number, it met our threshold to continue with the data analysis (*Opposite-Sex Female Offender*=24, *Same-Sex Female Offender*=15, *Opposite-Sex Male*=18, *Same-Sex Male Offender*=11). The limitation associated with sample size and return rate will be further explained in our limitations section. Surveys from 27 states were received to compile a sample that was 69% male, an average of 45 years old ($SD=11$), 97% white and 3% black, 54% politically conservative, 25% politically liberal, and 21% politically moderate.

No significant effect was found from any of our manipulations—“offender” sex and “victim” sex—with respect to the decision to prosecute. The cross tabulation of offender sex/victim sex and the decision to prosecute below depicts whether or not a participating prosecutor would choose to prosecute this case and the vignette offender’s sex layered with the vignette victim’s sex. This table represents the basic distribution, in percentage, of prosecutorial discretion amongst our manipulation of “offender” sex and “victim” sex.

Table 3. Cross Tabulation of Sex of “Offender”/ Sex of “Victim” & Decision to Prosecute:

Table 1: Cross Tabulation (Sex of “Offender”/ Sex of “Victim” & Decision to Prosecute)				
“Offender” Sex	“Victim” Sex	No, I would not choose to prosecute this case	Yes, I would choose to prosecute this case	Total
Male	Opposite Sex Offender	15 83.3%	3 16.7%	18 100%
	Same Sex	9	2	11

	Offender	81.8%	18.2%	100%
	Total	24 82.8%	5 17.2%	29 100%
Female	Opposite Sex Offender	20 83.3%	4 16.7%	24 100%
	Same Sex Offender	11 73.3%	4 26.7%	15 100%
	Total	31 79.30%	8 20.5%	39 100%
Total	Opposite Sex Offender	35 83.30%	7 16.7%	42 100%
	Same Sex Offender	20 76.9%	6 23.10%	26 100%
	Total	55 80.90%	13 19.1%	68 100%
Opposite-Sex Offender: Number of Observed=10, df= 1, Chi ² =0.00, Prob > Chi ² =0.738				
Same-Sex Offender: Number of Observed=10, df= 1, Chi ² =0.00, Prob > Chi ² =0.738				
Total: Number of Observed=20, df= 1, Chi ² =0.00, Prob > Chi ² =0.672				

I also ran a logistic regression to control for the factors that might otherwise influence the decision to prosecute.

Table 4. Logistic Regression of Sex of “Offender”/ Sex of “Victim” & Decision to Prosecute:

Table 2: Logistic Regression (Sex of “offender”/ Sex of “victim” & Decision to Prosecute)						
Decision to Prosecute (Yes Dummy)	Odds Ratio	Standard Error	z	P > z 	[95% Confidence Interval]	
Sex of “offender” (Male Dummy)	4.54	4.97	1.38	0.17	0.53	38.80
Sex of “victim” (Opposite Sex Dummy)	1.82	1.56	0.69	0.49	0.34	9.82
Likelihood of Winning	1.00	0.001	1.71	0.09	1.00	1.01

Confidence in Decision	1.00	0.001	1.14	0.26	1.00	1.01
Perceived Likelihood of Recidivism	1.00	0.001	0.45	0.65	1.00	1.00
Presence of Discretion	1.00	0.001	2.46	0.014	1.00	1.01
Presence of Romeo & Juliet Statutes	0.41	0.41	-1.14	0.25	0.09	1.88
Sex of “Offender” X Sex of “Victim” (Interaction Effect)	0.59	1.05	-0.30	0.77	0.02	19.32
Constant	0.03	0.004	-2.49	0.01	0.002	0.48
Number of Observed=70, LR Chi ² (7)=17.37, Prob > Chi ² =0.0265, Psuedo R ² =0.2585						

The results from this analysis show that “offender” sex and “victim” sex have do not have a statistically significant effect on prosecutions decisions.

After the logistic regression, I ran a marginal effects model in order to more uniformly determine the effect size that “offender” sex and “victim” sex dummy variables has on a prosecutor’s decision to prosecute the case.

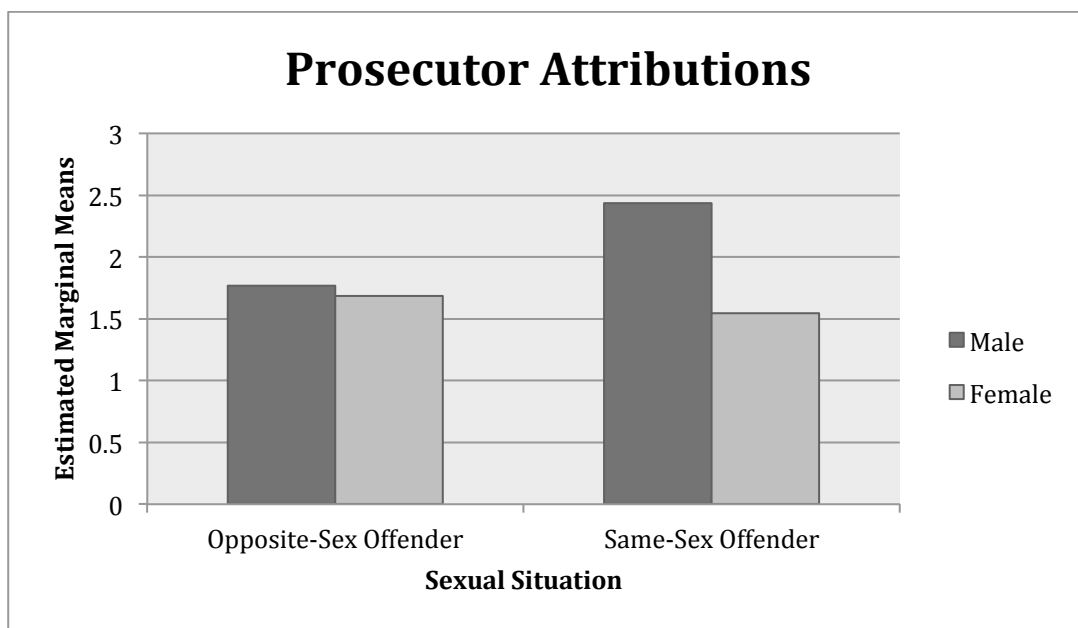
Table 5. Marginal Effects of Sex of “Offender”/ Sex of “Victim” & Decision to Prosecute:

Table 3: Marginal Effects (Sex of “offender”/ Sex of “victim” & Decision to Prosecute)						
	dy/dx	Delta-Method Standard Error	z	P > z 	[95% Confidence Interval]	
Sex of “offender” (Male Dummy)	0.17	0.12	1.42	0.16	-0.07	0.41
Sex of “victim” (Opposite Sex)	0.07	1.00	0.70	0.48	-0.12	0.26

Dummy)						
Number of Observed= 70						

The above results determine that being male increases the likelihood of being prosecuted 17%, while being heterosexual increases the likelihood of being prosecuted by 6%, although these effects are not statistically significant.

Figure 1. Prosecutor Attributions Sex of Offender and Victim:



Offender Gender, $F_{(1, 62)} = 9.51, p = 0.003, \eta_p^2 = 0.13$

Offender Sexual Orientation, $F_{(1, 62)} = 2.77, p = 0.101, \eta_p^2 = 0.04$

Offender Gender x Offender Sexual Orientation, $F_{(1, 62)} = 6.65, p = 0.012, \eta_p^2 = 0.10$

Although there was no effect from our manipulations in the decision to prosecute, there was an effect in how the prosecutor perceived the offender (*Male Opposite-Sex: M=1.77 SD=0.57, Male Same-Sex: M=1.69 SD=0.71, Female Opposite-Sex: M=2.43 SD=0.59, Female Same-Sex M=1.54 SD=0.51*). Figure 1 depicts how prosecutorial attributions of the offender interact with both offender sex and the whether the sex act involved someone of the same or opposite sex. The figure illustrates that the sex of the

offender has a significant impact on the ways prosecutors judge those involved in opposite-sex encounters compared to those who engaged in same-sex activity ($F_{(1, 62)}=6.65 P=0.012$). Specifically, negative attributions were higher against females who engaged in an act of oral sex with an under-age male than those who engaged in oral sex with another female, but the differences were not statistically significant ($F_{(1, 62)}=2.77 P=0.101$). In contrast, negative attributions ran much higher against those who engaged in oral sex with another males than those who engaged in oral sex with an opposite-sex partner ($F_{(1, 62)}=3.62 P=0.003$).

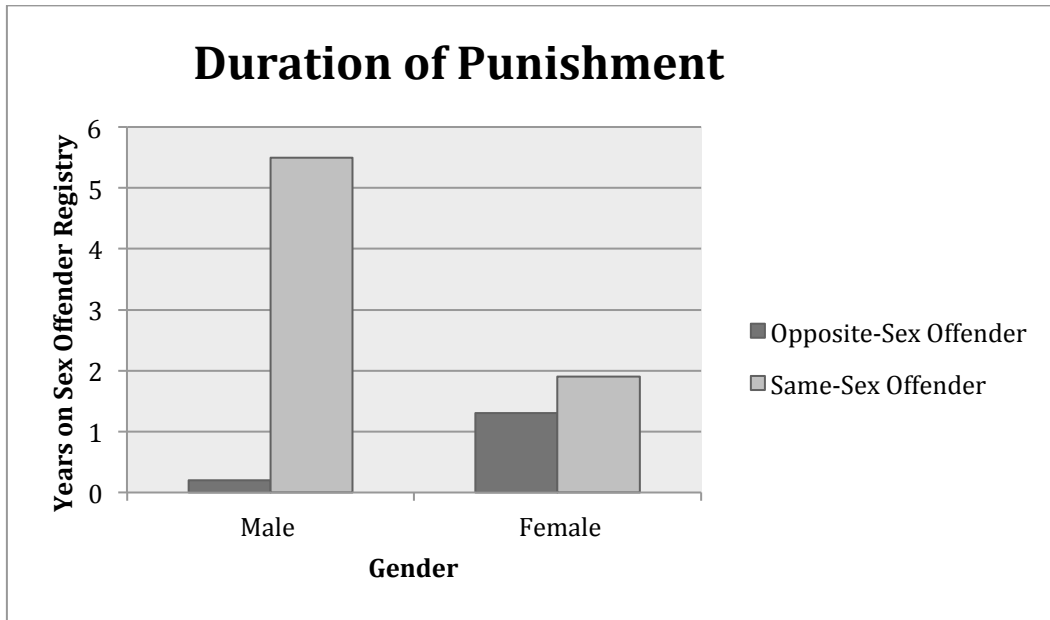
Table 6. Decision to Prosecute & Presence of Romeo & Juliet Statute

Decision to Prosecute & Presence of Romeo & Juliet Statute			
	No, I would not choose to prosecute this case	Yes, I would choose to prosecute this case	Total
Romeo and Juliet Statute Present	32 56.1%	7 53.84%	39 55.71%
No, Romeo & Juliet Statute Not Present	25 43.85%	6 46.15%	31 44.28%
Total	57 81.42%	13 18.57%	70
Number Observed: 60 Valid Percent: 85.7%, $\chi^2=1.013$			

Of the 13 prosecutors (18.5%) who indicated they would prosecute this case, six stated that their state had a Romeo and Juliet law. Over half—specifically 53.84%—of those that would chose not to prosecute cited that their state had, to their knowledge, no statute like it. In contrast, 57 (81.4%) of the respondents indicated they would not prosecute the case. Of those just over half ($n=32$, 56.1%) reported that they had Romeo

and Juliet statutes in their states, while the remaining 25 (43.9%) did not. Put differently, the data suggests that the existence of a Romeo and Juliet statute had no mitigating effect on likelihood to prosecute.

Figure 2. Duration on Sex Offender Registry Period:



Offender Gender Main Effect: $F_{(1, 62)} = 1.52, p = .222, \eta^2 = .02$

Offender Sexual Orientation Main Effect: $F_{(1, 62)} = 7.15, p = .010, \eta^2 = .10$

Offender Gender x Sexual Orientation Interaction: $F_{(1, 62)} = 4.81, p = .032, \eta^2 = .07$

In a univariate analysis of variance between registration outcome of “offender” and “victim” sex, I found that the main effect of the situation’s implied sexual orientation is not significant ($F_{(1, 62)}=1.62, p=0.210$), but the main effect of sex is significant, such that our sample¹³ was more punitive toward female offenders ($m=0.54, SD=0.88$) than male offenders ($m=0.12; SD= 0.45; F_{(1, 62)}=9.30, p=0.003$). The main effects are qualified by a significant interaction effect ($F_{(1,62)}=6.58, p=0.013$) such that our sample prosecutors

¹³ This graph contains punishment duration recommendations for our entire sample. Those who chose not prosecute responded with a punishment duration of zero.

are more likely to seek sex offender registration for males who offend with same-sex partners than their male counterparts who offend with opposite-sex partners ($F_{(1,62)}=6.58$, $p=0.013$). The effect of implied sexual orientation within female offenders, however, reveals the inverse insofar as prosecutors are more like to seek sex offender registration for opposite-sex female offenders than same-sex female offenders, however this effect was not significant ($F(1, 62) = 4.81, p = .032, \eta_p^2 = .07$). From the graph above, we see that same-sex male offenders receive a punishment nearly six times longer than opposite-sex male offenders—this effect is not as disparate when it comes to same-sex and opposite-sex female offenders.

Table 7. Correlation of Decision to Prosecute, Appropriate Outcome, and likelihood of Recidivating Measures

Correlation of Decision to Prosecute, Appropriate Outcome, and likelihood of Recidivating Measures			
	Decision to Prosecute	Appropriate Outcome	Likelihood of Recidivating
Decision to Prosecute	1.00	--	--
Appropriate Outcome	0.6965	1.00	--
Likelihood of Recidivating	0.3280	0.3194	1.00

A correlation between likelihood to prosecute, appropriate outcome for offender, and the probability that the offender will commit another sex offense reveals marginally significant results between likelihood to prosecute and the prosecutors’ belief that the offender will commit another sex offense ($r= 0.529 p=0.47$). The correlation between appropriate outcome for the offender and the prosecutor’s belief that that the offender

will commit another sex offense also showed marginally significant results ($r= 0.258$ $p=0.059$).

Correlations between demographic variables—such as political orientation, participant age, participant, participant sex, the number of years participant has been an attorney, the likelihood to prosecute, and their preferred punishment outcome—showed statistically insignificant results at an alpha of 0.05. The likelihood that prosecutor's likelihood to prosecute are unrelated to demographic variables (all r 's $< .15$, $p > 0.257$). The prosecutors' decisions regarding the appropriate disposition for offenders were also unrelated to the demographic factors of prosecutors (all r 's < 0.13 , $p > 0.30$).

The correlation between our attribution scale and likelihood to prosecute and appropriate outcome variables were also tested. Likelihood to prosecute and attributions scale were significantly correlated ($r=0.421$, $p=0.001$). The correlation between the appropriate outcome for the offender and our attributions scale also showed a relationship between these two variables ($r=0.331$, $p=0.007$). This means that the higher the level of negative attributions, or attitudes, that prosecutors hold about the offender, the higher the likelihood that the case would get prosecuted.

Qualitative Patterns

The overwhelming reason prosecutors offered in support of their decision not to prosecute ($n=13$) the case was that the act was consensual, and therefore, did not constitute prosecution as exemplified by “We try and limit prosecution to cases where there is coercion, force, or some type of fear in balance and that the courts offer little to "consensual offenders" ($n=16$). Another reason for not prosecuting was that the offender and victim were “too close in age” and therefore not a sexually exploitive situation

($n=17$). Other reasons provided for not prosecuting included: (1) that they would pursue a rehabilitative route ($n=4$); and (2) that the criminal punishment that could result from prosecuting this case does not fit the crime described ($n=4$).

A few of the prosecutors who indicated they would not prosecute expressed some reservations about their decisions:

Respondent #26:

“I would not prosecute this case unless I was put under extreme pressure by the parents of the boy”

Respondent #9:

“I would prosecute if the offender had a prior history of inappropriate sexual behavior

Respondent #65:

“Use of alcohol and/or drugs-could change my view.”

Others who chose not to prosecute stated that their state’s laws restricted them from prosecuting ($n=43$) and stated that “there is no case,” that this is “not a criminal issue,” or that “The minor is not a true "sex offender" who needs intervention via the Juvenile Justice System. She is unlikely to re-offend.” Moreover, several prosecutors in the sample who decided to not prosecute did so with the moral reasoning that “it didn’t seem like the right thing to do” ($n=12$).

Although our sample did not have a high percentage of individuals who chose to prosecute—only 13 people (about 18%)—the explanations they offered revealed some interesting patterns. The most frequent response concerned a strict constructionist view of statutory rape law as illustrated in on prosecutor’s response that “according to the letter

of the law this behavior is illegal, and it's my job to enforce the law regardless of my personal feelings" ($n=6$). In other words, because the law provides that people under a certain age cannot provide effective legal consent to engage in oral sex, the fact that such sexual activity occurred constituted a de facto violation of law that prosecutors had a duty to pursue regardless of their personal feelings or opinions.

In regards to the Romeo & Juliet exemptions, some prosecutors who elected to prosecute cited that their laws, while there was a Romeo & Juliet protection in place, this exemption didn't protect for oral sex or that "this scenario is not what, in my opinion, the statute was intended to prevent" ($n=4$). One prosecutor, who chose not to prosecute, noted that "this case is troubling" since Romeo & Juliet protections across states do not all include an oral sex component and another prosecutor who also chose not to prosecute stated that "the spirit of the exemption would apply."

Others explained that they would prosecute, but they would do so for reasons of legal paternalism, seeking rehabilitative or therapeutic sanctions lieu of criminal punishment ($n=4$):

Respondent #1:

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

Respondent #5:

I don't like the phrase "winning the case, do you mean getting a plea and going to jury trial? Winning does not matter with juvenile cases, rehabilitation is what matters.

Respondent #43:

“The minor is not a true "sex offender" who needs intervention via the Juvenile Justice System. She is unlikely to re-offend. If the boy's parents were insistent on pursuing the case I would refer the girl for a diversion program.”

Respondent #51:

“Would prosecute in juvenile court where the goals of the system are much different than in superior court. Services clearly need to be provided to prevent future delinquent behavior or possibly STD, unplanned pregnancies, etc.”

Analysis revealed several trends within both the “would prosecute” and the “would not prosecute” groups. One concerned expressions that their decisions were conditional on the outcome of a “psychological evaluation” ($n=5$) or whether the defendant had a “prior history of delinquency” either of which would indicate either predatory intent or a likelihood of further offenses ($n=23$).

Respondent #22:

“Prior criminal history especially anything violent or sexual in nature. This would give me a better understanding of the defendant and the likelihood of recidivism.”

Respondent #42:

“1) Does Jen have a history of sexually inappropriate behavior toward this boy and/or others? If so, this pattern of conduct may indicate the need for psychological assessment and appropriate services either through a diversion program or prosecution. 2) Is the victim functioning, intellectually and emotionally, at his chronological age? If the boy is significantly delayed, the delay would affect his ability to give ‘consent’

Another trend was whether the person over the age of consent actually knew that the minor had been under the age of consent or, alternatively, if the two parties were or had been in a relationship ($n=9$).

Respondent #33:

“I would want to know if the two had any relationship prior”

Respondent #9:

“Did he know she was underage?”

There were also requests for information regarding the victim’s and defendant’s credibility such as “court willingness/court opinion” of those on trial and “grades” of the victim or defendant ($n=12$):

Respondent #51:

“Courts willingness to entertain a charge of reduction even though facts clearly fit a felony offense.”

Respondent #44:

“Grades and behavioral reports from school.”

Discussion

The focus of this study was to determine whether inconsistencies in prosecution decisions and sentencing recommendations akin to those seen in *Kansas v. Limon* might be attributed to extra-legal biases relating to sexual orientation and sex. Although cases in which a minor and an adult of similar ages engage in a same-sex sexual act constitute only a small percentage of sexual assault cases in total, the effects of prosecution and punishment can affect the juvenile well into adulthood. These results should inform prosecutors to be more cognizant of their bias(es) in legally ambiguous cases, in order to avoid discrimination against this population. Furthermore, the findings should also inspire action in policy to afford more codified protections so that the potential risks faced by these juveniles are further minimized. In addition, more research on how sexual orientation influences processes in the criminal justice system is needed to further illuminate the issue of how “offender” sex and “victim” sex combinations affect the prosecutorial decision making process.

Because there was no statistically significant effect from our data manipulations of “offender” sex and “victim” sex, hypothesis 1 regarding prosecutors’ likelihood to prosecute same-sex offenders more than opposite-sex offenders, hypothesis 2 regarding prosecutors’ likelihood to prosecute males more than females, and hypothesis 3 regarding prosecutors’ likelihood to prosecute same-sex male offenders more than any other sex manipulation must be rejected. I believe that we failed to see an effect from our manipulations for numerous reasons: 1) prosecutor judgment of the offender is not affected by our “offender” sex and “victim” sex manipulations and combinations but does not manifest itself in the decision to prosecute—their personal beliefs and opinions are

kept separate from the prosecutorial process; 2) prosecutors understood the purpose of our study and altered their decisions in order to not appear biased but could not veil these opinions when asked about their perception of the offender; or 3) there were more mitigating circumstances in this case to cancel out any aggravating effect from “offender” sex and “victim” sex. In reference to hypotheses 4 (regarding prosecutors being more likely to punish same sex offenders more severely than opposite-sex offenders) and hypothesis 5 (regarding prosecutors being more likely to punish males more harshly than females), data analyses determined that the sample of prosecutors were not excessively punitive; indeed, the overwhelming majority would not prosecute the case, so these hypotheses must be rejected as well. For respondents who would prosecute, they indicated that they would do so in accordance with sex offender punishments for adult offenders as required through state law. Hypothesis 6 (prosecutors will be more likely to severely punish same-sex male offenders than any other sex manipulation combination) may be accepted since our analyses indicated a statistically significant effect.

Specifically, the results indicate that prosecutors would place males who offended with another male on the sex offender register almost six times as long as males who engaged in oral sex with opposite-sex partners and about three times as long as females who offended with either same- or opposite-sex partners.

In regards to the final research question regarding whether state law provided justification for prosecutorial discretion, it is unclear to what extent the law on deciding to prosecute according to our quantitative and qualitative results. Regression results reveal that the presence of a Romeo & Juliet Statute did not have a statistically significant effect on deciding whether or not prosecute ($z=-1.14$ $p=0.41$), The majority of

prosecutors who came from a state with a Romeo and Juliet provision in state law rarely included this exemption as an explanation for not prosecuting. Instead, mitigating circumstances—such as closeness in age and acts that were not coerced or forced— were predominant over any other reasons (e.g. the presented scenario is criminal). There could be many causes behind this; however, our research supports that most Romeo and Juliet provisions do not always codify for oral sex situations versus sexual intercourse involving penetration. Because oral sex was not always included in a Romeo and Juliet provision in state law, cases in which a minor and an adult of roughly similar age engage in oral sex provides an ambiguous circumstance that invites the exercise of high levels of prosecutorial discretion. The prosecutor may have determined that the exemption did not apply because the wording of the statute may not have encompassed acts of oral sex or, alternatively, may not have applied to sexual activity between members of the same-sex. In addition, states in which there were no Romeo and Juliet type exemptions and the prosecutor chose not to prosecute, indicated the presence of prosecutor nullification in which the prosecutor likely viewed either the law itself or the associated punishment as unjust and, therefore, chose not to enforce it ($n=35$).

To sum up, I found that there is a negative effect for same-sex male offenders in terms of punishment duration and prosecutor attitudes towards these offenders. Respondents indicated similarly negative views against females who offended with members of opposite-sex. Importantly, however, unlike with male defendants who engaged in oral sex with a same-sex partner, the negative view of female defendants in the opposite-sex vignette did not translate into harsh sentencing decisions in terms of recommending longer time periods of the sex offender registry. These findings could be

attributed to our study being limited in response rate, sample size, and power, thus making it likely that a Type II error was committed, or it could be because of the ambiguity of the survey questions. When a prosecutor makes the decision to prosecute, law and depth of evidence bind them more than when they decide whether or not to prosecute, so their personal prejudice or impartiality cannot affect his decision. In other aspects of the decision-making process—such as when they recommend punishment type and duration—prosecutors can be much more influenced by extra-legal factors because their discretion is virtually unrestricted.

Modern prejudice theories posit that social suppression of these undesirable views are kept in check when bias is most apparent, but in situations where there are certain justifications or excuses in which bias can be expressed without being noticed, bias is expressed (Crandall, Eschelman, O'Brien, 2002). This could be an alternate explanation to how prosecutors tended to punish same-sex versus opposite-sex sexual interactions within both male and female sexes. However, when comparing same-sex interactions, males are punished (at least) twice as severely than females. This finding indicates a clear bias and sex effect within same-sex interactions.

Our results showed that attributions concerning female offenders were more negative when the offender had engaged in a heterosexual sex act than when a female offender engaged in oral sex with another female, however, this effect found within the female condition revealed to be not statistically significant. The opposite was true for male offenders. This could be because same-sex female offenders are perceived as “going through a phase” while opposite-sex female offenders’ sexual orientation is “set”; therefore, the latter group may seem more predatory and more likely to offend because

they are seen as fixed in their sexual orientation as speculated by Salerno, Bottoms, Murphy in their 2014 study. The same-sex female offender could be considered more normative in this scenario since the individuals are young and it is interpreted as sexual exploration (Salerno, Bottoms, Murphy, 2014). On the other hand, presumed gay male offenders were judged more negatively than their presumed straight male counterparts. A possible explanation for this could be that, unlike females who engage in same-sex activity who may be viewed as going through a phase, males who engage in same-sex activity are likely to be viewed as being gay—a more permanent sexual orientation than the fluidity ascribed to female sexuality (see Kanazawa, 2016). This could, again, be attributed to normative values and gender expectations associated with sexuality throughout adolescence (Herek, 2002; see also Salerno, Bottoms, Murphy, 2014).

The effect that personal attributions can have in prosecutorial discretion can prove problematic as evidenced by some of the qualitative patterns observed in the participants' short response answers. Several participants wrote that they would prosecute if the family or parents insisted ($n=5$). Parents can be alarmed when they discover their teenager is engaging in sexual activity, and this alarm can be exacerbated if the sexual activity involves same-sex relations (Bullough & Bullough, 1977; Herek & Capitano, 1999). This is problematic because the intent of Romeo and Juliet provisions (and similar age-gap exemptions) are to protect against parents from pressing charges because they are unhappy with the sexual relationship their teenager is engaging in, similar to how the parents of Romeo and Juliet disapproved of their relationship (James, 2009). More severe punishment trends may be seen in male offenders because of the penetrative component in their same-sex sexual activities.

Penetration may elicit more negative attributions towards the offender because it could be interpreted as more forceful or aggressive. When the offender and victim are both female, the sexual act may be seen as less severe because of a lack of penetration, which may elicit less negative attributes. Also, girls are traditionally seen as gatekeepers in sexual activities, so having a female initiating the sexual act may be considered as a less coerced sexual situation. This can also explain why female offenders in these cases are not punished as severely as male offenders, however, this does not explain why male same-sex offenders being punished much longer than male opposite-sex offenders. This could be explained through moral outrage and disgust emotions that could be amplified due to the non-sexually normative act of homosexual intercourse. Since homosexuality has been socially and legally condemned throughout history, anti-gay sentiments could be the cause of this effect. However, this effect did not translate over within the female condition. A possible explanation could be that female homosexual acts are considered to more experimental, inferring a less set path towards homosexuality, and overall revered in popular culture and media as “sexy.” Even though these attitudes are kept separate from the actual decision of whether or not to prosecute, our research found that it does impact of punishment duration.

Policy Implications

Currently 31 states in the United States are recognized as having Romeo and Juliet provisions while 45 states have some form of an age gap provision to protect juveniles from harsh criminal punishments for engaging in age-normative sexual activity (James, 2009; National Juvenile Defender Center, 2015). The exact number of states with protections of this sort is hard to pinpoint because these laws are vastly different from

state to state and are sometimes written ambiguously. Some states have a single age of consent, below which an individual cannot legally provide consent—typically 18 however some states have it set at a younger age—and those above that age can legally provide consent. Other states include age-gap provisions, which allow for sexual activity between a minor and an adult if they are a close in age. These age gap provisions may protect juveniles by reducing adult punishment, reducing punishment as a juvenile, or completely protect by declassifying it as a crime. Furthermore, states may have sodomy laws, thus effectively nullifying consent at any age within the act of sodomy. According to the legal encyclopedia *American Jurisprudence*,

A sodomy statute may incorporate the general statutory definition of ‘adult,’ meaning that the crime is committed on a person under the age of 18, even though 15-year-olds may consent to sexual intercourse, as that ability does not equate with being an ‘adult,’ and sex acts with children are excepted from due process protection. Sodomy laws may also apply only to acts involving minors, as the government has an interest in preventing sexual conduct between minors and in promoting their health by reducing the risk of sexually transmitted diseases (70C AM. JUR. 2d, *Sodomy* § 37, 2011).

These laws are difficult to interpret and fail to extend protection across all sexes, genders, sexual orientations, and sexual activities. As far as policy goes, this study could influence three major changes. First, an increase in adoption of Romeo and Juliet provisions nationwide would protect against the influence of extra-legal factors in these types of cases. Second, re-writing laws to include oral sex (and anal sex) would be more inclusive of LGBTQIA people, thereby promoting equality under law. Third, not only

should the protections include for all types of sexual acts, these exemptions should be worded in a way that is gender/sex-neutral and sexual-orientation neutral in order to prevent further instances like the Matthew Limon case.

Beyond Romeo and Juliet age-gap exemptions, we should look towards making law in general more gender, sex, and sexual orientation neutral. This would include extending this concept to policies such as the Employment Non-Discrimination Act which currently does not extend protections to include homosexual or trans-gender populations (Weinberg, 2009). Lastly, since prosecutors must constantly continue their education and furthering their understanding of issues within the criminal justice system, implementing bias training that highlights subconscious bias manifestation and research findings that exemplify bias within legal decisions so prejudice based decisions are reduced.

Limitations

Our most prominent limitations in this study are the small sample size and the low return rate for surveys mailed to prosecutors. This limitation is partially mitigated by having received a sufficient number of survey responses to fill each of the four manipulations needed to conduct data analyses. Indeed, I cannot be confident in our statistically non-significant findings since the small sample size may mask significant differences, due to the low statistical power associated with the low number of participants represented in each cell condition of the study. Our results need to be replicated not only with a larger number of participants, but also with a more even distribution of participants across each condition in the study. Only a larger, more representative sample would allow generalizations to be made concerning prosecutors

nationwide. Still, this study provides a good first-step by showing the potential issues that can occur when researching this topic.

The measures that were taken to increase the survey response rate (such as shortening the survey from the one used in pilot study) helped to secure more data for analysis, but also limited the depth and variety of data I could collect. In the pilot study, the survey asked a longer battery of questions with numerous retests worded differently in order to ensure the reliability of the measures. Limiting the paper survey to a single page (and back) increase the response rate, but reduced the complexity of the survey, thereby decreased the data available for analysis.

Another limitation of our research design concerns variations in the proportion of prosecutors surveyed from each state. Because there is so much variability in the populations and sizes of each state, it would make sense that some states would have a highly disproportionate number of prosecutors in comparison to other states.

Furthermore, since our method of obtaining mailing addresses relied upon Internet searches, it excluded district attorney offices not properly listed online, thus our surveyed sample did not reach every prosecutor in the nation. Both of these complications threaten validity because more surveys were sent out to certain states than others (i.e. Hawaii $n=4$, Missouri ($n=111$)).

While I found no determinant effect on prosecutorial discretion or punishment within demographic data, it is important to note that the sample consisted of mostly conservative, White males. Concerns about the lack of generalizability from such a sample, however, should be mitigated by the fact that this profile aligns with those of most prosecutors in the United States (see Women Donors Network, 2015).

Future Research

Future research should focus on obtaining a better response rate and larger sample, in order to have more reliable result and avoid making Type II errors. Before doing this, more research is needed on this population in order to better understand how to better reach participants in order to obtain a large enough sample. General response-boosting techniques only go so far with special populations— such as prosecutors— so relying on other prosecutor-related studies that formulated more effective sampling models is a adequate place to start. Those interested in replicating this study should consider contacting membership agencies frequented by prosecutors such as the American Bar Association or contacting law review journals to obtain a bigger sample for study. While this approach may not necessarily improve response rates, it could prove fruitful in providing a study with more power to pick out effects and interactions.

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APPENDIX

A SURVEY INSTRUMENT

Adults found guilty of a sex offense must be listed on a public **sex offender registry**. In various states, this registry includes information such as name, social security number, age, race, gender, birth date, physical description, address, place of employment, details about the offense(s), fingerprints, a photo, a blood sample, and a hair sample. This information is available to the public upon request, sometimes by being posted on the Internet. In some cases, the police directly notify the people who live in the same area as the registered sex offender. Sex offenders are required to register anywhere from a few years to their entire life, depending on the state.

We are interested in your thoughts about applying these registration laws to juveniles who have been adjudicated (found guilty in juvenile court) or convicted as sex offenders.

Please read the following scenario and answer the questions below with this case in mind.

David, a high school junior, attended a party at a friend's house. During the party, a freshman boy performed oral sex on David. The boy's parents found out about the incident and decided that they wanted to press criminal charges. Although both teenagers stated that the act was consensual, because the boy was underage, he could not legally provide consent. This incident occurred in a state that has a "Romeo and Juliet" exemption for contact between minors who are similar in age that would lead to a misdemeanor charge in this case if the act had been sexual intercourse, but the exemption does not mention oral sex.

1. I would choose to prosecute this case (please circle one): YES NO

2. If YES: What would you charge David with?

3. What is the likelihood that you would prosecute this case (Please circle one)?

0% 10% 20% 30% 40% 50% 60% 70% 80% 90% 100%

4. If you DID prosecute this case, what do think is the likelihood of winning the case (Please circle one)?

0% 10% 20% 30% 40% 50% 60% 70% 80% 90% 100%

5. Please provide the reasons why you would or would not prosecute this case:

6. What additional information about this case would be important in deciding whether to prosecute? Why is it important?:

7. If he were convicted, in your opinion, what is the most appropriate outcome for David? CHECK ONE

- David should not be required to register at all with law enforcement in this community
- David should be required to register, but his information should never be posted on the Internet
- David should be required to register, but his information should not be publicly posted on the Internet until he turns 18, at which time his information should be publicly posted on the Internet
- David should be required to register and his information should be publicly posted on the Internet immediately

8. How confident are you about this choice?

0% (not confident at all) 10% 20% 30% 40% 50% 60% 70% 80% 90%
100% (completely confident)

9. How long should David be required to register as a sex offender?

10. In your opinion, what is the probability that David will eventually commit another sex offense?

0% 10% 20% 30% 40% 50% 60% 70% 80% 90% 100%
%

11. Given the case facts you just read, please indicate your agreement or disagreement with the following items. Use the following scale:

	Strongly Disagree	Disagree	Somewhat Disagree	Somewhat Agree	Agree	Strongly Agree
a) I feel a compelling need to punish David	1	2	3	4	5	6
b) I believe David is evil	1	2	3	4	5	6
c) I feel morally outraged by	1	2	3	4	5	6

what David did to his alleged victim						
d) David's actions should be considered a sex offense	1	2	3	4	5	6
e) David's actions legally constitute aggravated child molestation	1	2	3	4	5	6
f) David poses a danger to society	1	2	3	4	5	6
g) David is a bad person	1	2	3	4	5	6
h) David is a perverted person	1	2	3	4	5	6
i) David is a sexually promiscuous person	1	2	3	4	5	6
j) Should the Romeo and Juliet exception's silence be construed as including oral sex?	1	2	3	4	5	6
k) Using your prosecutorial discretion, would you prosecute David to the full extent of the law?	1	2	3	4	5	6

12. Your gender: Male Female **13. Age:** _____

14. What ethnicity are you? White Black Hispanic Asian Other: _____

15. When it comes to politics, how liberal or conservative are you? CIRCLE

Extremely Liberal Slightly Moderate Slightly Conservative Extremely
 Liberal Liberal Liberal Conservative Conservative
 Liberal Liberal Liberal Conservative Conservative

16. What is your job title?

17. Do you specialize in a particular type of law or case? _____

18. How many years have you been a prosecutor?

19. What is the age at which your state grants legal permission for someone to consent to sexual activity with another person who is over the age of consent?

20. Does your state have a so-called “Romeo and Juliet” exception to the usual age of consent rules that exempt teenagers within a certain number of years of each other’s ages from statutory rape (or similar) liability? ___ Yes ___ No

21. If yes, please provide the statutory citation: _____.