

# Equality with Exceptions? Recovering *Lawrence*'s Central Holding

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*In the eleven years since the Supreme Court handed down its Lawrence v. Texas<sup>1</sup> ruling, state courts have not consistently adhered to the decision's implicit rejection of laws that regulate based on animus alone. Relying on the Court's explicit limitation of its decision to cases that do not involve minors, "persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused," public conduct, prostitution, government recognition of same-sex relationships, and practices not "common to a homosexual lifestyle"<sup>2</sup>—the so-called Lawrence exceptions—a number of states have continued to use archaic antisodomy laws to police conduct they see as morally reprehensible. This Comment examines the interpretation and application of the Lawrence exceptions by state courts, arguing that by maintaining discriminatory prosecution and punishment schemes for conduct deemed to fall within the exceptions, states run afoul of the core antidiscriminatory logic of Lawrence and of the Court's earlier ruling in Romer v. Evans.<sup>3</sup> My analysis addresses not only whether laws that fall within the Lawrence exceptions discriminate on the basis of sexual orientation, but also whether they enable or invite discrimination along gender- and race-based lines.*

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1. Lawrence v. Texas, 539 U.S. 558 (2003).
2. *Id.* at 560.
3. 517 U.S. 620 (1996).

*While some commentators have addressed Lawrence's exceptions for conduct involving minors,<sup>4</sup> potentially coercive or injurious relationships,<sup>5</sup> and, to a lesser extent, the exception for same-sex marriage,<sup>6</sup> there is a lack of scholarship on how the Lawrence exceptions have affected so-called crime against nature laws—antisodomy laws which often survived in some form after 2003 because of the exceptions identified by the Court. This Comment addresses this gap, using crime against nature laws as an example to suggest that the Lawrence exceptions continue to enable and invite discrimination that contravenes the principles of Lawrence and Romer. Arguing that this trend cuts against the Court's intent in deciding Lawrence, I draw on an analogue from First Amendment jurisprudence to propose a framework with which courts can adhere to Lawrence's antidiscriminatory principles.*

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#### INTRODUCTION

When the Supreme Court handed down its decision in *Lawrence v. Texas* in June 2003, the ruling was heralded as a watershed moment in the gay-rights

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4. See, e.g., J. Kelly Strader, *Lawrence's Criminal Law*, 16 BERKELEY J. CRIM. L. 41 (2011); Joseph J. Wardenki, *A Minor Exception?: The Impact of Lawrence v. Texas on LGBT Youth*, 95 J. CRIM. L. & CRIMINOLOGY 1363 (2005).

5. See, e.g., S. Wesley Gorman, *Sex Outside of the Therapy Hour: Practical and Constitutional Limits on Therapist Sexual Misconduct Regulations*, 56 UCLA L. REV. 983 (2009); Christopher Scott Maravilla, *The Other Don't Ask, Don't Tell: Adultery Under the Uniform Code of Military Justice After Lawrence v. Texas*, 37 CAP. U. L. REV. 659 (2009).

6. See, e.g., Nancy Kubasek et al., *Amending the Defense of Marriage Act: A Necessary Step Toward Gaining Full Legal Rights for Same-Sex Couples*, 19 AM. U. J. GENDER SOC. POL'Y & L. 959 (2011) (arguing that Justice Kennedy's identification of same-sex marriage as exempt from *Lawrence* protection calls into question his likelihood to vote in favor of marriage equality when the issue reaches the Court).

movement.<sup>7</sup> Many of *Lawrence*'s supporters went further, identifying the opinion as a significant step away from discrimination that is grounded in animus and moral disapproval.<sup>8</sup> But more than eleven years after Justice Anthony Kennedy authored *Lawrence*, and despite the Court's more recent reliance on the opinion's antidiscrimination rhetoric to strike down a key portion of the Defense of Marriage Act,<sup>9</sup> such discrimination is alive and well. In at least some contexts, the expectations of those who championed *Lawrence* have not been matched by state courts' applications of the ruling.

The story of "Ian Doe"<sup>10</sup> illustrates this discrepancy. Ian, who lives in New Orleans, was kicked out of his home at the age of thirteen because he is gay.<sup>11</sup> Homeless and alone, Ian was picked up one night by an older man who offered him money for sex; from then on, sex work became a way for him to survive.<sup>12</sup> But Ian was caught soliciting sex for money, and instead of charging him under the state's generic prostitution statute,<sup>13</sup> officials chose to charge him under Louisiana's "Crime Against Nature by Solicitation" (CANS)<sup>14</sup> law, which criminalizes the exchange of money for oral and anal (but not vaginal) sex.<sup>15</sup> As a result of his subsequent conviction, he spent four years in prison, where he was raped by a guard and contracted HIV.<sup>16</sup> Once he was released, Ian was required to register as a sex offender, which led to him being regularly denied job opportunities and left him unable to find housing.<sup>17</sup> Ian did not

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7. See Katherine M. Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399, 1399–1400 (2004).

8. See MARTHA C. NUSSBAUM, FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION AND CONSTITUTIONAL LAW 89 (2010).

9. *United States v. Windsor*, 133 S. Ct. 2675, 2692, 2694 (2013).

10. Ian Doe was a named plaintiff in recent litigation challenging the application of Louisiana's "Crime Against Nature by Solicitation" law. *Doe v. Jindal*, 851 F. Supp. 2d 995 (E.D. La. 2012). All plaintiffs in that case used pseudonyms to protect their identities. Complaint at 1 n.1, *Doe v. Jindal*, No. 11-388 (E.D. La. Feb. 15, 2011).

11. Audio Recording: Statement of Ian Doe, Teleconference on Filing of *Doe v. Jindal* (Feb. 16, 2011), available at <http://www.ccrjustice.org/crime-against-nature> [hereinafter Statement of Ian Doe].

12. *Id.*

13. See LA. REV. STAT. § 14:82 (2011).

14. I use the acronym CANS (Crime Against Nature by Solicitation) to refer to Louisiana's law, which is unique in that it specifically regulates the *solicitation* of anal and oral sex. Most states have two statutes—a crime against nature statute and a solicitation statute—whereas Louisiana has the hybrid CANS statute. See *infra* notes 159-60 and accompanying text (noting the difference between these two approaches).

15. Complaint, *supra* note 10, at 2, 39. Louisiana's prostitution statute mandates a \$500 fine or a prison sentence of no more than six months for a first-time offender. LA. REV. STAT. § 14:82 (2011). In contrast, at the time of Ian Doe's conviction, the CANS statute made even a first-time conviction a felony, with a penalty of a prison term of up to five years, a fine of up to \$2,000, and a requirement that the convicted person register as a sex offender. Complaint, *supra* note 10, at 16.

16. Statement of Ian Doe, *supra* note 11.

17. *Id.* In June 2011, the Louisiana legislature equalized the penalties for CANS and prostitution, eliminating the registration requirement. CENTER FOR CONSTITUTIONAL RIGHTS, LOUISIANA'S CRIME AGAINST NATURE LAW: A MODERN-DAY SCARLET LETTER, available at [http://www.ccrjustice.org/files/CCR\\_ScarletLetter\\_Factsheet.pdf](http://www.ccrjustice.org/files/CCR_ScarletLetter_Factsheet.pdf) (last visited June 29, 2014).

understand why he was punished so harshly for being a sex worker; as he remarked in a press conference following a legal challenge to the law, “all I said was ‘fifty dollars.’”<sup>18</sup>

Until Louisiana’s legislature agreed in 2011 to equalize the penalties for the CANS law and its generic prostitution statute,<sup>19</sup> the state was unique in that it required people convicted for soliciting “crimes against nature” to register as sex offenders.<sup>20</sup> Louisiana is not unique, however, in distinguishing between those who solicit money for vaginal sex and those who do the same for nonprocreative sex, nor is it alone in applying different regulatory schemes to different forms of sexual conduct. States make this distinction by punishing nonprocreative sex,<sup>21</sup> and the solicitation thereof, under antisodomy laws—archaic statutes that trace their roots in the United States back to the colonial era.<sup>22</sup> As of 2013, thirteen states still had such laws on the books.<sup>23</sup> Some of these states define the regulated conduct as a “crime against nature,” while others use similar terminology or refer to “sodomy” more generally.<sup>24</sup> Many

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[hereinafter A MODERN-DAY SCARLET LETTER]. However, the state refused to apply the change retroactively until June 2013, when a settlement was reached to remove those already convicted under the CANS law from the sex offender registry. *See, e.g., Hundreds Removed from Louisiana Sex Registry in Class Action Settlement*, NOLA.COM (June 12, 2013, 5:25 PM), [http://www.nola.com/crime/index.ssf/2013/06/hundreds\\_removed\\_from\\_louisian.html](http://www.nola.com/crime/index.ssf/2013/06/hundreds_removed_from_louisian.html).

18. Statement of Ian Doe, *supra* note 11.

19. *See* A MODERN-DAY SCARLET LETTER, *supra* note 17.

20. WOMEN WITH A VISION, “JUST A TALKING CRIME”: A POLICY BRIEF IN SUPPORT OF THE REPEAL OF LOUISIANA’S SOLICITATION OF A CRIME AGAINST NATURE (SCAN) STATUTE, *available at* [http://wwav-no.org/wp-content/uploads/Final\\_PolicyBrief\\_TalkingCrime.pdf](http://wwav-no.org/wp-content/uploads/Final_PolicyBrief_TalkingCrime.pdf).

21. While many statutes refer to, or have been interpreted to refer to, anal and oral sex, I use the term “nonprocreative sex” to refer to the proscribed conduct. I do so because “nonprocreative sex” best captures what I identify as the root of the moral condemnation associated with the types of sexual conduct that are prohibited by crime against nature statutes and antisodomy laws.

22. WILLIAM N. ESKRIDGE, JR., DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA 16–23 (2008).

23. *See* Dana Liebelson, *Why Do So Many States Still Have Anti-Sodomy Laws?*, THE WEEK (Apr. 8, 2013), <http://theweek.com/article/index/242412/why-do-so-many-states-still-have-anti-sodomy-laws>.

24. The following states regulate sodomy as a separate category from other forms of sexual activity: Alabama (ALA. CODE §§ 13A-6-63 (1977)); Florida (FLA. STAT. § 800.02 (2013) (regulating “unnatural and lascivious act[s]”)); Idaho (IDAHO CODE ANN. § 18-6605 (1988) (regulating “the infamous crime against nature”)); Kansas (KAN. STAT. ANN. § 21-5504 (2010) (regulating “criminal sodomy”)); Louisiana (LA. REV. STAT. ANN. § 14:89 (2013) (regulating “crime[s] against nature”)); Michigan (MICH. COMP. LAWS § 750.158 (1952) (regulating “crime[s] against nature or sodomy”)); Mississippi (MISS. CODE ANN. § 97-29-59 (2013) (regulating sodomy and “the detestable and abominable crime against nature”)); Missouri (MO. REV. STAT. § 566.010 *et seq.* (2013) (regulating “deviate sexual intercourse”)); Montana (MONT. CODE ANN. § 45-8-218 (2013) (regulating “deviate sexual conduct”)); North Carolina (N.C. GEN. STAT. § 14-177 (1994) (regulating “crime[s] against nature”)); Oklahoma (OKLA. STAT. ANN. tit. 21, § 886 (West 2007) (regulating “the detestable and abominable crime against nature”)); South Carolina (S.C. CODE ANN. § 16-15-120 (1962) (referring to sodomy as “the abominable crime of buggery”)); Texas (TEX. PENAL CODE ANN. § 21.06 (West 1994) (regulating “homosexual conduct,” defined as “deviate sexual intercourse with another individual of the same sex)); and Utah (UTAH CODE ANN. § 76-5-403(2003)). Virginia’s antisodomy law, which regulated “crimes against nature,” remained on the books until March 2013, when it was

states do not explicitly define the prohibited conduct in the text of the statute itself, relying instead on courts to spell out what a “crime against nature” or “deviate sexual conduct” might entail.<sup>25</sup> In all of these states, however, nonprocreative sex is distinguished from procreative sex, with four states maintaining distinct regulatory schemes for conduct occurring between two people of the same sex.<sup>26</sup>

Crime against nature statutes and other antisodomy laws remain on the books in many states even though the Supreme Court held these laws unconstitutional more than eleven years ago.<sup>27</sup> In *Lawrence v. Texas*, the Court struck down Texas’s antisodomy statute on its face, ruling that the law contravened the plaintiffs’ due process liberty interest.<sup>28</sup> The Court’s holding in *Lawrence* suggested not only that intimacy between consenting adults warrants some level of constitutional protection, but also that states should not rely on moral disapproval to justify the punishment of one form of sex over another.<sup>29</sup>

However, the Justices placed certain limits on *Lawrence*’s ban on state regulation of intimate conduct. Reserving the rights of states to legislate in the area of sexual expression, the Court wrote:

The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle.<sup>30</sup>

These discrete exceptions suggested that states could continue to regulate intimate conduct to the extent that such conduct implicated certain “legitimate governmental interests,” even though regulation of sexual conduct would likely be considered unconstitutional without the presence of “some external, validly regulated element.”<sup>31</sup>

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struck down by the United States Court of Appeals for the Fourth Circuit. *MacDonald v. Moose*, 710 F.3d 154 (4th Cir. 2013); *see also infra* Part III.

25. *See supra* note 24. For example, while North Carolina’s antisodomy law merely states that it regulates “the crime against nature,” state courts have interpreted the statute to govern conduct which includes “sodomy and buggery” and “all kindred acts of a bestial character,” as well as oral sex. N.C. GEN. STAT. § 14-177 (1994); *State v. Harward*, 142 S.E.2d 691, 692 (N.C. 1965); *State v. Griffin*, 94 S.E. 678, 679 (N.C. 1917); *State v. Stiller*, 590 S.E.2d 305, 306–07 (N.C. Ct. App. 2004).

26. *See* Tim Murphy, *MAP: Has Your State Banned Sodomy?*, MOTHER JONES (Apr. 19, 2011, 11:29 AM), <http://www.motherjones.com/mojo/2011/04/map-has-your-state-banned-sodomy>.

27. *Lawrence v. Texas*, 539 U.S. 558 (2003).

28. *Id.* at 564.

29. *Id.* at 560 (citing *Bowers v. Hardwick*, 478 U.S. 186 (1986) (Stevens, J., dissenting)).

30. *Id.* at 578. The Court also suggested that practices not “common to a homosexual lifestyle” would be exempt from the explicit protection of *Lawrence*. *Id.*

31. Christopher R. Murray, *Grappling With “Solicitation”: The Need for Statutory Reform in North Carolina After Lawrence v. Texas*, 14 DUKE J. GENDER L. & POL’Y 681, 681–82 (2007).

In the eleven years since the *Lawrence* ruling, many courts have relied on the *Lawrence* exceptions to justify laws that impose distinct regulatory schemes on different forms of sexual activity. Indeed, Louisiana's policy is only one example of a state relying on the *Lawrence* exceptions to keep pared-down versions of its antisodomy laws on the books. Courts have cited the exceptions to uphold laws distinguishing between procreative and nonprocreative forms of sex in areas that include sexual conduct involving minors;<sup>32</sup> sexual conduct occurring where consent might be absent,<sup>33</sup> particularly within the military;<sup>34</sup> and the sale of sex toys.<sup>35</sup> Perhaps nowhere is this distinct treatment of nonprocreative sexual activity more stark than in states that single out the solicitation of "crimes against nature," or prostitution involving oral and anal (but not vaginal) sex, for distinct treatment and disproportionate punishment.

The *Lawrence* Court left uncertain whether the conduct covered by the *Lawrence* exceptions is governed by the principle that animus and moral disapproval alone cannot be used to justify distinctions between different forms of sexual activity.<sup>36</sup> I argue that it is. By failing to make this point explicit, the *Lawrence* decision has enabled lower courts to uphold conduct-based distinctions that fall within the exceptions, even where these distinctions reflect the moral disapproval that *Lawrence* and *Romer* reject. My Comment examines solicitation-related laws, highlighting crime against nature statutes in Louisiana, Virginia, and North Carolina<sup>37</sup> and using the solicitation example to demonstrate that laws that distinguish between different forms of sexual conduct based on moral condemnation alone violate the core logic of *Lawrence* and *Romer*.<sup>38</sup> My Comment further argues that courts should resolve this

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32. *E.g.*, *In re R.L.C.*, 643 S.E.2d 920, 925 (N.C. 2007) (unlike *Lawrence*, "[t]his juvenile case does involve minors"); *State v. Limon*, 83 P.3d 229 (Kan. Ct. App. 2004), *rev'd*, 122 P.3d 22 (2005).

33. *E.g.*, *State v. McKenzie-Adams*, 915 A.2d 822 (Conn. 2007), *overruled on other grounds* by *State v. Payne*, 34 A.3d 370 (Conn. 2012).

34. *See, e.g.*, *United States v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004); *United States v. McCoy*, No. NMCCA 200101209, 2006 WL 1029163 (N-M. Ct. Crim. App. Apr. 20, 2006).

35. *See, e.g.*, *Williams v. Morgan*, 478 F.3d 1316 (11th Cir. 2007); *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738 (5th Cir. 2008).

36. *See Lawrence v. Texas*, 539 U.S. 558, 560 (2003); *Romer v. Evans*, 517 U.S. 620, 634–35 (1996). This logic finds further support in *Windsor*, where the Justices reinforced the principle that "[t]he Constitution's guarantee of equality 'must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot' justify disparate treatment of that group." *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013) (citing *Dep't of Agric. v. Moreno*, 413 U.S. 528, 534–35 (1973)).

37. Louisiana, Virginia, and North Carolina were selected for discussion because they appear to be the only states whose courts have addressed the relationship between antisodomy laws and solicitation following the *Lawrence* ruling. However, this is not necessarily an indication that other states which retain antisodomy laws have not continued to enforce these laws in the solicitation context without mentioning *Lawrence*, nor is it an indication that states with antisodomy laws could not choose to enforce them against sex workers at any time.

38. While they might be partially based in moral condemnation, some regulations on sexual conduct are also justified by their relation to arguably legitimate governmental objectives, such as the prevention of teenage pregnancy. This Comment argues, however, that when they are applied to solicitation, crime against nature laws lack such additional valid justifications.

tension by interpreting *Lawrence* and *Romer*'s fundamental logic to govern even conduct that falls within the exceptions.

Many valuable arguments have been made critiquing state courts' continued reliance on the *Lawrence* exceptions to enforce antisodomy laws in a variety of contexts.<sup>39</sup> My contribution lies in addressing the impermissibility of the moral basis for these laws, and in using the example of solicitation to highlight the discrimination that their enforcement entails. More than eleven years after Justice Kennedy authored the landmark decision, it is remarkable that lower courts cite directly to *Lawrence* to uphold laws that can be used to discriminate on the basis of race, gender identity and expression, and sexual orientation. And although the Court arguably reinforced parts of *Lawrence*'s core logic when it struck down a part of the Defense of Marriage Act in 2013,<sup>40</sup> it seems to have done so in the limited context of committed relationships between consenting adults, leaving open the possibility that the application of the *Lawrence* exceptions may continue in state courts. With no further clarification of *Lawrence* on the horizon, it is crucial that the decision be understood for its rejection of laws with no basis in anything more than moral judgments.

Part I of this Comment provides a history of crime against nature laws and antisodomy statutes, highlighting the animosity that serves as their basis. Part II summarizes the relevant Supreme Court precedent, particularly the *Romer* and *Lawrence* rulings,<sup>41</sup> and Part III demonstrates how state court opinions have applied the *Lawrence* exceptions to justify distinct regulatory schemes for different types of sexual conduct. Part IV demonstrates that these opinions are inconsistent with the logic of *Lawrence* and *Romer*, and Part V draws on a First Amendment analogue to propose a legal framework avoiding this inconsistency

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39. See *supra* notes 32–35 and accompanying text; see also, e.g., Daniel Allender, *Applying Lawrence: Teenagers and the Crime Against Nature*, 58 DUKE L.J. 1825 (2009) (arguing that after *Lawrence*, crime against nature laws have been used to uphold disproportionate punishment of minors who engage in anal or oral sex); 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 (2008) (same); M. Blake Huffman, *North Carolina Courts: Legislating Compulsory Heterosexuality by Creating New Crimes Under the Crime Against Nature Statute Post-Lawrence v. Texas*, 20 LAW & SEXUALITY 1 (2011) (identifying harsh penalties for anal and oral sex in contexts involving minors, lack of consent, or commercial elements, while penalties are less harsh for vaginal sex that occurs in the same contexts).

40. E.g., *Windsor*, 133 S. Ct. at 2692 (looking to *Lawrence* for the proposition that “[p]rivate, consensual sexual intimacy between two adult persons of the same sex may not be punished by the State”); *id.* at 2694 (suggesting that the Defense of Marriage Act runs afoul of *Lawrence* by “plac[ing] same-sex couples in an unstable position of being in a second-tier marriage [and thereby] . . . demean[ing] the couple, whose moral and sexual choices the Constitution protects”).

41. Because of the *Windsor* decision's arguably limited scope, see *infra* note 40 and accompanying text, and because the *Windsor* Court relied primarily on a states'-rights analysis that is largely irrelevant to this Comment's argument, see, e.g., *Windsor*, 133 S. Ct. at 2695–96, I have omitted *Windsor* from my discussion of Supreme Court precedent.

by applying *Lawrence*'s core principles to conduct falling within the exceptions.

## I.

### ANTISODOMY LAWS IN HISTORICAL CONTEXT

The animosity that still serves as the basis for antisodomy laws can be traced back hundreds of years to Anglo-American legal tradition.<sup>42</sup> America's antisodomy regulatory scheme is drawn from the system used until relatively recently in Britain, where sodomy was a capital crime until 1861 (and was generally thought of as applying only to sex between men).<sup>43</sup> In 1533, at the behest of Henry VIII, England made "the detestable and abominable vice of buggery committed with mankind or beast punishable by death."<sup>44</sup> English courts interpreted the new law to apply to bestiality as well as anal intercourse between two men or between a woman and a man.<sup>45</sup> It was not until the late nineteenth century that Britain further modified its antisodomy law, passing much more sweeping legislation which proscribed, among other things, "act[s] of gross indecency" between two men.<sup>46</sup> This regulatory change was accompanied by public "hysteria" in England over the perceived social ill of male homosexuality; it was during this time that Oscar Wilde was prosecuted under the new law.<sup>47</sup>

Drawing on the British system, U.S. laws similarly originated out of disapproval of nonprocreative sex.<sup>48</sup> Colonial-era antisodomy laws were based on Christian moral disapproval toward nonprocreative sexual activity and, to a lesser extent, on the perceived need to increase the population in the colonies and to prevent sexual assault.<sup>49</sup> These early American statutes proscribed anal sex in any context, with some defining the crime as "carnall [*sic*] knowledge."<sup>50</sup> "Sodomy," however, was not considered equivalent to "homosexual conduct"; instead, it "was understood as a particular, discrete, act, not as an indication of a person's sexuality or sexual orientation."<sup>51</sup>

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42. NUSSBAUM, *supra* note 8, at 61.

43. *Id.* at 63.

44. Brief of Professors of History George Chauncey et al. as Amici Curiae in Support of Petitioners at 6, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102) [hereinafter History Professors' Brief]; ESKRIDGE, *supra* note 22, at 16.

45. History Professors' Brief, *supra* note 44, at 6 (citing William Eskridge, Jr., *Law and the Construction of the Closet: American Regulation of Same-Sex Intimacy, 1880-1946*, 82 IOWA L. REV. 1007, 1012 (1997); Ed Cohen, *Legislating the Norm: From Sodomy to Gross Indecency*, 88 S. ATLANTIC Q. 181, 185 (1989)).

46. NUSSBAUM, *supra* note 8, at 63-64.

47. *Id.* at 64.

48. See, e.g., History Professors' Brief, *supra* note 44, at 2, 6.

49. *Id.* at 2; see also ESKRIDGE, *supra* note 22, at 16-17, 20.

50. History Professors' Brief, *supra* note 44, at 6.

51. *Id.* at 2.

It was not until the late nineteenth century that American society and the American legal system alike began to draw parallels between sodomy and homosexuality—a relatively new concept at the time.<sup>52</sup> It was also around this time that legislatures began to spell out the type of conduct covered by their antisodomy statutes: in 1879, Pennsylvania enacted the first such clarification, defining sodomy and buggery as “carnal copulation by human beings with each other against nature, *res veneria in ano*, or with a beast, . . . [including] the act or acts where any person shall wilfully and wickedly have carnal knowledge, in a manner against nature, of any other person, by penetrating the mouth of such person.”<sup>53</sup> In other states, interpretations of antisodomy laws were left to courts or to individual law-enforcement officers.<sup>54</sup>

The antigay discrimination that has come to be associated with modern antisodomy regulations peaked during the twentieth century, particularly between the 1930s and the 1960s.<sup>55</sup> During that time, homosexuality was widely considered to be a “disease” or “degeneration.”<sup>56</sup> In response to this belief, states began to develop antisodomy laws that targeted conduct occurring between same-sex couples specifically, as opposed to the act of sodomy more generally.<sup>57</sup> In particular, the years following World War II saw a dramatic rise in antigay persecution, and a corresponding increase in antisodomy arrests.<sup>58</sup> This persecution was grounded primarily in efforts by the media and law enforcement in many cities to paint gay people as perverts and child molesters.<sup>59</sup> Proponents of this crackdown argued that “in breaking with social convention to the extent necessary to engage in homosexual behavior, a man had demonstrated the refusal to adjust to social norms that was the hallmark of the psychopath.”<sup>60</sup> Eskridge writes that during this period, gay individuals, “[d]emonized as sexual psychopaths, sex perverts, and child molesters, . . . became the new enemy of the people.”<sup>61</sup> However, the antigay hysteria of the mid-twentieth century, Eskridge argues, can be situated within a broader trend of “moralizing body politics” that favored antimiscegenation policies and gender-normative roles.<sup>62</sup> In other words, while antisodomy laws came to be associated with homosexual conduct, they remained firmly rooted in broader social norms and in ideas about the morality of nonprocreative sex.

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52. *Id.* at 2, 11.

53. ESKRIDGE, *supra* note 22, at 50.

54. *Id.* at 51.

55. History Professors’ Brief, *supra* note 44, at 2, 11.

56. *Id.* at 12–13.

57. *See id.* at 7.

58. *Id.* at 15, 19; ESKRIDGE, *supra* note 22, at 85.

59. History Professors’ Brief, *supra* note 44, at 17.

60. *Id.* at 18 (quoting GEORGE CHAUNCEY, *GAY NEW YORK: GENDER, URBAN CULTURE, AND THE MAKING OF THE GAY MALE WORLD, 1890–1940*, at 359 (1994)).

61. ESKRIDGE, *supra* note 22, at 77.

62. *Id.* at 82.

Despite growing opposition to antisodomy laws toward the end of the twentieth century, the Supreme Court upheld these regulations—and implicitly sanctioned their discriminatory basis—as recently as the late 1980s. In *Bowers v. Hardwick*, the Court declined to strike down Georgia’s antisodomy law, rejecting the notion that the Constitution protects a “fundamental right to engage in homosexual sodomy.”<sup>63</sup> While the *Bowers* Court relied heavily on what the Justices saw as an entrenched history of regulation of homosexual conduct, the decision is also notable for its endorsement of the belief that “notions of morality” can serve as a valid basis for criminal laws.<sup>64</sup> The Court refused to declare that “majority sentiments about the morality of homosexuality” were inadequate or that they did not justify the law at issue.<sup>65</sup> *Bowers*—and the idea that antisodomy laws were valid on the basis of moral beliefs alone—remained good law for the next seventeen years.

## II.

### RELEVANT SUPREME COURT PRECEDENT

#### A. *Lawrence v. Texas*

In September 1998, police officers in a Houston suburb responded to a report of a weapons disturbance at the home of John Geddes Lawrence.<sup>66</sup> Upon arrival, they allegedly encountered Lawrence “engaging in a sexual act” with another man, Tyron Garner.<sup>67</sup> The two men were arrested and charged under Texas Penal Code Annotated Section 21.06(a), which criminalizes “deviate sexual intercourse with another individual of the same sex,”<sup>68</sup> and further defines the proscribed conduct as “any contact between any part of the genitals of one person and the mouth or anus of another person [or] the penetration of the genitals or the anus of another person with an object.”<sup>69</sup> After pleading *nolo contendere* and paying fines, Lawrence and Garner appealed their convictions.<sup>70</sup> The Texas Court of Appeals for the Fourteenth District rejected

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63. *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986).

64. *Id.* at 196.

65. *Id.*

66. *Lawrence v. Texas*, 539 U.S. 558, 562 (2003); Dahlia Lithwick, *Extreme Makeover: The Story Behind the Story of Lawrence v. Texas*, THE NEW YORKER (Mar. 12, 2012), [http://www.newyorker.com/arts/critics/books/2012/03/12/120312crbo\\_books\\_lithwick?currentPage=all](http://www.newyorker.com/arts/critics/books/2012/03/12/120312crbo_books_lithwick?currentPage=all).

67. *Lawrence*, 539 U.S. at 563. Significantly, it is not at all clear that Lawrence and Garner were actually engaged in a sex act; the responding officers differ markedly in their accounts of what they saw, and some reports suggest that the two men never had sex at all. Lithwick, *supra* note 66; see also generally Dale Carpenter, *The Unknown Past of Lawrence v. Texas*, 102 MICH. L. REV. 1464 (2004). Moreover, Lawrence and Garner were not, and had never been, in a relationship; in fact, the police were called by Garner’s off-and-on partner, Robert Eubanks, who apparently summoned the officers by telling the dispatcher that a black man armed with a gun was “going crazy in the apartment.” Carpenter, *supra*, at 1479.

68. *Lawrence*, 539 U.S. at 563 (quoting statute).

69. *Id.*

70. *Id.*

their constitutional arguments, noting that these arguments were undercut by the 1986 ruling in *Bowers*.<sup>71</sup> The Supreme Court granted certiorari.<sup>72</sup>

In an opinion authored by Justice Kennedy, the Court rejected the notion that the government could intrude upon the most intimate aspects of a couple's relationship.<sup>73</sup> Grounding his analysis in the Due Process Clause, Justice Kennedy identified the liberty interest at stake as both autonomy-based and spatial, pointing to a constitutionally protected "realm of personal liberty which the government may not enter."<sup>74</sup> In defining this area of liberty, the Court looked to due process precedent protecting the right to privacy within the marital bedroom,<sup>75</sup> within relationships between unmarried people,<sup>76</sup> and regarding certain decisions relating to fundamental aspects of one's personal life.<sup>77</sup> Precedent also supported the Court's proposition that the right to privacy extends beyond the spatial dimension.<sup>78</sup>

While the Court's opinion in *Lawrence* is grounded in the Due Process Clause, it also implicates the Equal Protection Clause. The *Lawrence* majority wrote that the petitioners' "right to liberty under the Due Process Clause g[ave] them the full right to engage in their conduct without intervention of the government."<sup>79</sup> Under this rationale, Justice Kennedy concluded, the Texas antisodomy law "furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."<sup>80</sup> Moreover, the majority declined to explicitly align the conduct at issue with a specific identity category, instead articulating a more universal liberty to engage in "the most private human conduct, sexual behavior, [which] is within the liberty of persons to choose without being punished as criminals."<sup>81</sup> However, the decision is closely aligned with the Equal Protection Clause. Indeed, Justice Kennedy's decision not to rely on an equal protection approach seems to have arisen not out of a wholesale rejection of the equal protection analysis, but instead from a narrow concern that such an approach would cause antisodomy laws to be upheld whenever they proscribed conduct between same-sex and opposite-sex couples alike.<sup>82</sup> Justice Kennedy's opinion also emphasized that due process and equal protection rationales are not mutually exclusive, arguing

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71. *Lawrence v. State*, 41 S.W.3d 349, 355 (Tex. Ct. App. 2001), *rev'd*, 539 U.S. 558 (2003) (citing *Bowers v. Hardwick*, 478 U.S. 186 (1986)).

72. *Lawrence v. Texas*, 537 U.S. 1044 (2002).

73. *Lawrence*, 539 U.S. at 562, 578.

74. *Id.* at 578 (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 847 (1992)).

75. *Id.* at 565–66 (citing *Griswold v. Connecticut*, 381 U.S. 479 (1965)).

76. *Id.* (citing *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977); *Eisenstadt v. Baird*, 405 U.S. 438 (1972)).

77. *Id.* at 573–74 (citing *Planned Parenthood v. Casey*, 505 U.S. 833 (1992)).

78. *Id.* at 565 (citing *Roe v. Wade*, 410 U.S. 113 (1973)).

79. *Id.* at 578.

80. *Id.*

81. *Id.* at 567.

82. *Id.* at 575.

that a decision based in due process liberty also advances equality interests.<sup>83</sup> Thus, while Justice Kennedy was mindful that his ruling would have important antidiscrimination implications, his opinion makes clear that *Lawrence* protects a right to sexual autonomy that extends beyond a specific class of people.<sup>84</sup>

However, the *Lawrence* Court emphasized that its decision was bounded by the needs of legitimate government regulation. Establishing what have come to be known as the *Lawrence* exceptions, Justice Kennedy distinguished the case from those involving—among other things—minors, people in relationships that are coercive or not consent-based, public conduct, and prostitution.<sup>85</sup> Justice Kennedy also suggested that the Court’s ruling should not be read to endorse government recognition of “any relationship that homosexual persons seek to enter,”<sup>86</sup> and the decision can arguably be interpreted as limited in its scope to “sexual practices common to a homosexual lifestyle.”<sup>87</sup> While these exceptions have since become the basis for lower court holdings distinguishing or declining to follow *Lawrence*,<sup>88</sup> they have also been cited as confirmation of the *Lawrence* Court’s central holding that laws regulating sexuality are only valid when they are supported by the “legitimate governmental interests” reflected in the exceptions, and not merely by a “preference for one form of physical intimacy over another.”<sup>89</sup>

Fundamentally, *Lawrence*’s central holding rejects the use of animus and moral disapproval, without more, as justifications for criminal laws and regulations pertaining to intimate conduct.<sup>90</sup> The *Lawrence* majority rejected

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83. *See id.* (“If protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons.”)

84. *See id.*

85. *Id.* at 578.

86. *Id.*

87. *See id.*

88. *See infra* Part III.

89. *See, e.g.,* Murray, *supra* note 31, at 685.

90. *See Lawrence*, 539 U.S. at 571; *see also* Murray, *supra* note 31, at 681–82; Strader, *supra* note 4, at 54; Wardenski, *supra* note 4, at 1367. While this Comment argues that *Lawrence*’s core logic lies in a rejection of moral condemnation as the sole basis for regulation of sexual conduct, many scholars have advanced alternate theories of the Court’s main holding. One reading of *Lawrence* argues that the case primarily rejects the use of identity categories as the basis for disparate regulations of sexual conduct. *See, e.g.,* Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 MICH. L. REV. 431, 451 (2005) (“just as *Brown* led . . . to a presumptive judicial ban on all racial classifications, so is *Lawrence* likely to lead eventually to a presumptive judicial ban on all classifications based on sexual orientation”). However, this reading arguably fails to take into account Justice Kennedy’s emphasis on a universal right of sexual autonomy and his decision to root the holding in the Due Process Clause. Another reading of *Lawrence* characterizes the holding as dignity-based. *See, e.g.,* Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1898 (2004). An additional group of scholars have argued that *Lawrence* seeks to protect relationships. *See, e.g.,* Franke, *supra* note 7. If this interpretation does, in fact, accurately characterize Justice Kennedy’s intent, then it may help explain why the *Lawrence* Court rejected extending protections to solicitation and sex work. However, many scholars have argued that the sexual liberty interest protected by *Lawrence* is at odds with laws that

the *Bowers* Court's reliance on prevailing moral beliefs as the basis for criminal law: while "religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family" are profound concerns for many people, Justice Kennedy wrote, they could not be used to justify the restriction at issue in *Lawrence*. "Our obligation," Justice Kennedy asserted, "is to define the liberty of all, not to mandate our own moral code."<sup>91</sup>

Moreover, the *Lawrence* Court was clear that its liberty-based logic did not merely protect homosexual people as a class, but was intended to cut across identity lines. Justice Kennedy's opinion hinged on a rejection of *Bowers*, criticizing that ruling's mischaracterization of the issue as whether *homosexual people* have a right to engage in sodomy—a failure, in Justice Kennedy's eyes, to appreciate that the liberty at stake transcends categories of sexual orientation.<sup>92</sup> The *Lawrence* Court also recognized that the moral condemnation justifying the *Bowers* holding was based not on a social consensus about the immorality of homosexual conduct, but rather on a "general condemnation of nonprocreative sex."<sup>93</sup> Indeed, although Justice Kennedy did not mention it, *Bowers* initially included as co-plaintiffs a married heterosexual couple who argued that their ability to engage in nonprocreative sex had been chilled because the law at issue criminalized heterosexual, as well as homosexual, conduct.<sup>94</sup> Had the district court in *Bowers* not found that the married couple lacked standing to proceed because the law at issue had not been enforced against them, it seems entirely possible that the Supreme Court's holding could have encompassed their claim, instead of remaining limited in its application and import to conduct between people of the same sex.<sup>95</sup>

### B. *Romer v. Evans*

*Lawrence* followed on the heels of *Romer v. Evans*, a 1996 ruling that similarly rejected the use of moral disapproval and animus, without more, as

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push people into relationships. See, e.g., Michael Boucai, *Sexual Liberty and Same-Sex Marriage: An Argument from Bisexuality*, 49 SAN DIEGO L. REV. 415 (2012). Several scholars also note that the facts of the case cut against limiting its holding to people in relationships. See Carpenter, *supra* note 67, at 1478; Russell K. Robinson, *Masculinity as Prison: Sexual Identity, Race, and Incarceration*, 99 CALIF. L. REV. 1309, 1384 n.456 (2011). Finally, some have suggested that all encounters—not just those that take place in the context of committed relationships—can give rise to the liberty interest protected by *Lawrence*; these encounters often carry with them the *possibility* of a relationship, and even when that is not the case, *Lawrence* arguably affirms them nonetheless. See, e.g., Tribe, *supra*, at 1905; see also Robinson, *supra*, at 1384 n.456. These arguments suggest that a Court focused on the rights of couples might still be willing to extend protection to solicitation.

91. *Lawrence*, 539 U.S. at 571 (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 850 (1992)).

92. *Id.* at 566–67.

93. *Id.* at 569–70.

94. See *Bowers v. Hardwick*, 478 U.S. 186, 188 n. 2 (1986) (acknowledging the married plaintiffs' argument that their sexual expression had been "chilled and deterred" by the law at issue and by its enforcement against Hardwick); ESKRIDGE, *supra* note 22, at 234.

95. See *Bowers*, 478 U.S. at 188 n.2.

the basis for lawmaking.<sup>96</sup> *Romer* struck down Colorado's Amendment 2, which barred state and local governments from taking any legislative, executive, or judicial action to protect, as a class, "persons discriminated against by reason of their sexual orientation."<sup>97</sup> Justice Kennedy, writing for the majority, asserted that Amendment 2 could not stand because it created a "solitary class," withdrawing legal protections from "homosexuals" but not from others,<sup>98</sup> with apparently no more than animosity and moral disapproval as a basis.<sup>99</sup>

Critically, the *Romer* Court emphasized that the law's breadth raised the "inevitable inference" that it was grounded in animosity toward LGBT people,<sup>100</sup> which the majority found was an invalid justification. If the Equal Protection Clause means anything, Justice Kennedy wrote, it is that the "desire to harm a politically unpopular group *cannot constitute a legitimate governmental interest.*"<sup>101</sup> In short, *Romer* disavowed morality and animosity, without more, as legitimate bases for lawmaking, due in no small part to the significant stigma that can arise as a result of the legal establishment of identity- and conduct-based categories.<sup>102</sup>

*Romer* is distinct from *Lawrence* in that it relies on an equal protection analysis and not on the Due Process Clause.<sup>103</sup> However, the two rulings are alike in their rejection of moral disapproval as the sole basis for lawmaking. As Justice Kennedy noted in *Lawrence*, the equal protection and due process doctrines are fundamentally related in that deprivations of liberty that violate the Due Process Clause can also give rise to discrimination with equal protection implications.<sup>104</sup> The two doctrines thus overlap when laws based in discriminatory animus and moral disapproval are at issue. Because of this overlap in reasoning, even though *Romer* and *Lawrence* rely on different constitutional doctrines, they reach complementary conclusions about the validity of animus-based laws.

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96. Daniel Farber and Suzanna Sherry argue that the *Romer* Court invalidated the law at issue in that case by invoking "the pariah principle," which "forbids the government from designating any societal group as untouchable, regardless of whether the group in question is generally entitled to some special degree of judicial protection." Daniel Farber & Suzanna Sherry, *The Pariah Principle*, 13 CONST. COMMENT. 257, 258 (1996). This principle is rooted in a rejection of animus and hostility as legitimate governmental interests. *Id.* at 270.

97. *Romer v. Evans*, 517 U.S. 620, 623–24 (1996).

98. *Id.* at 627, 631.

99. *Id.* at 632. Notably, Justice Kennedy also acknowledged that Amendment 2 gave rise to a political-process-based harm by barring Coloradans from passing laws that would protect LGBT people as a class, a rationale that the lower court had emphasized but that Justice Kennedy did not consider dispositive. *Id.* at 625–26.

100. *Id.* at 634–35.

101. *Id.* at 634 (quoting *Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)) (emphasis added).

102. See Farber & Sherry, *supra* note 96, at 272.

103. See *Romer*, 517 U.S. at 631–32.

104. See *Lawrence v. Texas*, 539 U.S. 558, 575 (2003).

## III.

STATE COURT APPLICATION OF THE *LAWRENCE* EXCEPTIONS

Even though *Lawrence* and *Romer* establish that moral judgment alone cannot serve as the basis for proscriptions against certain types of conduct, particularly when such proscriptions give rise to the risk of unequal treatment, several lower courts have relied on the Court's precedent not for its equality-based principles but to use the *Lawrence* exceptions to sanction state laws. These courts have looked to *Lawrence* to justify regulation of sex involving minors,<sup>105</sup> sexual relationships in which consent might be absent,<sup>106</sup> public commerce,<sup>107</sup> and other activities. Unsurprisingly, many scholars argue that the use of the *Lawrence* exceptions to sustain these regulatory schemes has enabled courts to uphold the disparate treatment of vulnerable groups.<sup>108</sup>

Despite the *Lawrence* Court's rejection of morality as a basis for discrimination, lower courts have been able to maintain disparate regulations of nonprocreative sexual conduct because the Court did not make explicit the implied relationship between *Lawrence*'s core principle and its exceptions. This perceived "loophole" in the *Lawrence* opinion has had particularly acute implications for sex workers and others arrested for solicitation. Crime against nature statutes and other antisodomy laws have long been used to police prostitution, and following the *Lawrence* ruling, courts in a number of states have maintained that these regulatory schemes stand apart from *Lawrence*, holding that they fall within the exceptions for public conduct, prostitution, or both. As a result, these state courts have interpreted *Lawrence* as permitting solicitation laws which treat the solicitation of anal and oral sex differently than the solicitation of vaginal sex,<sup>109</sup> even where such laws implicitly enable law-enforcement officers to enforce these laws in a discriminatory fashion.

## A. North Carolina's Crime Against Nature Statute

While a number of states retain antisodomy laws nearly eleven years after *Lawrence*,<sup>110</sup> North Carolina has arguably received the most attention for its continued efforts to enforce its crime against nature statute.<sup>111</sup> The law, North

105. See, e.g., *In re R.L.C.*, 643 S.E.2d 920, 925 (N.C. 2007); *State v. Limon*, 83 P.3d 229 (Kan. Ct. App. 2004), *rev'd*, 122 P.3d 22 (2005).

106. See e.g., *State v. McKenzie-Adams*, 915 A.2d 822 (Conn. 2007); *United States v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004); *United States v. McCoy*, No. NMCCA 200101209, 2006 WL 1029163 (N-M. Ct. Crim. App. Apr. 20, 2006).

107. See, e.g., *Williams v. Morgan*, 478 F.3d 1316 (11th Cir. 2007).

108. See *supra* note 39.

109. See, e.g., *State v. Thomas*, 891 So.2d 1233 (La. 2005); *Singson v. Commonwealth*, 621 S.E.2d 682 (Va. Ct. App. 2005); *Tjan v. Commonwealth*, 621 S.E.2d 669 (Va. Ct. App. 2005); *State v. Pope*, 608 S.E.2d 114 (N.C. Ct. App. 2005).

110. See *supra* note 24.

111. See, e.g., *Huffman*, *supra* note 39; *Murray*, *supra* note 31. Despite the existing body of literature pertaining to the North Carolina antisodomy law, few scholars seem to have examined whether this law falls within the *Lawrence* exceptions when it is used to police solicitation. This

Carolina General Statute Section 14-177, simply refers to “the crime against nature [committed] with mankind or beast.”<sup>112</sup> In 1966, the North Carolina Supreme Court articulated the continuing public disgust associated with the proscribed conduct when it wrote that the regulation was designed “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.”<sup>113</sup>

In the eleven years following *Lawrence*, North Carolina has continued to rely on Section 14-177 to police the solicitation of nonprocreative sexual conduct, but not the solicitation of vaginal intercourse, which is regulated by a separate statute.<sup>114</sup> In *State v. Pope*, North Carolina’s Court of Appeals held that *Lawrence* did not render Section 14-177 unconstitutional as applied to solicitation.<sup>115</sup> In that case, Teresa Pope had been charged with the solicitation of crimes against nature, considered a misdemeanor under North Carolina law, after she offered to perform oral sex on undercover police officers for compensation.<sup>116</sup> The district court dismissed the charges on the ground that they were unconstitutional under *Lawrence*, but the North Carolina Court of Appeals reversed.<sup>117</sup> The appellate court acknowledged that *Lawrence* had eliminated *Bowers*’s protection of antisodomy laws, but expressly pointed to the *Lawrence* exceptions as justification for treating solicitation of nonvaginal sex as a distinct crime under North Carolina law.<sup>118</sup>

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Comment contributes to this scholarship by arguing that even conduct that falls within the *Lawrence* exceptions is still protected by that case’s central holding.

112. N.C. GEN. STAT. § 14-177 (2008).

113. *State v. Stubbs*, 145 S.E.2d 899, 902 (N.C. 1966).

114. *See State v. Richardson*, 300 S.E.2d 379, 380–81 (N.C. 1983).

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

116. *Id.* at 115. While the crime against nature itself is considered a felony under North Carolina law, state courts have determined that solicitation—a separate offense—is a misdemeanor when it pertains to the crime against nature. *See State v. Tyner*, 272 S.E.2d 626 (N.C. 1980). In the years since *Pope*, critics of that decision have pointed out that Teresa Pope’s conviction is also problematic because solicitation, an inchoate crime, may only be criminalized if the underlying conduct constitutes a crime as well. *See, e.g., Murray, supra* note 31, at 687. Under *Lawrence*, a crime against nature—without more—cannot be accompanied by criminal liability, and “making solicitation a criminal offense is valid only if the solicited conduct is actually a crime.” *Id.* It is arguable that *Pope* was wrongly decided on this basis as well.

117. *Pope*, 608 S.E.2d at 115–16.

118. *Id.* at 116. While this Comment does not address the authority of states to regulate the solicitation of sexual conduct, some scholars have argued that North Carolina’s strategy of regulating the solicitation of nonprocreative sex acts by allowing courts to append a solicitation element to the state’s now-defunct antisodomy statute is a poor substitute for the legislative action that should be used to bring “crimes against nature” within the reach of the state’s generic prostitution law. *See, e.g., Murray, supra* note 31, at 688–92.

*B. Virginia's Crime Against Nature Statute*

Until the Fourth Circuit struck down Virginia's antisodomy statute on its face in 2013,<sup>119</sup> Virginia state courts similarly continued to sustain convictions for solicitation of "crimes against nature" after *Lawrence*. In 2005, the Court of Appeals of Virginia decided two nearly identical cases—*Singson v. Commonwealth*<sup>120</sup> and *Tjan v. Commonwealth*<sup>121</sup>—both of which involved defendants who had solicited sex from an undercover officer in a public restroom.<sup>122</sup> The judge who decided both cases concluded that the public nature of that conduct placed it squarely outside of *Lawrence*'s protections, asserting that *Lawrence* only applied to a "narrow liberty interest" that did not extend to conduct occurring in a public location.<sup>123</sup> The *Singson* and *Tjan* court's refusal to consider the defendants' convictions in the context of *Lawrence*'s protections enabled it to ignore the problematic nature of Virginia's high penalty for the solicitation of a "crime against nature." Because Virginia's statute had made it a felony to engage in anal or oral sex until *Lawrence* called its constitutionality into question,<sup>124</sup> solicitation of that crime was still considered a felony under Virginia law.<sup>125</sup> As a result, while a prosecution under Virginia's crime against nature law would be impermissible under *Lawrence*, Virginia's state courts continued to condemn those caught soliciting nonprocreative sex to felon status using the logic of *Singson* and *Tjan*.

When the Fourth Circuit ultimately struck down the Virginia state court's approach in 2013, its holding was not based on *Lawrence*'s prohibition against animus-based disparate treatment.<sup>126</sup> Instead, the Fourth Circuit found that the state courts lacked the power to effectively narrow the unconstitutional statute by halting prosecutions for nonprocreative sex while continuing to regulate conduct not explicitly protected by the *Lawrence* decision.<sup>127</sup> *Lawrence*, the Fourth Circuit pointed out, invalidated Virginia's antisodomy law as a whole, and the state was not entitled to carve out the statute's unconstitutional applications while leaving intact those that fell within the *Lawrence* exceptions.<sup>128</sup> While "the Virginia General Assembly might be entitled to enact a statute specifically outlawing sodomy between an adult and an older minor," the court observed, it "ha[d] not seen fit to do so," and a "judicial reformation"

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119. *MacDonald v. Moose*, 710 F.3d 154, 162 (4th Cir. 2013); *see also id.* at 163 n.11.

120. 621 S.E.2d 682 (Va. Ct. App. 2005).

121. 621 S.E.2d 669 (Va. Ct. App. 2005).

122. It appears that neither *Singson* nor *Tjan* were seeking compensation for the sex in question. *See Singson*, 621 S.E.2d 682; *Tjan*, 621 S.E.2d 669.

123. *Singson*, 621 S.E.2d at 688; *see also Tjan*, 621 S.E.2d at 672.

124. *See* VA. CODE ANN. § 18.2-361 (2005).

125. VA. CODE ANN. § 18.2-29 (2002) (making it a felony to "command[], entreat[], or otherwise attempt[] to persuade another person to commit a felony other than murder").

126. *See generally MacDonald*, 710 F.3d 154.

127. *Id.* at 165–66.

128. *Id.* at 165.

narrowing the law would run afoul of Supreme Court precedent.<sup>129</sup> Ultimately, while the Fourth Circuit reached a result consistent with *Lawrence*'s core logic by striking down Virginia's antisodomy law as a whole, it left the state free to enact narrower laws that may contravene the liberty-based principles announced by the *Lawrence* Court.

### *C. Louisiana's Crime Against Nature Statute*

As in North Carolina and Virginia, courts in Louisiana have upheld the use of the state's crime against nature statute in the wake of *Lawrence* to impose disproportionate penalties on defendants who solicit nonprocreative sex.<sup>130</sup> Louisiana's "Crime Against Nature by Solicitation" (CANS) statute, Louisiana Revised Statute Section 14:89.2, criminalizes "the solicitation by a human being of another with the intent to engage in any unnatural carnal copulation for compensation."<sup>131</sup> Thus, Louisiana singles out sex workers who solicit nonprocreative sex, maintaining a separate prostitution statute—Louisiana Revised Statute Section 14:82—which applies to anal, oral, and vaginal sex.<sup>132</sup> Solicitation of nonprocreative sex for compensation can be punished either as prostitution, which is a misdemeanor and carries no sex-offender registration requirement,<sup>133</sup> or under the CANS law, which can constitute a felony and, until 2011, required registration as a sex offender.<sup>134</sup> Because police and prosecutors have complete discretion over which statute to use, sex workers who are vulnerable to discrimination—including LGBT sex workers, people of color, and women—are at the mercy of these officials.<sup>135</sup>

129. *Id.* at 165–66 (citing *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320 (2006)).

130. *See generally, e.g., State v. Thomas*, 891 So.2d 1233 (La. 2005).

131. LA. REV. STAT. ANN. § 14:89.2(A) (2012).

132. Section 14:82(B) states that "sexual intercourse"—the solicitation of which constitutes prostitution—"means anal, oral, or vaginal sexual intercourse." LA. REV. STAT. ANN. § 14:82(B) (2013).

133. Complaint, *supra* note 10, at 15.

134. *See, e.g., Doe v. Jindal*, 851 F. Supp. 2d 995, 998 n.4 (E.D. La. 2012) (detailing pre-2011 registration requirements pursuant to a conviction under Louisiana's law); LA. REV. STAT. ANN. § 14:89.2(C) (2012); A MODERN-DAY SCARLET LETTER, *supra* note 17 (same); LA. REV. STAT. ANN. § 14:89.2(B) (2012) (providing that a first conviction under the CANS law carries a fine of no more than \$500 and a term of imprisonment of no more than six months, but that a second or subsequent conviction carries a fine of no more than \$50,000 and a term of imprisonment of no more than two years—thus rendering a second or subsequent conviction a possible felony).

135. *See Crime Against Nature by Solicitation (CANS) Litigation*, CENTER FOR CONST. RTS., <http://www.ccrjustice.org/crime-against-nature> (last visited June 29, 2014) [hereinafter *CANS Litigation*] (observing that Louisiana's regulatory scheme for solicitation gives "[p]olice and prosecutors . . . unfettered discretion in choosing which to charge," and reporting that, in part because of this framework, a large percentage of the individuals listed on the Orleans Parish sex offender registry are female, African American, or both); *see also* Ed Anderson, *Those Convicted of Soliciting Would Not Have to Register as Sex Offenders if Bill Passes*, TIMES-PICAYUNE, May 24, 2011 (also reporting on sex offender registry demographics).

In 2005, the Louisiana Supreme Court upheld this regulatory scheme in *State v. Thomas*, finding that *Lawrence*'s protections do not extend to those convicted under the CANS statute. In *Thomas*, the court considered the case of Tina Thomas, who prosecutors had charged under the CANS law after she allegedly solicited an undercover officer to engage in oral sex for money.<sup>136</sup> The trial court granted Thomas's motion to quash on the basis that her prosecution was unconstitutional under *Lawrence*, noting that the case before it involved an adult sex worker and not a "child or a person incapable of consent."<sup>137</sup> Interestingly, the trial court appears to have made little, if any, mention of *Lawrence*'s exceptions for commercial and public sexual activity, reasoning instead that the application of the law was problematic primarily because it enabled discriminatory enforcement in violation of the Due Process Clause.<sup>138</sup> The Louisiana Supreme Court disagreed, ruling that *Lawrence*'s exceptions for prostitution and public conduct placed Louisiana's statute beyond the reach of *Lawrence*.<sup>139</sup> The *Thomas* court characterized *Lawrence*'s holding as relatively narrow, citing directly to the exceptions (and emphasizing that they specify both public conduct and prostitution) to determine that the High Court's decision was not controlling.<sup>140</sup>

The *Thomas* opinion also rejected the trial court's contention that the law was enforced in an unconstitutionally discriminatory manner because those convicted under the CANS law would receive harsher punishment than those convicted of prostitution.<sup>141</sup> Notably, the *Thomas* court did so by relying on pre-*Lawrence* cases upholding the heightened punishment for a CANS conviction.<sup>142</sup> The *Thomas* ruling is remarkable in that the state supreme court relied on pre-*Lawrence* precedent, overlooking *Lawrence*'s reasoning as far as its protections were concerned while simultaneously citing *Lawrence* directly for its exceptions. Indeed, one of the pre-*Lawrence* cases the *Thomas* court relied on found that the CANS statute was unproblematic because it applied to

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136. *State v. Thomas*, 891 So.2d 1233, 1234 (La. 2005).

137. *Id.* at 1234–35.

138. *Id.* (citing the trial court's conclusion that the law was "enforced in a discriminatory manner and also impede[d] a liberty specifically protected by the Due Process Clauses of the 5th Amendment and the 14th Amendment").

139. *Id.* at 1237.

140. *Id.* at 1235–37.

141. *Id.* at 1237–38.

142. *Id.* at 1238 (citing *State v. Smith*, 766 So.2d 501, 514 (La. 2000) (holding that no equal protection violation arose from the distinction between penalties for prostitution and CANS convictions)); *State v. Baxley*, 656 So.2d 973, 979 (La. 1995) (holding that no equal protection violation arose from the disproportionate punishments for CANS violations as opposed to other prostitution violations because "[b]oth statutes apply to heterosexuals and homosexuals equally. They simply punish two types of *conduct* differently . . . [t]he punishment of one type of conduct more severely than another similar type of conduct is not, of itself, an equal protection violation.") (emphasis in original); *State v. Neal*, 500 So.2d 374 (La. 1987) (finding that the "overlap" between the CANS and prostitution statutes did not make their application unconstitutional, despite the discrepancy between the penalties).

conduct while technically treating heterosexuals and homosexuals equally<sup>143</sup>—an argument at odds with *Lawrence*'s protection of a type of sexual autonomy that cuts across identity categories.<sup>144</sup> Ultimately, by grounding its conclusion in pre-*Lawrence* precedent, the *Thomas* court ignored *Lawrence*'s clear implications.

Since the *Thomas* ruling, Louisiana's legislature has equalized the penalties for violations of the CANS statute and the state's generic prostitution statute in response to public pressure.<sup>145</sup> As a result of this change, people charged under the CANS law will not be required to register as sex offenders.<sup>146</sup> Although Louisiana continued to argue that the change should not apply retroactively to those already required to register for convictions occurring before August 16, 2011,<sup>147</sup> subsequent class-action litigation resulted in a settlement that led to the removal of all individuals convicted of crimes against nature by solicitation from Louisiana's sex offender registry.<sup>148</sup>

Louisiana's legislative success has overwhelmingly positive implications for Louisianans at risk of being convicted under the CANS statute and has the potential to serve as a model for activists in states that continue to enforce antisodomy laws in the solicitation context. However, that this result took years of grassroots organizing, rather than judicial intervention, is a troubling reminder that state courts retain the potential to exploit *Lawrence*'s lack of clarity on the broad application of its central holding to its exceptions in order to perpetuate the application of animus-based laws. As I argue in the following Parts, these courts can—and should—interpret *Lawrence*'s ambiguity

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143. *Baxley*, 656 So.2d at 979.

144. See, e.g., Klarman, *supra* note 90; see also *infra* Section IV.

145. A MODERN-DAY SCARLET LETTER, *supra* note 17; see also *June 14th – SCAN Victory in the Louisiana Senate!!*, WOMEN WITH A VISION (June 14, 2011), <http://wwav-no.org/june-14th-victory>

-in-the-senate. This lobbying effort, led by the Center for Constitutional Rights and the New Orleans-based group Women With a Vision, consisted of community organizing, education, and outreach, and successfully persuaded state representative Charmaine Stiaes to sponsor a bill to equalize the penalties for violations of the CANS law and violations of the state's generic prostitution statute, which ultimately passed the Louisiana Senate unanimously and the House with only three dissenting votes. See *Women With a Vision Win Rights for Women of Color Convicted of "Crimes Against Nature" in Louisiana*, THIRD WAVE FOUNDATION (June 22, 2011), available at <http://www.thirdwavefoundation.org/women-with-a-vision-win-rights-for-women-of-color-convicted-of-crimes-against-nature-in-louisiana/>; *June 6th – SCAN Victory in the Louisiana House!!*, WOMEN WITH A VISION (June 6, 2011), available at <http://wwav-no.org/june-6th-victory-in-the-house>.

146. Complaint at 10, *Doe v. Caldwell*, No. 12cv01670 (E.D. La. June 27, 2012).

147. *Id.*

148. See, e.g., *Victory at Last! Louisiana has Removed Hundreds of Individuals Unconstitutionally Placed on Sex Offender Registry*, LOUISIANA JUSTICE INSTITUTE (Oct. 28, 2013), <http://louisianajusticeinstitute.blogspot.com/2013/10/victory-at-last-louisiana-has-removed.html>; see also *Louisiana to Remove Hundreds of Individuals Unconstitutionally Placed on Sex Offender Registry*, CENTER FOR CONST. RTS. (June 12, 2013), <http://ccrjustice.org/newsroom/press-releases/louisiana-remove-hundreds-of-individuals-unconstitutionally-placed-sex-offender-registry>.

differently, applying that case in a way that does not place certain types of conduct entirely outside of constitutional protection.

#### IV.

##### CATEGORIZING SOLICITATION AND PROSTITUTION: VIOLATIONS OF *LAWRENCE AND ROMER*

As the approaches used by state courts illustrate, the application of crime against nature laws and other antisodomy statutes to the solicitation of nonprocreative sex singles out sex workers who are convicted of soliciting or engaging in this conduct for money.<sup>149</sup> This animosity-based categorization is firmly rooted in the moral disgust toward nonprocreative sex that has historically served as the basis for antisodomy regulation. *Lawrence* and *Romer*, however, reject this type of moral justification as the sole basis for any sort of legal or statutory classification.<sup>150</sup> Contrary to the assertions of the *Pope* and *Thomas* courts (and other courts that have upheld similar solicitation regulations), that prostitution and public sexual conduct fall within the *Lawrence* exceptions should not be construed to give a license to lower courts to exempt laws that criminalize this conduct from constitutional review altogether.

Furthermore, the broad and subjective harm that can result from the continued application of antisodomy laws is at odds with the core logic of *Romer* and *Lawrence*. *Romer* rejects hostility and animus, without more, as lawmaking justifications.<sup>151</sup> *Lawrence* emphasizes that determinations of criminality cannot be based on moral judgments about the underlying conduct without evidence that the conduct is accompanied by a defined harm.<sup>152</sup> Because the harm that arises from the application of these statutes to the sale of nonprocreative sex cuts across boundaries of gender, race, and sexual orientation, it demands a response inclusive enough to combat the myriad of forms of discrimination that can result.<sup>153</sup>

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149. See *supra* Section III.

150. See *Lawrence v. Texas*, 539 U.S. 558, 571 (2003); *Romer v. Evans*, 517 U.S. 620, 632 (1996).

151. See Farber & Sherry, *supra* note 96, at 270–71. Some scholars have argued for a narrower reading of *Romer*, one that focuses upon the Court’s rejection of the law as one that would restrict equal participation in the political process. See, e.g., Teresa M. Bruce, Note, *Neither Liberty Nor Justice: Anti-Gay Initiatives, Political Participation, and the Rule of Law*, 5 CORNELL J. L. & PUB. POL’Y 431, 434 (1996). However, although the lower court in that case relied upon a similar interpretation, Justice Kennedy stressed that his own rationale in *Romer* was a different one. *Romer*, 517 U.S. at 625–26.

152. See, e.g., Strader, *supra* note 4, at 54.

153. Kathryn Abrams elaborates on the importance of recognizing the links between gender-based and sexual-orientation-based discrimination and advocates for the development of equality movements that transcend traditionally defined identity groups. Kathryn Abrams, *Elusive Coalitions: Reconsidering the Politics of Gender and Sexuality*, 57 UCLA L. REV. 1135 (2010). Abrams laments the failure of antihomophobia movements to involve feminist advocates and vice versa, arguing, for example, that “[m]arriage equality has potential benefits for everyone interested in

That two of the cases described in the preceding Section apparently dealt with convictions for solicitation of heterosexual nonprocreative sex does not mean that crime against nature statutes have ceased to be the tools of homophobia-based discrimination.<sup>154</sup> Rather, these cases show that the harm arising from application of such statutes is not uniquely tied to sexual orientation. Crime against nature statutes, when applied to the solicitation of nonprocreative sex for compensation, disadvantage not only LGBT sex workers but also others who are particularly vulnerable to discrimination<sup>155</sup>— due, at least in part, to the fact that they are often enforced at the discretion of law-enforcement officers.

The continued use of crime against nature laws creates a risk of discrimination-based harm because these laws give officials broad leeway in determining how to charge an offender. Crime against nature laws often permit law-enforcement officers and prosecutors to choose to charge a person with either solicitation or prostitution, thereby permitting them to select the severity of the accompanying penalty.<sup>156</sup> Therefore, laws criminalizing the solicitation of nonprocreative sex often allow officials to punish offenders based on the officials' own notions about the criminality or the moral reprehensibility of the offender's sexuality.

This potential for discretion and discrimination that characterizes the use of antisodomy laws raises constitutional concerns in that it enables law enforcement officers and prosecutors to penalize sex workers based upon their own moral judgments about whether, and to what extent, a particular sex worker's sexuality should be criminalized. For example, an official who sees an LGBT person's sexuality as inherently criminal can give effect to this prejudice

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nonnormative gender roles." *Id.* at 1136. A similar point may be made about regulations that target the sale of nonprocreative sex: these laws do not only harm LGBT people, but implicate all sex workers, whose work is implicitly at odds with dominant societal notions about sexual morality. Moreover, while antisodomy laws in some states could arguably be used to convict the clients of sex workers, who are often male, laws like Louisiana's—which target the person who solicits sex "for compensation"—cannot. *See* LA. REV. STAT. ANN. § 14:89.2 (2012). Because many sex workers are female, while their clients are often male, laws targeting sex workers but not their clients raise the risk of gender-based discrimination, as well as discrimination based on moral condemnation of the solicited conduct.

154. *See* Abrams, *supra* note 153.

155. In Louisiana, the now-modified "Crime Against Nature by Solicitation" statute has disproportionately been used in the past to convict not only queer-identified sex workers but also women, African Americans, and low-income people. A MODERN-DAY SCARLET LETTER, *supra* note 17. For example, in Louisiana's Orleans Parish, where nearly 40 percent of people on the sex offender registry are there for solicitation of "crimes against nature," 75 percent of those forced to register as a result of CANS convictions were women, and 79 percent of those forced to register as a result of a CANS conviction were African American. *Id.*; *see also* Anderson, *supra* note 135; WOMEN WITH A VISION, *supra* note 20.

156. A MODERN-DAY SCARLET LETTER, *supra* note 17 ("[p]olice officers and prosecutors have had complete discretion in applying the statute throughout the entire legal process – from the initial arrest and charges to conviction and subsequent mandatory registration as a sex offender. This creates a situation ripe for abuse and discriminatory enforcement").

by charging an LGBT sex worker under a disproportionately punitive antisodomy law. Similarly, an official who believes—either overtly or as a result of implicit bias<sup>157</sup>—that a black woman’s sexuality is more morally reprehensible than that of a white woman may have the option of using an antisodomy law with a disproportionately harsh penalty to punish a black female sex worker. Such laws may also place transgender people at particular risk, since members of the transgender community, especially transgender people of color, are frequently stereotyped as sex workers and are therefore at risk of being arrested without cause.<sup>158</sup>

This discretion (as well as the resulting risk of discrimination) is particularly acute where legislatures leave law-enforcement officers with the option of charging sex workers who are caught soliciting “crimes against nature” under different regulatory schemes. In some states (like North Carolina), prostitution statutes have been interpreted as only applicable to vaginal sex, so law-enforcement officers and courts have been forced to append a solicitation element to the state’s crime against nature law to punish the sale of nonprocreative sexual activity.<sup>159</sup> However, in other states (like Louisiana), the sale of nonprocreative sex can be punished either as prostitution or as a “crime against nature by solicitation,” and it is up to law-enforcement officers to choose how a defendant’s conduct should be criminalized.<sup>160</sup> In Louisiana, until the state legislature equalized the penalties for the two statutes, this meant that a police officer or prosecutor’s belief about the moral reprehensibility of a sex worker’s conduct could make the difference between a misdemeanor conviction on one hand, and a felony conviction requiring registration as a sex offender on the other.

Thus, in a number of states, the use of antisodomy laws to regulate solicitation implicates moral judgments about the criminalized conduct at two points: when legislatures criminalize the conduct, and when charging officers choose antisodomy laws over generic prostitution statutes. This potential for discrimination and animosity is at odds with *Lawrence* and *Romer*’s disavowal of societal beliefs about morality as a valid basis for drawing lines between

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157. The term “implicit bias” is frequently used to articulate the idea that human actors are guided not only by their explicit beliefs and intentions, but also by “processes of social perception, impression formation, and judgment” over which they lack conscious control. *See, e.g.*, Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 946 (2006); *see also* Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795, 797 (2012) (“[i]mplicit racial bias describes the cognitive processes whereby, despite even the best intentions, people automatically classify information in racially biased ways”).

158. NATIONAL CENTER FOR TRANSGENDER EQUALITY & NATIONAL GAY AND LESBIAN TASK FORCE, INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 158 (2011), available at [http://www.thetaskforce.org/downloads/reports/reports/ntds\\_full.pdf](http://www.thetaskforce.org/downloads/reports/reports/ntds_full.pdf).

159. *See* Huffman, *supra* note 39, at 19–20.

160. *See, e.g.*, Doe v. Jindal, 851 F. Supp. 2d 995, 998–99 (E.D. La. 2012).

different groups of people who engage in similar conduct—in this case, those who sell vaginal sex and those who sell nonprocreative sex. While state courts have upheld crime against nature statutes and other antisodomy laws—together with their often disproportionate penalties—on the basis that they regulate conduct that is exempt from the *Lawrence* holding, these decisions fail to recognize that nowhere in its opinion did the *Lawrence* Court specify that its core logic did not extend to the *Lawrence* exceptions.<sup>161</sup> Taking advantage of the ambiguity left by the *Lawrence* Court, these lower courts have rendered decisions that are fundamentally at odds with *Lawrence*'s broad rejection of morality as the sole basis for criminal laws.

Furthermore, many of the lower courts that purport to apply the *Lawrence* exceptions fail to appreciate that a more accurate reading of *Lawrence* would give rise to the conclusion that the Court's fundamental logic does carry over into the conduct specified by the exceptions. While the *Lawrence* exceptions permit limited government regulation of certain categories of conduct to prevent identifiable harms, the case should not be interpreted to give legislatures *carte blanche* to draw animus-based distinctions in policing the exempted conduct. As the solicitation example illustrates, such an interpretation raises the possibility that laws will continue to impose harsher punishments on certain conduct than on nearly identical, but less morally condemned, conduct, based on nothing more than animus. To give legislatures and law enforcement this leeway would be to overlook *Lawrence*'s rejection of the possibility that animus and moral judgment could serve as the sole basis for the application of a particular law.

To be sure, critics of *Lawrence*'s core logic might dispute this Comment's claim that *Lawrence*'s antianimosity holding extends to the exceptions, arguing that even if the Court rejected the use of moral judgments, without more, as the basis for regulations on sexual conduct, the type of regulations that fall within the *Lawrence* exceptions remain unencumbered by this principle because they *are* justified by more than moral disapproval. Regulations on the excepted conduct, it might be argued, are permissible because they seek to prevent cognizable harms that go beyond mere threats to the protection of morality—harms such as the dangers associated with children engaging in sexual conduct, for example, or the risks that can arise in sex work when consent is traded for money.<sup>162</sup> In the context of solicitation, many would argue that regulation is

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161. See, e.g., *State v. Thomas*, 891 So.2d 1233 (La. 2005). The *Thomas* court, relying on precedent, rejected the idea that the application of the crime against nature statute in the solicitation context was unconstitutional because of the higher penalty associated with that law than with the prostitution statute. *Id.* at 1237.

162. See, e.g., *Strader*, *supra* note 4, at 102 (“there are justifications for criminalizing prostitution other than public morality, including promoting public safety and preventing injury and coercion”); *id.* at 102 n.332 (“[p]rostitution also creates documented risks to public health”); see also *In re R.L.C.*, 645 S.E.2d 920, 925 (N.C. 2007) (pointing to “psychological implications” of sex

justified by the fact that sex work is inherently dehumanizing and exploitative<sup>163</sup>—which, in itself, constitutes a type of harm.

Yet while these arguments may justify a certain level of regulation to mitigate the harms associated with the excepted conduct, such regulation need not draw morality-based lines between nearly identical types of activity to alleviate these risks. Laws that regulate the solicitation of sex are arguably valuable because they provide law enforcement with the opportunity to ensure that sex workers are not being exploited or abused (despite the questionable success of this strategy),<sup>164</sup> but this goal is not advanced in any way by laws that categorize people based on whether they engage in procreative or nonprocreative sex. A test of whether a law regulates permissibly under *Lawrence*, then, might look to the relationship between that particular law's articulated goals and whether these goals are actually furthered by the identity-related<sup>165</sup> categories created by the law.

Moreover, critics of my reading of *Lawrence* might argue that moral judgment *can* serve as the sole basis of a law because the deterioration of public morality constitutes a harm, and that conduct falling within the *Lawrence* exceptions can be regulated to prevent this harm. Indeed, Justice Antonin Scalia advanced a similar argument in his dissent to the *Lawrence* ruling, in which he asserted that the protection of public morality constitutes a legitimate government interest that allows legislatures to regulate sexual conduct.<sup>166</sup> However, while Justice Scalia proposed this interpretation as an alternative to the *Lawrence* majority's decision, a lower court bound by Supreme Court precedent would be hard pressed to identify moral disapproval, without more, as a rational basis for the regulation of sexual conduct, given that the *Lawrence* and *Romer* Courts both explicitly rejected it as the sole

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between minors and the “government’s desire for a healthy young citizenry” to justify the application of an antisodomy law to a juvenile offender following *Lawrence*).

163. See, e.g., Alexandra Bongard Stremler, *Sex for Money and the Morning After: Listening to Women and the Feminist Voice in Prostitution Discourse*, 7 U. FLA. J.L. & PUB. POL’Y 189, 196 (1995) (citing Catharine A. MacKinnon, FEMINISM UNMODIFIED 61 (1987)) (acknowledging the argument advanced by some feminists that “since prostitutes generally play the role of the dominated sexual partner, the expression of male power through paid subservience creates the ultimate form of subordination and danger”).

164. See, e.g., Coty R. Miller & Nuria Haltiwanger, *Prostitution and the Legalization/Decriminalization Debate*, 5 GEO. J. GENDER & L. 207, 231–33 (2004) (describing the argument that prostitution is inherently exploitative and should therefore be regulated, but also noting that many feminist theorists believe that complete deregulation will decrease, rather than increase, the risk that sex workers will be exploited); see also Aaron D. Simowitz, *How Criminal Law Shapes Institutional Structures: A Case Study of American Prostitution*, 50 AM. CRIM. L. REV. 417, 437 (2013) (“criminalization makes prostitutes ‘vulnerable to coercion, abuse, and exploitation’”) (quoting Julia O’Connell Davidson, PROSTITUTION, POWER AND FREEDOM 16 (1998)).

165. I use the term “identity-related” here to acknowledge that many of the antisodomy laws at issue in this Comment draw lines based on conduct rather than identity. Nonetheless, I argue that these classifications can properly be characterized as “identity-related” because of their potential to disproportionately impact members of the LGBT community.

166. *Lawrence v. Texas*, 539 U.S. 558, 589–90 (Scalia, J., dissenting).

justification for lawmaking decisions.<sup>167</sup> No matter how harmful “crimes against nature” might be to the moral status quo, courts cannot use this harm to distinguish between different types of consensual adult sexual conduct under either *Lawrence* or *Romer*.

Indeed, the Court’s actions since *Lawrence* underscore the claim that even laws regulating conduct that falls within the exceptions are constitutionally reviewable. *State v. Limon*, which reached the Court just after the *Lawrence* decision was handed down, illustrates the Justices’ intent that *Lawrence*’s central logic should control even within the context of the exceptions.<sup>168</sup> *Limon*, an eighteen-year-old man who had engaged in consensual oral sex with a fourteen-year old male, had been convicted under Kansas’s sodomy statute and given a 206-month prison sentence, coupled with a requirement that he register as a sex offender upon release.<sup>169</sup> After a Kansas appellate court affirmed *Limon*’s conviction and sentence, he petitioned the U.S. Supreme Court for certiorari.<sup>170</sup> While his appeal was pending, the Court decided *Lawrence*, and the next day, the Justices granted *Limon*’s petition, vacated his conviction, and remanded his case for consideration in light of the *Lawrence* holding.<sup>171</sup>

That the Court vacated and remanded *Limon*’s conviction even though the conduct at issue clearly fell within the first of the *Lawrence* exceptions suggests that the Justices never intended the laws regulating such conduct to be immune from constitutional review. Had the Court intended the reach of *Lawrence* to be so limited, it seems more likely that the Justices would have declined to take up *Limon*’s case, letting the opinion below stand. By remanding *Limon*’s case for further review, the Court implicitly rejected the idea that *Lawrence* permits sexual-orientation-based discrimination, even when it occurs in the context of regulating sex that involves minors.

On remand, the Kansas Appeals Court relied on the *Lawrence* exceptions to distinguish the case before it from the Supreme Court’s holding in *Lawrence*,<sup>172</sup> but the Kansas Supreme Court reversed, applying a nuanced analysis consistent with *Lawrence*’s core logic to strike down *Limon*’s conviction.<sup>173</sup> Even though the Kansas antisodomy statute did not on its face single out homosexual conduct, the court reasoned, its application—and the

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167. See *id.* at 560; *Romer v. Evans*, 517 U.S. 620, 634–35 (1996).

168. See *Limon v. Kansas*, 539 U.S. 955 (2003) (*per curiam* order) (granting *Limon*’s petition, vacating the judgment of the Court of Appeals of Kansas, and remanding for consideration in light of *Lawrence*).

169. *State v. Limon*, 122 P.3d 22, 24–25 (Kan. 2005).

170. *Id.* at 25.

171. *Limon*, 539 U.S. 955; *Limon*, 122 P.3d at 26.

172. *Limon*, 83 P.3d 229, 234 (Kan. App. 2004), *rev’d*, 122 P.3d 22 (Kan. 2005) (citing the *Lawrence* exceptions and noting that “[b]ecause the present case involved a 14-year-old . . . child, it is factually distinguishable from *Lawrence*”).

173. *Limon*, 122 P.3d 22.

accompanying disproportionate punishment—created a “discriminatory classification” warranting rational basis review.<sup>174</sup> Applying such an analysis, the Kansas Supreme Court found that no rational basis existed for the state’s practice of subjecting nonprocreative sex between an adult and a minor to higher penalties than would be imposed for vaginal sex occurring in the same context.<sup>175</sup> To the extent that the distinction between nonprocreative and vaginal sex was based on traditional sexual mores, the court reasoned, such a justification was precluded by the core logic of the *Lawrence* ruling.<sup>176</sup> Indeed, in its post-*Lawrence* opinion, the Kansas Supreme Court made no reference whatsoever to the *Lawrence* exceptions, notwithstanding the fact that the appellate court, when reconsidering the case on remand, had relied on these exceptions to distinguish the case before it from the Court’s recent holding.

The Kansas Supreme Court’s approach serves as a valuable starting point for the development of a *Lawrence* interpretation that applies the Court’s central holding even within the exceptions. As the *Limon* court correctly suggested, some sexual conduct is often accompanied by the risk of harm and therefore warrants some level of government regulation.<sup>177</sup> In this sense, regulation within the context of the *Lawrence* exceptions is valid where it bears a rational relationship to a legitimate government interest—the rational basis test espoused by the *Limon* court.<sup>178</sup> However, because the *Limon* court declined to explicitly address the applicability of *Lawrence*’s central logic to the conduct that falls within the *Lawrence* exceptions, its analysis is incomplete for the purposes of this Comment.

Moreover, *Limon* further reinforces the Justices’ emphasis on a broad-based liberty protected by *Lawrence*—one that arguably exists outside of the context of committed relationships. The facts of *Limon* do not suggest in any way that the young men who engaged in the conduct at issue—both of whom were residents in the same group home—were in a relationship.<sup>179</sup> Although the connection between the two parties in *Limon* appears to be a far cry from the committed, intimate relationship that *Lawrence* and Garner’s advocates described to win over the *Lawrence* Court,<sup>180</sup> the Justices indicated their willingness to extend *Lawrence*’s protections to the parties in *Limon* when they remanded that case. Even as *Lawrence* implicitly emphasizes the significance

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174. *Id.* at 29–30.

175. *Id.* at 38.

176. *Id.* at 34–35 (crediting *Limon*’s argument that “the State’s moral disapproval of homosexuality is an illegitimate justification for discrimination”).

177. *See id.* at 35–38 (considering, and dismissing, the state’s purported justification that failure to regulate sex between youths of the same gender would result in harms, reasoning that these potential harms were not unique to sex occurring between young people of the same gender).

178. *Id.* at 30.

179. *Id.* at 24.

180. *See generally* Lithwick, *supra* note 66.

of relationships,<sup>181</sup> the Court's decision does not place the conduct that occurs outside of relationships entirely out of the Constitution's reach.

V.

AN ALTERNATE APPROACH: THE *R.A.V.* FRAMEWORK

A thorough interpretation of the applicability of *Lawrence*'s central holding can benefit from an examination of a key First Amendment case, *R.A.V. v. City of Saint Paul*.<sup>182</sup> That ruling provides a valuable framework through which to more effectively and holistically interpret *Lawrence*'s ambiguity regarding the application of the Court's central holding to the *Lawrence* exceptions. To be sure, *R.A.V.*—unlike *Lawrence*—is predominantly a First Amendment case,<sup>183</sup> and the analysis relied on by the *R.A.V.* Court is distinct from *Lawrence* in many ways. However, *R.A.V.* sheds light on the interpretation of *Lawrence* advanced by this Comment in that it demonstrates a parallel context in which the Supreme Court suggested that the core constitutional principles that undergird a legal framework can apply even to exceptions to that framework. According to *R.A.V.*—and, as I argue, according to *Lawrence*—even conduct that falls within exceptions to a constitutional framework should not necessarily be considered “entirely invisible to the Constitution.”<sup>184</sup>

The dispute in *R.A.V.* began when a group of teenagers, including Robert A. Viktora, placed a wooden cross in the yard of an African American family that lived in their neighborhood and set it afire.<sup>185</sup> While it had several statutes at its disposal with which to charge Viktora, the City of Saint Paul chose a local ordinance banning certain acts committed with the knowledge that they would “arouse[] anger, alarm or resentment in others on the basis of race, color, creed, religion or gender . . . .”<sup>186</sup> Viktora challenged that ordinance on the basis that it violated the First Amendment because it was content-based—in other words, because it restricted certain speech due to “disapproval of the ideas expressed.”<sup>187</sup> In an opinion authored by Justice Scalia, the Supreme Court agreed.<sup>188</sup>

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181. See *Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (condemning antisodomy laws for their tendency “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”).

182. 505 U.S. 377 (1992).

183. See generally Akhil Reed Amar, *The Case of the Missing Amendments: R.A.V. v. City of Saint Paul*, 106 HARV. L. REV. 124 (1992).

184. See *R.A.V.*, 505 U.S. at 383.

185. *Id.* at 379; see also Amar, *supra* note 183, at 127.

186. *R.A.V.*, 505 U.S. at 379–80.

187. *Id.* at 380, 382.

188. *Id.* at 381.

Fundamentally, the *R.A.V.* decision is one that privileges the central principles of the First Amendment.<sup>189</sup> The Court asserted that the First Amendment, at its core, prevents the government from proscribing speech or expressive conduct merely because it disapproves of the ideas expressed therein.<sup>190</sup> Such content-based regulations, Justice Scalia wrote, are “presumptively invalid.”<sup>191</sup> The First Amendment does not permit the government to “handicap the expression of particular ideas.”<sup>192</sup> However, the *R.A.V.* Court recognized an exception to the First Amendment’s general bar on the regulation of speech, acknowledging that the Constitution permits some regulation of “fighting words.”<sup>193</sup> It was within the context of the “fighting words” exception that the lower court upheld the regulation at issue in *R.A.V.*<sup>194</sup>

Critically, the *R.A.V.* Court’s holding turns on the idea that the core logic of the First Amendment—its rejection of speech restrictions that are content-based—carries over into the “fighting words” category. While certain areas of speech fall within the First Amendment exceptions, the Court reasoned, the exceptions do not render these categories of speech “entirely invisible to the Constitution.”<sup>195</sup> The bar on content-based restrictions still exists within these categories: for example, Justice Scalia wrote, while the government may regulate or ban libel, it may not ban *only* that libel with which it disagrees.<sup>196</sup> In other words, while conduct that falls within the exceptions is susceptible to some regulation, it cannot be subjected to content-based regulations rooted in government disapproval of certain types of speech or expression. Virtually no form of expression, the *R.A.V.* Court suggested, is altogether unprotected by the First Amendment.

*R.A.V.* has important implications for the development of a thorough interpretation of *Lawrence*. The decision presents a framework under which a government can subject certain categories of speech to reduced constitutional

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189. Indeed, in the time since it was decided in 1992, *R.A.V.* has given rise to significant criticism based in large part on the Court’s virtual refusal to incorporate any Fourteenth-Amendment analysis into the opinion. See, e.g., Amar, *supra* note 183, at 125; see also Guy-Uriel E. Charles, *Racial Identity, Electoral Structures, and the First Amendment Right of Association*, 91 CALIF. L. REV. 1209, 1214 n.12 (2003) (elaborating on Amar’s point); Steven G. Gey, *A Few Questions About Cross Burning, Intimidation, and Free Speech*, 80 NOTRE DAME L. REV. 1287, 1301 n.56 (2005) (discussing and critiquing Amar’s argument).

190. *R.A.V.*, 505 U.S. at 382.

191. *Id.* (internal citations omitted); see also *id.* at 386 (“[t]he government may not regulate use based on hostility—or favoritism—towards the underlying message expressed”).

192. *Id.* at 394.

193. *Id.* at 386. The fighting words exception identified by the Court finds its basis in *Chaplinsky v. New Hampshire*, in which the Court identified a First Amendment exception for words “which by their very utterance inflict injury or tend to incite an immediate breach of the peace.” 315 U.S. 568, 572 (1942). Regulation and punishment of such speech, the *Chaplinsky* Court wrote, raised no constitutional concern. *Id.*

194. *R.A.V.*, 505 U.S. at 379.

195. *Id.* at 383–84.

196. *Id.* at 384.

protection if a rational basis exists for doing so, but cannot place categories of speech altogether outside of constitutional protection by subjecting them to content-based restrictions that are at odds with the First Amendment. In other words, the government's disagreement with a particular message does not constitute a rational basis for regulation of the expression of that message. *Lawrence* can be understood in a similar manner: under one interpretation of Justice Kennedy's opinion, the government may regulate conduct that falls within the *Lawrence* exceptions to avoid the risk of certain identified harms, but it may not place this conduct outside of constitutional protection altogether by creating unconstitutional distinctions that are based on no more than notions of morality. Moral justifications and animus, under such an interpretation of *Lawrence*, do not constitute the rational basis that is necessary to legitimately distinguish between vaginal sex and nonprocreative sex, even where that conduct occurs within a context falling within the *Lawrence* exceptions.

*R.A.V.* has given rise to significant criticism, based largely on the assertion that the Court privileged the First Amendment over the Fourteenth Amendment and virtually ignored the equality-based justifications for regulating animus-based speech. Akhil Reed Amar has argued that the *R.A.V.* Court could have incorporated a Fourteenth Amendment analysis into its holding without reaching a contrary result, writing that the Justices' near-exclusive focus on the First Amendment demonstrates their failure to appreciate that "it is a *Constitution* they are expounding, and that the Constitution contains not just the First Amendment, but the Thirteenth and Fourteenth Amendments as well."<sup>197</sup> Now-Justice Elena Kagan also sheds light on some of the key *R.A.V.* criticisms by noting that the Court's adherence to the First Amendment is viewpoint-based—that is, it prioritizes the avoidance of discrimination based on an individual's viewpoint over other types of discrimination—while *R.A.V.*'s critics use a harm-based approach.<sup>198</sup> Indeed, the Court gave credence to the Fourteenth Amendment's harm-based focus in later years when it upheld part of Virginia's cross-burning ban based on the practice's history as a symbol of intimidation and violence, although the Justices were careful to note that the Virginia law differed from the statute at issue in *R.A.V.* in several critical ways.<sup>199</sup>

Key distinctions also exist between *R.A.V.* and *Lawrence*. The *R.A.V.* Court effectively extended First Amendment protection to racial hate speech with no regard to whether it was based in hostility and animus, and the Justices showed little consideration for the myriad of identity-based injuries that can

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197. Amar, *supra* note 183, at 125, 153–54.

198. Elena Kagan, *Regulation of Hate Speech and Pornography After R.A.V.*, 60 U. CHI. L. REV. 873, 878 (1993) (explaining that these arguments "have enriched discussion of the viewpoint neutrality principle," but stopping short of finding the harm-based arguments fully persuasive).

199. *Virginia v. Black*, 538 U.S. 343, 344 (2003). Among these acknowledged distinctions was the fact that the statute at issue in *R.A.V.* focused on the cross-burner's *intent*, while the Virginia statute focused on the *harm* that might result from a cross-burning. *Id.* at 362–63.

result when equality and antisubordination analyses are not applied.<sup>200</sup> *Lawrence*, in contrast, squarely rejects laws grounded in animus, holding that in the case of the Texas law, hostility and societal views about morality did not provide the rational basis necessary for lawmakers to restrict certain expressions of sexuality.<sup>201</sup> Indeed, Justice Scalia's vigorous dissent from the *Lawrence* ruling stresses the majority's abandonment of the proposition that a government interest in protecting "order and morality" is sufficient to justify the regulation of sexuality.<sup>202</sup> The majority, according to Justice Scalia, has improperly elevated this antianimus principle, paving the way for challenges to countless morality-based laws.<sup>203</sup>

By rejecting animus-based laws and the risk of discrimination that accompanies them, *Lawrence* incorporates the equality-based principles that the *R.A.V.* ruling conspicuously omits. In large part, *Lawrence* therefore withstands the criticism that has been directed at *R.A.V.*'s holding. Moreover, while *R.A.V.*'s logic would arguably benefit from a more thorough incorporation of Fourteenth Amendment principles, this criticism does not call into question the efficacy of *R.A.V.*'s central framework: while the First Amendment does not bar the government from regulating fighting words to some extent, it cannot place any category of speech *entirely* outside of the First Amendment's core protections.

*Lawrence* can properly be understood on similar terms, and courts interpreting the *Lawrence* exceptions can and should look to the *R.A.V.* framework to understand and apply what I identify as the core logic of *Lawrence*. To be sure, *R.A.V.* made explicit that the First Amendment's categorical ban on content-based restrictions applied even to the fighting words exception, while the *Lawrence* Court was never fully clear that the antianimus principle at the core of its opinion could be interpreted as applying to the *Lawrence* exceptions. *R.A.V.*, however, suggests that this interpretation is a plausible one, and that it would not be inconsistent with the Court's constitutional jurisprudence to analyze *Lawrence* in this way.

#### CONCLUSION

The Supreme Court's *Lawrence* ruling has profound implications for countless individuals who no longer risk being branded as criminals simply because they engage in intimacy. Yet the Justices left *Lawrence* open to the possibility of an inaccurate reading, creating substantial uncertainty for those people whose conduct falls within the *Lawrence* exceptions, and enabling state courts, legislatures, and law-enforcement officers to place these individuals outside of the Constitution's protection altogether. As a result, the past eleven

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200. See *R.A.V.*, 505 U.S. at 425 (Stevens, J., concurring in the judgment).

201. See *Lawrence v. Texas*, 539 U.S. 558, 558–59 (2003).

202. *Id.* at 589–90 (Scalia, J., dissenting).

203. *Id.* at 590 (Scalia, J., dissenting).

years have seen an application of the *Lawrence* exceptions in an often-discriminatory fashion that is completely at odds with what I identify as *Lawrence*'s central premise—that the State cannot create discriminatory, animosity-based laws where no rational basis exists for doing so. And since the Court, in its most recent discussion of *Lawrence*, limited its reliance on the case to the marriage context<sup>204</sup>—providing little, if any, guidance regarding the *Lawrence* exceptions—it is likely that states will continue to consider themselves free to exempt conduct from the Constitution's protections based on their own moral judgments.

The ambiguity I identify in *Lawrence*'s logic can be bridged by interpreting the decision in a more holistic manner—one that recognizes the applicability of *Lawrence* and *Romer*'s core logic even to *Lawrence*'s exceptions. It follows from Justice Kennedy's landmark ruling that while the State may regulate people who engage in the exempted conduct and cause harm, it may never do so to satisfy its own hostility.<sup>205</sup> For this reason, courts assessing the continued applicability of crime against nature laws to conduct that seemingly falls within the *Lawrence* exceptions should consider whether the use of these laws contravenes *Lawrence* and *Romer*'s underlying equality principle—in other words, whether the application of the law in question draws identity- or conduct-based lines that are driven by notions of morality rather than by a logical harm-prevention rationale. Indeed, courts have already begun to interpret *Lawrence* in a manner consistent with this approach: while the Fourth Circuit's reasoning in *MacDonald* differed from this interpretation in several key respects,<sup>206</sup> that decision nonetheless serves as a promising example of the power of lower courts to prohibit states from making “end runs” around *Lawrence* by continuing to rely on archaic antisodomy laws.

Under the logic of *Lawrence*, no one is exempt from the Constitution's promise of equality—not minors, not those in coercive relationships, and not sex workers. Nowhere is the Constitution's guarantee of protection against the tyranny of the majority more important than where majority groups discriminate against vulnerable groups, and a proper interpretation of *Lawrence* shields these vulnerable groups rather than victimizing them.

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204. See generally *United States v. Windsor*, 133 S. Ct. 2675 (2013) (drawing on *Lawrence* in striking down part of the Defense of Marriage Act).

205. See *Lawrence*, 539 U.S. at 582 (rejecting the state's argument that the law at issue “further[ed] the legitimate governmental interest of the promotion of morality”).

206. See *MacDonald v. Moose*, 710 F.3d 154 (4th Cir. 2013). For example, while this Comment advocates an approach that would directly acknowledge *Lawrence*'s antianimism logic, the *MacDonald* court based its conclusion on the logic that the state of Virginia could continue certain, specific applications of a statute that had been found facially unconstitutional. *Id.* at 166–67.