

LAW & SEXUALITY

A Review of Lesbian, Gay, Bisexual, and Transgender Legal Issues

VOLUME 20

2011

North Carolina Courts: Legislating Compulsory Heterosexuality by Creating New Crimes Under the Crime Against Nature Statute Post-*Lawrence v. Texas*

M. Blake Huffman*

I.	INTRODUCTION	2
II.	THE NORTH CAROLINA CRIME AGAINST NATURE STATUTE.....	5
III.	THE NORTH CAROLINA COURTS’ JUDICIAL LEGISLATION TO SAVE THE CRIME AGAINST NATURE STATUTE POST- <i>LAWRENCE</i>	7
	A. <i>The North Carolina Approach</i>	7
	B. <i>Adding “Commercial” and “in Public” to the Crime Against Nature Statute</i>	8
	C. <i>Adding “Involving a Minor” to the Crime Against Nature Statute</i>	10
	D. <i>Adding “Nonconsent” to the Crime Against Nature Statute</i>	11
	E. <i>North Carolina Courts Lack Authority for this Ad- Hoc Approach</i>	12
IV.	NORTH CAROLINA COURTS <i>CHOSE</i> TO UPHOLD THE CRIME AGAINST NATURE STATUTE: WHY THE COURTS SHOULD HAVE CONDUCTED FACIAL CHALLENGES.....	13
V.	THE FLAWS IN POSSIBLE POLICY RATIONALES FOR THE NORTH CAROLINA COURTS’ ACTIVISM.....	16

* © 2011 M. Blake Huffman. Associate, Arnold & Porter LLP; Law Clerk for the Honorable Roger L. Gregory, Circuit Judge, U.S. Court of Appeals for the Fourth Circuit, 2009-10; B.S. 2004, University of North Carolina at Chapel Hill; J.D. 2009, University of North Carolina at Chapel Hill School of Law. The views expressed herein are those of the author and not necessarily those of Arnold & Porter.

A.	<i>Deference to the Preferences of Prosecutors and Police</i>	17
B.	<i>Covering Nonforcible “Rape”</i>	18
C.	<i>Controlling Prostitution</i>	19
D.	<i>HIV/AIDS and Sexually Transmitted Disease Prevention</i>	20
E.	<i>Protection of Youth</i>	22
F.	<i>Banning Sex in Public</i>	23
VI.	THE REAL RATIONALE FOR THE CONTINUED PRESENCE OF THE CRIME AGAINST NATURE STATUTE: STIGMATIZING HOMOSEXUALITY	23
A.	<i>The Courts</i>	24
B.	<i>The General Assembly</i>	26
C.	<i>Law Enforcement</i>	28
VII.	CONCLUSION	29

I. INTRODUCTION

As of January 1, 2003, only thirteen states criminalized consensual sodomy, seven of those states as a felony.¹ Yet, it was not until that year that the Supreme Court of the United States in *Lawrence v. Texas*² announced the right of adults, including gays and lesbians, to engage in private, intimate conduct without government intervention.³ Specifically, the Supreme Court in *Lawrence* held unconstitutional a “Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct.”⁴ Instead of confining the holding of *Lawrence* to the principle that there was a constitutional right for homosexuals to engage in sodomy, the Supreme Court “more broadly announced a substantive due process right of adult sexual intimacy for all Americans.”⁵ The Court grounded this right in an expansive interpretation of liberty under the Due Process Clause of the Fourteenth

1. WILLIAM N. ESKRIDGE JR., *DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA 1861-2003* 297 (2008).

2. 539 U.S. 558 (2003).

3. *Id.* at 578.

4. *Id.* at 562, 578.

5. Matt Larsen, Comment, *Lawrence v. Texas and Family Law: Gay Parents’ Constitutional Rights in Child Custody Proceedings*, 60 N.Y.U. ANN. SURV. AM. L. 53, 57 (2004) (noting that “since heterosexuals already enjoyed an unspoken right to lead sex lives safe from government intrusion, *Lawrence* is also a kind of equal protection ruling for extending this unofficial right to same-sex couples”) (footnote omitted). Justice O’Connor, concurring in the judgment, explicitly based her conclusion on Equal Protection analysis. *Lawrence*, 539 U.S. at 579 (O’Connor, J., concurring).

Amendment: “Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. . . . Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.”⁶ The Court explained that “[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.”⁷ Based on these striking passages, *Lawrence* has often been read to mark a dramatic shift towards equality for gays and lesbians⁸ and was hailed as the end of sodomy laws in America.⁹ To this day, the Web site of the Human Rights Campaign states, “North Carolina’s sodomy law was struck down by the U.S. Supreme Court on June 26, 2003, as a result of the Court’s decision in *Lawrence v. Texas*.”¹⁰

Yet, for all of *Lawrence*’s promise, its effect has fallen short. Prosecutions under North Carolina’s “crime against nature” statute,¹¹ the state’s sodomy law, are still alive and well. Right after *Lawrence* was announced, it was reported that the crime against nature law was still being enforced across the state.¹² More than four years later, a North Carolina State University tennis player was charged with the crime against nature after “allegedly performing oral sex on a sleeping team

6. *Lawrence*, 539 U.S. at 562; see also Larsen, *supra* note 5, at 58 (“Focusing on the rights of a ‘person’ rather than those of a ‘gay person,’ the Court explicitly found that the liberty protected by the Due Process Clause includes the freedom to engage in ‘certain intimate conduct.’”).

7. *Lawrence*, 539 U.S. at 567. “The petitioners are entitled to respect for their private lives. The State cannot demean [homosexual persons’] 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.” *Id.* at 578.

8. See, e.g., Jennifer Naeger, Note, *And Then There Were None: The Repeal of Sodomy Laws After Lawrence v. Texas and Its Effect on the Custody and Visitation Rights of Gay and Lesbian Parents*, 78 ST. JOHN’S L. REV. 397, 398-99 (2004) (“This landmark decision not only gives homosexuals the right to enter into sexual relationships in the privacy of the home ‘and still retain their dignity as free persons,’ but also provides them with legal entitlement to equal respect and equal treatment in civil litigation in areas where they have been disadvantaged the most—namely employment, housing, and parenthood—and puts homosexuals in a better position in court to fight for equal treatment in the military.”) (citation omitted).

9. See *id.* at 397-98, 412.

10. *North Carolina Sodomy Law*, HUMAN RIGHTS CAMPAIGN, http://www.hrc.org/your_community/1152.htm (last visited Jan. 31, 2011).

11. N.C. GEN. STAT. § 14-177 (2007).

12. *North Carolina Still Enforcing Sodomy Law*, ADVOCATE.COM, (Aug. 27, 2003), <http://www.advocate.com/article.aspx?id=23942>.

mate.”¹³ The most shocking case illustrating the use of the crime against nature law in North Carolina came approximately five years after *Lawrence*.¹⁴ In May of 2008, Raleigh police charged two men, both adults, with the crime against nature even though the conduct occurred in private.¹⁵ A spokesman for the Raleigh police stated that it

look[ed] like a case of a consensual act that may have gotten out of hand. . . . The law is still on the books. Our detectives got involved in it last night and decided this was the best thing to do. What the D.A.’s office will do with it, I don’t know.¹⁶

What the District Attorney did was drop the charges, citing *Lawrence*.¹⁷ However, one of the men charged with the “crime” recognized that “as long as this law remains on the books, it is a crime punishable by an arrest, a stay in jail, media attention and a fine of \$450.”¹⁸ The magistrate that heard the case stated

I couldn’t care less what these guys do. . . . I’m with the old Victorian lady who said, “I don’t care what people do as long as they don’t do it in the street and scare the horses.” But you don’t want me to decide which laws to enforce and which not to. My opinion shouldn’t enter into it.¹⁹

Charges like this would not be surprising before *Lawrence*, as North Carolina has a lengthy history of using the crime against nature statute to discriminate against gays and lesbians, particularly gay men.²⁰ But after *Lawrence*, what happened to the prediction that the case’s announcement meant that sodomy laws could no longer be utilized?

The North Carolina crime against nature statute has withstood the test of time because North Carolina courts have engaged in judicial legislation. The true motive behind the courts’ zealous defense of the North Carolina crime against nature statute, as seen through their judicial

13. Matt Comer, *NC State Tennis Player Charged with “Crimes Against Nature,”* INTERSTATE Q. (Nov. 7, 2007, 8:46 AM), <http://www.interstateq.com/archives/2427/>.

14. Matthew Eisley, *Police Charge Pair with “Crime Against Nature,”* NEWS & OBSERVER, May 24, 2008, at B3.

15. *Id.*

16. *Id.*

17. Josh Shaffer & Matthew Eisley, *Wake Drops Sodomy Case Against Men,* NEWS & OBSERVER, May 31, 2008, at B1.

18. *Id.*

19. *Id.*

20. See e.g., Lorraine Ahearn, *One Officer Called Morals Trials,* NEWS & RECORD, Sept. 17, 2006, at A1 (“On Feb. 4, 1957, a Guilford County grand jury emerged from its closed session and issued a bundle of indictments of a scope unlike any before or since—against 32 men accused of being homosexual. After witnesses named the men during police interrogations, the suspects were tried one by one in a Greensboro courtroom for crimes against nature, almost exclusively with consenting adults.”).

legislation, is leaving the stigmatizing law on the books.²¹ This stigmatization is mainly intended to express hostility towards homosexuality. In this manner, courts, along with the North Carolina General Assembly and law enforcement, are enforcing “compulsory heterosexuality,”²² spreading the design of a society in which only one form of sex—vaginal intercourse—is nondeviant. Any queer is forever the outcast in such a society.

This Article will first discuss the scope of the North Carolina crime against nature statute. Next, the Article will lay out the approach of the North Carolina courts to constitutional challenges to the statute and assert that the courts engaged in judicial legislation to save the statute by adding elements that are not present on its face. The next section of this Article will differentiate between facial and as-applied constitutional challenges to show that North Carolina courts should have conducted facial challenge analyses but instead conducted as-applied challenge analyses to preserve the statute. Because the courts conducted as-applied analyses and presented no convincing legal reasoning to uphold the crime against nature statute post-*Lawrence*, this Article then analyzes and rejects numerous policy rationales for the courts’ decisions. Finally, this Article offers the real rationale for the continued presence of the crime against nature statute in North Carolina—the stigmatization of homosexuality.

II. THE NORTH CAROLINA CRIME AGAINST NATURE STATUTE

North Carolina has a long history of prosecuting the crime against nature. The North Carolina General Assembly’s parenthetical to the statute includes a reference to King Henry VIII of England.²³ In 1854, “North Carolina [became] the last state in the nation to abolish references from its sodomy law to the old English legal custom of benefit of clergy.”²⁴ Furthermore, a 1975 North Carolina case offers a rare illustration of enforcement “of sodomy laws against consenting homosexuals within the home.”²⁵ Nine years earlier, the Supreme Court of North Carolina announced that the purpose of the crime against nature

21. Christopher R. Murray, Note, *Grappling with “Solicitation”*: The Need for Statutory Reform in North Carolina after *Lawrence v. Texas*, 14 DUKE J. GENDER L. & POL’Y 681, 681, 688-89 (2007).

22. ESKRIDGE, *supra* note 1, at 82.

23. N.C. GEN. STAT. § 14-177 (2007).

24. SODOMY LAWS, <http://www.sodomylaws.org/> (last visited June 16, 2010) (see North Carolina).

25. ESKRIDGE, *supra* note 1, at 184 (describing the case *State v. Enslin*, 214 S.E.2d 318 (N.C. Ct. App. 1975)).

statute “is 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.”²⁶

The statute itself provides that “[i]f any person shall commit the crime against nature, with mankind or beast, he shall be punished as a Class I felon.”²⁷ A Class I felony is punishable by four to six months in prison with no mitigating or aggravating factors if the person charged has no prior record.²⁸ But the term “crime against nature” is never statutorily defined.²⁹ Instead, the North Carolina courts have been allowed to interpret the statute broadly.³⁰ Generally, as recent as this year, the crime against nature has been defined by the North Carolina Court of Appeals as “sexual intercourse contrary to the order of nature.”³¹ Buggery, anal intercourse between men, and bestiality have been within the statute’s scope for over a century.³² Courts have expanded the statute’s coverage over time to include fellatio,³³ “indecent liberties with minors,”³⁴ cunnilingus,³⁵ and “any penetration, however slight, by an object, such as a piece of candy, into the genital opening of a person’s body.”³⁶ Additionally, within the statute’s scope are “all kindred acts of a bestial

26. *In re R.L.C.*, 635 S.E.2d 1, 2 (N.C. Ct. App. 2006) (quoting *State v. Stubbs*, 145 S.E.2d 899, 902 (N.C. 1966)).

27. N.C. GEN. STAT. § 14-177 (2007).

28. *Id.* § 15A-1340.17.

29. *State v. Stiller*, 590 S.E.2d 305, 307 (N.C. Ct. App. 2004) (“Crime against nature is defined by the common law and interpreted by [the] courts.”).

30. See Michael Kent Curtis & Shannon Gilreath, *Transforming Teenagers into Oral Sex Felons: the Persistence of the Crime Against Nature After Lawrence v. Texas*, 43 WAKE FOREST L. REV. 155, 206 (2008). One could argue that the statute is interpreted too broadly and the term “crime against nature” is so unclear that it is void for vagueness. Given the North Carolina courts’ hostility towards challenges to the statute in general over the last decade, it is unlikely this challenge would succeed. This is supported by Virginia’s rejection of this challenge since Virginia, like North Carolina, has persisted in prosecutions under its sodomy law after the *Lawrence* decision. See, e.g., *Tjan v. Commonwealth*, 621 S.E.2d 669, 674 (Va. Ct. App. 2005).

31. *In re R.N.*, 696 S.E.2d 898, 901 (N.C. Ct. App. 2010) (quoting *State v. Harward*, 142 S.E.2d 691, 692 (1965)).

32. See, e.g., *State v. Hefner*, 40 S.E. 2, 2-3 (N.C. 1901).

33. *State v. Griffin*, 94 S.E. 678, 679 (N.C. 1917) (including fellatio involving a minor within the statute, finding that “[w]hile the crime against nature and sodomy have often been used as synonymous terms, [North Carolina’s] statute is broad enough to include in the crime against nature other forms of the offense than sodomy and buggery. It includes all kindred acts of a bestial character whereby degraded and perverted sexual desires are sought to be gratified.”); *State v. Fenner*, 80 S.E. 970, 971 (N.C. 1914) (“[U]nder our statute, having carnal knowledge of another by inserting the private parts in the mouth is indictable.”).

34. ESKRIDGE, *supra* note 1, at 400.

35. *Stiller*, 590 S.E.2d at 306-07 (finding a jury instruction appropriate when it included in the definition of the crime against nature “cunnilingus, which is any touching, however slight, by the lips or tongue of one person to any part of . . . the female sex organ of another”).

36. *Id.* at 307.

character whereby degraded and perverted ‘sexual desires are sought to be gratified.’”³⁷ On its face, North Carolina’s statute does not discriminate between activity engaged in by heterosexuals and that engaged in by homosexuals, does not distinguish between private and public conduct, and does not mention any difference between consensual and nonconsensual acts.³⁸ In fact, as recently as 1979, the Court of Appeals of North Carolina held the crime against nature statute constitutional as applied to consensual fellatio between a man and woman in private.³⁹

III. THE NORTH CAROLINA COURTS’ JUDICIAL LEGISLATION TO SAVE THE CRIME AGAINST NATURE STATUTE POST-*LAWRENCE*

A. *The North Carolina Approach*

As the court of appeals explained in *In re R.L.C.*,⁴⁰ it “has had an opportunity to interpret the crimes against nature statute post-*Lawrence*, and repeatedly has found its application permissible when the conduct involved: minors; public conduct; prostitution; or nonconsensual, coercive conduct.”⁴¹ While the State does have authority to criminalize this sexual conduct, the Supreme Court of North Carolina itself has recognized that “[t]he creation and expansion of criminal offenses is the prerogative of the legislative branch of the government.”⁴² When it comes to the exact elements of a crime, the court of appeals has stated that “[i]t is the role of [the] General Assembly to define the elements of a crime. The role of courts is to interpret statutes not to enact them.”⁴³ This is supported by the view of the Supreme Court of the United States that “because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity.”⁴⁴

37. *State v. Harward*, 142 S.E.2d 691, 692 (1965) (quoting *Griffin*, 94 S.E. at 679).

38. *See* Curtis & Gilreath, *supra* note 30, at 158.

39. *State v. Poe*, 252 S.E.2d 843, 845 (N.C. Ct. App. 1979).

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

41. *Id.* at 316, 635 S.E.2d at 4. The courts in Virginia have engaged in similar judicial activism to uphold that state’s sodomy law after *Lawrence*. *See generally* *Singson v. Commonwealth*, 621 S.E.2d 682, 686 (Va. Ct. App. 2005); *Tjan v. Commonwealth*, 621 S.E.2d 669, 673-74 (Va. Ct. App. 2005). Additionally, the Supreme Court of Idaho has adopted the same approach. *See generally* *State v. Cook*, 192 P.3d 1085 (Idaho Ct. App. 2008) (adding nonconsent as an element to the state’s sodomy statute).

42. *State v. Beale*, 376 S.E.2d 1, 4 (N.C. 1989).

43. *In re R.L.C.*, 635 S.E.2d at 4 (citation omitted).

44. *United States v. Bass*, 404 U.S. 336, 348 (1971).

Yet, North Carolina courts have not lived up to their rhetoric extolling the proper role of the judiciary. How did the courts apply the crime against nature statute to sex involving minors, sex in public, prostitution, and rape after *Lawrence* when the statute makes no such distinctions? The statute plainly includes private, consensual, adult sexual conduct—regulation forbidden by the Supreme Court of the United States.⁴⁵ Instead of striking down the crime against nature statute as unconstitutional and allowing the General Assembly to fulfill its proper role of drafting a new statute, North Carolina courts have upheld the statute by embarking on a “case-by-case . . . [redefinition of] the state’s criminal laws relating to sexual conduct.”⁴⁶ According to Curtis and Gilreath, “[i]n [the] *In re R.L.C* [decision], the North Carolina appellate courts read the *Lawrence* decision quite narrowly [, and] [t]he effect was to preserve as many ‘crime against nature’ prosecutions as possible after *Lawrence v. Texas*.”⁴⁷ The Supreme Court of North Carolina has even confessed to construing the crime against nature statute to avoid “rendering” it “useless and redundant”⁴⁸—a decision itself not one for the court to make. In the end, North Carolina courts have created new crimes by reading elements into the crime against nature statute. This redefinition of North Carolina’s criminal sex code is best illustrated by three cases: *State v. Pope*,⁴⁹ *In re R.L.C.*,⁵⁰ and *State v. Whiteley*.⁵¹

B. Adding “Commercial” and “in Public” to the Crime Against Nature Statute

Pope offers a starting point. In addition to the solicitation of prostitution, Teresa Pope “was charged with four counts of solicitation of a crime against nature” because she allegedly offered to perform oral sex on undercover officers in exchange for money.⁵² The district court dismissed the crime against nature charges, finding the statute unconstitutional after *Lawrence*.⁵³ The Court of Appeals of North Carolina, in *Pope*, found the district court’s interpretation incorrect and

45. N.C. Gen. Stat. § 14-177 (2007); see *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

46. Murray, *supra* note 21, at 690.

47. Curtis & Gilreath, *supra* note 30, at 198.

48. *In re R.L.C.*, 643 S.E.2d 920, 924 (N.C. 2007).

49. 608 S.E.2d 114 (N.C. Ct. App. 2005).

50. 643 S.E.2d 920 (N.C. Ct. App. 2007).

51. 616 S.E.2d 576 (N.C. 2005).

52. *Pope*, 608 S.E.2d at 115.

53. *Id.*

reversed.⁵⁴ Absent from the court of appeals' decision was the broad language from *Lawrence*. In its place, the court decided to give *Lawrence* a narrow reading, highlighting *some* of the Supreme Court's language from the case:

The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve *public conduct or prostitution*. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.⁵⁵

One could read this language from *Lawrence* to mean that the Supreme Court simply was not reaching the constitutionality of criminalizing the mentioned conduct. However, the court of appeals found that because the Supreme Court "expressly excluded prostitution and public conduct from its holding, the State of North Carolina may properly criminalize the solicitation of a sexual act it deems a crime against nature."⁵⁶ The court's holding, along with its use of *Lawrence*, is incorrect.

The court takes a logical leap before making the conclusory statement about *Lawrence*'s "exceptions."⁵⁷ For solicitation to be a crime, the conduct solicited must also be criminalized.⁵⁸ What is the underlying offense here? The court of appeals is correct that *Lawrence*'s holding did not include prostitution or public conduct. Thus, it is clear that North Carolina may regulate prostitution and public sexual conduct without interference from the holding of *Lawrence*.⁵⁹ While North Carolina does criminalize prostitution,⁶⁰ courts have interpreted the prostitution statute to cover only vaginal intercourse.⁶¹ Oral sex, the underlying conduct offered by Teresa Pope, would thus not come within the prostitution statute. Nor did Teresa perform any sexual act in public.⁶² North Carolina does have an indecent exposure statute,⁶³ but because Teresa did not expose herself, this could not be the underlying offense on which a

54. *Id.*

55. *Id.* at 116 (quoting *Lawrence v. Texas*, 539 U.S. 558, 578 (2003)).

56. *Id.*

57. Murray, *supra* note 21, at 687.

58. *See id.*

59. Note that this does not mean that any regulation of this conduct is per se constitutional, but only that the Supreme Court of the United States did not pass on the constitutionality of such regulation in *Lawrence*.

60. N.C. GEN. STAT. § 14-204 (2007).

61. *State v. Richardson*, 300 S.E.2d 379, 380-81 (N.C. 1983).

62. *See State v. Pope*, 608 S.E.2d 114, 115 (N.C. Ct. App. 2005)

63. N.C. GEN. STAT. § 14-190.9.

solicitation charge could attach.⁶⁴ Therefore, in this case, the underlying offense must have been the crime against nature itself.

Relying on the crime against nature, the court erred in finding that *any* sexual act that the State deems to be a crime against nature may be criminalized.⁶⁵ The Supreme Court in *Lawrence* struck down the Texas sodomy statute and never indicated that *sodomy statutes* (or crime against nature statutes) could be used to criminalize any sexual acts that were not limited to the facts of *Lawrence* (private, consensual, sexual conduct between adults).⁶⁶ As previously discussed, North Carolina's crime against nature statute does not distinguish between public and private conduct.⁶⁷ It does not mention sex for hire.⁶⁸ Instead, the statute provides only that the crime against nature itself is punishable—meaning in any location and at any time.⁶⁹ Rather than striking the statute down based on *Lawrence*, the court of appeals read elements into the crime against nature statute to create a new crime all-together—here the elements commercial and in public.⁷⁰ After *Pope*, it is clear that North Carolina courts will use the crime against nature statute to criminalize public and commercial sexual acts even if the conduct does not come within existing criminal statutes.

C. Adding “Involving a Minor” to the Crime Against Nature Statute

The Supreme Court of North Carolina endorsed this crime-creation model in *In re R.L.C.*⁷¹ In that case, the crime against nature statute was held constitutional as applied to a fourteen-year-old boy because a twelve-year-old girl performed oral sex on him.⁷² Under North Carolina's comprehensive statutes regulating sex involving minors, the conduct was *not* punishable because the two minors were “under sixteen years of age[,] . . . coercion was not involved and the minors were within three years of each other in age.”⁷³ However, the supreme court held that the conduct came within the crime against nature statute and that the court would “not judicially impose an age differential element into” that

64. See *Pope*, 608 S.E.2d at 115.

65. See *id.*

66. See *Lawrence v. Texas*, 539 U.S. 558, 578-79 (2003).

67. See N.C. GEN. STAT. § 14-177 (2007).

68. See *id.*

69. See *id.*

70. See *Pope*, 608 S.E.2d at 116.

71. 643 S.E.2d 920, 920 (N.C. 2007).

72. *Id.* at 925.

73. See *Curtis & Gilreath*, *supra* note 30, at 169 (referencing N.C. GEN. STAT. §§ 14-27.1, 14-27.4, 14-27.7A, 14-202.2 (2000)).

statute.⁷⁴ While it is true that the crime against nature statute does not have an age differential requirement on its face, it does not distinguish between sexual conduct involving only adults and those involving minors. Thus, the court should have found the statute unconstitutional, following *Lawrence*. Yet, like the court of appeals in *Pope*, the supreme court gave a limited reading to *Lawrence*, finding that it had no relevance because its facts did not involve minors.⁷⁵ The supreme court chose to read a “minor age” element into the crime against nature statute to create a new crime.⁷⁶

The reasoning of the *R.L.C.* court defies logic. If the crime-against-nature conviction is valid only because of the age of the participants, then what law determines the age of sexual minority? The court, as a matter of logic, *must* have grafted *some* age element to save the statute after *Lawrence*. Further, in crafting that age requirement, what is the court’s authority to ignore the legislature’s most recent articulation of the age of sexual minority in the statutory rape context?⁷⁷

Therefore, sexual acts involving minors are now criminalized if the acts can be deemed crimes against nature, even if the resulting convictions are contrary to legislative intent as seen in the laws governing statutory rape.

D. Adding “Nonconsent” to the Crime Against Nature Statute

Next, in *State v. Whiteley*,⁷⁸ an adult male had been convicted of the crime against nature because he allegedly performed cunnilingus and digital penetration on a female complainant who was intoxicated.⁷⁹ The defendant was also charged with first degree rape and first degree sexual offense, both of which he was found not guilty.⁸⁰ Consistent with its approach in the other cases noted, the court of appeals found that language in *Lawrence* meant

state regulation of sexual conduct involving minors, nonconsensual or coercive conduct, public conduct, and prostitution falls outside the

74. *In re R.L.C.*, 643 S.E.2d at 924. The court claimed it was guided by the “plain meaning” of the statute, but refused to follow the plain meaning in finding that the statute does not cover private consensual, sexual conduct between adults. Finding such conduct covered would require finding the statute unconstitutional, a step the courts have been unwilling to take. *See id.* at 923, 925.

75. *Id.* at 925.

76. *See id.*; *see also* *State v. Browning*, 629 S.E.2d 299, 303 (N.C. Ct. App. 2006).

77. *Murray*, *supra* note 21, at 690-91.

78. 616 S.E.2d 576 (N.C. Ct. App. 2005).

79. *Id.* at 578.

80. *Id.*

boundaries of the liberty interest protecting personal relations and is therefore constitutionally permissible.⁸¹

In so noting, the court of appeals failed again to recognize that although regulation of such conduct is permissible, this allowance does not equal rewriting the existing crime against nature statute to cover such conduct. In this case, the court grafted a “new nonconsent element” onto the statute.⁸² The court specifically admitted that “in order for the application of section 14-177 to be constitutional post-*Lawrence* on the facts of this case, the State must prove beyond a reasonable doubt that [the] defendant committed the sexual act, cunnilingus, and that such an act was nonconsensual.”⁸³ The court ultimately found that nonconsent was not proven, and thus the crime against nature statute could not be applied.⁸⁴ Because North Carolina’s rape statutes require nonconsent *and* force,⁸⁵ it is now possible under the courts’ reading for certain sexual acts to fall outside of rape (no force) but come within the redrafted crime against nature statute (which only requires nonconsent).⁸⁶ Thus, sexual acts involving nonconsent but no force can be criminalized if the acts are deemed crimes against nature, despite the fact that this is the creation of a new crime and contrary to legislative intent as demonstrated through existing rape statutes.

E. North Carolina Courts Lack Authority for this Ad-Hoc Approach

As these cases have shown, North Carolina courts have engaged in judicial activism to usurp the role of the legislature in creating new crimes. This court action raises obvious separation of powers concerns. Furthermore, “[i]t has long been the rule in North Carolina that ‘criminal statutes are to be strictly construed.’”⁸⁷ The courts have ignored this rule of statutory construction when it comes to the crime against nature statute. Instead of limiting the construction of the statute to its plain meaning, which would require striking the statute down because it regulates conduct protected by the liberty interest articulated in *Lawrence*, North Carolina courts have expanded the statute’s coverage by grafting elements into it—the so-called *Lawrence* exceptions. The courts

81. *Id.* at 580.

82. Murray, *supra* note 21, at 690.

83. *Whiteley*, 616 S.E.2d at 581.

84. *Id.* at 583.

85. *See, e.g.*, N.C. GEN. STAT. §§ 14-27.2, 14-27.3, 14-27.4, 14-27.5, 14-27.5A (2007).

86. *See Whiteley*, 616 S.E.2d at 581.

87. Murray, *supra* note 21, at 689 (quoting *State v. Hearst*, 356 N.C. 132, 136; 567 S.E.2d 124, 128 (N.C. 2002)).

also lack authority at common law to refashion the crime against “nature statute”—there is no authority to suggest that a court can, in response to the constitutional invalidation of a common-law crime, unilaterally revive that crime by refashioning its elements on a case-by-case basis.”⁸⁸ Yet, this is exactly what the courts have been doing. This case-by-case journey is vastly “unpredictable” and possibly “unconstitutionally vague.”⁸⁹ North Carolina citizens are not on notice of what the courts may decide to prosecute next. Even if one knows what a “crime against nature” is, it is impossible to predict the manner by which the courts may expand the statute. North Carolina courts should therefore leave the creation of new crimes to the General Assembly.

IV. NORTH CAROLINA COURTS *CHOSE* TO UPHOLD THE CRIME AGAINST NATURE STATUTE: WHY THE COURTS SHOULD HAVE CONDUCTED FACIAL CHALLENGES

In *Pope*, *In re R.L.C.*, and *Whiteley*, the courts considered as-applied constitutional challenges to the crime against nature statute. This allowed the courts to utilize the facts in each respective case to graft elements onto the statute. In no case, however, was an as-applied approach necessary. The crime against nature statute on its face plainly criminalizes the *performance* of whatever activity is considered a “crime against nature” (buggery, fellatio, cunnilingus, etc.).⁹⁰ Because the statute criminalizes the sexual activity itself, no matter the situation, the statute violates the terms of *Lawrence* and is unconstitutional on its face. This Article briefly discusses the distinction between facial and as-applied constitutional challenges to statutes and explains why North Carolina courts should have conducted facial challenge analyses.

First, there is a “traditional hostility to facial challenges,”⁹¹ and “as-applied challenges are the normal mode of constitutional adjudication.”⁹² In *Whiteley*, the Court of Appeals of North Carolina, which conducted a flawed facial challenge analysis,⁹³ noted there is a “heavy burden inherent in mounting a facial challenge to the constitutionality of a statute.”⁹⁴

88. *Id.* at 689-90.

89. *Id.* at 691.

90. See N.C. GEN. STAT. § 14-177 (2007).

91. Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1335 (2000).

92. *Id.* at 1329.

93. *State v. Whiteley*, 616 S.E.2d 576, 580 (N.C. Ct. App. 2005) (rejecting the facial challenge because it viewed *Lawrence* as illustrating that “regulation of particular sexual acts is permissible when legitimate state interests justify intrusion into the personal and private life of the individual”). Based on that view of *Lawrence*, the court found that use of the crime against

“A facial challenge to a legislative [a]ct is, of course, the most difficult challenge to mount successfully. . . .” An individual challenging the facial constitutionality of a legislative [a]ct “must establish that no set of circumstances exists under which the [a]ct would be valid. . . .” The fact that a statute “might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid.”⁹⁵

While this language is typical of facial challenge analyses, it does a poor job describing what a facial challenge actually entails. Often, “facial invalidation occurs as an outgrowth of as applied adjudication.”⁹⁶ *Marbury v. Madison*⁹⁷ is a classic example: “the challenged provision of the Judiciary Act was invalid not merely as applied to Marbury’s suit against Madison, but in all cases insofar as it purported to confer original Supreme Court jurisdiction not contemplated by Article III.”⁹⁸ Debate and confusion exists even within the Supreme Court as to what a facial challenge to the constitutionality of a statute entails and when it should apply.⁹⁹

This confusion exists because, as Professor Richard H. Fallon, Jr. points out, facial challenges are not applicable to a “distinctive class” of cases, and “no general categorical line” divides cases in which courts perform as-applied versus facial analyses.¹⁰⁰ As Fallon describes it, “as-applied litigation” always exists because “all challenges to statutes arise when a particular litigant claims that a statute cannot be enforced against her.”¹⁰¹ Instead of a distinct category of cases where facial challenges are the rule, substantive “doctrinal tests . . . produce what are effectively facial challenges.”¹⁰² One such doctrinal test is the “purpose test.”¹⁰³

nature statute to prosecute anything outside of the “narrow liberty interest recognized in *Lawrence* remains constitutional.” *Id.* This is not a correct facial challenge analysis, but appears more like an as-applied analysis. A facial challenge analysis would seem to ask whether the crime against nature statute on its face violates the constitutional liberty interest recognized in *Lawrence*. Because the North Carolina crime against nature statute makes no exception for private, consensual, sexual conduct between adults, the answer must be yes.

94. *Id.*

95. *State v. Thompson*, 508 S.E.2d 277, 281-82 (N.C. 1998) (citation omitted) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)).

96. Fallon, Jr., *supra* note 91, at 1337.

97. 5 U.S. 137 (1803).

98. Fallon, Jr., *supra* note 91, at 1337.

99. *Id.* at 1322-23 (“[I]t is tempting to say that Justices of the Supreme Court are not only divided, but also conflicted or even confused, about when statutes should be subject to facial invalidation.”).

100. *Id.* at 1339.

101. *Id.* at 1324.

102. *Id.* at 1328. Commentator Matthew Adler puts forward the view that all challenges to the constitutionality of statutes are facial challenges, but this view has not been accepted. *Id.*

103. *Id.* at 1338.

“‘Purpose’ tests identify statutes as invalid if enacted for constitutionally forbidden motives. If a bad motive infects one statutory subrule, it typically will infect all others.”¹⁰⁴ But, if a court is certain that only part of the statute is unconstitutional, it *can* sever the unconstitutional part by limiting the construction of the statute through an as-applied challenge.¹⁰⁵ Limits on the ability of the court to conduct this severability include the statute being “readily susceptible” to that construction.¹⁰⁶ Otherwise, the construction would be judicial legislation to save the statute.¹⁰⁷

In the case of the North Carolina crime against nature statute, the courts have clearly engaged in this kind of judicial legislation when they should have conducted facial challenge analyses. The statute’s prohibition of the crime against nature in the privacy of one’s home is certainly unconstitutional following *Lawrence*. As-applied challenges were inappropriate because the statute is not “readily susceptible” to the construction the courts gave it—nowhere does it include elements of “commercial,” “in public,” “involving minors,” or “nonconsent.” Facial challenge analyses were thus the only appropriate manner for the courts to decide the statute’s constitutionality. Moreover, a facial challenge to the statute is *not* a novel idea. Shortly after the announcement of *Lawrence* in 2003, a Mecklenburg County district court judge held that the crime against nature statute was unconstitutional on its face.¹⁰⁸ No court records of this case were found, likely because the case was not appealed. Also, in 2006, a facial challenge succeeded based on *Lawrence* in North Carolina Superior Court.¹⁰⁹ The court found the state statute against fornication unconstitutional as a violation of the “substantive due process right to liberty as explained in *Lawrence v. Texas*.”¹¹⁰ The statute, also referred to as the “adultery and cohabitation statute,” provides:

If any man and woman, not being married to each other, shall lewdly and lasciviously associate, bed and cohabit together, they shall be guilty of a

104. *Id.*

105. *See id.* at 1333.

106. *Id.*

107. *Id.* at 1333-34.

108. Raymond A. Warren, *Mecklenburg Judge Declares Sodomy Law Unconstitutional*, RAYWARREN.LAW.COM (July 11, 2003), <http://www.raywarrenlaw.com/release-071103.pdf>; *North Carolina Judge Rules State Sodomy Law Unconstitutional*, ADVOCATE.COM (July 15, 2003), http://www.advocate.com/news_detail_ektid09945.asp. Warren makes the argument that the Supreme Court in *Lawrence* conducted a facial challenge. *See* Brief in Support of Motion to Dismiss at 6-7, <http://www.raywarrenlaw.com/Brief.pdf>.

109. *Hobbes v. Smith*, No. 05 CVS 267, 2006 WL 3103002, at *1 (N.C. Super., Aug. 25, 2006) (this decision is not binding on the courts).

110. *Id.*

Class 2 misdemeanor: Provided, that the admissions or confessions of one shall not be received in evidence against the other.¹¹¹

The court's unpublished decision omits any facts of the case, but the case arose when

Debora Lynn Hobbs, who had been employed by the county as an emergency dispatcher until the sheriff discovered that she was living with a boyfriend[,] [was] told [by the sheriff that] she had three choices: marry, move, or leave her job, citing the criminal statute. Hobbs quit her job rather than marry or move, and filed this suit challenging the constitutionality of the statute.¹¹²

If *Lawrence* can be successfully used to perform a facial challenge to North Carolina's fornication statute, there is no reason why it cannot be used in the same manner to strike down the crime against nature statute, a statute much more analogous to the sodomy law at issue in *Lawrence* itself.

V. THE FLAWS IN POSSIBLE POLICY RATIONALES FOR THE NORTH CAROLINA COURTS' ACTIVISM

Given that the North Carolina courts could and should have conducted facial challenges to the constitutionality of the crime against nature statute, but instead engaged in judicial legislation by limiting construction of the statute through as-applied challenges, this Article will now address possible rationales for such approach. Many rationales behind sodomy laws date back to the nineteenth century.¹¹³ These include: "protection of the community against public indecency[.]" "protection of children, women, and weaker men against sexual assault[.]" and establishing "as a symbol of a public norm that . . . sexual pleasure was morally wrong unless procreative within marriage."¹¹⁴ Many of these nineteenth century rationales still survive, but new policy justifications have also informed courts' decisions.

Sometimes the courts themselves have vocalized these rationales; sometimes the courts have remained silent. These rationales are, by their nature, based in policy because, as discussed previously, there is no statutory or common law authority to create new crimes by reading elements into the crime against nature statute. The courts provided no

111. N.C. GEN. STAT. § 14-184 (2007).

112. Arthur S. Leonard & Leonard Link, *Mopping Up Operation on Sex Crimes*, NEW YORK LAW SCHOOL (Nov. 6, 2006), http://newyorklawschool.typepad.com/leonardlink/2006/11/mopping_up_oper.html.

113. See ESKRIDGE, *supra* note 1, at 254-55.

114. *Id.*

legal reasoning and no basis in plain meaning to construe the statute in such manner. Instead, the courts acted legislatively, determining that the crime against nature statute was worth saving—but why?

A. *Deference to the Preferences of Prosecutors and Police*

“Law enforcement officers and prosecutors argue that they continue to enforce and press charges for [crime against nature] activity because the laws against prostitution, sex with minors, and the like are not worded broadly enough to include oral and anal sex.”¹¹⁵ Attorney Ray Warren, in his brief in Mecklenburg County to dismiss crime against nature charges on the basis of unconstitutionality, acknowledged the concerns of law enforcement: “If N.C.G.S. 14-177 is indeed a constitutionally invalid law, there appears to be no specific prohibition against public sexual conduct that does not involve commercial intercourse or the exposure of one’s private parts to members of the opposite gender.”¹¹⁶ In 2008, it was reported that “[s]ome district attorneys have stopped prosecuting the crime, but sometimes police rely on it to prosecute public sex, same-sex prostitution and opposite-sex prostitution involving oral sex.”¹¹⁷

Though the concerns of prosecutors and law enforcement are not directly cited in court opinions, the concerns likely inform the courts’ thinking. For one, the reason that any crime against nature case comes to court in the first place is because prosecutors and police are using the statute to cover prostitution, sex involving minors, etc. Yet, as Warren argued in his brief,

It is understandable that law enforcement and prosecutors would seek some method within the existing legal framework to regulate a perceived problem with public sexual activity. N.C.G.S.14-177, which was not enacted for that purpose, and which never contained either a “commercial” or a “public” element of the offense, cannot be used as a substitute for properly drafted (and constitutional) legislation directly addressing the issue. If a problem exists, the remedy lies with the legislature, not in attempts to amend the unconstitutional Crime Against Nature law by prosecutorial discretion or ad hoc law enforcement interpretation.¹¹⁸

As Warren states, the prosecutorial and law enforcement concerns are problematic rationales for courts to uphold the crime against nature

115. JOHN H. BODIE, A LEGAL GUIDE FOR LESBIANS AND GAY MEN IN NORTH CAROLINA (1996-97 Ed., 1996), available at http://www.ncgala.org/guide/Legal_Guide.htm.

116. Brief in Support of Motion to Dismiss, *supra* note 108, at 11.

117. Eisley, *supra* note 14 at B3.

118. Brief in Support of Motion to Dismiss, *supra* note 108, at 12.

statute.¹¹⁹ First, discretionary enforcement largely means discrimination against gay men, as the statute has been “interpreted by some law enforcement and prosecutorial authorities in a strained and selective manner.”¹²⁰

[T]he problem is that enforcement of the CAN law penalizes homosexual men more severely than heterosexuals for sexual activity in secluded areas. For example, a heterosexual couple “parking” at night in a deserted area or making love in the woods will most likely be ignored by law enforcement officers. At most, they will be charged with indecent exposure, a misdemeanor. Two men in an identical situation, however, will usually be charged with CAN—a felony.¹²¹

Separation of powers concerns are also raised by allowing prosecutors and law enforcement to make the law instead of enforce it. Courts should guard against such infringement on the balance of powers, but North Carolina courts have consistently sided with the statutory interpretation of the executive branch. This leaves citizens guessing at not only who makes the law, but also at what exactly the law means.

B. Covering Nonforcible “Rape”

While many states have removed force as a requirement to be prosecuted for rape, North Carolina’s rape statutes require nonconsent *and* force.¹²² Based on these statutes, it is possible for a woman (or a man) to have nonconsensual sexual acts or intercourse performed on her and still be unable to bring a rape charge if no force was used.¹²³ Such situations have led to the phrase “a woman [was] raped but not by a rapist[.]”¹²⁴

The crime against nature statute, based on the courts’ interpretation, contains an element of nonconsent, but does not require force. The Court of Appeals of North Carolina in *Whiteley* found that “[a] legitimate state interest . . . permits prosecution under section 14-177 in cases involving nonconsensual or coercive acts.”¹²⁵ The court pointed to language from *Lawrence* to show that crime against nature statutes “were routinely used to prosecute ‘predatory acts against those who could not or did not consent[.]’”¹²⁶ Based on this language, the court evidenced concern over

119. *Id.*

120. *Id.* at 3, 14.

121. BODIE, *supra* note 115.

122. *See supra* note 85.

123. *See supra* note 85.

124. CATHARINE MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 183 (1989).

125. 616 S.E.2d 576, 581 (N.C. Ct. App. 2005).

126. *Id.* (quoting *Lawrence v. Texas*, 539 U.S. 558, 569 (2003)).

nonconsensual sexual encounters that do not meet the requirements of the state's rape statutes.

This policy reason for preserving the crime against nature statute is understandable, and this Article even agrees with the need for reforming North Carolina's rape laws. However, such reform should not take place through judicial expansion of the crime against nature statute. Rather, the North Carolina General Assembly should act. Furthermore, as seen in *Whiteley*, use of the crime against nature statute, even without the element of force, is problematic in situations of intoxication.¹²⁷ The court determined that the only issue in the case was whether the "victim" was physically helpless and equated this condition with nonconsent.¹²⁸ Thus, the problem of nonconsensual sex when the victim is intoxicated will not be solved by the use of the crime against nature statute because the victim would likely have to drink to the point of passing out to be considered physically helpless. If the courts are taking into account the protection of North Carolina citizens from nonconsensual sexual encounters when interpreting the crime against nature statute, they are not solving the problem but rather are rewording it.

C. *Controlling Prostitution*

The Supreme Court of North Carolina has interpreted the state's prostitution statute to cover only vaginal intercourse.¹²⁹ This interpretation is supported by North Carolina General Statute section 14-204.1, "Loitering for the purpose of engaging in prostitution offense," because the statute references both the prostitution statute and the crime against nature statute as if the two covered mutually exclusive sexual activities.¹³⁰ So, without legislative action, "punishment of prostitution involving forms of intimacy other than vaginal, heterosexual sex could only be accomplished by judicial lawmaking: either expanding the scope of the prostitution statute or creating a new crime by adding a commercial element to the crime against nature."¹³¹ *Pope* illustrates the court of appeals choosing the latter option, using the crime against nature statute to criminalize oral sex when it contains a commercial element.¹³²

The most obvious problem with this policy rationale is that North Carolina *has* a statute covering prostitution. If the courts have a problem

127. *See id.* at 582-83.

128. *Id.*

129. *State v. Richardson*, 300 S.E.2d 379, 380-81 (N.C. 1983).

130. N.C. GEN. STAT. 14-204.1 (2007).

131. Murray, *supra* note 21, at 688-89.

132. *See State v. Pope*, 608 S.E.2d 114, 116 (N.C. Ct. App. 2005).

with their prior interpretation of that statute, the most straightforward solution is to re-interpret the prostitution statute. Alternatively, if the courts are unwilling to revisit that interpretation, they should await action by the legislature to expand the prostitution statute's coverage. Engaging in judicial expansion of an unrelated statute is inappropriate.

Additionally, if the courts are relying on this rationale to uphold the crime against nature statute, their reasoning is plagued with inconsistency. The state supreme court in *State v. Richardson* claimed to be guided by the plain meaning of the term "sexual intercourse" and referred to the dictionary in determining the term meant only heterosexual vaginal intercourse.¹³³ The court also stated that "[i]f the legislature wishes to include within G.S. 14-204 [the prostitution statute] other sexual acts, such as cunnilingus, fellatio, masturbation, buggery or sodomy, it should do so with specificity since G.S. 14-204 is a criminal statute."¹³⁴ This reasoning is abandoned by the courts when considering the construction of the crime against nature statute. As discussed previously, the courts read elements into the statute that were not present on the statute's face and ignored the relevance of legislative inaction in the wake of *Lawrence*.¹³⁵

D. HIV/AIDS and Sexually Transmitted Disease Prevention

Bowers v. Hardwick,¹³⁶ the case that *Lawrence* overturned,¹³⁷ "came to the [Supreme] Court just as the AIDS connection [to transmission through homosexual sodomy] was peaking among mainstream Americans."¹³⁸ Over twenty years after the *Bowers* decision, could North Carolina courts still exploit concern over the spread of HIV/AIDS or other sexually transmitted diseases to justify upholding the crime against nature statute? The apparent answer is yes. Applying the crime against nature statute to two minors because they engaged in oral sex, the Supreme Court of North Carolina in *In re R.L.C.* admitted rather honestly that it considered "the government's desire for a healthy young citizenry" to be a rational basis for the law.¹³⁹ Citing an HIV/AIDS prevention study to justify upholding the statute, the court noted that

133. *Richardson*, 300 S.E.2d at 380-81.

134. *Id.* at 381.

135. *See supra* Part III.

136. 478 U.S. 186 (1986), *rev'd*, 539 U.S. 558 (2003).

137. *Lawrence*, 539 U.S. at 578. ("*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.")

138. ESKRIDGE, *supra* note 1, at 261.

139. *In re R.L.C.*, 643 S.E.2d 920, 925 (N.C. 2007).

“nonvaginal sexual activity carries with it the risk of sexually transmitted diseases.”¹⁴⁰

The use of this policy rationale to support expanding the crime against nature statute into new frontiers is troubling. “[T]he AIDS argument for sodomy laws” was rejected before consensual sodomy was even made legal.¹⁴¹ “Following the leadership of Surgeon General C. Everett Koop, judges not only came to see AIDS as a public health problem to be addressed in practical ways, but came to regard gay men and lesbians as responsible partners and caregivers, not sex maniacs.”¹⁴² However, North Carolina courts have used the AIDS argument to support applying sodomy laws to a new group—children.¹⁴³

How does criminalizing children help promote their public health? It seems that education on contraception and safe sexual practices would move the state further towards that goal—education that is frustrated by many local school districts in North Carolina. Looking at evidence, not misinformation, the presence of sodomy laws and the rate of HIV infection do not correlate:¹⁴⁴

Washington, D.C.’s sodomy law did not prevent it from having one of the highest HIV infection rates in the nation. In the 1980s[,] medical professionals concluded that sodomy laws actually threatened their ability to deal with the epidemic, because they encouraged sexual secrecy and thereby impeded medical efforts to identify and inform potentially infected sex partners.¹⁴⁵

Furthermore, “vaginal sex is more likely to result in HIV transmission than is oral sex.”¹⁴⁶ The AIDS argument to preserve sodomy laws is consequently unconvincing. Punishing children would seem to encourage “sexual secrecy” that will prevent education and hinder public health progress. Use of the crime against nature statute in this manner also has a discriminatory effect on gay minors because their sexual activities will always be criminal.¹⁴⁷

140. *Id.* See Ctrs. for Disease Control & Prevention, *HIV/AIDS Update* (Dec. 2000) (“Numerous studies have demonstrated that oral sex can result in the transmission of HIV and other sexually transmitted diseases.”).

141. ESKRIDGE, *supra* note 1, at 276.

142. *Id.*

143. They no doubt would still apply the same justification to gay men and lesbians.

144. See Eskridge, *supra* note 1, at 218.

145. *Id.* (“More generally, the ‘don’t ask, don’t tell’ approach to homosexuality contributed to the Reagan administration’s refusal to create safer-sex education programs or to fund AIDS research at the levels recommended by medical experts.”).

146. See Curtis & Gilreath, *supra* note 30, at 202.

147. *Id.* at 200.

E. Protection of Youth

The Supreme Court of North Carolina in *In re R.L.C.* also evidenced a desire to protect the state's youth in upholding the crime against nature statute in the face of a due process challenge.¹⁴⁸ It saw the "government's interest" as "preventing sexual conduct between minors."¹⁴⁹ Interestingly, the court did not take its guidance from the statutes the General Assembly enacted for the exact purpose of regulating sexual activity between minors, but instead twisted the crime against nature statute to cover the situation.¹⁵⁰ The court put forward two other justifications the government could plausibly have for prosecuting children under the crime against nature statute: (1) "promoting proper notions of morality among [the] State's youth," and (2) protecting children "in their most formative years [because they] are unable to make reasoned decisions based upon their limited life experience and education whether to engage in these sexual activities."¹⁵¹

This "protection rationale" raises perplexing questions because the crime against nature statute does not cover vaginal intercourse: Does the court find it more "moral" for minors to engage in vaginal intercourse as opposed to other sexual activities? How are children any more educated about vaginal intercourse than other types of sex? Another problem with the "protection rationale" is that it ignores the North Carolina General Assembly's legislative scheme governing sex involving minors.¹⁵² Instead, the courts created an alternative scheme that penalizes oral sex and anal intercourse, while not punishing vaginal intercourse at all.

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.¹⁵³

Beyond going against legislative intent, the judicially created regime has implications contrary to protecting North Carolina's youth—criminalizing them. "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-

148. See *In re R.L.C.*, 643 S.E.2d 920, 925 (N.C. 2007).

149. *Id.*

150. See *supra* Part III.C.

151. *In re R.L.C.*, 643 S.E.2d at 925.

152. See Curtis & Gilreath, *supra* note 30, at 207.

153. *Id.*

year-old males and 55.7% of its seventeen-year-old males.”¹⁵⁴ “[S]tatistics suggests that, by the social facts of today, oral sex is simply another form of sexual expression and ought to be treated as such.”¹⁵⁵ It is unreasonable to think that all these children are being “‘unnatural’, ‘perverted’, and ‘depraved.’”¹⁵⁶ North Carolina’s judges have chosen to ignore reality and cast shame on a majority of the state’s youth.

F. *Banning Sex in Public*

North Carolina courts have also used the need to punish sex in public to justify manipulation of the crime against nature statute. For example, in *In re R.L.C.*, the court of appeals stated that “[p]ublic morals and standards of decency continue to consider public sexual behavior criminal.”¹⁵⁷ While this Article will not argue with the court regarding what “standards of decency” are to guide society, the crime against nature statute cannot be used to punish vaginal sex in public. Therefore, heterosexuals can engage in vaginal sex in public while at most being charged with indecent exposure, if within that statute.¹⁵⁸ Homosexual individuals, on the other hand, would be punished for public sex under the crime against nature statute. As a result, it is fair to say that the courts were truly concerned about *gay* sex in public. That heterosexuals are not the focus of the courts’ concern is emphasized even further by the selective enforcement of the crime against nature against gay men in the context of public sex.¹⁵⁹ This policy justification therefore lacks sophistication and legitimacy.

VI. THE REAL RATIONALE FOR THE CONTINUED PRESENCE OF THE CRIME AGAINST NATURE STATUTE: STIGMATIZING HOMOSEXUALITY

That the previously discussed rationales for the courts’ defense of the crime against nature statute are based in policy should alone be sufficient to discard them as illegitimate. Courts should not be engaged in lawmaking. However, because the courts did engage in this judicial legislation, the rationales necessarily were addressed. The flaws with

154. *Id.* at 186.

155. *Id.* at 216 (laying out statistics for youth engaging in oral sex).

156. *Id.*

157. *In re R.L.C.*, 635 S.E.2d 1, 5 (N.C. Ct. App. 2006).

158. *See* N.C. GEN. STAT. § 14-190.9 (2007).

159. Whether it is rest areas or public restrooms, entrapments are frequently set for gay men. One would think that if this unease is so pressing, the General Assembly would act to pass legislation specifically covering such situations.

each policy rationale have thus led to a search for the true basis for the continued existence of the North Carolina crime against nature statute post-*Lawrence*. This Article argues that the reason for the preservation of the crime against nature statute is the stigmatization of homosexuality. Courts have joined the legislature and law enforcement to enforce “compulsory heterosexuality,”¹⁶⁰ spreading the design of a society in which only one form of sex—vaginal intercourse—is nondeviant.

In his book *Dishonorable Passions: Sodomy Laws in America 1861-2003*, William Eskridge demonstrates just how pervasive sodomy laws have been in this country.¹⁶¹ Generally, the laws were selectively enforced to create social order.¹⁶² Sodomy laws were methods for the State to control minorities it considered unwanted.¹⁶³ Then, in the twentieth century, the term “crime against nature” became synonymous with homosexuality.¹⁶⁴ So, it is simply not debatable that even when North Carolina courts were analyzing the crime against nature statute as applied to heterosexuals, concern and/or awareness of homosexuality was an underlying premise of the decisions. Likewise, the North Carolina General Assembly rejected reform based on the law’s link to homosexuality, and law enforcement still selectively targets homosexuals. After *Bowers*, “state governments kept sodomy laws on the books to send a message that homosexuality was unacceptable.”¹⁶⁵ North Carolina, eight years after the nation’s highest court unequivocally rejected *Bowers*, clings to this declaration.

A. *The Courts*

“The duty of a court is to construe a statute as it is written. It is not the duty of a court to determine whether the legislation is wise or unwise, appropriate or inappropriate, or necessary or unnecessary.”¹⁶⁶ That statement by North Carolina’s highest court unfortunately did not guide it

160. ESKRIDGE, *supra* note 1, at 82.

161. *See generally id.*

162. *See id.* at 5-6.

163. *See id.* at 4.

164. *See id.* at 6 (“This phenomenon flows, in part, from the logic of the crime against nature and its underlying anxieties. When heterosexual intercourse involves oral sex, anal intercourse, sexual fondling, and other play, it can often be linked to human projects beyond animalistic pleasure, perhaps as foreplay preceding procreative sex or as a reinforcement to the moral ties of marriage. Oral sex between two men or two women, in contrast, satisfies neither of these conditions. Hence, the open homosexual, unlike the heterosexual, by his or her very presence flouts the sex-not-for-pleasure norm, as well as the norm of strict gender distinction.”).

165. Naeger, *supra* note 8, at 405 n.56.

166. *Campbell v. First Baptist Church of the City of Durham*, 259 S.E.2d 558, 563 (N.C. 1979).

or the other appellate courts of the state in deciding the constitutionality of the crime against nature statute. The courts engaged in judicial legislation to create a new statute they considered wise, appropriate, and necessary. Because this Article has rejected the possible policy rationales behind that reasoning, the courts' underlying desire to stigmatize homosexuality and enforce "compulsory heterosexuality" dominates.

This desire to stigmatize homosexuality is seen in the courts' determination of the crime against nature statute's purpose. The court of appeals in *In re R.L.C.* found the purpose of the statute today to be the same as the Supreme Court of North Carolina decided in 1966: "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."¹⁶⁷ The court was being upfront—its reason for upholding the crime against nature statute was that it viewed sex outside of vaginal intercourse as disgusting and sinful. The message is plain: sex between two men or two women is not acceptable. The courts are thus willing to read elements into the crime against nature statute to preserve it because they need the statute to spread the court's vision.

Consistent with the message of "compulsory heterosexuality," the supreme court in *In re R.L.C.* referenced promoting morality among youth as a reason to uphold the crime against nature statute.¹⁶⁸ Under the new statute created by the North Carolina courts (adding "involving minors" as an element), the sex of "gay minors is *always criminal*."¹⁶⁹ Therefore, the court's message of morality to North Carolina's youth is that being heterosexual is their only choice.

North Carolina courts have also voiced moral distaste with the acts themselves that come within the crime against nature statute, calling such acts "unnatural" and "contrary to the order of nature."¹⁷⁰ It is unreasonable to think that the courts did not recognize this moral condemnation fell heavily on one group of citizens—homosexuals. The language of the courts shows "little more than hostility to a historically unpopular group of people and revulsion at the sex acts of members of

167. *In re R.L.C.*, 635 S.E.2d 1, 2 (N.C. Ct. App. 2006) (quoting *State v. Stubbs*, 145 S.E.2d 899, 902 (N.C. 1966)).

168. *In re R.L.C.*, 643 S.E.2d 920, 925 (N.C. 2007).

169. See Curtis & Gilreath, *supra* note 30, at 200-01 (putting forth the argument that "[w]hat the legislature cannot do is punish oral sex more harshly because it is the 'crime against nature'").

170. *In re R.L.C.*, 635 S.E.2d at 5, (quoting in part *State v. Harwood*, 142 S.E.2d 691, 692 (N.C. 1965)).

the group.”¹⁷¹ To solve this stigmatization, Wake Forest University Professors Michael Curtis and Shannon Gilreath claim that “[i]n considering what is ‘unnatural’ and ‘depraved,’ courts should take judicial notice of studies of sexual behavior in addition to modern psychiatric and psychological understanding.”¹⁷² These studies show that extremely high percentages of the population engage in oral sex and for the age range twenty-five to forty-four, forty percent of males have had anal sex with a woman while thirty-five percent of females have had anal sex.¹⁷³ This Article does not agree with the use of such studies to inform court opinion because it finds the concept of a court defining what is “unnatural” unpalatable. The studies fail to show that sex between members of the same sex is “common,” but that does not mean these sexual acts should be deemed “unnatural” and thus criminalized. To get rid of the stigmatization of homosexuality from the crime against nature statute, the courts must stop legislating and start following the United States Constitution.

B. *The General Assembly*

Even if a North Carolina court were to find the statute facially unconstitutional, the court lacks authority to remove it from the “statute books.”¹⁷⁴ Professors Curtis and Gilreath argue that “[t]he legislature[] should once and for all rid us of the heritage of bigotry and persecution embodied in ‘crime against nature’ laws.”¹⁷⁵ Yet the General Assembly has not altered the crime against nature statute post-*Lawrence*.¹⁷⁶

North Carolina state senator Ellie Kinnaird was able to shed some light on this legislative inaction. She introduced bills to repeal the crime against nature statute since her first term in 1997 until the *Lawrence* decision,¹⁷⁷ but the General Assembly took no action on any of Senator Kinnaird’s bills.¹⁷⁸ Kinnaird stated that she has

171. Curtis & Gilreath, *supra* note 30, at 198.

172. *Id.* at 215.

173. *Id.* at 218.

174. Fallon, Jr., *supra* note 91, at 1339.

175. Curtis & Gilreath, *supra* note 30, at 221. They also note that this will not be “easy.” *Id.* at 220 (“[L]egislators 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.”).

176. *Id.* at 170.

177. E-mail from Ellie Kinnaird, North Carolina State Senator (Oct. 22, 2008 06:00 PM EST) (on file with author).

178. See SB 1050 Session 1997 (N.C. 1997); SB 759 Session 1999 (N.C. 1999); SB 263 Session 2001 (N.C. 2001); SB 969 Session 2003 (N.C. 2003).

tried without success . . . to get the Statutes Commission to take it off the books. They refused, saying the Legislature would not consider it because of the controversial nature of the issue and they didn't want their entire bill to be defeated because of it. They also didn't want to second guess the courts.¹⁷⁹

The latter reason shows an abdication of legislative duties by the General Assembly to the courts and a misunderstanding of the fundamental structure of our constitutional system of government. Beyond that criticism, one must consider why the General Assembly thought reform so "controversial."

Though no bill made its way to the General Assembly floor, in 1999, then-senator Brad Miller, the Judiciary Committee chair, held a hearing on Senator Kinnaird's bill.¹⁸⁰ The hearing "was after the crossover date which allows [a] bill to be eligible for consideration, so it was only for public input."¹⁸¹ At the hearing, Senator Jim Forrester, R-Gaston, asked whether the bill would "legalize homosexuality?"¹⁸² Senator Kinnaird responded that the crime against nature statute is "antiquated" and "used to discriminate . . . against gay people It is the main tool those who wish to discriminate against gays use."¹⁸³ Reverend Jimmy Creech, who was kicked out of Methodist churches in Raleigh and Nebraska for supporting gay rights, testified that the statute "was designed from the beginning to deny full civil rights to gay and lesbian persons."¹⁸⁴

Clear from the statements at this hearing is the fact that reform of the crime against nature statute and debate over homosexuality were one. The two issues were inextricably linked. "Statutes have significance completely independent of their actual enforcement. Law reflects society *and* informs it."¹⁸⁵ Here, a majority of the General Assembly intended to send a message by leaving the crime against nature statute untouched: no matter what the Supreme Court said in *Lawrence*, gays and lesbians are not citizens worthy of equal respect in North Carolina.

179. E-mail from Ellie Kinnaird, *supra* note 177.

180. *Id.*; *Briefly, State Legislature*, HERALD-SUN, May 12, 1999, at C8 (providing article *Gay Rights Advocates Are Heard by Panel*).

181. E-mail from Ellie Kinnaird, *supra* note 177.

182. *Briefly, State Legislature*, *supra* note 180.

183. *Id.*

184. *Id.*

185. Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws*, 35 HARV. C.R.-C.L. L. REV. 103, 114 (2000) (emphasis added).

C. Law Enforcement

Actual enforcement of the crime against nature statute also reflects a desire to stigmatize homosexuality. Traditionally, “[t]he most important effect of sodomy laws . . . was the extent to which they situated homosexuals outside the normal protections of the law.”¹⁸⁶ Even as courts held consensual sodomy in private between adults is no longer prohibited, we have seen that arrests in North Carolina are still being made against gay men.¹⁸⁷ This discriminatory enforcement has allowed the crime against nature statute to survive.¹⁸⁸ Otherwise, a majority of society would, at least before *Lawrence*, be criminals. Even now, general enforcement would likely lead to the end of the crime against nature statute. For example, selective enforcement is the reason the statute has survived the contorted reading given to it by the North Carolina appellate courts in *In re R.L.C.* when they applied the statute to two minors within three years age of each other.¹⁸⁹

Today, if it were possible to prosecute even all the sixteen- and seventeen-year-old (and younger) oral sex felons created by the 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.¹⁹⁰

“[R]are prosecutions greatly increase the chances that the suffering of a few isolated victims will be ignored so that unreasonable statutes will persist.”¹⁹¹ As long as law enforcement concentrates on homosexuals, focusing resources and sex stings on rest areas or public restrooms, society will pay little attention (except maybe when it involves a United States Senator, e.g., Larry Craig). Can you imagine the outrage if in Raleigh, North Carolina, it had been a heterosexual couple arrested for performing the crime against nature in the privacy of their home instead

186. ESKRIDGE, *supra* note 1, at 67.

187. See text accompanying *supra* notes 12-20.

188. See Curtis & Gilreath, *supra* note 30, at 219 (“Suppose that in 2000 (before *Lawrence*), the State of North Carolina benefited from a technical break through. 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.”).

189. *Id.*

190. *Id.*

191. *Id.*

of two men? The crime against nature statute would not have stood a chance. The fact that gay men were the target changed everything.

VII. CONCLUSION

“If any person shall commit the crime against nature, with mankind or beast, he shall be punished as a Class I felon.”¹⁹² North Carolina has an extensive history with this statute. State courts, long responsible for determining what conduct equates a “crime against nature,” have themselves become guardians of the statute’s survival. The statute makes no distinctions between public and private conduct, nor between sexual conduct involving only adults and sexual conduct involving only minors. Nor does it make distinctions between commercial and noncommercial activity or differentiate consensual and nonconsensual conduct. Yet, each time the crime against nature statute has been challenged as unconstitutional, the courts have upheld it by reading elements into the statute. While the State does have authority to criminalize public sexual activity, sex involving minors, prostitution, and nonconsensual sex, the Supreme Court of North Carolina itself has recognized that “[t]he creation and expansion of criminal offenses is the prerogative of the legislative branch of the government.”¹⁹³ Nevertheless, the North Carolina courts have not lived up to their rhetoric of judicial restraint. They have failed to recognize that the State has indeed already regulated public sexual activity, sex involving minors, prostitution, and nonconsensual sex through action by the General Assembly. Instead of striking down the crime against nature statute as unconstitutional and allowing the legislature to fulfill its proper role of drafting a new statute *if* it thought necessary, North Carolina courts responded to *Lawrence* by embarking on a “case-by-case . . . [redefinition of] the state’s criminal laws relating to sexual conduct.”¹⁹⁴

This unpredictable case-by-case journey was made possible by judicial acceptance of as-applied challenges as the proper mode of constitutional adjudication. The courts, however, should have conducted facial challenge analyses because the crime against nature statute was not “readily susceptible” to the construction courts gave it. Because the courts narrowed construction of the statute by reading elements into it through as-applied challenges, they engaged in judicial legislation.

192. N.C. GEN. STAT. § 14-177 (2007).

193. *State v. Beale*, 376 S.E.2d 1, 4 (N.C. 1989).

194. Murray, *supra* note 21, at 690.

Having engaged in this judicial legislation, the courts were unable to provide any convincing reasoning based in law. The rationales left were based in policy: deference to prosecutors and law enforcement who liked the statute because it was vague; covering nonforcible rape because the state's rape statutes required force; controlling prostitution because the state's prostitution statutes covered only vaginal intercourse; HIV/AIDS and STD prevention; protection of youth; and banning sex in public. Beyond the fact that all these rationales are proper considerations only for the legislature, the justifications are fatally flawed.

The real reason behind the continued presence of the crime against nature statute in North Carolina is that it stigmatizes homosexuality. A number of state courts have joined the General Assembly and law enforcement to ensure that only one type of sex is deemed acceptable—vaginal intercourse. Over time, the crime against nature statute became synonymous with homosexuality. Courts deemed the sex engaged in by homosexuals unnatural and perverse. And when sex for pleasure became more acceptable beginning in the 1960s, “America clearly had to construct a new line between sexual freedom and community values. That line was provisionally drawn across the backsides of homosexuals, still the universal scapegoats.”¹⁹⁵ Today, North Carolina courts keep that line in place by redrafting the crime against nature statute to legislate “compulsory heterosexuality.”¹⁹⁶

195. ESKRIDGE, *supra* note 1, at 158.

196. *Id.* at 82.