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TRANSFORMING TEENAGERS INTO ORAL SEX FELONS: THE PERSISTENCE OF THE CRIME AGAINST NATURE AFTER *LAWRENCE V. TEXAS*

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I. INTRODUCTION

This Article focuses on the persistence of the "crime against nature," a crime which seemed to have been largely buried by the Supreme Court in its 2003 decision in *Lawrence v. Texas*.[1] *Lawrence* struck down "crime against nature" statutes as applied to consenting *adults* in private. But, as several state courts have read their statutes, the "crime" survives for use in other circumstances. The result is that the "crime against nature" can still be used to prosecute teenagers who voluntarily engage in oral or anal sex with each other. That is true, for example, in North Carolina[2] and Georgia[3] and apparently elsewhere as well.

1. 539 U.S. 558 (2003).

2. *E.g.*, *In re* R.L.C., 179 N.C. App. 311, 635 S.E.2d 1 (Ct. App. 2006), *aff'd*, 361 N.C. 287, 643 S.E.2d 920 (2007).

3. *E.g.*, Wilson v. State, 631 S.E.2d 391 (Ga. Ct. App. 2006), *cert. denied*, No. S06C1689, 2006 Ga. LEXIS 1036 (Ga. Oct. 2, 2006).

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In examining the persistence of the "crime against nature" for minors, we highlight two recent cases that illustrate a broader problem. In North Carolina, a teenager was found delinquent based on committing the felony "crime against nature"—oral sex—with his younger girlfriend, even though the acts of oral sex were voluntary and vaginal sex with her was not criminal at all. (In fact, under North Carolina's more recent statutes dealing specifically with minors who have sex with other minors close to them in age, neither vaginal sex, oral sex, nor anal sex was a crime.) In Georgia, a seventeen-year-old teenager was sentenced to ten years in prison and required to register as a sex offender for having voluntary oral sex with a fifteen-year-old girl. In contrast, if the teenager had engaged only in vaginal sex with the girl, his crime would have been a misdemeanor under Georgia law and would not have required sex offender registration or a minimum of ten years in prison. In these cases, the "crime against nature" was used to transform a teenager guilty of no crime (in North Carolina) or a lesser crime (in Georgia) for having sex into an oral sex felon and therefore into a delinquent or a criminal.

Our analysis is important for any jurisdiction that retains a "crime against nature" statute after *Lawrence*. It is directly important for many cases involving minors engaging in voluntary sex with other minors and who would be guilty of no crime if they had engaged only in vaginal intercourse. In North Carolina, for example, such cases would apparently include voluntary oral or anal sex where (1) both of the parties are under eighteen years of age, but above sixteen, the otherwise applicable "age of consent," and where (2) those under sixteen are within three years of each other in age and so immune from criminal prosecution for voluntary vaginal sex. Our discussion is also pertinent to other situations—such as sex in a public place—in which the "crime against nature" is still treated as viable. In such cases, the "crime against nature" is used to transform the crime into a more serious one.

We have three suggestions. First, where reasonable (as it is in North Carolina), state statutes should be construed to avoid the bizarre and unfortunate result of uniquely punishing oral or anal sex engaged in by substantial numbers of sexually active minors. These are minors whose sex acts would otherwise not be criminal. Second, statutes that uniquely punish noncoerced oral or anal sex between minors while leaving vaginal sex unpunished or less severely punished are so irrational that they violate equal protection and the rationality required by due process. These statutes are almost as irrational as one that does not punish minors who have vaginal sex, but does punish them if they use birth control devices. Finally, however the courts respond to this problem, the legislature should make the "crime against nature" a crime only to the same

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extent that vaginal sex under similar circumstances would be a crime.

II. THE "CRIME AGAINST NATURE" REVISITED

A. *The Importance of* Lawrence v. Texas

The 2003 decision in *Lawrence* dealt with a comparatively rare problem—prosecution for a "crime against nature" committed by consenting adults in the privacy of the home. North Carolina's "crime against nature" had long criminalized oral or anal sex regardless of the gender or age of the participants and the location of the act.[4] And that was true in some other states as well.[5]

Before *Lawrence*, eight states had abandoned traditional morality—which had historically applied the "crime against nature" to both same-sex sex and opposite-sex sex—and made the acts criminal only if performed by persons of the same sex. That was so in Arkansas, Kansas, Kentucky, Missouri, Montana, Nevada, Oklahoma, Tennessee, and Texas. But the Nevada legislature had repealed its same-sex only law, and state courts had struck such laws down under their state constitutions in Arkansas, Kentucky, Montana, and Tennessee.[6]

North Carolina and some other states remained committed to the historic tradition of punishing all "crimes against nature."[7] Georgia was one of these, but before *Lawrence*, its state supreme court had also held its law unconstitutional as applied to consenting adults in private.[8]

Most "crime against nature" statutes trace their lineage (appropriately) to the reign of Henry VIII.[9] Where the traditional crime persisted, the prohibition against the "crime against nature" was violated by a very large segment of the adult population. How can this massive epidemic of felonies that escaped prosecution be explained?

First, consensual sexual conduct between adults typically takes

4. State v. Poe, 40 N.C. App. 385, 252 S.E.2d 843 (Ct. App. 1979) (holding consensual heterosexual oral sex in private violates the "crime against nature" statute).

5. *See, e.g.*, State v. Langley, 265 N.W.2d 718, 723 (Iowa 1978) (holding that sodomy can be committed with mutual consent); State v. Schmit, 139 N.W.2d 800, 809 (Minn. 1966) ("It is conceivable that a husband and wife could be convicted of sodomy even though the proof established consent.").

6. *Lawrence*, 539 U.S. at 570–71 (citing 1993 Nev. Stat. 518 (repealing NEV. REV. STAT. § 201.193 (2006)); Jegley v. Picado, 80 S.W.3d 332 (Ark. 2002); Commonwealth v. Wasson, 842 S.W.2d 487 (Ky. 1992); Gryczan v. State, 942 P.2d 112 (Mont. 1997); Campbell v. Sundquist, 926 S.W.2d 250 (Tenn. Ct. App. 1996)).

7. *E.g.*, *Poe*, 252 S.E.2d at 843.

8. Powell v. State, 510 S.E.2d 18 (Ga. 1998).

9. *In re* R.L.C., 179 N.C. App. 311, 313, 635 S.E.2d 1, 2 (Ct. App. 2006).

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place in private, away from the prying eyes of others or the state. So even in the days when enthusiasm for such prosecutions was higher, apprehending offenders was difficult. Second, sexual morality has changed dramatically. By 2003, oral sex had been accepted and engaged in by a substantial portion of adults in the nation.[10] Anal sex also had been practiced by a significant portion of adults.[11] Difficulty of detection plus changing values meant that prosecutions of consenting adults in private were comparatively rare. Third, the law is a lagging indicator, but by 2003, the indicator had moved considerably. At the time of the decision in *Lawrence*, only thirteen states still had viable sodomy laws that reached consenting adults in private. Even in those states, prosecutors might elect not to prosecute. So, few participants in the "crime against nature" were caught by the law—because the law itself had disappeared from much of the nation and because much of the adult public had rejected it, at least for adults in private. But in spite of its decline, the "crime against nature" remained significant.

Even in jurisdictions where the law survived on the books *but* prosecutors elected not to prosecute, the laws made it possible for law enforcement personnel who were hostile to gays (or heterosexual "sodomites" for that matter) to subject those few who were discovered to humiliating treatment. The account of the travails suffered by Michael Hardwick (a gay man who an Atlanta police officer observed and arrested for oral sex with another man in the bedroom of his home)[12] makes this humiliation clear in a way one could never understand simply by reading the decision of the United States Supreme Court in *Bowers v. Hardwick*.[13]

According to Hardwick's account, an Atlanta police officer saw him coming out of a gay bar where he was working and baselessly charged him with having intoxicants in public.[14] From the context and the officer's questions to Hardwick, it was clear to the officer that Hardwick was gay. The warrant for public display of intoxicants had two inconsistent court dates, so Hardwick was

10. *See* WILLIAM D. MOSHER ET AL., U.S. DEP'T OF HEALTH & HUMAN SERVS., SEXUAL BEHAVIOR AND SELECTED HEALTH MEASURES: MEN AND WOMEN 15–44 YEARS OF AGE, UNITED STATES, 2002, at 3 fig.4 (2005) (reporting that 90% of males and 88% of females between 25 and 44 years of age had engaged in oral sex with a member of the opposite sex).

11. *Id.* The figures for anal sex were 40% for males and 35% for females. *Id.* Among males 22 to 24 years of age, 7.4% reported engaging in sex with another male. *Id.* at 5 tbl.B. And 12.4% of females between 15 and 24 years of age reported engaging in sex with another female. *Id.* at 22 tbl.4.

12. PETER IRONS, THE COURAGE OF THEIR CONVICTIONS: SIXTEEN AMERICANS WHO FOUGHT THEIR WAY TO THE SUPREME COURT 392 (Penguin Books 1990) (1988).

13. 478 U.S. 186 (1986).

14. IRONS, *supra* note 12, at 394.

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confused and missed his hearing.[15] Almost immediately, the officer came to his home with an arrest warrant for failure to appear, but Hardwick was out.[16] Hardwick cleared the problem with the court, pled guilty to the charge, paid his fine, and was told that the warrant was now invalid and would be no problem.[17] Subsequently, and perhaps coincidentally, a group of men met Hardwick outside of his apartment, asked if he was Michael Hardwick, and severely beat him.[18]

Three weeks later, the officer who charged Hardwick personally served the invalid warrant for failure to appear for the now resolved charge.[19] He came to Hardwick's home at 8:30 a.m.[20] A guest he awakened told him Hardwick was in the bedroom, and the officer opened the bedroom door and saw Hardwick and his friend engaged in mutual oral sex.[21] The officer told Hardwick he was under arrest, and Hardwick explained that the warrant was no longer valid.[22] The officer explained that he was arresting the men for what he had seen in the bedroom.[23] Hardwick asked him to wait outside the door so they could dress, but the officer responded, "[t]here's no reason for that, because I have already seen you in your most intimate aspect," and he stood and watched the men dress.[24] He drove them to a police station and left them handcuffed to the back floor of the car for about twenty minutes.[25] Then he brought the men in "and made sure everyone in the holding cells and guards and people who were processing [them] knew [Hardwick] was in there for 'cocksucking' and that [he] should be able to get what [he] was looking for."[26] "The guards were having a *real* good time with that."[27] The prosecutor elected not to prosecute Hardwick.

In North Carolina, a decade or so before Michael Hardwick's ordeal, a married couple had filmed themselves having sex. The couple had created a sexual diary on film—a private film intended only for themselves. Later, however, the privacy of their sexual diary ended when the local police raided their home looking for marijuana the couple's son was suspected of possessing. In the course of the search, the police observed the film, seized it, projected it (to find out what it showed), and prosecuted the married couple

15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.* at 395.
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.* at 395–96.
23. *Id.*
24. *Id.* at 396.
25. *Id.*
26. *Id.*
27. *Id.*

for their documented "crimes against nature." Then, when it occurred to the prosecution that it must prove the venue where the crime occurred, the police returned and seized items from the couple's bedroom. Nor was this all: the police screened the films for other officers at the police club.

The prosecutor insisted on pursuing the case, and the state survived a motion to dismiss at a preliminary hearing. The couple's sex life became front page news in the local paper as well as being displayed to a number of police officers not involved in the case. The police seemingly became concerned about being sued as a result of their film festival. The case was eventually dismissed, and the police obtained a release; but much harm was done, and the humiliated couple left the state.[28]

The decision in *Lawrence* recognized other substantial continuing effects of the "crime against nature" statutes, however dormant the crime sometimes appeared to be. As the Court noted in *Lawrence*: "The stigma the Texas criminal statute imposes . . . is not trivial. . . . [I]t remains a criminal offense with all that imports for the dignity of the persons charged, including notation of convictions on their records and on job application forms, and registration as sex offenders under state law."[29] Finally, as the *Lawrence* case demonstrated, as late as 2003, some states continued to prosecute consenting adults for sex acts in the privacy of their homes.[30]

B. The "Crime Against Nature" in the Supreme Court

In *Lawrence*, police observed two adult men engaging in anal sex in private, at home.[31] The Texas statute targeted only same-sex intercourse, and the crime was a misdemeanor. At the time of *Lawrence*, other states, such as North Carolina and Georgia, had statutes that (like their English predecessor) reached both heterosexual and gay sex. In North Carolina and Georgia the crime was a felony, although the states departed from Henry VIII and English law at the time of Blackstone by no longer punishing the crime with death. The decision in *Lawrence* was based on the liberty protected by the Due Process Clause of the Fourteenth Amendment.[32] While the statute in *Lawrence* purported "to do no more than prohibit a particular sexual act," the Court recognized that the "crime against nature" had "more far reaching

28. This account comes from the personal recollection of Michael Curtis and is based on an interview with the married couple shortly after the events and a review at that time of the transcript of the preliminary hearing and other sources.

29. Lawrence v. Texas, 539 U.S. 558, 560 (2003).

30. *Id.* at 558.

31. *Id.* at 562–63.

32. *Id.* at 578.

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consequences."[33] It "touch[ed] upon the most private human conduct, sexual behavior, and in the most private of places, the home."[34] It sought to "control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals."[35] Significantly, the Court understood that more than an isolated sex act was often involved: "When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring."[36]

The Court noted that the case did not involve minors, prostitution, coercion, the right to gay marriage, or relationships where consent might not easily be refused.

> The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. . . . The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.[37]

As the Court noted in *Lawrence*, it previously had upheld the sexual privacy right of married couples to use birth control devices—in effect the right to engage in nonprocreative sex.[38] It had later extended the same right to the unmarried,[39] and subsequently, it struck down a law forbidding distribution of contraceptives to minors under sixteen years of age.[40] The right of privacy relating to sex was not confined to married couples, nor could the state permit only procreative sex and punish nonprocreative sex. Following Justice Stevens' earlier dissent in *Bowers*, the Court held that "individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of 'liberty' protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons."[41]

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33. *Id.* at 567.
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.* at 578.
38. *See* Griswold v. Connecticut, 381 U.S. 479 (1965).
39. *See* Eisenstadt v. Baird, 405 U.S. 438 (1972).
40. *See* Carey v. Population Servs. Int'l, 431 U.S. 678 (1977).
41. Lawrence v. Texas, 539 U.S. 558, 578 (quoting Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

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The Court saw liberty under the Due Process Clause as a concept that evolved as understanding of sexual privacy and sexual orientation had evolved. "The Nation's laws and traditions in the past half century are most relevant here. They show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."[42] As *Lawrence* made clear, this liberty was shared by gay and straight adults alike. As was the case with interracial marriage and with birth control, that a majority had traditionally viewed the practice as immoral was not controlling.[43]

While *Lawrence* was a "liberty" decision under due process, it also had a strong equality theme.[44] The Court cited *Romer v. Evans*, where it had "invalidated an amendment to Colorado's Constitution which named as a solitary class persons who were homosexuals, lesbians, or bisexuals either by 'orientation, conduct, practices or relationships' . . . and deprived them of protection under state antidiscrimination laws."[45] The Court in *Romer* concluded that the Colorado statute violated equal protection because it "was 'born of animosity toward the class of persons affected' and . . . had no rational relation to a legitimate governmental purpose."[46]

Although the Court did not decide *Lawrence* on equal protection grounds, it noted a close connection between the due process and equal protection guarantees as they applied to cases like that of *Lawrence*. "Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests."[47] In short, a decision that protected the sexual liberty of all adults protected the equal liberty of the minority as well.

The Court noted that a decision based solely on equal protection might be seen as an invitation to write a broader statute that covered gay and straight "crimes against nature." Failure to examine the substantive validity of the law, the Court warned, might leave the stigmatic effect of such laws standing. Making "homosexual conduct . . . criminal . . . is an invitation to subject homosexual persons to discrimination both in the public and in the

42. *Id.* at 559.

43. *Id.* at 577–78 (quoting *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting)).

44. For a fuller treatment of the equal protection aspects of the *Lawrence* decision, see Shannon Gilreath, *Of Fruit Flies and Men: Rethinking Immutability in Equal Protection Analysis—With a View Toward a Constitutional Moral Imperative*, 9 J.L. & SOC. CHANGE 1, 32–38 (2006).

45. *Lawrence*, 539 U.S. at 574 (quoting Romer v. Evans, 517 U.S. 620, 624 (1995)).

46. *Id.* (quoting *Romer*, 517 U.S. at 634).

47. *Id.* at 575.

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private spheres."[48] Courts have treated *Lawrence* as affecting both sorts of "crime against nature" statutes—those statutes reaching all who engage in oral or anal sex as well as those that simply target same-sex sex.[49]

Justice O'Connor concurred in the result in *Lawrence*, finding the Texas statute violated the Equal Protection Clause of the Fourteenth Amendment. She wrote: "Texas treats the same conduct differently based solely on the participants. Those harmed by this law are people who have a same-sex sexual orientation . . . ."[50] She noted that the statute "brands all homosexuals as criminals, thereby making it difficult for homosexuals to be treated in the same manner as everyone else."[51] The state could not "single out one identifiable class of citizens for punishment that does not apply to everyone else, with moral disapproval as the only asserted state interest for the law. The Texas sodomy statute subjects homosexuals to 'a lifelong penalty and stigma.'"[52] Justice O'Connor reserved the constitutionality of a neutral "crime against nature" statute for another day. But she was "confident . . . that so long as the Equal Protection Clause requires a sodomy law to apply equally to the private consensual conduct of homosexuals and heterosexuals alike, such a law would not long stand in our democratic society."[53] Experience in North Carolina suggests that Justice O'Connor may have been overly optimistic on this point.[54] When the victims of a general "crime against nature" statute are relatively few and isolated, statutes that would be promptly repealed if actually applied to a majority have a far better chance of survival.

The majority's decision in *Lawrence* provoked a heated dissent by Justice Scalia, joined by Justices Rehnquist and Thomas. When

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48. *Id.*

49. *E.g.*, State v. Whiteley, 172 N.C. App. 772, 780–82, 616 S.E.2d 576, 581–83 (Ct. App. 2005).

50. *Lawrence*, 539 U.S. at 581 (O'Connor, J., concurring).

51. *Id.*

52. *Id.* at 584. O'Connor also noted that:

> [W]hile the penalty imposed on petitioners in this case was relatively minor, the consequences of conviction are not. It appears that petitioners' convictions, if upheld, would disqualify them from or restrict their ability to engage in a variety of professions, including medicine, athletic training, and interior design. *See, e.g.*, Tex. Occ. Code Ann. § 164.051(a)(2)(B) (2003 Pamphlet) (physician); § 451.251(a)(1) (athletic trainer); § 1053.252(2) (interior designer). Indeed, were petitioners to move to one of four States, their convictions would require them to register as sex offenders to local law enforcement. *See, e.g.*, Idaho Code § 18-8304 (Cum. Supp. 2002); La. Stat. Ann. § 15:542 (West Cum. Supp. 2003); Miss. Code Ann. § 45-33-25 (West 2003); S.C. Code Ann. § 23-3-430 (West Cum. Supp. 2002). . . .

Id. at 581.

53. *Id.* at 584–85.

54. State v. Poe, 40 N.C. App. 385, 252 S.E.2d 843 (Ct. App. 1979).

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the majority recognized that same-sex sex could "be but one element in a personal bond that is more enduring,"[55] Justice Scalia accused the Court of "coo[ing]."[56] He suggested that the Court and law profession had "signed on to . . . the agenda promoted by some homosexual activists," an agenda directed at "eliminating the moral opprobrium that has traditionally attached to homosexual conduct."[57]

Justice Scalia seemed to insist that liberty interests protected against state action by heightened judicial scrutiny should be limited to fundamental rights, and that fundamental rights not explicit in the text of the Constitution must be supported by a long history of recognizing the specific right at issue. He noted that there had been "203 prosecutions for consensual, adult homosexual sodomy reported in the West Reporting system and official state reporters" from 1880 to 1995.[58] (This would amount to less than two prosecutions per year.) The historic punishment of homosexual conduct showed that the regulations should be tested only by low level rational basis.

Justice Scalia rejected the constitutional relevance of an "emerging recognition" of a liberty interest in the right of adults to decide "how to conduct their lives in matters pertaining to sex," an awareness the Court found reflected in its decisions and in the national trend toward rejecting sodomy statutes.[59] "[S]uch an 'emerging awareness'" could not "establish a 'fundamental right,'"[60] the liberty interest Justice Scalia suggested was required for significantly heightened scrutiny. A fundamental right had to be "deeply rooted in this Nation's history and tradition[s]."[61] Indeed, he insisted, that was what the Court "ha[d] said 'fundamental right' status requires."[62] Sometimes the Court has said that.[63] Still, even in recent cases, it seems not to limit heightened scrutiny to fundamental liberty interests.[64] For Justice Scalia, the trend in the states of eliminating their "crime against nature" statutes was irrelevant. "Constitutional entitlements do not spring into existence because some States choose to lessen or eliminate criminal sanctions

55. *Lawrence*, 539 U.S. at 567 (majority opinion).
56. *Id.* at 604 (Scalia, J., dissenting).
57. *Id.* at 602.
58. *Id.* at 597.
59. *Id.* at 597–98; *see also id.* at 570–72 (majority opinion).
60. *Id.* at 598 (Scalia, J., dissenting).
61. *Id.*
62. *Id.*
63. But not always. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965) (striking down a statute that punished use of contraceptives by married couples).
64. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992); Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261 (1990).

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on certain behavior."[65]

Justice Scalia also harshly criticized the majority for citing "foreign" law decisions from Europe.[66] It had done so in response to Justice Burger's concurring opinion in *Bowers* (where Justice Burger supplied the crucial fifth vote). There, Justice Burger cited foreign law, including some foreign law from the distant past—homosexuality was "a capital crime under Roman law" and was "subject to state intervention throughout the history of Western civilization."[67] While the Court in *Lawrence* answered Justice Burger's concurring opinion, Justice Scalia focused solely on the majority opinion: "The *Bowers* majority opinion *never* relied on 'values we share with a wider civilization,' . . . but rather rejected the claimed right to sodomy on the ground that such a right was not 'deeply rooted in this Nation's history and tradition . . . .'"[68]

As to Justice O'Connor's equal protection analysis, Justice Scalia responded that the law was facially neutral. Neither heterosexuals nor homosexuals, and neither men nor women could have the prohibited sex acts with persons of the same sex.[69] A simple rational basis was all that was required to support the statute, and that was supplied by the presumed belief that homosexual conduct was immoral.[70] That men could violate the statute only with other men and women with other women was no problem. That was exactly the case with marriage laws.[71]

Justice Scalia also said that the Court's statement that its decision did not involve gay marriage should not be believed.[72] In addition, Justice Scalia devoted a substantial portion of his opinion to defending the Court's earlier decision in *Bowers*, which upheld applying a Georgia statute to consensual oral sex between two men at home.[73] He harshly criticized the Court for overruling it.[74]

The statute Michael Hardwick was charged with violating in *Bowers* had covered all acts of consensual oral or anal sex, regardless of the genders or ages of the participants.[75] A closely divided United States Supreme Court upheld the Georgia "crime

65. *Lawrence*, 539 U.S. at 598 (Scalia, J., dissenting).

66. *Id.*

67. Bowers v. Hardwick, 478 U.S. 186, 196 (1986) (Burger, C.J., concurring).

68. *Lawrence*, 539 U.S. at 598 (Scalia, J., dissenting) (quoting *Bowers*, 478 U.S. at 193–94).

69. *Id.* at 599–600.

70. *Id.* at 601.

71. *Id.* at 600.

72. *Id.* at 604 ("[T]he Court says that the present case 'does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.'. . . Do not believe it." (quoting *id.* at 578 (majority opinion))).

73. *See id.* at 586–98; *see also Bowers*, 478 U.S. at 190–96.

74. *See Lawrence*, 539 U.S. at 586–99 (Scalia, J., dissenting).

75. *Bowers*, 478 U.S. at 187–88 & n.1.

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against nature" statute as applied to adult gay sex.[76] Although the Georgia statute applied to both same and opposite-sex sex acts, the Court limited its decision to "homosexual sodomy."[77] Indeed, as the majority opinion unfolded, "homosexual sodomy" was virtually a hyphenated word.

In a concurring opinion in *Bowers*, Chief Justice Burger cited Blackstone for the proposition that the "crime against nature" was "of 'deeper malignity' than rape."[78] The Chief Justice also noted that a statute against sodomy had "ancient roots" and had been passed under Henry VIII, and he found "homosexual sodomy" condemned by the Bible and other religious traditions.[79]

It is not entirely clear why the Court majority in *Bowers* focused obsessively on "homosexual sodomy," a departure from the wording of the Georgia statute and from the broad historic tradition of sodomy laws and prosecutions. One reason may have been an effort to avoid the force of the Court's decisions finding a right of adults to use birth control, which could reasonably read as at least a right to engage in nonprocreative, heterosexual sex.[80] If one heterosexual nonprocreative sex act was protected, why not another? By focusing on "homosexual sodomy," the Court provided an answer of sorts—limiting the privacy right to a right of birth control or perhaps nonprocreative sex for heterosexual couples.[81] Another less edifying possibility is that a decision limited to allowing the state to prosecute adult gays for their private sex lives had the advantage of targeting a minority and not raising the specter of Court approval of punishing the sex lives of many—if not most—married couples and unmarried heterosexuals.

If either of these concerns was a factor, they did not seem to trouble the judiciary in North Carolina. In 1979, before *Bowers* and *Lawrence*, the North Carolina Court of Appeals had held the state sodomy statute constitutional, as it recently noted, "when applied to fellatio between an adult man and an adult woman, even in private."[82] That was so even if the act was "consensual."[83]

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76. *Id.* at 195–96; *see also id.* at 197 (Burger, C.J., concurring).

77. *Id.* at 190 (majority opinion).

78. *Id.* at 197 (Burger, C.J., concurring) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 215 (Garland Publ'g 1978) (1783)).

79. *Id.* at 196–97 (citing Act of 1533, 25 Hen. 8, ch. 6)

80. *Id.* at 191 (majority opinion).

81. Justice Powell later regretted voting with the *Bowers* majority. "When I had the opportunity to reread the opinions a few months later, I thought the dissent had the better of the arguments." He added: "My vote was the deciding vote . . . ." Anand Agneshwar, *Powell Concedes Error in Key Privacy Ruling*, N.Y. L.J., Oct. 26, 1990, at 1.

82. *In re* R.L.C., 179 N.C. App. 311, 314, 635 S.E.2d 1, 3 (Ct. App. 2006) (citing State v. Poe, 40 N.C. App. 385, 252 S.E.2d 843 (Ct. App. 1979)).

83. *Id.*, 635 S.E.2d at 3.

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At the time the Court decided *Bowers*, twenty-five states still had sodomy statutes that reached at least some consenting adults in private. After *Bowers*, the number of state sodomy statutes reaching consenting adults in private continued to decline. By the time of the decision in *Lawrence*, only thirteen states still had viable statutes reaching consenting adults in private. A number of state courts had held their statutes unconstitutional under state constitutions—declining to apply *Bowers*' reasoning to decisions under their state constitutions.[84]

At any rate, after *Lawrence*, the surviving state sodomy statutes were no longer available to punish adults for private consensual acts of oral or anal sex. But if "crime against nature" laws were dead for the immediate future for consenting adults in private, in a number of states they were alive and well in other respects. One of these respects involved teenagers—minors having sex with other minors. In that connection, we turn again to North Carolina and Georgia as examples of the persistence of laws punishing the "crime against nature." We discuss these cases in some detail because the issues raised in these cases typify issues that remain troublesome in those states that have retained their statutes outlawing the "crime against nature."

III. STATE STATUTES AND DECISIONS IN NORTH CAROLINA AND GEORGIA

A. *North Carolina:* In re R.L.C.

1. *The Statutes*

Persistently, but often very unwisely, minors have sex with other minors. Recognizing this situation, in 1979, North Carolina passed a comprehensive series of statutes dealing with minors and sex.[85] These statutes were further elaborated on in 1995, when the legislature enacted a statute reaching "indecent liberties between children."[86] In cases not involving force or coercion, these statutes carefully determine whether the act is criminal and the degree of the criminal offense based on the ages of the parties involved in sexual conduct. Where force is involved, the act is criminal regardless of the age differential.[87]

The comprehensive minor sex statutes cover vaginal sex, oral

84. *See, e.g.*, Kentucky v. Wasson, 842 S.W.2d 487, 500 (1992) (declining to apply *Bowers* and adopting a more protective approach under the Kentucky Constitution).

85. Act of Jan. 10, 1979, ch. 682, 1979 N.C. Sess. Laws 725 (codified as amended in scattered sections of N.C. GEN. STAT. § 14 (2000)).

86. Act of July 27, 1995, ch. 494, 1995 N.C. Sess. Laws 494 (codified as amended in N.C. GEN. STAT. § 14-202.2 (2000)).

87. *See, e.g.*, N.C. GEN. STAT. § 14-27.5(a)(1) (2000).

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sex, and anal sex, and typically treat vaginal, oral, and anal sex in the same way. The North Carolina law specifically defines "sexual act" to cover oral and anal sex.[88] The North Carolina legislature generally elected not to criminalize these acts between minors under sixteen years of age when coercion was not involved and the minors were within three years of each other in age.[89] The statutes involving sex and minors also do not criminalize voluntary sexual conduct when both parties are over sixteen years of age.

Before it was severely restricted by the North Carolina Supreme Court, the North Carolina statute decriminalizing voluntary sexual acts between minors close to one another in age (including "crimes against nature") was similar to the approach taken by many states. As the Georgia Supreme Court recently noted in a case involving oral sex between a seventeen-year-old teenage boy and a fifteen-year-old girl, "most states either would not punish [the boy's conduct] or would, like Georgia now, punish it as a misdemeanor."[90] Similarly, the Model Penal Code decriminalizes oral or vaginal sex with a person under sixteen years of age who willingly engages in the sex act with a person not more than four years older.[91]

R.L.C. had engaged in two acts of oral sex with his younger girlfriend and numerous acts of vaginal sex. Since R.L.C. and his girlfriend were both under sixteen, the age of consent offered no protection. But because the minors were within three years of each other in age, none of their sex acts were a crime under North Carolina's statutes dealing with minors and sex.

In addition, North Carolina has an ancient statute that punishes the "crime against nature."

> **Crime against nature.**
> If any person shall commit the crime against nature, with mankind or beast, he shall be punished as a Class I felon.[92]

The obvious question is how the "crime against nature" and child sex statutes should fit together.

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88. "'Sexual act' means cunnilingus, fellatio, analingus, or anal intercourse, but does not include vaginal intercourse. Sexual act also means the penetration, however slight, by any object into the genital or anal opening of another person's body: provided, that it shall be an affirmative defense that the penetration was for accepted medical purposes." N.C. GEN. STAT. § 14-27.1(4) (2000). Typically, the various acts refer to vaginal intercourse or a sexual act.

89. *See, e.g.*, N.C. GEN. STAT. §§ 14-27.1, 14-27.4, 14-27.7A, 14-202.2 (2000).

90. Humphrey v. Wilson, 652 S.E.2d 501, 509–10 (Ga. 2007).

91. MODEL PENAL CODE § 213.3(1)(a) (Official Draft and Revised Comments 1980).

92. N.C. GEN. STAT. § 14-177 (2000).

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2. The North Carolina Courts Construe the Statutes

a. *The Court of Appeals.* The majority of the North Carolina Court of Appeals held the "crime against nature" statute was appropriately applied to the two instances of oral sex involving R.L.C. and his girlfriend. It noted the long history of the statute in North Carolina, tracing its lineage to a statute of Henry VIII.[93] By 1837, according to the majority, the statute had taken its current form.[94] Those convicted were "guilty of felony, and shall suffer death without benefit of clergy."[95] In 1868, the death penalty was replaced with a prison term between five and sixty years. Subsequent amendments, the court noted, had affected only the penalty.[96] The court also discussed the evolution of North Carolina's rape statute, including the 1979 amendments, which created degrees of sexual offenses and recognized the age of the parties as an important factor in determining criminality (or not) and the degree of punishment.[97]

According to the majority, its task was to determine legislative intent.[98] The court of appeals addressed legislative intent with refreshing candor. It said that the manifest intent and purpose of the "crime against nature" statute was set out in a 1966 decision of the North Carolina Supreme Court.[99] That purpose was "to punish persons who undertake by unnatural and indecent methods to gratify a perverted and depraved sexual instinct which is an offense against public decency and morality."[100]

The court of appeals decision in *R.L.C.* noted that the legislature did not create any explicit exception from the "crime against nature" statute *within the minors' sex statutes*; those statutes exempted from punishment noncoerced sex acts between minors less than three years apart in age.[101] Nor did the legislature alter the "crime against nature" statute after the 2003 decision in *Lawrence.*[102]

While the court of appeals said that statutes dealing with the same subject matter must be harmonized and construed together, it noted that the "crime against nature" and the statutes dealing with statutory rape and sex offenses "are not only not found within the same Article, but also are not within the same Subchapter . . . .

93. *In re* R.L.C., 179 N.C. App. 311, 313, 635 S.E.2d 1, 2 (Ct. App. 2006); *see also* Act of 1533, 25 Hen. 8, ch. 6.

94. *R.L.C.*, 179 N.C. App. at 313, 635 S.E.2d at 2.

95. *Id.* at 313, 635 S.E.2d at 2 n.1 (citing N.C. Rev. Stat. ch. 34, § 6 (1837)).

96. *Id.* at 313–14, 635 S.E.2d at 2.

97. *Id.* at 315–16, 635 S.E.2d at 3–4.

98. *Id.* at 316, 635 S.E.2d at 4.

99. *Id.* at 314, 635 S.E.2d at 2 (citing State v. Stubbs, 266 N.C. 295, 298, 145 S.E.2d 899, 902 (1966)).

100. *Id.*, 635 S.E.2d at 2 (quoting *Stubbs*, 266 N.C. at 298, 145 S.E.2d at 902).

101. *Id.* at 315 n.3 & 316, 635 S.E.2d at 4 & n.3.

102. *Id.* at 316–17, 635 S.E.2d at 4.

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Therefore, it is improper to construe these statutes together."[103] The statute punishing indecent liberties between children *did* fall within the same article as "crimes against nature," but, the majority noted, "sections 14-177 and 14-202.2 are not sequential."[104]

Finally, the majority embraced an alternative holding: even "had [R.L.C.] and his partner been adults, making the issue of minority immaterial, he would yet have been guilty under section 14-177 [of the 'crime against nature']."[105] That was so, according to the majority, because the sex acts had occurred "in a car parked in a bowling alley parking lot."[106] By this approach, R.L.C. would not be guilty of having sex in public; he would be guilty of the more serious "crime against nature," because the majority assumed the oral sex act also met the requirements for punishable public sex.

Applying a public place analysis in R.L.C.'s case raises serious legal problems.[107] That approach was not followed by any Justice on

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103. *Id.* at 317, 635 S.E.2d at 5.

104. *Id.*, 635 S.E.2d at 5.

105. *Id.*, 635 S.E.2d at 5.

106. *Id.* at 318, 635 S.E.2d at 5.

107. There were several potential problems with the public place approach. *See id.* at 311–18, 635 S.E.2d at 1–5. R.L.C. was not charged with the crime against nature by engaging in oral sex in public with his girlfriend. He was simply charged with having engaged in the crime against nature with her. If the public nature of the conduct was essential to the offense, according to North Carolina case law at the time, it seems that element should have been spelled out in the charge. The allegation was that the child did "commit the abominable and detestable crime against nature with O.P.M. This is a violation of G.S. 14-177." Transcript of Record on Appeal at 11, *In re* R.L.C., 179 N.C. App. 311 (Ct. App. 2006) (No. 02J153). The adjudication order found the child guilty of two of the three counts of crime against nature charged. The finding was that he did "feloniously commit the abominable and detestable crime against nature in violation of GS 14-177 as alleged" in counts 1 and 2. *See id.* No finding was made with reference to whether the act occurred in a public place.

If these facts are essential to making the conduct a felony, it seems that they should be included in the charging document. In a criminal case, a warrant that fails to notify the defendant of the crime charged is fatally defective. *Cf.* State v. Madry, 140 N.C. App. 600, 603, 537 S.E.2d 827, 829 (Ct. App. 2000) (noting that a warrant that fails to notify the defendant of the crime charged is fatally defective and cannot be cured by amendment); *see also* N.C. GEN. STAT. § 15A-924(a) (2005) ("A criminal pleading must contain: . . . (5) A plain and concise factual statement in each count which . . . asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant . . . of the conduct which is the subject of the accusation."). Failure to allege an essential element makes the charge invalid and deprives the court of jurisdiction. State v. Bowen, 139 N.C. App. 18, 26, 533 S.E.2d 248, 253 (Ct. App. 2000). In juvenile proceedings, "notice must be given the juvenile and his parents sufficiently in advance of scheduled court proceedings to afford them reasonable opportunity to prepare, and the notice must set forth the alleged misconduct with particularity." *In re* Jones, 135 N.C. App. 400, 403, 520 S.E.2d 787, 788 (Ct.

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the North Carolina Supreme Court.

b. *The Dissent in the Court of Appeals.* Judge Elmore dissented. His dissent shows that applying well established rules of statutory construction avoids transforming teenagers into oral sex felons. He noted that the North Carolina General Assembly chose not to criminalize voluntary sex acts between minors unless the older minor was at least three years older than the younger.[108] Judge Elmore wrote, "[i]f this Court is to interpret the application of the crime against nature statute according to the intent of the General Assembly, we must consider whether this statute conflicts with the other statutes regulating sexual conduct of minors in Chapter 14."[109] According to Judge Elmore,

> All statutes addressing the same subject matter must be interpreted *in pari materia* and harmonized if possible through a reasonable and fair construction. . . . This rule of interpretation does not require that the two statutory provisions be in the same subchapter or article, only that they 'relat[e] to the same subject matter.'[110]

Judge Elmore pointed out that the subject matter was the same—"sexual conduct involving minors."[111]

Judge Elmore cited other pertinent rules of construction as well:

> Where a literal interpretation of the language of a statute will lead to absurd results, or contravene the manifest purpose of the Legislature, as otherwise expressed, the reason and purpose of the law shall control and the strict letter thereof shall be disregarded. . . . Interpretations that would create a conflict between two or more statutes are to be avoided, and the statutes should be reconciled with each other whenever possible.[112]

Finally, the dissent noted that "when two statutory enactments are in apparent conflict, the more specific statute controls over the more general one."[113]

Judge Elmore agreed with the majority that "conduct involving minors is a legitimate state interest explicitly acknowledged in

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App. 1999).

108. *R.L.C.*, 179 N.C. App. at 321, 635 S.E.2d at 7 (Elmore, J., dissenting).

109. *Id.*, 635 S.E.2d at 7.

110. *Id.* at 319, 635 S.E.2d at 6 (citing Faulkner v. New Bern-Craven County Bd. of Educ., 311 N.C. App. 42, 58, 316 S.E.2d 281, 291 (Ct. App. 1984)) (internal citation omitted).

111. *Id.* at 319 n.5, 635 S.E.2d at 6, n.5.

112. *Id.* at 319, 635 S.E.2d at 6 (citing Velez v. Dick Keffer Pontiac-GMC Truck, Inc., 144 N.C. App. 589, 593, 551 S.E.2d 873, 876 (Ct. App. 2001)).

113. *Id.*, 635 S.E.2d at 6 (citing Furr v. Noland, 103 N.C. App. 279, 281, 404 S.E.2d 885, 886 (Ct. App. 1991)).

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Lawrence."[114] However, he continued, "we disagree with the State that all conduct between minors *may be regulated* by the crime against nature statute, without regard to the circumstances."[115] According to the dissent, after *Lawrence*, the state could punish sex acts between minors in those circumstances provided for by the comprehensive state statutes dealing with sex involving minors. Judge Elmore continued:

> But our General Assembly has dictated that there is no *legitimate state interest* in the regulation of minors less than three years apart in age, absent the use of force. Where, as here, the two minors are less than three years apart in age and there is no evidence of force, the General Assembly did not intend that the conduct be criminalized.[116]

Judge Elmore's references to what "may be regulated" and to "legitimate state interest" clearly referred to the constitutional challenge. Absent constitutional restraints, the legislature may regulate.

c. *The North Carolina Supreme Court Majority: Statutory Construction.* The North Carolina Supreme Court affirmed in a fractured opinion. A plurality of three justices—Justices Brady, Newby, and Parker—held that the "crime against nature" statute was unaffected by the later statutes dealing with sex acts between minors close to each other in age. The plurality said that the purpose of construing statutes together with others "is to harmonize statutes of like subject matter and, if at all possible, give effect to each."[117] The plurality continued, "the statutes that contain age differentials did not constrain R.L.C.'s sexual activity in this instance. However, the crime against nature statute did. Accordingly, we hold R.L.C.'s actions violated the crime against nature statute, which does not contain any age differential element."[118]

Any other decision, the court noted, would "give effect to statutes containing age differential requirements while disregarding a statute that does not, in essence rendering the crime against nature statute useless and redundant."[119] Of course, at the time they were passed, the statutes dealing with minors having sex with other minors would not have rendered the "crime against nature"

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114. *Id.* at 322, 635 S.E.2d at 8.

115. *Id.*, 635 S.E.2d at 8 (emphasis added). The plural pronoun "we" may suggest that Judge Elmore originally wrote for a majority.

116. *Id.*, 635 S.E.2d at 8 (emphasis added).

117. *In re* R.L.C., 361 N.C. 287, 294, 643 S.E.2d 920, 924 (2007).

118. *Id.* at 294–95, 643 S.E.2d at 924.

119. *Id.* at 294, 643 S.E.2d at 924.

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statute useless. It could still have been applied to consenting adults, whether in public or private. It would simply have provided a more forgiving rule for transgressions by children.

The plurality addressed R.L.C.'s constitutional claims. We will address this portion of the plurality opinion below in Part C.

Justices Martin and Edmunds concurred on statutory construction grounds. These justices said that because the meaning of the "crime against nature" statute was plain on its face, any statutory construction, including harmonizing the statute with another, was not proper. This was so because "[w]here the language of a statute is clear and unambiguous, there is no room for judicial construction . . . ."[120] Limitations not within the text of the plain and unambiguous statute could not be imposed on it. This approach was said to be dictated by the intent of the legislature.[121]

By this "no construction necessary" rule embraced by the two concurring justices, meaning apparently had to be discerned by focusing exclusively on the "crime against nature" statute, while studiously disregarding a contradictory provision in a later statute that specifically dealt with minors having sex with other minors. This version of the intent of the legislature had to be carried out "irrespective of any opinion we may have as to its wisdom or its injustice."[122] Because the "crime against nature" statute "unambiguously" applied to "any person," the court was required to apply it to R.L.C.[123]

The concurring opinion dealt with the statutes involving minors who have vaginal, oral, or anal sex with each other in a simple and economical way. These statutes, which exempted R.L.C. from punishment for oral sex with a minor close to him in age, were simply ignored.

Of course, the North Carolina courts had already construed the "crime against nature" statute in ways that violated its plain meaning. In response to the *Lawrence* decision, the appellate court had created a new "crime against nature" statute to deal with the contradiction between the statute and the constitutional rule. The crime was no longer the "crime against nature" by anyone, in any place. The new judicially crafted "crime against nature" had new essential elements: that it occur in public or involve minors or sex-for-hire.[124]

Courts considering crimes charged after *Lawrence* under "crime against nature" statutes might simply have declared the "crime

120. *Id.* at 296, 643 S.E.2d at 925 (Martin, J., concurring) (quoting *In re* Estate of Lunsford, 359 N.C. 382, 391–92, 610 S.E.2d 366, 372 (2005)).

121. *Id.* at 297, 643 S.E.2d at 925–26.

122. *Id.*, 643 S.E.2d at 926.

123. *Id.*, 643 S.E.2d at 926.

124. For problems with the public place approach in R.L.C.'s case, see *supra* note 107.

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against nature" statute unconstitutional on its face since it could no longer be applied to most of those who would have been guilty under it.[125] That would have left the legislature with the task of deciding whether the crime should be retained and in what circumstances. Instead, the North Carolina Court of Appeals, like others,[126] had given the statute a limiting construction, complying with the inescapable holding of *Lawrence* but leaving the statute otherwise intact.[127]

d. *The North Carolina Supreme Court Dissent.* In the supreme court, Justices Timmons-Goodson and Hudson dissented on statutory interpretation grounds:

> The application of the crime against nature statute to the conduct of R.L.C. and O.P.M. clearly conflicts with the intent underlying the more specific statutes governing consensual sexual conduct between minors. Construing the statutes *in pari materia* so that the age differences established in the statutes governing consensual sexual conduct between minors also apply to the crime against nature statute results in a fair and reasonable outcome that is in line with the intent of the North Carolina General Assembly.[128]

B. *Georgia:* State v. Wilson

1. *Facts and Statutes*

Genarlow Wilson, a black teenager seventeen years of age, had attended a raucous and unsupervised New Year's Eve party in motel rooms rented by a group of teenagers.[129] Wilson and others had sex with an intoxicated seventeen-year-old girl, and he was charged with rape.[130] He was acquitted of that charge by the jury.[131] At the same party, Wilson had oral sex with a fifteen-year-old girl.[132] In

125. This approach was urged on the North Carolina Supreme Court in the *R.L.C.* case by an amicus brief filed on behalf of Professor Erwin Chemerinsky. *See* Amicus Curiae Brief (Professor Erwin Chemerinsky), *In re* R.L.C., 361 N.C. 287, 643 S.E.2d 920 (2007) (No. 531A06), 2006 WL 3385261.

126. *E.g.*, Singson v. Virginia, 621 S.E.2d 682, 684–85 (Va. Ct. App. 2005) (discussing solicitation of the "crime against nature" to be performed in a public restroom).

127. *E.g.*, State v. Pope, 168 N.C. App. 592, 608 S.E.2d 114, 115 (Ct. App. 2005) (discussing solicitation of oral sex for hire).

128. *R.L.C.*, 361 N.C. at 299, 643 S.E.2d at 927 (Timmons-Goodson, J., dissenting).

129. Wilson v. State, 631 S.E.2d 391, 392 (Ga. Ct. App. 2006).

130. *Id.*

131. *Id.*

132. *Id.*

that case, he was charged with aggravated child molestation.[133] Both events were recorded on video tape, which was shown to the jury.[134] Although the jury acquitted Wilson of rape and the oral sex was voluntary, it convicted him of aggravated child molestation.[135] The Georgia Court of Appeals described the Georgia statutes in effect at the time and how they were applied to Genarlow Wilson:

> Under OCGA § 16-6-4(a), "[a] person commits the offense of child molestation when he or she does any immoral or indecent act to or in the presence of or with any child under the age of 16 years with the intent to arouse or satisfy the sexual desires of either the child or the person." OCGA § 16-6-4(c) provides that "[a] person commits the offense of aggravated child molestation when such person commits an offense of child molestation which act physically injures the child or involves an act of sodomy." OCGA § 16-6-4(d)(1) states that a person convicted of aggravated child molestation "shall be punished by imprisonment for not less than ten nor more than 30 years." OCGA § 16-6-4(d)(1) additionally provides that any person convicted of aggravated child molestation shall also "be subject to the sentencing and punishment provisions of Code Sections 17-10-6.1 and 17-10-7." Under OCGA § 17-10-6.1, aggravated child molestation is a "serious violent felony" carrying a mandatory minimum sentence of ten years without possibility of parole.
>
> Thus, if a seventeen-year-old male who engages in an act of sodomy with a female under the age of sixteen years is convicted of aggravated child molestation, he is subject to a mandatory sentence of ten years imprisonment without possibility of parole. If, however, that same teenage male engages in an act of sexual intercourse with the same female child and is convicted of statutory rape, he is guilty of only a misdemeanor. This is because the crime of statutory rape, though otherwise a felony, is classified as a misdemeanor under OCGA § 16-6-3(b) if "'the victim is 14 or 15 years of age and the person so convicted is no more than three years older than the victim.'"[136]

133. *Id.*
134. *Id.* at 392, 394.
135. *Id.* at 392.
136. *Id.* at 392–93. GA. CODE ANN. § 16-6-3 (2007) provided:
§ 16-6-3. Statutory rape.
(a) A person commits the offense of statutory rape when he or she engages in sexual intercourse with any person under the age of 16 years and not his or her spouse, provided that no conviction shall be had for this offense on the unsupported testimony of the victim.
(b) Except as provided in subsection (c) of this Code section, a person convicted of the offense of statutory rape shall be punished by imprisonment for not less than one nor more than 20 years; provided,

On appeal, Wilson claimed that the distinction between vaginal sex and oral sex in the facts of his case violated equal protection.[137] However, the Georgia Supreme Court determined the issue was waived because it was first raised by Wilson's counsel on a motion for a new trial (which also asserted that his original trial counsel was ineffective for not having raised the issue earlier).[138] While the court of appeals was skeptical of the supreme court's analysis on that point, it considered itself bound by it.[139] In any case, it held that precedent rejecting such an equal protection challenge under the state constitution (decided before *Lawrence* and followed afterwards) was controlling.[140]

While Genarlow Wilson's appeal was pending, the Georgia legislature enacted a comprehensive revision of a number of criminal statutes. One was Ga. Code Ann. § 16-6-2, the statute that Wilson was convicted of violating. In cases like that of Genarlow Wilson (noncoerced oral sex between persons eighteen years or younger and persons between thirteen and sixteen years of age where the parties were within four years of each other in age) the effect of the revision was to reduce the crime to a misdemeanor and avoid the mandatory prison sentence. However, the statute provided:

> (c) The provisions of this Act shall not affect or abate the status as a crime of any such act or omission which occurred prior to the effective date of the Act repealing, repealing and reenacting, or amending such law, nor shall the prosecution of such crime be abated as a result of such repeal, repeal and re-enactment, or amendment.[141]

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however, that if the person so convicted is 21 years of age or older, such person shall be punished by imprisonment for not less than ten nor more than 20 years. Any person convicted under this subsection of the offense of statutory rape shall, in addition, be subject to the sentencing and punishment provisions of Code Section 17-10-6.2.

(c) If the victim is at least 14 but less than 16 years of age and the person convicted of statutory rape is 18 years of age or younger and is no more than four years older than the victim, such person shall be guilty of a misdemeanor.

137. *Wilson*, 631 S.E.2d at 393.

138. *Id.*

139. *Id.*

140. *Id.* On June 11, 2007, a state judge in Atlanta granted a writ of habeas corpus and found the sentence cruel and unusual. *Last Minute Appeal in Teen Sex Case Sparks Outrage*, CNN.COM, June 12, 2007, http://www.cnn.com/2007/US/06/11/teen.sex.case/. The state appealed. *Id.*

141. GA. CODE ANN. § 16-6-2 (2007). The statute was amended as follows in July 2006 while Wilson's case was pending on appeal:

(a)(1) A person commits the offense of sodomy when he or she performs or submits to any sexual act involving the sex organs of one

The Georgia Supreme Court refused to review the decision of the court of appeals,[142] and the teenager began serving his ten-year prison sentence.[143]

2. The Georgia Court's Statutory Analysis

Wilson argued that, taken as a whole, the Georgia legislature's acts involving minors and sex "create doubt as to whether the legislature intended any [noncoerced] sexual activity between teenagers aged 14 to 17 to be treated as a felony, so that the rule of lenity requires imposition of misdemeanor punishment in this case."[144] The Georgia Supreme Court recognizes the rule of lenity, but the Georgia Court of Appeals found the rule inapplicable. "The rule of lenity entitles the accused to the lesser of two penalties where the *same* conduct would support either a felony or misdemeanor conviction."[145] "Wilson was convicted of only one offense, aggravated child molestation, and it was not based on the same conduct that would have supported a conviction for statutory rape."[146]

After losing his appeals, Wilson filed a writ of habeas corpus claiming that his punishment was cruel and unusual, especially in light of the subsequent Georgia legislation. On October 26, 2007, the Georgia Supreme Court held that the punishment imposed on

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person and the mouth or anus of another.

(2) A person commits the offense of aggravated sodomy when he or she commits sodomy with force and against the will of the other person or when he or she commits sodomy with a person who is less than ten years of age. The fact that the person allegedly sodomized is the spouse of a defendant shall not be a defense to a charge of aggravated sodomy. . . .

(b)(1) Except as provided in subsection (d) of this Code section, a person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years and shall be subject to the sentencing and punishment provisions of Code Section 17-10-6.2.

. . . Any person convicted under this Code section of the offense of aggravated sodomy shall, in addition, be subject to the sentencing and punishment provisions of Code Sections 17-10-6.1 and 17-10-7. . . .

(d) If the victim is at least 13 but less than 16 years of age and the person convicted of sodomy is 18 years of age or younger and is no more than four years older than the victim, such person shall be guilty of a misdemeanor and shall not be subject to the sentencing and punishment provisions of Code Section 17-10-6.2. . . .

GA. CODE ANN. § 16-6-2.

142. *Wilson*, 631 S.E.2d at 391.

143. For a journalistic discussion of the events, see Chandra R. Thomas, *Why Is Genarlow Wilson in Prison?*, ATLANTA MAG., Jan. 2006, http://www.atlantamagazine.com/article.aspx?id=6150.

144. *Wilson*, 631 S.E.2d at 393 (footnote omitted).

145. *Id.* at 393–94 (quoting Quaweay v. State, 618 S.E.2d 707, 709 (Ga. Ct. App. 2005).

146. *Id.* at 394.

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the boy was cruel and unusual in violation of both the Georgia and United States Constitutions.[147] It found his punishment was grossly out of proportion to the severity of the crime; the concept of cruel or unusual punishment was to be measured by the "evolving standards of decency that mark the progress of a maturing society."[148] The court concluded that "the amendments to § 16-6-4 and § 42-1-12 reflect a decision by the people of this State that the severe felony punishment and sex offender registration imposed on Wilson make no measurable contribution to acceptable goals of punishment."[149]

The court said that the legislature's great reduction in punishment for conduct such as Wilson's

> appears to be a recognition by our General Assembly that teenagers are engaging in oral sex in large numbers; that teenagers should not be classified among the worst offenders because they do not have the maturity to appreciate the consequences of irresponsible sexual conduct and are readily subject to peer pressure; and that teenage sexual conduct does not usually involve violence and represents a significantly more benign situation than that of adults preying on children for sex. Similarly the Model Penal Code adopted a provision de-criminalizing oral or vaginal sex with a person willingly engaged in the acts with another person who is not more than four years older.[150]

At this point, the teenager had been in prison for two years.

IV. THE ROAD NOT TAKEN: A BETTER APPROACH TO STATUTORY CONSTRUCTION

There are two routes the courts might have followed that would have avoided the unfortunate results in the North Carolina and Georgia cases. One would involve statutory construction. The other would treat the legislatures as having intended the result and to subject the statutes to searching constitutional scrutiny.

Clear and consistently followed rules of statutory construction are elusive. The "rules" are more like factors, or vectors leading to a resultant force. The more factors that point in a given direction and the stronger the factors, the stronger the argument for that construction. The sound public policies or purposes the judge sees as important in a particular case can be factors of considerable weight, particularly when legislation is ambiguous. While the discussion of statutory construction below involves construction of North Carolina and Georgia statutes, the issues in these cases

147. Humphrey v. Wilson, 652 S.E.2d 501, 511 (Ga. 2007).
148. *Id.* at 505.
149. *Id.* at 508.
150. *Id.* at 511.

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illuminate similar problems in other states that retain their "crime against nature" statutes.

A. *Statutory Construction Revisited: North Carolina*

Several reasonable and reciprocally reinforcing approaches to statutory construction are implicated by the facts of the *R.L.C.* case. First, when several statutes deal with the same subject, they are to be read together to produce a reasonable result.[151] Here the application is simple. The older general statute is contradicted by the later specific statute—as to minors close in age to each other having sex. Since the two statutes conflict, the more recent and specific should control.[152]

Both the more recent statutes dealing with sex acts by minors and the older crime against nature statute cover oral sex. The "plain meaning" of each is clear. The later statute deals specifically with minors. It exempts from punishment voluntary sex acts—including vaginal, oral, and anal sex—between minors under sixteen years of age who are also within three years of each other in age. (It also does not punish minors when both are over sixteen years of age.) When a reader looks at these statutes and the "crime against nature" statute, the contradictions between them are clear. The exceptions from criminal liability in the case of oral sex (and anal and vaginal sex) that appear in the statutes involving minors close in age make no sense if oral sex is to remain criminal.

The earlier, ancient "crime against nature" statute says, in effect, that oral sex is a crime for anyone, any place. The later statute says, in effect, that oral sex is not a crime if the act is not coerced and the minors are within three years of each other in age. Oral sex for these minors cannot be both criminal and noncriminal at the same time. The obvious way to reconcile the contradiction is to treat the statute that specifically involves sex between minors as limiting the "crime against nature" statute to that extent. By this reading, the legislature's decriminalization of oral sex between minors of about the same age can be effectuated. By the other reading, the earlier general statute nullifies the later specific one.

A plain meaning approach coupled with a determination to look only at one of two conflicting statutes (the older statute) and to avoid looking at the others (the more recent statutes) does not solve the problem. An approach that insists that one look only at the plain meaning of one of the statutes puts blinders on the judge. The outcome depends on which plain meaning one looks at first. If a judge chose to look first at the plain meaning of the minors sex

151. *E.g.*, Faulkner v. New Bern-Craven County Bd. of Educ., 311 N.C. 42, 58, 316 S.E.2d 281, 291 (1984).

152. We are indebted to Professor Miles Foy for his suggestion that the analysis is clearer if it begins by recognizing that this is a case of stark contradiction.

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statutes, then the rule would bar looking at the "crime against nature" statute. Where, as here, two statutes contradict each other, one needs to look at both. The idea that the earlier general command issued by the legislature must control over the later specific one is contrary to democratic principles.

The concurring justices apparently focused exclusively on the plain meaning of the "crime against nature" statute because that was the crime with which R.L.C. had been charged. He was not (and could not have been) charged under the statutes dealing with minors having sex with each other. By focusing only on the "plain meaning" of the charged "crime against nature" statute, the concurring justices allowed a litigant (the prosecutor) to select the statute they would look at and the ones they would ignore. No litigant, civil or criminal, should have the power to limit a court's field of vision in that way.

Second, where possible, the statutes should be construed to produce a reasonable result. The idea of an earlier general statute nullifying the public policy of a later specific one directed at the very problem before the court is unreasonable. In the case of conflict, more recent statutes that deal more specifically with the subject should limit earlier more general statutes.[153] Where two statutes are irreconcilable, the later should control.[154]

Third, the legislature should not be presumed to have intended arbitrary and irrational distinctions if such a construction can be avoided. The distinction between noncoercive oral sex between minors close in age (treated as a felony) and vaginal sex in the same situation (not a crime) is arbitrary and irrational.

In addition to these reasons, there are others that militate against the approach taken by the majorities in the North Carolina appellate courts. First, in cases of serious doubt, the rule of strictly construing criminal statutes in favor of the defendant militates in favor of a construction that avoids unnecessarily making lots of young people into delinquents or criminals. Obviously, construing the "crime against nature" statute to make a felony of *the very same conduct* that is innocent under the statutes dealing with sex and minors is the harshest possible interpretation. In doubtful cases where the reach of the statute is unclear, a criminal statute should be strictly construed. That had long been the rule both in England before the Revolution[155] and in this country. A strict construction of the "crime against nature" statute would limit it in light of the comprehensive statutory scheme for minors and sex.

The rule of lenity is a useful analogy. North Carolina and other

153. *Cf.* State v. Greer, 308 N.C. 515, 518, 302 S.E.2d 774, 777 (1983).

154. *Id.*, 302 S.E.2d at 777.

155. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *88 (Garland Publ'g 1978) (1765).

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states apply the rule where the court finds the statute ambiguous. It seems especially likely to be applied when supported by other principles of statutory construction.[156] As the North Carolina Court of Appeals has noted, when the court finds "ambiguity in a criminal statute, the rule of lenity requires us to interpret the statute in favor of defendant."[157]

In R.L.C.'s case, the criminality of oral sex between minors of about the same age is not clear. Indeed, the better interpretation points in the direction of noncriminality.

Since the matter is at least ambiguous, the principle of lenity should apply, although we consider two statutes instead of one. Lenity cases typically involve ambiguity in the very same statute. One might, and the concurring justices did, argue that the rule is inapplicable because the "crime against nature" statute is not (by

156. *See, e.g.*, State v. Hinton, 361 N.C. 207, 211, 639 S.E.2d 437, 440 (2007) ("[U]se of the word 'means,' which the State asserts allows the jury to determine whether hands and feet were used as deadly weapons [is] ambiguous. In construing ambiguous criminal statutes, we apply the rule of lenity, which requires us to strictly construe the statute."); State v. Beale, 324 N.C. 87, 92–93, 376 S.E.2d 1, 4 (1989) (applying the rule of lenity to a felony murder charge of killing a viable fetus in light of abortion and related offenses); State v. Smith, 323 N.C. 439, 443–44, 373 S.E.2d 435, 437–38 (1988) (explaining that when the legislature fails to establish the allowable unit of prosecution under a statute, the courts must resolve the ambiguity in favor of lenity and, thus, the sale of one obscene magazine and one film in a single transaction, and two magazines and one film in a second transaction constituted two, not four, violations of the obscenity statute); State v. Hanton, 175 N.C. App. 250, 259, 623 S.E.2d 600, 606 (Ct. App. 2006) ("[N.C. GEN .STAT. § 15A-1340.14(e)] does not instruct the trial court how to determine [for punishment purposes] which North Carolina offense is most substantially similar to the out-of-state offense when the out-of-state offense has elements that are similar to multiple North Carolina offenses. In light of such an ambiguity in a criminal statute, the rule of lenity requires us to interpret the statute in favor of defendant."). *But see* State v. Cates, 154 N.C. App. 737, 739–40, 573 S.E.2d 208, 209–10 (Ct. App. 2002) (holding that a habitual felon statute was not ambiguous for failure to specify which felony offenses the prosecutor could select to support indictment, and thus, prosecutor's selection of felonies with low sentencing points to support habitual felony charge, which left higher-point felonies to determine prior record level, for purposes of sentencing, did not violate the rule of lenity.)

157. *Hanton*, 175 N.C. App. at 259, 623 S.E.2d at 606 (citing State v. Boykin, 78 N.C. App. 572, 577, 337 S.E.2d 678, 681 (Ct. App. 1985) ("[T]he 'rule of lenity' forbids a court to interpret a statute so as to increase the penalty that it places on an individual when the Legislature has not clearly stated such an intention."). The rule is sometimes stated strongly by the United States Supreme Court. Scheidler v. Nat'l Org. for Women, Inc., 537 U.S. 393, 409 (2003) ("[W]hen there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language." (quoting McNally v. United States, 483 U.S. 350, 359–60 (1987))). The federal courts are now hesitant to apply the rule strictly. *See* United States v. Batchelder, 442 U.S. 114, 124 (1979) (upholding charging and sentencing a defendant under the harsher of two statutes which prohibited exactly the same conduct).

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itself) ambiguous, but instead is plain. Still, ambiguity exists because the very same sex act by persons of the same age performed under the same circumstances is not criminal under one statute but is criminal under another. The Georgia state court has applied the rule of lenity where two statutes with different punishments cover the same act.[158]

Today, by contrast, federal courts seem not to apply the lenity rule in situations where two different punishments are provided, arguing (dubiously) that the legislature has simply given the prosecutor discretion to choose between two punishments for the same act.[159] That rationale does not work when the choice is between prosecuting and not prosecuting. The prosecutor *always* has the choice not to prosecute and would not need a detailed statute making the conduct in question innocent to have that option.

Whatever the rule should be when the difference is merely the degree of criminality, the rule should be strictly applied when it is extremely doubtful that the legislature *intended the party's act to be criminal at all. Cato's Letters* was probably the most widely read work on liberty in America before, during, and shortly after the Revolution. As Cato noted: "It is a Maxim of Politicks in despotick Government, That Twenty innocent Persons ought to be punished, rather than One guilty Man escape; but the Reverse of this is true in free States . . . ."[160] Cato applied this maxim to the proper interpretation of a rule of substantive law dealing with libel of public officials.

The rule requiring proof beyond a reasonable doubt is constitutionally required by due process.[161] The policy behind the rule is that in case of doubt, it is better to resolve the doubt in favor of freeing the innocent, even though some guilty people will escape punishment.

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158. Dixon v. State, 596 S.E.2d 147, 150 (Ga. 2004) ("[T]he rule of lenity requires that Dixon only be sentenced for the misdemeanor. As this Court has explained, 'where any uncertainty develops as to which penal clause is applicable, the accused is entitled to have the lesser of two penalties administered.'").

159. *Batchelder*, 442 U.S. at 125.

160. John Trenchard & Thomas Gordon, *Letter 101*, *in* 3 CATO'S LETTERS (6th ed. 1755), *reprinted in* JOHN TRENCHARD & THOMAS GORDON, CATO'S LETTERS 300, 303–04 (Leonard W. Levy ed., Da Capo Press 1971) (1755); *see also* MICHAEL KENT CURTIS, FREE SPEECH, "THE PEOPLE'S DARLING PRIVILEGE": STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY 39 (2000). Cato applied the maxim to the question of what the substantive law of libel should be, not to proof beyond a reasonable doubt. *See* TRENCHARD & GORDON, *supra*, at 300.

161. *In re* Winship, 397 U.S. 358, 364 (1970) ("[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

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> The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. Accordingly, a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt.[162]

The rule of reasonable doubt cannot further the objectives of protecting the immense interests of the accused and not punishing those guilty of no crime when the fact of oral sex is clear, but it is very, very far from clear that the legislature intended it to be a crime for a boy in R.L.C.'s situation. In such cases, in keeping with the policy of free governments against convicting the innocent, grave doubts as to the proper scope of the statute (and therefore grave doubts about the criminality of the accused's conduct) should be resolved in favor of the accused.

In its statutes involving voluntary sex between children close in age, the North Carolina legislature's approach was similar to the humane approach followed by many states that have decriminalized sex between minors close to each other in age. By holding that the older general "crime against nature" statute is not limited by the later statutes specifically dealing with voluntary sex between children close in age, the North Carolina Supreme Court has effectively withdrawn North Carolina from the modern, enlightened approach—for sex acts such as oral sex. This unfortunate result could have been avoided by using traditional principles of statutory construction. The result that would have been reinforced by considerations of justice.

Where exceptions for children close in age have not been provided, as in Georgia before its statute was amended, barbaric results have followed. A case from Wisconsin is an additional example. In that case, according to a news report and court records, a fifteen-year-old girl asked a sixteen-year-old boy to let her perform oral sex on him.[163] The boy agreed to the girl's suggestion, but the act was discovered.[164] The state prosecuted and the jury convicted

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162. *Id.* at 363–64.

163. Amie Jo Schaenzer, *Sex Offender Says Neighbors' Actions Constitute Harassment*, FOND DU LAC REP. (Wis.), Aug. 1, 2007, at A1. "In the victim statement included in the court documents, the 15-year-old girl said it was her idea to perform the sexual act. She also wrote that she didn't think it was [the boy's fault] or that he should get in trouble." *Id.*; *see also* Wis. Dept. of Corrections, SOR Registrant Information, Michael A. Allen, http://offender.doc.state.wi.us/public/search/sor?action=offenderdetail&offender=37056&x=15&acknowledged=true&last_name=allen&first_name=michael&page=1&y=14&hist=%2Fsearch%2Fsearchbyname.jsp%2Baction%3Dsearchbyname (last visited Jan. 17, 2008).

164. Schaenzer, *supra* note 163, at A1.

the boy of a felony for having sex with an underage girl.[165] For that conviction, he was required to register as a sex offender for the remainder of his life.[166] In 2007, in his mid-twenties and engaged to be married, he was still registered as a sex offender and consequently harassed by neighbors—all this based on a childish mistake he made in 1997 at the suggestion of a girl who was almost exactly his age.[167]

In addition to the considerations listed above, there was an additional reason to construe the child sex statutes to protect R.L.C. Courts can and often do construe statutes to avoid serious constitutional questions. Sometimes the statute ends up quite different from the one the legislature wrote. The advantage of the approach is that it helps the courts avoid constitutional constructions which can be quite difficult to change. Unlike a constitutional decision, the legislature has the power to change judicial constructions of a statute. The disadvantage of the rule is that writing statutes is the business of the legislature. Typically, statutes strikingly different from what the legislature wrote should be revised (if at all) by the legislature. Still, where a limiting construction that avoids a constitutional problem is quite reasonable, the argument for such a construction is strong.

The constructions followed by the North Carolina and Georgia courts raise serious constitutional questions. The canon of construing statutes to avoid serious constitutional questions is often applied by state courts and by the United States Supreme Court.[168] "Where one of two reasonable constructions of a statute will raise a serious constitutional question, the construction which avoids the question should be adopted."[169] This principle should apply with special force where the interpretation honors the later specific statute that applies to the issue at hand rather than applying an earlier more general statute.

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165. *Id.*

166. *Id.*

167. *Id.*

168. *E.g.*, Jones v. United States, 529 U.S. 848 (2000). In *Jones*, the Court held that an owner-occupied dwelling not used for any commercial purpose does not qualify as property used in commerce under 18 U.S.C. § 844(I). *Id.* at 850–51. This interpretation is "in harmony with the guiding principle that 'where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.'" *Id.* at 857.

169. *In re* Arthur, 291 N.C. 640, 642, 231 S.E.2d 614, 616 (1977). This rule has been followed by the North Carolina Court of Appeals as well. *See, e.g.*, Baugh v. Woodard, 56 N.C. App. 180, 185, 287 S.E.2d 412, 415 (Ct. App. 1982) ("When a statute is reasonably susceptible of two constructions, one of which will raise a serious constitutional question and the other will avoid such question, the court must adopt the construction which avoids the constitutional question." (citing *Arthur*, 291 N.C. at 640, 231 S.E.2d. at 616)).

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The interpretation embraced by the North Carolina Supreme Court is unfortunate. In its statutes dealing with sex between minors, the legislature has recognized some hard facts of life. Most parents would probably agree that it is wiser for minors to postpone sexual activity. But a great many minors do not. According to the statistics gathered by the U.S. Centers for Disease Control and Prevention, by age fifteen, 43.2% of male children have had a sexual experience with a member of the opposite sex, 53.3% by age sixteen, and 63.5% by age seventeen.[170] For girls the figures are 33.8% at fifteen years, 49.6% at sixteen years, and 64% by age seventeen.[171] Among boys between fifteen and nineteen years of age, about 4.5% report same-sex experience.[172] For girls, the figure is 10.6%.[173]

The legislature might simply have made all the children experimenting with sex into delinquents or felons. But, in its statutes focusing on minors and sex, it decided not to. It did not punish noncoerced sex between minors who were at least sixteen. For cases involving minors below the age of consent, it decided that the sex act would not call for criminal sanction for minors of about the same age who voluntarily engage in sex with each other. It decided this for all sorts of sex acts, including oral sex, and for gay as well as straight children. But if the "crime against nature" statute is applied to these minors, a large number are in fact delinquents or felons. The same will be true for an even larger number of teenagers over sixteen. For example, if a sixteen- or seventeen-year-old boy and his girlfriend of the same age have oral sex, under the majority opinion in *R.L.C.*, they may be treated as felons. If they have vaginal sex, they are guilty of no crime.

If North Carolina's teenagers' sexual practices are similar to those in the rest of the nation, the interpretation embraced in *R.L.C.* makes "oral sex felons" of more than 42% of the state's sixteen-year-old males and 55.7% of its seventeen-year-old males.[174] If general application of the "crime against nature" statute to all young adult men and women were legally and practically possible, things would be even worse.[175]

The majorities on the court of appeals and the North Carolina Supreme Court argued that they were simply following the clear intent of the legislature. Had the legislature wanted to limit the "crime against nature" statute with reference to minors of about the same age, it could have done so. When it passed the child sex

170. Mosher, *supra* note 10, at 21 tbl.3.
171. *Id.* at 22 tbl.4.
172. *Id.* at 21 tbl.3.
173. *Id.* at 22 tbl.4.
174. *Id.* at 21 tbl.3.
175. According to the Centers for Disease Control and Prevention, 83.2% of men between 20 and 21 have engaged in oral sex, and so have 80.6% of women of the same age. *Id.* at 21 tbl.3, 22 tbl.4.

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statutes that included oral and anal intercourse, the legislature could have amended the "crime against nature" statute to exclude those protected by the child sex statutes.

The problem with this plain meaning argument is that the converse is at least equally reasonable. If the legislature did not intend its decriminalization of oral sex between minors of about the same age to prevent criminal prosecutions of the minors under the "crime against nature" statute, it could have said so explicitly. It might have said, "provided, however, the fact that noncoercive oral or anal sex between minors where the older child is under sixteen and the younger child is within three years of age of the older child is not a crime under this section shall not prevent prosecution of the minor for the 'crime against nature' under N.C. Gen. Stat. § 14-177." But it did not.

B. Statutory Construction Revisited: Georgia

The Georgia statute dealing with minors and sex specifically provided that sexual activity with a minor under sixteen was a felony. If oral sex was involved, the crime was an aggravated felony. But Georgia prescribed a misdemeanor punishment for voluntary sexual intercourse with a minor under sixteen if the parties were separated by no more than three years in age.[176] Other "immoral or indecent act[s]" between such teenagers—such as touching the vaginal area or breast or mutual masturbation—were the felony of child molestation.[177] Oral sex was aggravated child molestation.[178] It seems unlikely that the Georgia legislature actually intended these weird distinctions in cases of teenagers engaging in sex with those close in age. After the *Wilson* case, it revised its statutes.

The Georgia court might have read the three year limitation on the crime of sexual intercourse in the case of a minor under sixteen more broadly. It might have read it as an implied limit on voluntary sexual activity including oral sex. (Oral sex is a form of sexual intercourse.) That would have generalized the leniency to young minors engaging in oral sex, but would have left the harsher penalty in place in the case of older adults. Reading the statutory scheme in a consistent manner would have required some judicial creativity, but the result might well have been more in keeping with the larger legislative purpose.[179]

176. GA. CODE ANN. § 16-6-3 (2007).
177. § 16-6-4(a).
178. § 16-6-4(c).
179. This observation is supported by the fact that the Georgia legislature did revise the statute.

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V. UPHOLDING CONVICTIONS: CONSTITUTIONAL ANALYSIS IN GEORGIA AND NORTH CAROLINA

The Georgia courts refused to consider the equal protection issue because it was not raised in the trial court before a motion for a new trial was filed.[180] The North Carolina Court of Appeals held that the conduct in R.L.C.'s case was not constitutionally protected under *Lawrence* for two independent reasons—because it involved minors and because the court assumed it took place in public.[181] The North Carolina Court of Appeals had previously interpreted *Lawrence* to make the "crime against nature" statute inapplicable to consenting adults in private, but still applicable to minors, public conduct, prostitution, and coercive conduct.[182]

The three judge plurality in the North Carolina Supreme Court reached, discussed, and rejected R.L.C.'s as-applied due process challenge. It held an equal protection challenge was not properly before it.[183]

First, the plurality distinguished *Lawrence* on the ground that the case did not involve minors. The plurality noted that it still had to decide if the law in question was rationally related to a legitimate state interest.[184]

The plurality applied the most permissive form of rational basis analysis. Under this approach, it was not necessary to look (as the court of appeals had done) "at the actual . . . purpose" of the "crime against nature" statute; "instead," in keeping with the most permissive rationality analysis, the plurality said that "any conceivable legitimate purpose is sufficient."[185] The plurality proceeded to discuss "*plausible* legitimate purpose[s]."[186] One would be "preventing sexual conduct between minors."[187] Of course, since vaginal sex was not prohibited, punishing only minors engaging in oral or anal sex did not prevent sexual conduct between minors. Another purported purpose would be promoting health, both physical and psychological; the plurality noted that one can get HIV and other sexually transmitted diseases from oral sex.[188] However, the risk of contracting HIV from vaginal sex is greater.

The first dictionary definition of "plausible" is "superficially fair, reasonable, or valuable but often specious."[189] For the lowest level of rationality—the "not-insane-therefore-o.k." imagined basis test—a

180. Wilson v. State, 631 S.E.2d 391, 393 (Ga. Ct. App. 2006).
181. *In re* R.L.C., 179 N.C. App. 311, 318, 635 S.E.2d 1, 5 (Ct. App. 2006).
182. *Id.* at 316, 635 S.E.2d at 3–4.
183. *In re* R.L.C., 361 N.C. 287, 290–91, 643 S.E.2d 920, 922 (2007).
184. *Id.* at 295, 643 S.E.2d at 924.
185. *Id.*, 643 S.E.2d at 924.
186. *Id.*, 643 S.E.2d at 925 (emphasis added).
187. *Id.*, 643 S.E.2d at 925.
188. *Id.*, 643 S.E.2d at 925.
189. WEBSTER'S NEW COLLEGIATE DICTIONARY 881 (8th ed. 1974).

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plausible pretext is often sufficient. It would not work for heightened rationality analysis, however.

The plurality did not discuss the irrational classification implicit in the two statutes as construed—by which minors close in age were guilty of no crime if they engaged in vaginal sex, but of a felony "crime against nature" if they engaged in oral sex. Such a classification would be grossly under-inclusive in terms of pursuing the legislative goal of discouraging sex between minors. It would also be grossly under-inclusive with reference to the health concerns. That fact suggests that the statutory purpose the court of appeals candidly cited was the likely actual purpose behind the statute. In contrast, the imagined "conceivable" no sex for minors and health rationales were unlikely to be an actual purpose of the statute. Instead, these were purposes that did not rationally explain a real world function of the judicially re-written "crime against nature" statute as it applied to minors close to each other in age.

Perhaps the plurality mistakenly thought it avoided the problems of an irrational classification with a poor fit between ends and means by holding that an equal protection claim was not properly before it. At any rate, for reasons that follow, a "plausible" "not-insane-therefore-o.k." imagined-basis test is not the appropriate test to apply.

The two concurring justices did not discuss the constitutional claim at all. The dissenters avoided the issue by statutory construction.

VI. A BETTER APPROACH TO CONSTITUTIONAL ANALYSIS

A. General Constitutional Principles

1. Adults and Minors

"Crime against nature" statutes typically cannot be enforced against consenting adults in private. Such enforcement is, as the Supreme Court has ruled in *Lawrence v. Texas*, an infringement on the liberty of adult citizens. North Carolina and other states have followed this principle.[190]

Minors are different. The state may prohibit many activities for minors which it cannot prohibit for adults. For example, (without parental approval) minors may be denied access to many sexually oriented books and films that are constitutionally protected for adults.[191] Before *Lawrence*, a number of state courts held that the state may constitutionally prohibit minors from engaging in

190. *E.g.*, State v. Whiteley, 172 N.C. App. 772, 776–78, 616 S.E.2d 576, 579–81 (Ct. App. 2005).

191. Ginsberg v. New York, 390 U.S. 629, 634–36 (1968).

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consensual sex.[192] We assume that the state may prohibit sexual activity by minors (including vaginal intercourse) that it could not prohibit for consenting adults in the privacy of their homes. In doing so, presumably, the state is pursuing the legitimate interest of protecting minors from harms associated with premature sex. On that assumption, punishing sexual activity by minors would be rationally related to the objective.

But the Constitution still protects minors. Among other things, it protects them from illegitimate, arbitrary, and irrational classifications that injure them in violation of due process or equal protection of the laws.[193] This Article focuses mainly on equal protection, but due process and equal protection analysis frequently overlap. Both require a legitimate state interest and a statute reasonably related to that interest. The United States Supreme Court has recognized that a classification can be so irrational as to violate the Due Process Clause of the Fifth Amendment.[194] While this Article discusses equal protection based on the Federal Constitution, the perspective is also relevant to state constitutional claims. Equality guarantees under state constitutions are sometimes interpreted as significantly broader than those in the federal Constitution.[195]

2. *General Equal Protection Principles and Application*

The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution requires that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws."[196] The guiding principle of equal protection is that similarly situated individuals must be treated alike.[197] In North Carolina, the

192. *E.g.*, *In re* T.A.J., 73 Cal. Rptr. 2d 331, 338 (Cal. Ct. App. 1998); J.A.S. v. State, 705 So. 2d 1381, 1385 (Fla. 1998).

193. *See, e.g.*, *In re* Gault, 387 U.S. 1, 13 (1967); Population Servs. Int'l v. Carey, 476 F. Supp. 4 (S.D.N.Y. 1979); State v. Limon, 122 P.3d 22, 24 (Kan. 2005).

194. Bolling v. Sharp, 347 U.S. 497, 499 (1954) ("[D]iscrimination may be so unjustifiable as to be violative of due process."). More recently, the Court has found the equal protection requirements of the Due Process Clause of the Fifth Amendment to be identical to those of the Fourteenth. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 217 (1995) (holding that an equal protection violation also violates due process). *Adarand* says that "equal protection obligations imposed by the Fifth [Amendment Due Process Clause] and Fourteenth Amendment [Equal Protection Clause are] indistinguishable." *Id.* at 217. It cited numerous Supreme Court decisions to that effect. *See, e.g.*, *id.* ("This Court's approach to Fifth Amendment equal protection claims [under the Due Process Clause] has always been precisely the same as to equal protection claims under the Fourteenth Amendment [Equal Protection Clause]." (citing Weinberger v. Wiesenfeld, 420 U.S. 636, 638, n.2 (1975))).

195. Commonwealth v. Wasson, 842 S.W.2d 487, 491 (Ky. 1992).

196. U.S. CONST. amend. XIV, § 1.

197. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439 (1985).

statutory construction embraced by the appellate courts created two classes of similarly situated people under sixteen years of age: (1) minors less than three years apart in age who engage in voluntary oral sex and (2) minors less than three years apart in age who engage in voluntary vaginal sex.[198]

Minors who engage in oral sex and minors who engage in vaginal sex are similarly situated because they are all *minors engaging in voluntary sexual contact.* They are similarly situated because for minors engaging in sex, oral sex is at least as common as vaginal sex.[199] That the North Carolina legislature treated the sex acts alike in its detailed statutes regulating sex between minors is compelling evidence that the legislature recognized that the groups are similarly situated. As a result, the unique punishment of those engaging in oral sex is neither legitimate nor rational.

Before it was revised by the Georgia legislature, the Georgia statutes also created an irrational classification. A seventeen-year-old boy who had noncoerced oral sex with a fifteen-year-old girl was guilty of a felony requiring a mandatory ten year prison sentence and registration as a sex offender. However, if the seventeen-year-old had only had vaginal sex, he would have been guilty of a misdemeanor and would not have been required to register as a sex offender.[200]

Since minors engaging in oral and vaginal sex are similarly situated, the state must have a basis for their unequal treatment under the law. Otherwise, the state would be free to discriminate between similarly situated people simply by classifying their conduct under different criminal statutes. Equal protection analysis asks what legitimate interest the legislation is pursuing and how that interest is related to the reach of the statute.

An immediate objection is likely to be lodged against applying heightened constitutional scrutiny to the distinction in criminal law between vaginal and oral sex. The claim will be that those engaging in (for example) oral sex and those engaging in vaginal sex are not classes cognizable to courts applying equal protection or similar equality guarantees. That would be so, the argument goes, because this is not a suspect class (like race) or a quasi-suspect class (like gender). For that reason, it is important to review the history of the Equal Protection Clause and the evolution of the Court's analysis of it.

198. Another class of similarly situated minors would be those over sixteen who engage in vaginal sex and those over sixteen who engage in oral sex. Even more compelling equality considerations apply when the teenagers are both above the state's age of consent.

199. *See infra* notes 330–37 and accompanying text (noting relevant studies of sexual behavior).

200. Wilson v. State, 631 S.E.2d 391, 392 (Ga. Ct. App. 2006).

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3. Evolution of Equal Protection and Heightened Rationality Review

In general, under federal constitutional law, where statutory classifications are not drawn on the basis of a suspect or quasi-suspect class, e.g., race or gender, and do not impinge on a fundamental right, the statutory scheme is subjected to "rational basis" review. As the Court noted in *City of Cleburne v. Cleburne Living Center, Inc.*, under equal protection rational basis review, the state must show that it is pursuing a legitimate interest and that the statute is drawn to rationally promote that interest.[201] The same would be true for due process review.

At one time, it seemed that almost all legislation that did not involve race or gender or classifications that impinged on a fundamental right would be found rational. In the years after 1937, the Supreme Court, at first, did not inquire strictly into the fit between ends and means when it applied the rational basis test.[202] Indeed, for some time the Court applied the most permissive sort of rational basis review even to gender discrimination. Under the most permissive form of rational basis, the basis need not be one the legislature ever considered. It is enough that rational legislators *might* have embraced it *if* they had thought of it. The court is free to dream up a basis that rational people might have accepted. The assumed factual basis need not be grounded in empirical reality. One might call this the "imagined basis" test. Under the most permissive form of rational basis, the relation of the legitimate state purpose to the scope of the statute can be quite loose. The Court still employs this approach in many cases, applying it to much ordinary commercial and economic legislation.[203]

Goesaert v. Cleary[204] is an example of the "not-insane-therefore-o.k." imagined basis form of rational basis analysis. The case was decided before gender classifications got substantially heightened scrutiny. Michigan passed a statute that prevented women from being bartenders unless the bar was owned by the woman's husband or father. Under the "not-insane-therefore-o.k." approach, the court was allowed to dream up some rational justification or accept one dreamed up by counsel—however tenuous the rationale might be. The rationale the Court accepted was that the law was protecting

201. *City of Cleburne*, 473 U.S. at 440.

202. *E.g.*, Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 487–88, 491 (1955).

203. *E.g.*, New York City Transit Auth. v. Beazer, 440 U.S. 568, 591–92 (1979) (holding that "an employment policy that postpones eligibility [for methadone users] until the treatment program has been completed . . . is rational"); New Orleans v. Dukes, 427 U.S. 297, 303–05 (1976) (holding that an economic regulation that exempted pushcart food vendors who had operated in the French Quarter for more than eight years, but restricted vendors who had operated for less than eight years, was rational).

204. 335 U.S. 464, 466–67 (1948).

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women from disorderly drunks.

This end was presumably accomplished if the woman was the daughter or wife of the owner, even if he was always absent from the premises. Women owners could not tend bar, even if they were black belts in karate or if they hired security guards to protect them. The statute was clearly over-inclusive—that is, the classification covered employment of women that did not cause the problem, such as the women with black belts and the ones with security guards. It was under-inclusive as well—it did not protect most women working in the bar who would be exposed to the supposed problem. Women could be waitresses, taking drinks to the tables in very close proximity to the presumably unruly male patrons. Meanwhile, a woman who would work behind the barricade of the bar was not allowed an opportunity to work as a bartender. When the imagined basis test is applied, under-inclusiveness is no problem. The legislature can deal with only a part of the problem; it can proceed one step at a time.[205]

But in the early 1970s, a heightened form of rational basis analysis emerged under equal protection and due process, often referred to as "rational basis with bite."[206] Here, the courts actually look critically at the rationality of the statute even though it does not fit into one of the slots previously reserved for substantially heightened scrutiny, e.g., race, gender, fundamental right, etc. In heightened rational basis cases, the courts look with care at the link between the classification and the object of the legislation, and at whether the legislation furthers a legitimate state interest.[207]

Clearly, the Court no longer uniformly applies the "not-insane-therefore-o.k." stamp to all social and economic legislation that does not involve race, gender, or interference with a fundamental right. For example, in *City of Cleburne v. Cleburne Living Center, Inc.*, the Court considered a local ordinance that required a special use permit to locate a group home for the mentally retarded in Cleburne,

205. *E.g.*, *Williamson*, 348 U.S. at 489 ("[R]eform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind."); Ry. Express Agency, Inc. v. New York, 336 U.S. 106, 110 (1949) (finding that there is no requirement under low level rational basis that "all evils of the same genus be eradicated or none at all").

206. Gerald Gunther, *The Supreme Court, 1971 Term: Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 18–21 (1972) (discussing enhanced rational basis). *See generally* 2 MICHAEL KENT CURTIS ET AL., CONSTITUTIONAL LAW IN CONTEXT 1616–19 (2d ed. 2006) (discussing enhanced rational basis).

207. Lawrence v. Texas, 539 U.S. 558, 578 (2003) (holding that, under rational basis, the conviction of two adult men for having anal sex at home violated due process); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 438, 440 (1985) (holding that the denial of a permit for a group home for the mentally retarded violated equal protection).

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Texas.[208] No special use permit was required for fraternity houses, apartment houses, hospitals, or nursing homes.[209] The classification was challenged as violating equal protection.[210] The Court refused to find a fundamental right or a suspect class, and it applied rational basis analysis.[211]

The city offered various justifications. One was the negative attitude of residents toward the mentally retarded. But the Court held that "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding," were not a permissible basis for treating the mentally retarded differently.[212] "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."[213]

In addition, the city said it was protecting the mentally retarded from a flood predicted to occur every 500 years, but the Court found the justification seriously under-inclusive because others facing similar problems were allowed to locate in the neighborhood.[214] Nursing homes and hospitals could be located in the 500-year flood plain.[215] The city also suggested it was preventing traffic congestion, but this justification was unpersuasive in light of fraternity houses and apartment houses that were allowed without a special permit.[216] The Court also rejected other equally imaginative justifications and found the zoning ordinance unconstitutional as applied.[217]

Other cases have also used a heightened rational basis approach, sometimes under due process and sometimes under equal protection. *Lawrence v. Texas*[218] found prosecution of gay adults for having sex at home lacked a rational basis.[219] In *Department of Agriculture v. Moreno*, the Court considered an amendment to the Food Stamp Act that denied assistance to unrelated people living together.[220] The Court noted that the act

> creates two classes of persons for food stamp purposes: one class is composed of those individuals who live in households all of whose members are related to one another, and the other class consists of those individuals who live in households containing one or more members who are unrelated to the

208. 473 U.S. at 448–50.
209. *Id.* at 436 n.3.
210. *Id.* at 447.
211. *Id.* at 438, 442, 446.
212. *Id.* at 448.
213. *Id.* (quoting Palmore v. Sidoti, 466 U.S. 429, 433 (1984)).
214. *Id.* at 449.
215. *Id.*
216. *Id.*
217. *Id.* at 449–50.
218. 539 U.S. 558, 564 (2003) (basing the decision on due process, but also citing equal protection concerns).
219. *Id.* at 577–78.
220. 413 U.S. 528 (1973).

rest.[221]

The Court found the provision violated the equal protection component of Fifth Amendment Due Process because it was irrational and furthered no legitimate governmental purpose.[222] In *Village of Willowbrook v. Olech*, a city required a larger easement from plaintiffs than from other property owners before they could be connected to the city water system. The Olechs alleged that the higher rate was imposed to punish them for prior litigation against the city.[223] The Court found an irrational denial of equal protection.[224]

State courts have used a similar heightened rational basis approach in construing the Federal Constitution.[225] A number have also used an enhanced rationality approach under equality guarantees of their state constitutions.[226] For example, prior to

221. *Id.* at 529.

222. *Id.* at 533, 538 (holding the amendment invalid under the Due Process Clause of the Fifth Amendment because it was not related to the purposes of the act as declared by Congress, which were "to safeguard the health and well-being of the Nation's population and raise levels of nutrition among low-income households" and to strengthen the agricultural economy). The purpose suggested by scant legislative history was to keep "hippie" communes from taking advantage of the act. *Id.* at 534–35 ("The challenged classification clearly cannot be sustained by reference to this congressional purpose. For if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest. As a result, '[a] purpose to discriminate against hippies cannot, in and of itself and without reference to [some independent] considerations in the public interest, justify the 1971 amendment.'" (quoting Moreno v. United States Dep't of Agric., 345 F. Supp. 310, 314 (D.D.C. 1972))); *see also* Romer v. Evans, 517 U.S. 620 (1996) (finding equal protection violated by state constitutional amendment that uniquely exempted gays from anti-discrimination ordinances that forbade discrimination based on sexual orientation). *But cf.* Eisenstadt v. Baird, 405 U.S. 438, 447 (1972) (holding that states could not legislate different treatment "accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute" (quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920))); *see also id.* (holding that there was no "ground of difference that rationally explains the different treatment accorded to married and unmarried persons" under the Massachusetts statute (alternate holding)).

223. Vill. of Willowbrook v. Olech, 528 U.S. 562, 563 (2000).

224. *Id.* at 564–65.

225. *See, e.g.*, State v. Limon, 122 P.3d 22, 38 (Kan. 2005) (reviewing enhanced punishment for an eighteen-year-old teenage boy who had oral sex with a fifteen-year-old boy compared to the punishment for oral sex between an eighteen-year-old boy and a fifteen-year-old girl and holding the discrimination between same-sex as opposed to opposite-sex oral sex was irrational and violated the Equal Protection Clause).

226. *E.g.*, Commonwealth v. Wasson, 842 S.W.2d 487, 501–02 (Ky. 1992) (striking, under the equality and liberty provisions of the Kentucky Constitution, a statute that punished oral and anal intercourse between

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Lawrence, in *Commonwealth v. Wasson*, the Kentucky Supreme Court considered a Kentucky statute that punished oral or anal intercourse, but only if engaged in between persons of the same sex.[227] The state argued that homosexuals were not entitled to status as a protected class and that heightened protection was limited to discrimination based on race or gender.[228] The Kentucky court responded:

> We need not speculate as to whether male and/or female homosexuals will be allowed status as a protected class if and when the United States Supreme Court confronts this issue. They are a separate and identifiable class for Kentucky constitutional law analysis because no class of persons can be discriminated against under the Kentucky Constitution.[229]

In any case, the authorities cited above show that, although the classification does not involve a suspect class, a quasi-suspect class, or a fundamental right, it still may be analyzed under heightened rational basis review. Unfortunately, just when the courts will apply heightened rationality review is not entirely clear.[230] A classification should get heightened rationality scrutiny when it disadvantages a historically unpopular or vulnerable group (or one viewed that way by the legislature when the law was passed), when it is based on animus or prejudice, when justifications for singling out the group and not others similarly situated are weak—suggesting mere hostility, and when the classification is irrational when looked at clearly and without the benefit of naked disapproval. In such cases, courts should and often do refuse to apply a nearly

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persons of the same sex in private, but not for persons of different sexes).

227. *Id.* at 489. *Wasson* involved a conviction for solicitation directed to an undercover police officer who was invited to go to Wasson's home to have sex. The court noted that the case involved two adults and that money was not involved. *Id.* The statute was struck down and the conviction voided. *Id.* at 502. The court held that one could not be guilty of solicitation of a crime if the underlying act solicited was not criminal. *Id. But see* Sawatzky v. City of Oklahoma City, 906 P.2d 785 (Okla. Crim. App. 1995) (discussing a statute in which all public solicitation for sex in private was made criminal, except for married couples).

228. *Wasson*, 842 S.W.2d at 499.

229. *Id.* at 500.

230. *Compare* Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 435 (1985) (holding that a lesser standard of scrutiny is appropriate), *with* Heller v. Doe 509 U.S. 312, 314–15, 321 (1993) (upholding, by a five to four vote, different procedures for involuntary commitment of the mentally retarded—clear and convincing evidence—and the mentally-ill—beyond a reasonable doubt). For an argument that the Equal Protection Clause as originally understood forbade singling out a group for special burdens without an adequate justification and that the lack of specificity in the clause recognized that what are acceptable public purpose justifications might change over time, see Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245, 332–33 (1997).

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irrefutable presumption of constitutionality.[231]

Classifications such as the one created by the North Carolina appellate courts and the one followed in Georgia in the case of Genarlow Wilson should be subjected to a heightened form of rational basis review under equal protection. Once these classifications are subjected to a requirement that they actually be rational, that is once one looks at them critically and not through a "not-insane-therefore-o.k." imagined basis lens, the classifications fail the test.

B. A Classification Punishing Oral Sex Between Minors More Harshly Than Vaginal Sex Between Minors Is Irrational and Violates the Equal Protection and Due Process Clauses of the United States Constitution

It is true, of course, that for many years, people who engaged in the "crime against nature" were viewed by many as a unique and threatening group—an evil, "unnatural," and "depraved" minority to be mutilated and burned at the stake along with heretics[232] (at first), then simply executed, and (later) imprisoned for many years. It is true that the North Carolina "crime against nature" statute has ancient origins, dating back to its transfer from the ecclesiastical courts to the secular courts of Henry VIII.[233] As late as 1966, the North Carolina Supreme Court referred to those who engage in the "crime against nature" as "persons who undertake by unnatural and indecent methods to gratify a perverted and depraved sexual instinct which is an offense against public decency and morality."[234]

This understanding of the purpose of the law has proved quite persistent. Forty years later, in 2006, the North Carolina Court of Appeals in *R.L.C.* quoted the 1966 Supreme Court decision as establishing the view that *in general* those who engage in the sex acts covered by the "crime against nature" are "perverted," "depraved," and "unnatural." It therefore read the "crime against nature" statute as expansively as possible to deal with the supposed evil. "This Court 'has no authority to overrule decisions of [the North Carolina] Supreme Court and [has] the responsibility to

231. *E.g.*, State v. Limon, 122 P.3d 22, 28 (Kan. 2005). *Compare* Lawrence v. Texas, 539 U.S. 558, 578 (2003) (applying a heightened scrutiny), *with id.* at 580–82 (O'Connor, J., concurring) (declining to consider the disparate treatment of those inclined to engage in sexual intercourse with another individual of the same sex and sexual intercourse between heterosexuals).

232. LOUIS CROMPTON, HOMOSEXUALITY AND CIVILIZATION 150–212, 245–410 (2003).

233. On the transfer to the secular courts, see BLACKSTONE, *supra* note 155, at 16.

234. State v. Stubbs, 266 N.C. 295, 298, 145 S.E.2d 899, 902 (1966). *Stubbs* was relied on as controlling in *In re R.L.C.* *See In re* R.L.C., 179 N.C. App. 295, 298, 635 S.E.2d 1, 2 (Ct. App. 2006).

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follow those decisions until otherwise ordered by the Supreme Court.'"[235] As late as 1979, the North Carolina Court of Appeals directly held the "crime against nature" statute could be used to punish an act between consenting heterosexual adults in private.[236] In *R.L.C.*, the plurality of the North Carolina Supreme Court provided less embarrassing and less plausible reasons: deterring minors from having sex by punishing oral but not vaginal sex and protecting minors from health hazards by the punishment of oral, but not vaginal, sex.[237]

In *R.L.C.*, the North Carolina appellate courts read the *Lawrence* decision quite narrowly. The effect was to preserve as many "crime against nature" prosecutions as possible after *Lawrence v. Texas*. They also read North Carolina's statutes dealing with minors who have sex with each other narrowly, so as to preserve the greatest possible constitutional scope for the "crime against nature." While this approach is unfortunate, it is not unique.[238]

The constitutional problem with this expansive approach is the lack of a rational reason for punishing oral sex and not vaginal sex when engaged in by minors under similar circumstances. Labels like "perverted" and "depraved" do not supply the need for a rational basis that shows that oral sex, *in itself* and disconnected from independent harms, deserves unique punishment. Indeed, they suggest little more than hostility to a historically unpopular group of people and revulsion at the sex acts of members of the group. Similarly, a goal of preventing minors from having sex or from contracting sexually transmitted diseases that is pursued by preventing only oral but not vaginal sex is not persuasive. It is similar to protecting mentally retarded people from a 500 year flood by denying them a permit for a group home, but not similarly protecting people in homes for the aged or in hospitals.

Lawrence v. Texas and earlier cases clearly indicate that hostility and revulsion do not provide a rational basis. *Lawrence* cited *Romer v. Evans*, which found that the state constitutional amendment in that case could not be explained except as based on "animus toward the class it affects."[239] The *Romer* Court also held that "[d]esire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."[240] Since hostility to

235. *In re* R.L.C., 179 N.C. App. at 318, 635 S.E.2d at 2, 5.

236. State v. Poe, 40 N.C. App. 385, 389, 252 S.E.2d 843, 845 (Ct. App. 1979).

237. *See supra* notes 185–88 and accompanying text.

238. Wilson v. State, 631 S.E.2d 391, 392–93 (Ga. Ct. App. 2006), *cert. denied*, 642 S.E.2d 1 (Ga. 2006). *See generally* Singson v. Commonwealth, 621 S.E.2d 682 (Va. Ct. App. 2005) (involving solicitation of oral sex in a public bathroom).

239. Romer v. Evans, 517 U.S. 620, 632 (1996).

240. *Id.* at 634–35 (quoting Dep't of Agric. v. Moreno, 413 U.S. 528, 534

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oral sex and those who engage in it is not a legitimate state interest, what is left is the protection of minors from premature sex with its attendant risks. But the North Carolina law does not punish minors close in age who engage in vaginal intercourse. So it is difficult to see the legislature as pursuing either protection of minors from premature sex with other minors of about their age or protecting them from sexually transmitted diseases. The same would be true for minors above the age of consent for vaginal intercourse.

The different treatment of vaginal and oral sex is significant. As the Kansas court noted in *Limon*, "a failure to create a classification which is sufficiently broad to effectively accommodate the State's interest, i.e., the creation of an under-inclusive class, may evidence an animus toward those burdened."[241] The statutory scheme created by the North Carolina appellate courts in *R.L.C.* is dramatically under-inclusive because of its failure to include vaginal intercourse among punishable child sex acts.

Revulsion, moral disapproval, and hostility were not sufficiently rational to justify criminal punishment for racial intermarriage.[242] Nor were they sufficiently rational to justify punishing the "crime against nature" committed by gay adults in private. That was so even though the crime, like the ban on racial intermarriage, had ancient roots.[243] Mere hostility to a supposedly unpopular group does not provide a rational basis. Nor does intense disapproval of oral or anal sex justify punishing minors for what would otherwise not be criminal conduct.

The governmental objective of punishing nonprocreative sex merely because it is not procreative is not a legitimate, constitutionally permissible objective or rationally related to one.[244] This is true even in the case of minors, where the government's regulatory authority is expansive.[245] The majority of the North Carolina Court of Appeals in *R.L.C.* gave no reasons (other than moral distaste for the "crime against nature" and those who practice it, together with the long history of the judicial recognition of the crime, and the fact that minors are involved) to justify treating young people who engage in oral sex more harshly than those who engage in vaginal sex. The plurality of the Supreme Court gave reasons so under-inclusive as to support the inference that the true

(1973)); *see also* Lawrence v. Texas, 539 U.S. 558, 579–80 (2003) (O'Connor, J., concurring); Jegley v. Picado, 80 S.W.3d 332, 351–52 (Ark. 2002).

241. State v. Limon, 122 P.3d 22, 30 (Kan. 2005) (quoting City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 450 (1985)).

242. *See* Loving v. Virginia, 388 U.S. 1, 7–12 (1967).

243. *Lawrence*, 539 U.S. at 567.

244. Carey v. Population Servs. Int'l, 431 U.S. 678 (1977); Griswold v. Connecticut, 381 U.S. 479 (1965).

245. *Cf. Carey*, 431 U.S. at 691–96 (addressing state ban on minors' access to contraceptive devices).

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legislative motivation was the one candidly recognized by the court of appeals.

As both North Carolina appellate courts interpreted the law in *R.L.C.*, the sexual acts that express the sexual orientation of gay minors *are always criminal*. That is so in spite of the statutes that specifically deal with all sex acts by minors and that do not criminalize such voluntary acts between minors of about the same age.[246]

Where the legislature seeks to obtain legitimate objectives and lacks a specific intent to discriminate against a disfavored group, the Court holds that disproportionate impact of a facially neutral statute does not trigger heightened scrutiny. This is so even when gender is involved and the disfavored group is women. For example, in *Personnel Administrator v. Feeney*, a Massachusetts veteran's preference statute gave significant advantages to veterans (who at the time were ninety-eight percent men) for civil service jobs.[247] In that situation, the Court gave substantial weight to the fact that the statute disadvantaged a very large number of men who were not veterans. "Crime against nature" statutes like those in North Carolina and Georgia facially cover a very large number of sexually active heterosexual minors as well as virtually all sexually active gay minors. To some extent at least, they are applied to both groups. Where, as in North Carolina, the legislation lacks a truly rational connection to a legitimate purpose, the fact that it impacts virtually all members of a historically oppressed group should be an additional factor in favor of finding a constitutional violation.

The fact that *minors* of about the same age are having oral sex with each other does not mean the legislature or the court can classify free of all constitutional restraints.[248] Nor does the fact that minors and oral sex are involved mean equal protection concerns disappear.[249] We assume that minors can be punished for having sex, though, like the North Carolina legislature, we doubt the wisdom of broadly applying this power. The mere label "crime against nature" is not enough to prove minors engaging in vaginal and oral sex are not similarly situated. Nor is it enough to show that the state's objective in enforcing these bizarre distinctions is the presumptively legitimate one of discouraging sex by minors.

246. While there is a disproportionate impact on gay children, many other children are also affected. *See Limon*, 122 P.3d at 28 (noting that the statute "criminaliz[es] conduct commonly engaged in by homosexuals"); *cf. Lawrence*, 539 U.S. at 568–71 (noting that sodomy laws apply to more than just homosexual conduct).

247. 442 U.S. 256, 270 (1979).

248. *Limon*, 122 P.3d at 28–29, 40 (finding that a statute punishing voluntary homosexual sex by children more harshly that heterosexual sex by children of the same age range violated equal protection).

249. People v. Hofsheier, 129 P.3d 29, 41 (Cal. 2006) (holding enhanced punishment based on the distinction between oral and vaginal sex irrational).

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These observations also apply even if it is assumed that the "crime against nature" took place in a public place. Of course, public sex may be punished. To transform that crime to a much more serious violation because oral sex rather than vaginal sex was involved is irrational.[250]

The North Carolina Court of Appeals majority apparently believed that *Lawrence* and its due process and equality principles were completely inapplicable to cases involving minors.[251] The plurality in the Supreme Court applied only the most permissive form of rational basis review. *Lawrence* recognizes that its principle of liberty for adults does not give them license to engage in sex in public; it does not give them license to have sex with children; it does not protect prostitution. Here is how the court of appeals handled that aspect of *Lawrence*, an approach essentially followed by the North Carolina Supreme Court:

> The Supreme Court's holding in *Lawrence* specifically limited the scope of the decision, by stating: "The present case *does not involve minors*. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It *does not involve public conduct* or prostitution. . . . The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime."[252]

What the legislature cannot do is punish oral sex more harshly merely because it is the "crime against nature." In contrast, it could punish oral *and other* forms of sex between minors because of the harm to the minor from engaging in premature sex, or the harm to the public confronted by unwanted public sex. However, it is irrational to punish the act more harshly, not because of any unique independent harm to the minor from oral sex, or to the unwilling viewer, or as a result of the commercialization of sex, but just because the act is labeled (by the court or the legislature) as "perverted" and "depraved." Other than the distaste of some for the allegedly "unnatural" and "depraved act" (now practiced by a large majority of adults and a great many young persons), no independent

250. *See In re* R.L.C., 179 N.C. App. 311, 318, 635 S.E.2d 1, 5 (Ct. App. 2006) (finding that prosecution of the child for the felony of "crime against nature" was also supported by the fact that the act allegedly took place in a public place); *see also supra* note 107 (discussing the notice problems associated with the court's use of the public place principle for support).

251. *In re R.L.C.*, 179 N.C. App. at 315–16, 635 S.E.2d at 3–4.

252. *Id.* at 314, 635 S.E.2d at 3 (quoting Lawrence v. Texas, 539 U.S. 558, 578 (2003)).

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rational harm distinguishes between vaginal and oral sex. As construed, the North Carolina statutes are grossly under-inclusive in light of their purported purposes. That fact supports the idea that animus is at work.

The nation faces a serious problem of teen pregnancy. Vaginal sex by a boy and girl of about the same age carries a risk of pregnancy. Since teen pregnancy is a problem, a system that (if it had any effect) would deter nonprocreative, oral sex and encourage procreative sex by minors is extraordinarily irrational. If the state had a preference for procreative sex by minors, that unlikely purpose would not be a constitutional one.[253]

The Supreme Court plurality also argued that the conceivable purpose of the statute could be to protect children from HIV. The legislature pursued this objective by preferring vaginal sex to oral sex. The problem with that argument is that it is contradicted by the medical facts. As the Kansas court noted in *Limon*, analyzing a similar argument by the state, vaginal sex is more likely to result in HIV transmission than is oral sex.[254]

Of course, if courts elect to pursue the "not-insane-therefore-o.k." imagined rational basis test, then the legislation would survive constitutional challenge. Under that extraordinarily permissive form of constitutional analysis, the legislature can proceed one step at a time, and it can punish the less serious conduct while leaving the more serious untouched. Under-inclusiveness is no problem for the "not-insane-therefore-o.k." analysis. By this approach, since sex by minors can rationally be seen as a problem, the legislature can single out oral sex.

The imagined basis test has much to be said for it when the classification does not involve prejudice against historically oppressed groups—for example, when it is applied to allow regulations of manufacturing of cigars in tenement houses, without regulating the manufacture elsewhere.[255] In light of the sad history of oppression of those engaging in oral or anal sex[256]—simply because of the nature of the sex act—the "not-insane-therefore-o.k." imagined basis test should be rejected.

The opinion in *State v. Limon* is a detailed, scholarly, and careful analysis that shows that the mere fact that a case involves the "crime against nature" and minors does not free the state from the need to legislate rationally. *Limon* is particularly instructive

253. *See* Carey v. Population Servs. Int'l, 431 U.S. 678, 684–92 (1977) (striking down a statute that banned minors' access to contraceptives).

254. State v. Limon, 122 P.3d 22, 36–37 (Kan. 2005) (citing statistics from the United States Centers for Disease Control and Prevention).

255. Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483 (1955).

256. *See* CROMPTON, *supra* note 232, at 150–212, 245–410 (describing horrific punishments of persons found to have committed "the crime against nature" and burning at the stake alongside heretics).

because the case was remanded by the Supreme Court to the Kansas Supreme Court for reconsideration in light of *Lawrence*.[257] The second *Limon* decision was the result of careful consideration of the issues on remand.

Limon involved male teenagers of about the same age who had sex with each other.[258] Under the Kansas statute, the punishment was much more severe if minors engaged in same-sex sex rather than opposite-sex sex—whatever the sex acts.[259] So two boys or two girls of around the same age who had oral sex were guilty of a much more severe crime than a boy and a girl would be. *Although the case involved minors*, the Kansas Supreme Court analyzed the problem as an equal protection violation and applied heightened rationality review.[260] The court recognized that because minors were involved, the *Lawrence* right of adults to engage in sex in private was not implicated, but it also recognized that Supreme Court precedent still required that classifications based on the way minors were engaging in sex must meet the constitutional test for rationality.[261]

The Kansas Supreme Court highlighted the *Lawrence* Court's emphasis on equality as well as liberty.[262] It also noted the *Lawrence* Court's reliance on equal protection precedent, including *Romer v. Evans*.[263] Because the Kansas court recognized that classification of *minors* based on the type of voluntary sex (same-sex couple vs. opposite-sex couple) required a rational basis, it carefully assessed each proffered state interest and found each to lack rationality. The classification had to be justified by more than animus toward gays or gay sex.

People v. Hofsheier[264] is a case directly on point. There, a twenty-two-year-old adult man was convicted of having *oral sex* with a sixteen-year-old girl.[265] In such cases, a California statute required mandatory lifetime registration as a sex offender for adults having sex with a minor sixteen years of age or older.[266] Another

257. Limon v. State, 41 P.3d 303 (Kan. Ct. App. 2002); *cert. granted, vacated* Limon v. Kansas, 539 U.S. 955 (2003) (mem.) (remanded for further consideration in light of *Lawrence v. Texas*), *appeal after remand*, State v. Limon, 83 P.3d 229 (Kan. Ct. App. 2004); *rev'd, remanded*, State v. Limon, 122 P.3d 22 (Kan. 2005).

258. State v. Limon, 122 P.3d 22, 27 (Kan. 2005).

259. *Id.* at 30.

260. *Id.* at 27–41.

261. *Id.* at 30; *see* Carey v. Population Servs. Int'l, 431 U.S. 678 (1977).

262. *Limon*, 122 P.3d at 34 (citing Lawrence v. Texas, 539 U.S. 558, 575 (2003)).

263. *Id.* at 30 (citing Romer v. Evans, 517 U.S. 620, 632–35 (1996) (noting that animus or desire to harm a politically unpopular group cannot constitute a legitimate governmental interest)).

264. 129 P.3d 29 (Cal. 2006).

265. *Id.* at 31.

266. *Id.* at 34.

statute punished vaginal sexual intercourse between an adult and a minor sixteen years of age or older.[267] Such an offender was not subject to the same mandatory registration.[268]

The California Supreme Court analyzed the case under equal protection principles. Although the registration provisions were located in different statutes, the court found that the offenders were similarly situated and were treated in an irrationally different manner.

> It may well be that in most cases . . . persons who commit different crimes are not similarly situated, but there is not and cannot be an absolute rule to this effect because the decision of the Legislature to distinguish between similar criminal acts is itself a decision subject to equal protection scrutiny. . . . Otherwise, the state could arbitrarily discriminate between similarly situated persons simply by classifying their conduct under different statutes.[269]

The court found the classification failed to pass *even the lowest form of rational basis review*.[270]

In North Carolina, there is no rational basis for differentiating oral sex acts engaged in by minors from vaginal sex acts engaged in by minors and punishing oral sex when vaginal sex is not punished. This conclusion is further established by a significant fact: *the North Carolina legislature has chosen to treat these sex acts identically in its statutes dealing with sex involving minors.*

One might argue that the harsher treatment of oral compared to vaginal sex poses no equal protection problem because the legislature is merely classifying and punishing activities, not groups. By this view, for example, women and blacks would be groups. Persons engaging in the "crime against nature" would not be viewed as a group, but as persons engaging in an activity. That distinction does not work. In *Kansas v. Limon*, the state statute punished children close in age to each other who were engaging in same-sex oral sex more harshly than similarly situated children who were engaging in opposite-sex oral sex. Obviously, one could argue that the legislature was simply classifying activities, not groups. The activities would be same-sex and opposite-sex oral sex. Still, the Kansas court found a violation of the Equal Protection Clause. In *Department of Agriculture v. Moreno*, one could argue that Congress targeted an activity: unrelated people living together.[271] But the

267. *Id.* at 35.
268. *Id.*
269. *Id.* at 36.
270. *Id.* at 37, 41 (noting three standards of review, with "rational basis" being the lowest standard).
271. *See* 413 U.S. 528, 535 (1973) (involving households with related members and households with unrelated members accessing federal food assistance); *see also* Eisenstadt v. Baird, 405 U.S. 438, 442–43 (1972)

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Court required the classification of the two types of activity related and unrelated people living together to be rational and found hostility to hippies was not a justification for the statute. Viewing *Lawrence* itself as an equal protection problem, one could argue that the Texas legislature was classifying and punishing an activity—same-sex "crime against nature," not opposite-sex "crime against nature"—and not a group. Although it did not base its decision simply on equality, it seemed unimpressed by such considerations, and Justice O'Connor squarely rejected them.[272]

As in the other cases mentioned above, people who engage (for example) in oral sex are a group. The group is defined by the activity it engages in, but that was also true of Justice O'Connor's analysis in *Lawrence*, and of the courts' analyses in *Limon* and *Moreno*. There is the strongest reason to see those engaging in the "crime against nature" as a distinct group targeted by hostility disconnected from a legitimate independent harm. In 1966, the North Carolina Supreme Court viewed those engaging in the "crime against nature" *in general* as a group of a very distinct (abnormal, perverse, and depraved) type.[273]

In responding to an equal protection claim in *Lawrence v. Texas*, Justice Scalia invoked the argument that activities, not groups, were being regulated.[274] The Texas statute, unlike that in North Carolina, punished only same-sex sex. Justice Scalia insisted that the Texas law punishing same-sex (but not opposite-sex) oral and anal sex "applies equally to all persons."[275] As he noted, neither homosexuals nor heterosexuals were permitted to engage in oral or anal sex with persons of the same sex.[276]

Justice O'Connor acknowledged that lawyers for Texas argued that its "crime against nature" statute targeted only homosexual conduct, not homosexuals as such. She replied that the conduct targeted was "closely correlated with being homosexual."[277] As a result, she found the Texas statute was "targeted at more than conduct."[278] She had previously noted that "a bare desire to harm" a

(discussing married and unmarried persons accessing contraceptives).

272. Lawrence v. Texas, 539 U.S. 558, 579 (2003) (O'Connor, J., concurring).

273. State v. Stubbs, 266 N.C. 295, 298, 145 S.E.2d 899, 902 (1966); *see also In re* R.L.C., 179 N.C. App. 311, 314, 635 S.E.2d 1, 2 (Ct. App. 2006) (restating that *persons* who engage in "crimes against nature" are gratifying a perverted and depraved sexual instinct).

274. *See* Lawrence v. Texas, 539 U.S. 558, 600–01 (2003) (Scalia, J., dissenting).

275. *Id.* at 599.

276. *Id.* at 599–600. Justice Scalia invoked the analogy of marriage, where only men and women could marry each other. *Id.*

277. *Id.* at 583 (O'Connor, J., dissenting).

278. *Id.*

politically unpopular group is not a legitimate state interest.[279]

In broad "crime against nature" statutes, like that in North Carolina, the group targeted is larger. But, as the decisions of the North Carolina courts have shown, the rationale for criminal punishment was the mistaken conclusion that all those practicing these acts belong to a distinct, unnatural, perverted, and depraved group. Whichever side of the group-activity coin one chooses to inspect, this rationale is not legitimate: it targets a supposedly unpopular group based on an outmoded hostility and prejudice.

In the absence of arbitrary classifications, the United States Supreme Court has said that providing a prosecutor with a choice between two statutes with identical elements but different sentences does not violate equal protection, provided the enforcement is not based on an arbitrary classification.[280] Here, however, the classification between oral and vaginal sex for persons otherwise similarly situated is arbitrary and lacks a reasonable relation to a legitimate state purpose. Under one of North Carolina's two statutory schemes covering the very same conduct, the acts would often not be a crime at all for the minors involved.

C. *A Different Approach: Resuscitating the Crime Against Nature*

To be sure, several state court opinions are inconsistent with the thesis advanced here. As we have seen, the court of appeals opinion in *R.L.C.* and the plurality of the North Carolina Supreme Court suggest a very different view.[281]

In addition, there are decisions from other states inconsistent with the analysis suggested here. Several are from Georgia.

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279. *Id.* at 582.

280. United States v. Batchelder, 442 U.S. 114, 124–25 & n.9 (1979).

281. *Cf.* State v. Poe, 40 N.C. App. 385, 252 S.E.2d 843 (Ct. App. 1979). *Poe* was decided before *Lawrence* and upheld against an equal protection challenge the prosecution of unmarried heterosexuals for engaging in oral sex in private. *Id.*, 252 S.E.2d at 843. Assuming that married couples would be protected by the right of privacy, the court found no violation of equal protection. *Id.* at 389, 252 S.E.2d at 845. As the court noted:

> Conceding for purposes of argument that a husband or wife could not be prosecuted for engaging in fellatio in private with his or her spouse, we do not believe it creates an unreasonable class to treat unmarried persons differently. The state can forbid certain types of sexual conduct. The statute under which the defendant was prosecuted forbids homosexual as well as heterosexual unnatural sex acts. It has been upheld as to homosexual acts. . . . In this state, fornication and adultery have been proscribed since at least 1805 . . . . We believe the state, consistent with the Fourteenth Amendment, can classify unmarried persons so as to prohibit fellatio between males and females without forbidding the same acts between married couples. We hold that the constitutional right of privacy does not protect the defendant in this case.

Id., 252 S.E.2d at 845.

Initially, the issue came up in Georgia in a setting far different from that involved in the horrific *Wilson* case. In *Odett v. State*, the defendant, a twenty-five-year-old man, was convicted of aggravated child molestation under section 16-6-4 of the Georgia Code for sodomy with a thirteen-year-old girl.[282] The Georgia statutes dealing with sex involving minors punished the "crime against nature" far more harshly than vaginal sex, and the defendant argued that the distinction violated equal protection under the state constitution.[283] In this setting, the Georgia Supreme Court rejected the claim and cited the compelling interest of protecting children.[284]

In taking this approach, the Georgia court applied the most permissive form of rational basis analysis. "As the statute at issue does not affect a fundamental right or a suspect class, to survive Odett's constitutional challenge it 'need only bear a rational relationship to some legitimate state purpose.'"[285] The court proceeded to employ the "not-insane-therefore-o.k." imagined basis standard. Under this approach, the legislature need not actually have entertained any such basis. It is enough that the court can imagine one. The court in Odett quoted the *Powell* decision: "many believe that acts of sodomy . . . are morally reprehensible;" the *Odett* court therefore concluded that "[b]ecause the General Assembly could reasonably conclude that the psychological well-being of minors is more damaged by acts of sodomy than by acts of intercourse, and that such acts warrant a greater punishment for child molestation by sodomy, Odett's statutory challenge has no merit."[286]

Odett did not involve minors close in age engaging in oral sex. But the *Odett* rule was later applied to that situation. *Odett* was decided before *Lawrence* and the challenge was based on equal protection under the state constitution.

It is difficult to believe that the North Carolina legislature found the "crime against nature" to be uniformly more psychologically harmful to minors close to each other in age than vaginal intercourse. This is so because the legislature treated the two sex acts identically *in the statute specifically dealing with minors and sex.* There, it chose to punish (or not punish) oral sex and vaginal sex in exactly the same way. Likewise, if the Georgia legislature ever actually entertained the Georgia court's imagined basis for harsher punishment in the case of minors close in age, it has abandoned it. Georgia now treats vaginal sex and oral sex

282. 541 S.E.2d 29, 30 (Ga. 2001).
283. *Id.*
284. *Id.* at 31.
285. *Id.* (quoting Barnett v. State, 510 S.E.2d 527, 528 (Ga. 1999)).
286. *Id.* (quoting Powell v. State, 510 S.E.2d 18, 26 (Ga. 1998)).

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between children close in age in the same way.[287]

In any case, the Georgia court's broad imagined "rational basis" assumption of greater psychological injury was explicitly based on an assumed and general prejudice against those who engage in oral sex, which in turn would affect the child. Such a justification is problematic and especially so for minors close in age having sex with each other. In other situations, the United States Supreme Court has rejected the idea that protecting a child from irrational prejudice justifies discrimination. The town of Cleburne suggested that students at a nearby school might harass the mentally retarded. The Court rejected this and another rationale based on assumed public hostility to the mentally retarded. The Court responded: "[D]enying a permit based on such vague, undifferentiated fears is again permitting [prejudice entertained by] some portion of the community to validate what would otherwise be an equal protection violation."[288] Similarly, the Court found protecting a child from prejudice did not justify denying custody to an interracial couple.[289] These decisions suggest an additional reason for caution in invoking a "not-insane-therefore-o.k." imagined basis like the one imagined in the *Odett* case to sustain classifications punishing oral sex between minors more harshly than vaginal sex.

Since *Odett* was pre-*Lawrence*, the Georgia court could not consider the impact of that case. Instead of heightened rational basis, the Georgia court used low-level rational analysis of the "not-insane-therefore-rational" variety. It apparently justified the classification based on the *supposedly* widespread view that the "crime against nature" is intrinsically immoral. The Georgia courts continued to follow this approach and applied it to minors close to each other in age, simply citing *Odett* with no reference to *Lawrence*, *Limon*, or heightened rational basis analysis.[290]

State v. Thomas[291] goes further. There, the Louisiana Supreme Court took a different approach from that of the Kansas and California courts. It upheld, as to sex for hire, the distinction between vaginal and oral intercourse, remarking "[p]unishment of one type of conduct more severely than another similar type of conduct is not, of itself, an equal protection violation."[292] By this

287. *Compare* GA. CODE ANN. § 16-6-2 (2007) (finding children close in age who engage in oral sex acts guilty of a misdemeanor), *with* GA. CODE ANN. § 16-6-3 (2007) (finding children close in age who engage in vaginal sex guilty of a misdemeanor).

288. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 449 (1985).

289. Palmore v. Sidoti, 466 U.S. 429, 433 (1984).

290. *See* Widner v. State, 631 S.E.2d 675, 677–78 (Ga. 2006); Wilson v. State, 631 S.E.2d 391, 392–93 (Ga. Ct. App. 2006), *cert. denied*, No. S06C1689, 2006 Ga. LEXIS 1036 (Ga. Oct. 2, 2006).

291. 891 So. 2d 1233 (La. 2005).

292. *Id.* at 1238; *cf.* Schochet v. State, 580 A.2d 176 (Md. 1990) (construing,

categorical pronouncement, the Louisiana court spared itself the need to find even a rational basis for the distinction.[293]

Decisions from long ago are entitled to respectful consideration. But they must be analyzed in light of the facts as understood today, not simply as the facts may have been misunderstood in 1966 or in the time of Henry VIII. Today, we have the benefit of social facts of which the North Carolina Supreme Court in *State v. Stubbs*[294] was apparently unaware. Judges increasingly have looked at social facts, including the changing legal approach to the "crime against nature" in the nation and the current understanding of the medical community.[295] Much of the transformed understanding of the "crime against nature" is discussed in the *Lawrence* opinion. The substantial acceptance of oral sex by Americans, the repeal of "crime against nature" statutes by most states, state decisions holding state statutes unconstitutional under state constitutions,[296] and the decision in *Lawrence* all support seeing oral sex as simply another form of sexual intimacy.

In *Commonwealth v. Wasson*, in *Lawrence*, and in a number of other cases, courts looked at constitutional principles in light of the social facts as they understood them in the twentieth and twenty-first centuries. Doing so is consistent with equal protection analysis. For example, at the time *Loving v. Virginia* was decided (striking down a ban on interracial marriage), sixteen states still punished racial interracial marriage.[297] Just fifteen years before, thirty states did.[298] But the long legal recognition of the ban on interracial marriage and the strong view held by many that miscegenation was a gross evil did not save the statute from re-examination in light of the *Loving* Court's understanding of race in the twentieth century.

D. In Applying the Constitutional Prohibition Against Irrational Discrimination, Courts Should Interpret the Constitutional Principle in Light of the Conditions in the World as We Understand Them Today

Even if the decision in *Lawrence v. Texas* had not been issued, facts now widely available show that courts should not continue to

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pre-*Lawrence*, the Maryland "crime against nature" statute to not cover heterosexual oral sex and assuming that application of the construed statutes to minors otherwise guilty of no crime might be constitutional).

293. *See Thomas*, 891 So. 2d at 1237–38.

294. 266 N.C. 295, 145 S.E.2d 899 (1966).

295. *E.g.*, State v. Limon, 122 P.3d 22, 24–27 (Kan. 2005); Commonwealth v. Wasson, 842 S.W.2d 487, 489–92 (Ky. 1992).

296. *E.g.*, Jegley v. Picado, 80 S.W.3d 332, 345–46 & n.4 (Ark. 2002) (collecting some of the cases).

297. 388 U.S. 1, 6 (1967).

298. *Id.* at 6 n.5

rely on earlier pronouncements about the supposedly "unnatural," "perverted," and "depraved" nature of those who practice oral sex. Nor should they rely on supposed purposes which bear a tenuous relation to the bizarre classification created by a state court's interpretation of a state's statutes. Studies of sexual behavior show that the assumption that this behavior is "unnatural" is grossly mistaken, if actual human behavior is taken into account.[299] In the face of these facts and current psychological and medical opinion, it is not tenable to support the broadest possible application of these statutes to minors otherwise guilty of no crime and to ignore the resulting irrationality based on characterizations such as "unnatural," "perverted," and "depraved."

It may be tempting to reject inquiry into the actual behavior of the American people in determining whether the sex acts condemned as the "crime against nature" can be classified as unique, "unnatural," and "depraved," but constitutional analysis inevitably involves two steps.[300] The first step is to identify the meaning of the constitutional principle; the second is to understand the social facts to which the principle applies.

The principle is like a major premise in a syllogism, the social facts are like a minor premise, and the result is the conclusion. One might believe that we must simply assume the social facts embraced by most people at the time the constitutional provision was framed, or at least that one should accept social facts set out in earlier precedent. In the *R.L.C.* case, the social facts emphasized by the panel of the court of appeals are set out in a 1966 North Carolina Supreme Court decision, *State v. Stubbs*.[301] These social facts are that oral sex (as part of the "crime against nature") and those who practice it are "unnatural," "depraved," and "perverse." These facts provide one supposedly legitimate state interest behind the legislation. Because these facts are seriously mistaken,

299. *See infra* notes 330–37 and accompanying text (noting relevant studies of sexual behavior).

300. For a few of the many discussions of legal and constitutional interpretation to which we are deeply indebted, see generally WILSON HUHN, THE FIVE TYPES OF LEGAL ARGUMENT (2002); MICHAEL J. PERRY, WE THE PEOPLE: THE FOURTEENTH AMENDMENT AND THE SUPREME COURT (1999); Charles Curtis, *A Better Theory of Legal Interpretation*, 3 VAND. L. REV. 407 (1950); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987); Lawrence Lessig, *Fidelity and Constraint*, 65 FORDHAM L. REV. 1365 (1997); Cass Sunstein, *General Propositions and Concrete Cases (With Special Reference to Affirmative Action and Free Speech)*, 31 WAKE FOREST L. REV. 369 (1996). On the Principle-Application distinction, see PERRY, *supra*, at 28–35; Ronald Dworkin, *Comment*, *in* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 115 (Amy Gutmann ed., 1997). For a discussion of the originalism debate, see Michael J. Perry, *The Legitimacy of Particular Conceptions of Constitutional Interpretation*, 77 VA. L. REV. 669 (1991).

301. 266 N.C. 295, 145 S.E.2d 902 (1966).

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constitutional analysis based on them will be also.

Courts must examine social facts as they understand them when they apply constitutional principles, not as they may have been understood in a previous era. Otherwise, *Brown v. Board of Education*,[302] striking down segregation, was quite probably wrong; the decisions protecting men and women against gender discrimination[303] are wrong; and many other decisions, such as the one protecting the right of the mentally retarded to have a group home,[304] may well be wrong.

In questions of irrationality under equal protection, reliance on social facts is *inevitable*. The Court in *Plessy v. Ferguson*[305] relied on its view of social facts, as did the Court in *Brown*. Similarly, Justice Brandeis applied the Fourth Amendment to wiretaps by applying the amendment's principle to changed social facts.[306] The North Carolina Court of Appeals candidly asserted that the rationality and legitimacy of punishing oral sex is supported by the 1966 claim that the practice is "unnatural," "depraved," and "perverse." So, the accuracy of this judgment is central. This view appears to be the true reason for North Carolina's "crime against nature" statute. Other imagined bases simply serve to conceal the hostility that motivated the statute. As a result, the claim that such conduct is "depraved" and "unnatural" should be reexamined and cannot be impervious to modern evidence, understanding, and analysis.[307]

Looking at social facts is not doing anything novel. The practice has been implicit and often explicit in the unfolding story of the application of equal protection and has been a part of the expansion of constitutional protection for groups that were at first left out—black people, women, and others. A brief review of history shows this to be the case.

According to the United States Supreme Court, the Fourteenth Amendment embraces a core principle. The principle forbids irrational and invidious governmental classifications that discriminate against similarly situated people.[308] The Fourteenth Amendment is "essentially a direction that all persons similarly situated should be treated alike."[309] Sometimes these irrational classifications have involved immutable characteristics, but that is

302. 347 U.S. 483 (1954).

303. *E.g.*, Craig v. Boren, 429 U.S. 190 (1976).

304. City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985).

305. 163 U.S. 537 (1896).

306. Olmstead v. United States, 277 U.S. 438 (1928) (Brandeis, J., dissenting). Brandeis's dissent was subsequently endorsed by the Court in *Katz v. United States*. *See* Katz v. United States, 389 U.S. 347 (1967).

307. *E.g.*, Lawrence v. Texas, 539 U.S. 558 (2003); *City of Cleburne*, 473 U.S. at 432; Reed v. Reed, 404 U.S. 71 (1971); *Brown*, 347 U.S. at 483.

308. *City of Cleburne*, 473 U.S. at 439.

309. *Id.*

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not required. For example, *Village of Willowbrook v. Olech* involved property owners seeking a connection to the municipal water and sewage system.[310] *United States Department of Agriculture v. Moreno*[311] involved people who satisfied the income eligibility requirements for federal food assistance, but were excluded from the program solely because the persons in each group were not all related to each other.[312]

While the principle is clear, it is also clear that classifications we understand today as irrational and invidious were not always so understood by many at the time they were adopted. Today, we find segregation by race irrational and invidious. But the Senate that passed the Fourteenth Amendment had segregated galleries,[313] and the Congress provided for and tolerated segregated schools in the District of Columbia.[314] In 1866–1868, probably most Americans saw

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310. 528 U.S. 562, 563 (2000).

311. 413 U.S. 528 (1973) (involving equal protection under Fifth Amendment Due Process).

312. *Id.* at 529. The court further explained:

> The legislative history that does exist, however, indicates that that amendment was intended to prevent so-called "hippies" and "hippie communes" from participating in the food stamp program. See H.R. Conf. Rep. No. 91-1793, p. 8; 116 CONG. REC. 44439 (1970) (Sen. Holland). The challenged classification clearly cannot be sustained by reference to this congressional purpose. For if the constitutional conception of "equal protection of the laws" means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest. As a result, "[a] purpose to discriminate against hippies cannot, in and of itself and without reference to [some independent] considerations in the public interest, justify the 1971 amendment."

Id. at 534–35 (quoting Moreno v. U.S. Dep't of Agric., 345 F. Supp. 310, 314 n.11 (D.D.C. 1972). The legitimate state interest requirement is of course equally applicable to Fourteenth Amendment due process.

313. *See* CONG. GLOBE, 39th Cong., 1st Sess. 766 (1866) (statement of Sen. Johnson) ("Why is that separate places for the respective races even in your own Chamber? [sic.] Why are they not put together?"); *see also* Interview by Donald A. Ritchie with J. Franklin Little, Senate Page (1910–1912), in Annandale, Va. (Dec. 9, 1983), *available at* http://senate.gov/artandhistory/history/resources/pdf/Little_interview.pdf, at 16–17 (last visited Dec. 17, 2007). For scholarly debate, compare Michael J. Klarman, Brown, *Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881 (1995) (finding *Brown v. Board of Education* an expansion of original understanding), with Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 950–53 nn.6–16 (1995) (supporting *Brown v. Board of Education* as consistent with original intent and relying heavily on evidence from later debates in 1875).

314. *See e.g.*, CONG. GLOBE, 42nd Cong., 2nd Sess. App. 353 (1872) (statement of Sen. Bayard) (opposing a bill to integrate D.C. schools and citing an act of 1866 providing for schools for black children); *see also id.* at 2539 (statement of Sen. Sumner) (advocating a bill to integrate the schools of the District). Providing public education for black children, though in a segregated setting, was a step forward since no earlier provision had been made for black

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the rationality of many racial distinctions through a lens darkened by pervasive racism.

So, in the 1954 case of *Brown v. Board of Education*, the Justices faced a dilemma. They could apply the principle against irrational and invidious discrimination to social facts about race as they currently understood them or they could violate the principle (based on the world as they understood it) and follow what was likely the application expected by many of the framers of the Fourteenth Amendment and citizens at that time. The Justices chose to apply the principle to the reality as they understood it in 1954 America.[315]

The issue arose again in connection with the constitutional status of women. Many framers of the Fourteenth Amendment rejected irrational classifications.[316] But many framers accepted as rational rules of law that provided that married women could not contract, had no right to their own earnings, could not practice law, and could not sue in their own name. Unlike denials of the right to contract to black men, these discriminations against women were not understood to be irrational.[317] In 1866, many saw women in a way somewhat similar to the way we see children today—not capable of being entrusted with serious worldly affairs.[318] One can

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children. For segregation in the North and early court decisions upholding it, see DAVISON M. DOUGLAS, JIM CROW MOVES NORTH: THE BATTLE OVER NORTHERN SCHOOL SEGREGATION, 1865–1954, at 70–73 (2005). While most early decisions upheld segregation, a couple of trial court decisions went the other way. *See id.* at 70 n.15.

315. *See* Brown v. Bd. of Educ., 347 U.S. 483 (1954) (applying the Fourteenth Amendment to segregated schools); *see also* Harper v. Va. Bd. of Elections, 383 U.S. 663 (1966) (applying the Fourteenth Amendment to the denial of the right to vote to those who failed to pay a poll tax, thus disfranchising many who were poor); *accord* Bush v. Gore, 531 U.S. 98, 105 (2000) (citing *Harper* with approval).

316. *See also* CONG. GLOBE, 39th Cong., 1st Sess. 1063–64 (1866) (setting forth discussion of women and equal protection by Reps. Stevens and Hale, wherein Stevens suggests that a distinction, e.g., in the right to contract between a white man and a black man, violates equal protection, but the distinction between married and single women or women and men does not); *see also id.* at 2766 (statement of Sen. Howard) (suggesting that equal protection protects all persons and forbids caste legislation). The discussions are set out in 1 MICHAEL KENT CURTIS ET AL., CONSTITUTIONAL LAW IN CONTEXT 683–84, 695 (2d ed. 2006).

317. *See* CONG. GLOBE, 39th Cong., 1st Sess. 1063 (1866) (statements of Reps. Hale and Stevens on equal protection and discriminations against married women); *cf. id.* at 1833 (statement of Rep. Lawrence assuming differences of sex could justify discrimination in connection with the right to enter contracts, a right he assumed was protected to some extent by Article IV, sec. 2).

318. For one example of this quaint belief, see ORESTES A. BROWNSON, THE WOMEN QUESTION, ARTICLES I AND II (1885), *reprinted in part in* STEPHEN B. PRESSER & JAMIL S. ZAINALDIN, LAW AND JURISPRUDENCE IN AMERICAN HISTORY

see that view in Justice Bradley's concurring opinion in *Bradwell v. Illinois*. In *Bradwell*, the Court held women did not have a constitutional right to practice law.[319] Other courts also rejected that claim for additional reasons. In the case of *In re Goodell*, the Wisconsin Supreme Court extolled the wisdom of the common law rule that excluded women from the practice of law.[320] The Wisconsin court said the exclusion was essential because issues considered by courts of justice (such as the "crime against nature") were "unfit for women's ears."[321]

In contrast, the North Carolina Supreme Court admitted a woman, Tabitha Anne Holton, to the practice of law in 1878. Her lawyer was Albion Tourgée, who was also Plessy's lawyer in *Plessy v. Ferguson*.[322]

But earlier, in 1862, the North Carolina court apparently had a more traditional view of the role of women. In *Joyner v. Joyner*, a woman sued for divorce because her husband had beaten her with a horsewhip and a switch.[323] Since the court found "the wife must be subject to the husband," it opined that it might have been appropriate to beat her with a switch and horsewhip.[324] That would

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551–52 (3d ed. 1995) ("We do not believe women, unless we acknowledge individual exceptions, are fit to have their own head. . . . Revelation asserts, and universal experience proves that man is the head of the woman, and that the woman is for the man, not the man for the women. . . . [A]s an independent existence, free to follow her own fancies and vague longings, her own ambition and natural love of power, without masculine direction or control, she is out of her element, and a social anomaly, sometimes a hideous monster . . . .").

319. Bradwell v. Illinois, 83 U.S. 130, 139–42 (1872) (Bradley, J., concurring). Bradley appealed to the historic role of women and "the law of the Creator" to justify denying them constitutional protection for the right to practice law. *Id.* at 141. The claim was made under the Privileges and Immunities Clause, not the Equal Protection Clause. *Id.* at 130 (majority opinion). Bradley had previously endorsed a broad reading of the clause for men, one which, had it been followed for women, would have afforded relief to Mrs. Bradwell. *Id.* at 139–40 (Bradley, J., concurring); *see also* Strauder v. West Virginia, 100 U.S. 303, 310 (1879) (holding that the Equal Protection Clause banned exclusion of black men from juries but did not ban exclusion of women). Note the potential effect of the Nineteenth Amendment on this issue. The effect was resisted by some courts on the theory that the legislature would not have expected women jurors. Commonwealth v. Welosky, 177 N.E. 656, 660 (Mass. 1931). A Massachusetts statute provided that "[a] person qualified to vote for representatives to the general court shall be liable to service as a juror." *Id.* at 658. Subsequently, the Nineteenth Amendment prohibited denying or abridging the right to vote based on sex. *See* U.S. CONST. amend. XIX. Still, the Massachusetts court denied women the right to serve as jurors on the ground that when the legislature used the word person in the statute, it could not have intended to include women. *Welosky*, 177 N.E. at 661.

320. *In re* Goodell, 39 Wis. 232 (1875).

321. *Id.* at 239.

322. Michael Kent Curtis, *Albion Tourgée: Remembering Plessy's Lawyer on the 100th Anniversary of Plessy v. Ferguson*, 13 CONST. COMMENT. 187 (1996).

323. Joyner v. Joyner, 59 N.C. (6 Jones Eq.) 322, 322 (1862).

324. *Id.* at 325.

be true, for example, if she had "an unruly temper or an unbridled tongue" and treated her husband with "disrespect."[325] However it may have looked to judges in 1862, a rule of law that allows the husband to beat a disrespectful wife with a horsewhip (but not vice versa) would not pass the rationality test today. Our understanding of social facts has changed.

As we have seen, as late as 1948, the Supreme Court continued to apply a "not-insane-therefore-o.k." imagined basis rubber stamp to classifications that sorely disadvantaged women. In *Reed v. Reed*, in the 1970s, the Court reconsidered its approach.[326] By this time, it understood that women are not like children and are typically capable in the same ways men are capable. In *Reed*, the Court struck down, as a violation of equal protection, a rule preferring men over women as administrators of estates using a heightened rational basis analysis.[327]

No rule of constitutional law now holds that striking down irrational discrimination is solely for the legislature. The Court did not take that approach in *Brown*. It did not take that approach in the case of gender discrimination against women or against men.[328] Nor did it follow it in the case of the group home for the mentally retarded or in ruling on a statute denying food stamps to needy unrelated people living together.[329] Significantly, the Court often reached its result using a heightened rationality approach.

E. The Assumption That Oral Sex for Anyone Under Any Circumstances Is Intrinsically "Unnatural" and "Depraved" Is Irrational in Light of the Conduct and Understanding of Most Americans Today: The Conceivable Justifications Are Specious

In considering what is "unnatural" and "depraved," courts should take judicial notice of studies of sexual behavior in addition to modern psychiatric and psychological understanding. Statistics from surveys commissioned by the Centers for Disease Control and Prevention show that, among young males 22 to 24 years of age, some 82.3% had engaged in oral sex with a member of the opposite sex.[330] For males 18 to 19 years, the figure was 69.5%, somewhat higher than the 65.5% who had engaged in vaginal intercourse.[331] For males 15 to 17, the figure was 44%.[332] Is it rational to assume

325. *Id.*
326. Reed v. Reed, 404 U.S. 71, 71–72 (1971).
327. *Id.* at 76–77.
328. *See id.*; Craig v. Boren, 429 U.S. 190 (1976).
329. *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985); Dep't of Agric. v. Moreno, 413 U.S. 528 (1973)
330. MOSHER ET AL., *supra* note 10, at 21 tbl.3.
331. *Id.*
332. *Id.*

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that some 83% of our young men are "unnatural," "depraved," and "perverted"?

These statistics suggest that, by the social facts of today, oral sex is simply another form of sexual expression and ought to be treated as such. Among females between 15 and 19 years of age, some 54.3% had engaged in oral sex, a bit higher than the 53% who had engaged in vaginal sex.[333] For females 20 to 24 years of age, the figure was 83.1%.[334] Is it rational to believe that 83% of our young women are "unnatural," "perverted," and "depraved"? If not, then something more than pejorative labels will be required to distinguish oral from vaginal sex.

In the Centers for Disease Control and Prevention study, most respondents reported heterosexual experiences. Among males 22 to 24 years of age, some 7.4% reported sexual experience with another male.[335] Among males 15 to 19 years of age, about 4.5% reported same sex experience.[336] And among females 15 to 24 years of age, 12.4% reported sexual experience with another female.[337]

Occasionally, judges have looked behind the curtain of anachronistic rhetoric about the allegedly "unnatural" nature of the "crime against nature" to find out what is really going on.

In *Schochet v. State*, the defendant was charged with rape and the "crime against nature," but was acquitted of rape.[338] He was convicted of the "crime against nature" as a result of apparently voluntary oral sex between the defendant and an adult woman that occurred in private.[339] The majority of the Maryland intermediate appellate court upheld the conviction, a decision that was reversed on appeal when the state's highest court construed the "crime against nature" statute to avoid the constitutional question raised by Schochet.[340] Judge Wilner dissented from the (subsequently reversed) decision of the intermediate appellate court. As he noted:

> The only ground asserted for this kind of criminal sanction is some vague notion of public morality, some unarticulated need to punish acts that the Legislature once regarded as "unnatural or perverted" and that the majority holds to be "unorthodox." So let us explore that for a moment. Public morality may be a valid basis for regulation. *Bowers v. Hardwick*, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140

333. *Id.* at 22 tbl.4.
334. *Id.*
335. *Id.* at 21 tbl.3.
336. *Id.*
337. *Mosher*, *supra* note 10, at 22 tbl.4.
338. 541 A.2d 183, 183–84 (Md. Ct. Spec. App. 1988), *rev'd*, 580 A.2d 176 (Md. 1990).
339. *Id.* at 183.
340. Schochet v. State, 580 A.2d 176, 181–84 (Md. 1990).

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(1986). But there has to be some evidence of what that public morality is; the term itself cannot supply the fact.

The *fact* is that public morality, to the extent documented, condones rather than condemns this activity, and the degree of condonation has not only dramatically increased over the past 40 years but is approaching universality, at least among married couples. The conduct, in other words, is no longer regarded by the people as unnatural, or perverted, or unorthodox.

[The judge continued in footnote 3:]

In his first report, *Sexual Behavior in the Human Male* (1948), Alfred Kinsey found that fewer than half of the men interviewed engaged in fellatio or cunnilingus, even during marriage. In the category of highest incidence—married men with 13+ years of education—45.3% performed cunnilingus and 42.7% engaged in fellatio. Five years later, in his *Sexual Behavior in the Human Female*, Kinsey reported that 54% of the married women interviewed had engaged in pre-coital cunnilingus and 49% had engaged in fellatio. See also P. Gebhard and A. Johnson, *The Kinsey Data* (1979). In their 1977 Redbook Report on Female Sexuality, C. Tavris and S. Sadd found that 93% of wives responding reported having engaged in cunnilingus and 91% had engaged in fellatio. They concluded from this response that, "Today it is clear that if the sexual revolution has occurred anywhere, it is in the practice and acceptance of oral sex. Among people under age twenty-five, it is virtually a universal part of the sexual relationship."

P. Blumstein and P. Schwartz have reported similar statistics—93% of heterosexual couples had engaged in cunnilingus and 90% had engaged in fellatio. *See also* W. *Masters, V. Johnson*, and R. Kolodny, *Human Sexuality* 393 (1985). Nor is this phenomenon confined to the young. E. Brecher reports in *Love, Sex, and Aging* 358-59 (1984), that, among people over 50, 49% of women and 56% of men engaged in cunnilingus and 43% of women and 49% of men engaged in fellatio.

[End footnote 3].

The majority, apparently, views this as a matter for the Legislature alone to consider; but I submit that, if the only

> asserted basis for a criminal statute is a perception of public morality, it is a matter for the courts as well.[341]

Similarly, studies by the Centers for Disease Control and Prevention show that 90% of males between 25 and 44 years of age have had oral sex with members of the opposite sex; 40% have had anal sex with members of the opposite sex.[342] And 88% of females between 25 and 44 years of age have had oral sex with members of the opposite sex, while 35% have had anal sex.[343]

What all of these figures suggest is that the North Carolina legislature was quite rational when, in statutes dealing with sex by minors, it treated oral sex acts and vaginal sex acts as similar. Perhaps in light of these social facts, courts will be less inclined to rely on older cases that refer to those who engage in the "crime against nature" as "perverted," "depraved," and "unnatural" or as a unique evil to be punished—just as we no longer cite *Plessy v. Ferguson*[344] for the proposition that segregating people by race (but not by hair color) is rational.[345] Similarly, we no longer cite *Joyner v. Joyner* for the proposition that the wife must be subject to the husband and horsewhipping may be appropriate for wives with an "unbridled tongue."[346] Courts should no longer rely on a rationale that ignores social reality and demeans a huge portion of young Americans as well as a very substantial portion of the adult population.

F. Why Constitutional Intervention by Courts May Be Required

The fact that a statute punishes conduct accepted and practiced by a majority does not mean that legislative correction is likely. To see that this is so, one need look no further than North Carolina in the years before *Lawrence* was decided. There are other historical examples as well. For example, in the nineteenth century, Connecticut made it a crime for anyone, even married couples, to use birth control devices. In this, Connecticut was exceptional. The authors of the law expected vigilant neighbors to observe tell-tale signs of birth control and to help prosecute the "whelps of sin" who were practicing birth control.[347] They suggested that people who used contraceptives were an evil comparable to "mad dogs."[348] But vigorous enforcement was difficult, and prosecutions were extremely

341. *Schochet*, 541 A.2d at 206 & n.3 (1988) (Wilner, J., dissenting).
342. MOSHER ET AL., *supra* note 10, at 3 fig.3, 25 tbl.7.
343. *Id.* at 3 fig.3, 25 tbl.7.
344. 163 U.S. 537, 543 (1896).
345. *Id.* at 549–50 (explaining that discrimination based on hair color would be irrational).
346. Joyner v. Joyner, 59 N.C. (6 Jones Eq.) 322, 325 (1862).
347. KERMIT L. HALL, THE MAGIC MIRROR: LAW IN AMERICAN HISTORY 161 (1989).
348. *Id.*

rare. As a result, a law intolerable to the majority if enforced generally remained on the books, making it difficult to provide contraceptives as part of family planning. The Connecticut law was finally struck down by the Supreme Court in 1965.[349]

Because sexual activity typically takes place in locations where it is not likely to be observed, those prosecuted for a consensual "crime against nature" that occurred in private have typically been few and isolated. After *Lawrence*, those punished or punished more harshly because they engaged in a sex act encompassed within a "crime against nature" statute are even fewer and more isolated.

Suppose that in 2000 (before *Lawrence*), the State of North Carolina benefited from a technical breakthrough. It could now secretly monitor the sex lives of all its residents. After the data was collected with the help of the new Sexual Activities Detection Device (the "SADD"), the state began systematically to prosecute all violators. If, in 2000, the "crime against nature" statute could have been and was used to prosecute all adults who were violating it, it would soon have been consigned to the garbage heap of history along with religious persecution and other relics of the reign of Henry VIII. The beginning of general enforcement would have been the end of the statute.

Today, if it were possible to prosecute even all the sixteen- and seventeen-year-old (and younger) oral sex felons created by construction of the states' statutes like that of the North Carolina appellate courts, the beginning of that reign of terror would end the statute. Most parents would react in horror as huge numbers of children were marched off to court and convicted as felons. But rare prosecutions greatly increase the chances that the suffering of a few isolated victims will be ignored so that unreasonable statutes will persist.

VII. ANOTHER ALTERNATIVE: THE CONSTITUTION IN THE LEGISLATURE

Legislative action is possible and desirable. Since legislators have an independent duty to be sensitive to constitutional principles, legislators can consider their understanding of the mandate of equality and rationality under their state constitutions and under the national Constitution, even when a court finds the principle inapplicable.

Such an expansive view of the protection of constitutional principles does not involve defiance of court orders or disrespect for a coordinate branch of government. It simply means that when a legislator believes the state or national constitution stands for a more expansive view of equality or liberty than the courts do, the

349. *See* Griswold v. Connecticut, 381 U.S. 479 (1965).

legislators can and should act on that belief—when they can do so without violating the letter or spirit of court orders.[350] For example, when the courts upheld school segregation as constitutionally permissible, it was entirely proper for legislators to act on the contrary belief and, by legislation, to extend greater protection than that afforded by the courts. Before the Civil War, Charles Sumner and Robert E. Davis (one of Massachusetts' two black lawyers)[351] challenged school segregation in the case of *Roberts v. City of Boston*.[352] When the Massachusetts Supreme Court upheld school segregation in 1849, the opponents of segregation took their constitutional vision to the legislature. By 1855 the Massachusetts legislature changed the law.[353]

When courts were upholding legal discrimination based on gender, it was entirely proper for a legislator to work to strike such discrimination from the law and to do so based in part on her or his understanding of constitutional principles. When the courts were upholding prosecutions and jailing of consenting adults (and even married couples) who had oral or anal sex in private, it was entirely proper for a legislator to act on a more expansive reading of constitutional guarantees of liberty.

In any case, whatever the legislator's view of constitutional requirements, it is entirely proper for legislators to seek to make the criminal law more reasonable and humane. But it is not always easy; legislators fear the wrath of a furious and politically active minority and thirty-second T.V. and radio ads that grossly distort the issue. In this situation, it may be more comfortable to ignore the problem and leave the isolated victims of the law to their fate. But it is not more just.

VIII. PROPOSED LEGISLATIVE REFORM

Many advances for liberty and equality have come from legislatures. Congress passed the Civil Rights Act of 1964[354] (prohibiting racial discrimination in places of public accommodation

350. *See* Michael Kent Curtis, *Judicial Review and Populism*, 38 WAKE FOREST L. REV. 313, 357–67 (2003) (noting the importance of popular constitutional ideas in American history in protecting and advancing liberty); *see also* Shannon D. Gilreath, *The Technicolor Constitution: Popular Constitutionalism, Ethical Norms, and Legal Pedagogy*, 9 TEX. J. C.L. & C.R. 23 (2003).

351. Sandra F. VanBurkleo, *"The Gods' Unwritten and Unfailing Laws": A Response*, 50 WAYNE L. REV. 893, 896 (2004) (discussing *Roberts v. City of Boston*, 59 Mass. (4 Cush.) 198 (1849)).

352. Roberts v. City of Boston, 59 Mass. (4 Cush.) 198 (1849).

353. HAROLD M. HYMAN & WILLIAM M. WIECEK, EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT 1835–1875 at 96–97 (1982) (discussing *Roberts v. City of Boston* and its legislative correction).

354. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 1981 to 2000h6 (2000)).

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and prohibiting discrimination based on race, religion, national origin, or sex in employment). It passed the Voting Rights Act of 1965.[355] After the Illinois court denied Mrs. Bradwell the right to practice law,[356] the state legislature opened law and other professions (except the military) to women. Progress through the democratic process has important advantages in terms of the legitimacy and consensus that often follows democratic change.

The legislatures should once and for all rid us of the heritage of bigotry and persecution embodied in "crime against nature" laws. They could do so in one of two ways. One course would be to leave the "crime against nature" statutes in place, but to pass a law limiting their scope and effect. This would work in jurisdictions like North Carolina and probably in many others. That law would say that, notwithstanding any other provision of the criminal code, persons should be punished for the "crime against nature" only to the extent that similarly situated persons engaging or offering to engage in vaginal intercourse would be punished. The result would be to reach all the independent harms associated with sex acts—public sex, sex with children, sex for hire, rape, etc. These acts could and would be punished, but the unique punishment for the "crime against nature" would not survive. The better approach would be to repeal the "crime against nature" and, if necessary, to amend or enact statutes dealing with public sex, sex with children, sex for hire, etc., so that the crime would include oral and anal as well as vaginal sex and be punished in the same way.

IX. CONCLUSION

There are many reasonable justifications for regulation of sexual conduct. Unique and harsh punishment of persons solely because their sex acts fit within the ancient statute prohibiting the "crime against nature" is not one of them.

355. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2000)).

356. Bradwell v. Illinois, 83 U.S. 130 (1873).

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