

# GRAPPLING WITH “SOLICITATION”: THE NEED FOR STATUTORY REFORM IN NORTH CAROLINA AFTER *LAWRENCE V. TEXAS*

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## I. INTRODUCTION

In North Carolina, prior to the 2003 Supreme Court decision in *Lawrence v. Texas*,<sup>1</sup> virtually any form of physical intimacy other than vaginal sex between a man and a woman was punishable as the felony “crime against nature.”<sup>2</sup> Indeed, a mere invitation to participate in such a felony was punishable on a theory of derivative criminality at North Carolina common law as “solicitation of the crime against nature.”<sup>3</sup> After *Lawrence*, however, statutes that would criminalize a personal choice in forms of physical intimacy are constitutionally invalid.<sup>4</sup> It follows that if a given activity is no longer criminal, an offer to engage in that conduct is no longer punishable as solicitation. Or so it would seem.

Teresa Pope was charged with solicitation of the crime against nature for offering oral sex for money to two undercover police officers.<sup>5</sup> Solicitation is an inchoate offense—like attempt or conspiracy—that relies on the criminality of the underlying conduct.<sup>6</sup> Although oral sex by itself cannot be criminalized post-*Lawrence*, the North Carolina Court of Appeals held in *State v. Pope* that the charge of solicitation of the crime against nature survived *Lawrence* by virtue of an exception in that decision allowing criminalization of “prostitution.”<sup>7</sup> But prostitution in North Carolina is governed by a separate statute that applies only to the commercialization of vaginal intercourse between a man and a woman. And the crime against nature is not a prostitution offense because it has no commercial element.<sup>8</sup> After *Lawrence*, criminality cannot turn merely on the

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1. 539 U.S. 558, 569 (2003).

2. N.C. GEN. STAT. § 14-203 (2005) (criminalizing the “crime against nature”); *State v. Harward*, 142 S.E.2d 691, 692 (N.C. 1965) (1965) (construing the statute to apply to a broad range of sexual conduct).

3. *State v. Tyner*, 272 S.E.2d 626, 627 (N.C. Ct. App. 1980).

4. *Lawrence*, 539 U.S. at 560 (“[I]ndividual decisions concerning the intimacies of physical relationships . . . are a form of ‘liberty’ protected by due process.”).

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

6. *Pope*, 608 S.E.2d at 115 (citing *Tyner*, 272 S.E.2d at 627 (defining solicitation as the “counseling, enticing, or inducing another to commit a crime”).

7. *Id.*

8. Nor does solicitation of the crime against nature require add a commercial element. See *Tyner*, 272 S.E.2d at 627. The term “solicitation” is problematic because it has multiple meanings; in other contexts it can be a synonym for prostitution. BLACK’S LAW DICTIONARY 1427 (8th ed. 2004) (3d listed definition of “solicitation”).

type of physical intimacy chosen, but rather it must depend on some external, validly regulated element, such as a commercial exchange.

*Pope* is more than just a bungled state court opinion. It reveals deep uncertainty about the legality of solicitation of sexual conduct in North Carolina after *Lawrence*. Indeed, *Pope* is just one of an increasing number of cases where North Carolina courts have—without any guidance from the General Assembly—attempted to adapt the crime-against-nature statute to survive *Lawrence* by refashioning the elements of the offense on a case-by-case basis.<sup>9</sup>

North Carolinians deserve better than the uncertainty of ad hoc judicial criminal lawmaking. It is the responsibility of the General Assembly to legislate the criminal law and give due notice of what is—and is not—legal in the State of North Carolina after *Lawrence*. Properly reformed regulations of sexual activity would—without impermissibly discriminating between forms of physical intimacy—clearly identify those additional elements, such as a commercial exchange, that would render any physical intimacy a crime.

## II. NORTH CAROLINA SOLICITATION LAWS BEFORE *LAWRENCE*

North Carolina regulates solicitation of sexual activity under two separate regimes: vaginal intercourse between a man and a woman is subject to one set of regulations, and all other forms of sexual intimacy—whether heterosexual or homosexual—are regulated as “crimes against nature.” Commercialization of sex—that is, offering or receiving any form of sexual conduct in exchange for money—is ostensibly prohibited under the corresponding regime. Vaginal, heterosexual sex for money is prohibited as prostitution, while all other forms of physical intimacy-for-hire are prohibited as solicitation of the crime against nature. The following figure illustrates the difference.

*Figure: North Carolina’s Conduct-Differentiating Solicitation Laws*

| <b>Vaginal,<br/>Heterosexual Sex</b>                                       | <b>Form of Intimacy</b>  | <b>All Other<br/>Forms of Intimacy</b>   |
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| (not criminalized)   | <b>Conduct Alone</b>   | <b>Crime Against Nature</b><br>(felony under<br>N.C. Gen. Stat. § 14-203)                            |
|  | <b>Solicitation of Conduct</b><br>(enticing or encouraging)              | <b>Solicitation of the Crime<br/>Against Nature</b><br>(misdemeanor under<br><i>State v. Tyner</i> ) |
| <b>Prostitution</b><br>(misdemeanor under<br>N.C. Gen. Stat. § 14-<br>177) | <b>Commercialization</b><br>(offering or receiving<br>conduct for money) |  |

9. See discussion *infra* Part V.

Prostitution is defined by North Carolina's criminal code as "the offering or receiving of the body for sexual intercourse for hire."<sup>10</sup> In *State v. Richardson*, the Supreme Court of North Carolina construed this statute to apply only to vaginal, heterosexual sex.<sup>11</sup> Consistent with the canon that criminal laws are to be interpreted narrowly, the court explained that "[i]f the legislature wishes to include within [the prostitution statute] other sexual acts, such as cunnilingus, fellatio, masturbation, buggery or sodomy, it should do so with specificity."<sup>12</sup> Under *Richardson*, all forms of physical intimacy, even when offered or received for money, fall squarely outside North Carolina's definition of prostitution.

By contrast, the crime-against-nature statute purports to criminalize certain forms of physical intimacy directly, without regard to whether they are performed for money.<sup>13</sup> The statute provides that "[i]f any person shall commit the crime against nature . . . he shall be punished as a Class I felon."<sup>14</sup> This modern version of the ancient sodomy statute<sup>15</sup> was interpreted expansively by the Supreme Court of North Carolina to include all "sexual intercourse contrary to the order of nature . . . [including] acts between humans *per anum* and *per os*."<sup>16</sup> Indeed, the court emphasized that "our statute is broad enough to include . . . other forms of the offense than sodomy and buggery."<sup>17</sup>

As with solicitation of other felonies, solicitation to commit the crime against nature is punishable as a separate offense at North Carolina common law.<sup>18</sup> The inchoate crime of solicitation is defined generally as "urging, advising, commanding, or otherwise inciting another to commit a crime."<sup>19</sup> In

10. N.C. GEN. STAT. § 14-203 (2005). The statute also considers "offering or receiving of the body for indiscriminate sexual intercourse without hire" to be prostitution. *Id.*

11. 300 S.E.2d 379, 381 (N.C. 1983) (citing a dictionary in holding that "sexual intercourse" refers only to "actual contact of the sexual organs of a man and a woman, and an actual penetration into the body of the latter").

12. *Id.*

13. N.C. GEN. STAT. § 14-177 (2005).

14. *Id.*

15. The crime against nature has been prohibited by statute in common-law jurisdictions for centuries. *E.g.* An Acte for the punysshement of the vice of Buggerie (The Buggery Act), 25 Hen. VIII, c. 6 (1533) (Eng.) (making a felony "the detestable and abominable vice of buggery committed with mankind or beast"). Compare *Bowers v. Hardwick*, 478 U.S. 186, 192-94 (1986) (surveying the "ancient roots" of sodomy statutes in the United States), with *Lawrence v. Texas*, 539 U.S. 558, 568-69 (2003) ("[E]arly American sodomy laws were not directed at homosexuals as such but instead sought to prohibit nonprocreative sexual activity more generally.").

16. *Harward*, 142 S.E.2d at 692 (citations omitted).

17. *Id.*

18. North Carolina common law has long recognized the offense of solicitation to commit a felony. *State v. Hampton*, 186 S.E. 251, 252 (N.C. 1936) ("Is it a substantive common-law offense to solicit another to commit a felony, when the solicitation is of no effect, and the crime solicited is not in fact committed? By the clear weight of authority, the question must be answered in the affirmative."). The common-law crime of solicitation, though recognized in *Hampton* was not created by it; solicitation to commit a felony is recognized in North Carolina's criminal code. See N.C. GEN. STAT. § 14-1 (2005) (incorporating pre-existing common law); N.C. GEN. STAT. § 14-2.6 (2005) (defining sentences for solicitation of felonies separately from sentences applicable to the felonies themselves).

19. BLACK'S, *supra* note 8, at 1427. See also WAYNE R. LAFAVE, CRIMINAL LAW § 11.1(a) (4th ed. 2003). Solicitation as a separate offense is recognized by the Model Penal Code. Model Penal Code § 5.02 (1962) (solicitation to commit a crime punishable to the same extent as the underlying crime, regardless of whether the crime is carried out).

*State v. Tyner*, a North Carolina Court of Appeals acknowledged the offense of solicitation of the crime against nature.<sup>20</sup>

Solicitation of the crime against nature, however, is not a prostitution offense because it lacks the requisite commercial element. The *Tyner* court was clear that liability for solicitation derives from the criminality of the underlying conduct, holding that “[t]he gravamen of the offense of solicitation to commit a felony lies in counseling, enticing, or inducing another to commit a crime.”<sup>21</sup> While a commercial exchange is the gravamen of *prostitution*, defendants have been convicted of solicitation of the crime against nature even where the offer of intimacy was non-commercial.<sup>22</sup>

Indeed, that the crime-against-nature statute seeks to punish an individual’s choice of forms of physical intimacy is demonstrated by the fact that the conduct itself actually constitutes a more serious offense than a mere offer to engage in it. After *Lawrence*, such conduct-based regulation is unconstitutional.<sup>23</sup> Therefore, criminal liability cannot turn on the form of the conduct. Instead, criminality may only be predicated upon those extrinsic aspects (such as a commercial element) that have survived *Lawrence* as justifications for criminalizing sexual activity.

### III. NORTH CAROLINA SOLICITATION LAWS AFTER *LAWRENCE*

The *Lawrence* decision has profound significance for North Carolina because it holds unconstitutional statutes that would criminalize a choice between forms of sexual intimacy. John Geddes Lawrence and Tyron Garner, both adults, were engaging in consensual, non-commercial sex in a private residence in Houston, Texas, when police officers entered the home.<sup>24</sup> Because the two were of the same gender, they were charged under a Texas statute proscribing “deviate sexual intercourse with another individual of the same sex.”<sup>25</sup>

Appealing their conviction to a Texas intermediate appellate court, the couple challenged the constitutionality of the statute on grounds of due process<sup>26</sup> (right to privacy) and equal protection<sup>27</sup> (discrimination based on sex and sexual orientation). Relying on *Bowers v. Hardwick*,<sup>28</sup> the Texas court rejected the argument that homosexual conduct falls within a zone of protected consensual sexual activity.<sup>29</sup> On the equal protection claim, the Texas court reasoned that

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20. 272 S.E.2d 626, 627 (N.C. Ct. App. 1980) (distinguishing between solicitation and attempt to commit sodomy).

21. *Id.*

22. See, e.g., *Hodgkins v. North Carolina Real Estate Comm’n*, 504 S.E.2d 789, 792 (N.C. Ct. App. 1998) (noting petitioner’s prior conviction for solicitation of the crime against nature where the conduct was not offered for hire).

23. See discussion *infra* Part III.

24. *Lawrence*, 539 U.S. at 562.

25. *Id.* The relevant statute is TEX PENAL CODE ANN. § 21.06(a) (2003).

26. *Lawrence*, 539 U.S. at 564.

27. *Lawrence v. State*, 41 S.W.3d 349, 351 (Tex. Ct. App. 2001), *rev’d*, 539 U.S. 558 (2003).

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

29. *Lawrence*, 41 S.W.3d at 360.

homosexuals were not a suspect class and that the law facially applied only to homosexual conduct, not homosexual status.<sup>30</sup> With respect to gender, the court upheld the law on the grounds that both sexes were subject to the same rule and the law did not advantage one sex over another.<sup>31</sup> The court thus rejected the equal protection challenge and upheld the law, citing morality and health concerns as rational bases supporting the statute.<sup>32</sup>

The Supreme Court of the United States reversed on due process grounds. The privacy right at issue, the Court held, was the right to choose one form of intimate conduct over another without governmental interference. The Court began its right-to-privacy analysis with the liberty interest recognized in *Griswold v. Connecticut*.<sup>33</sup> In *Griswold*, the Court held that married couples have a right to choose whether to use contraception and emphasized the privacy of the marital bedroom.<sup>34</sup> Characterizing the holding in *Griswold* as a “right to make certain decisions regarding sexual conduct,” the *Lawrence* Court reiterated that *Eisenstadt v. Baird* had extended that right to non-married couples.<sup>35</sup>

The Court emphasized the broader right of individuals to choose one type of relationship over another.<sup>36</sup> Recognizing that forms of sexual conduct vary depending on the type of relationship chosen, the Court made clear its intention to protect a fundamental choice “touching on the most private human conduct, sexual behavior, and in the most private of places, the home.”<sup>37</sup>

That *Lawrence* protects a right of choice is confirmed by the fact that the decision does not rest on equal protection grounds.<sup>38</sup> It is further confirmed by the exceptions to the liberty interest articulated by the Court. In a frequently cited passage, *Lawrence* sets limits to its holding: “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.”<sup>39</sup> Indeed, each “exception”<sup>40</sup> confirms that sex laws are valid only when supported by legitimate governmental interests beyond a mere preference for one form of physical intimacy over another.

30. *Id.* at 353–55.

31. *Id.* at 359.

32. *Id.* (“To the extent the statute has a disproportionate impact on homosexual conduct, the statute is supported by a legitimate state interest.”).

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

34. *Id.* at 485.

35. *Lawrence*, 539 U.S. at 564 (citing *Eisenstadt v. Baird*, 405 U.S. 438 (1972)).

36. *Id.* at 567.

37. *Id.* Of course, this right of choice is not unlimited, and the Court explained that it does not extend to sexual conduct that causes injury to others. *Id.*

38. *Id.* at 579 (O’Connor, J., concurring) (“Rather than rely on the . . . *Due Process Clause*, as the Court does, I base my conclusion on the . . . *Equal Protection Clause*.”) (emphasis added).

39. *Id.* at 578.

40. While this Comment follows the practice of North Carolina courts in using the term “exception” to describe limits on the holding in *Lawrence*, it is worth noting that these limits are only exceptions by negative inference. For example, prohibitions on indecent exposure or sexual conduct with minors lie beyond the *ratio decidendi* of the case. At most, *Lawrence* enumerates the types of cases it is *not* deciding, leaving unanswered whether a liberty interest might be infringed by regulation of those cases.

In the case of consent, the government has an interest in protecting individuals from sexual conduct they do not want. Indeed, a consent requirement for sexual conduct further upholds the *Lawrence* right to choose one's relationships and forms of intimacy when it protects the right to choose not to engage in sexual conduct. Along these lines, a state can validly regulate relationships with minors by declaring that minors lack the capacity to consent. The same is true with respect to relationships where consent may be illusory, such as within families, relationships involving positions of unequal power, such as between prison guards and inmates, and in circumstances of vulnerability to economic exploitation, such as with prostitution.

Other limitations on *Lawrence* are easily traced to legitimate governmental interests independent of the form of intimacy at issue. Public sexual conduct, for example, may validly be regulated on the same ground as regulation of any other public activity. If a city can prohibit skateboarding in the park as a valid exercise of its police power, it can certainly prohibit sexual conduct at the park on the same rational basis without interfering with an individual's right to choose among forms of private intimacy.<sup>41</sup>

Similarly, prostitution may validly be regulated after *Lawrence* because its commercial nature implicates consent and public health concerns.<sup>42</sup> Commercialization of sex creates incentives to trade consent for money, rendering that consent illusory. Commercialization of sex also creates an incentive to increase the number of sexual partners one has, increasing the risk of public health problems. Note that individual promiscuity does not implicate public health in the same way: the right of an individual to choose multiple partners falls squarely within the liberty interest recognized in *Lawrence*. Rather, prostitution is different because the commercial aspect provides an *additional* incentive to have more sexual partners. One reason that prostitution laws pass muster under *Lawrence* is that they regulate the commercial nature of the conduct without seeking to influence private choices in the *form* of physical intimacy between consenting adults.

In short, *Lawrence* stands for the proposition that the state cannot interfere with an individual's liberty interest in choosing between forms of physical intimacy. Rather, the state may only regulate sexual activity with respect to other considerations, such as the consent of the participants, the public location of the conduct, or the commercial element of intimacy-for-hire.

#### IV. CURRENT UNCERTAINTY IN NORTH CAROLINA'S SOLICITATION LAWS

Teresa Pope was charged with solicitation of the crime against nature and challenged the constitutionality of that charge in light of *Lawrence*.<sup>43</sup> There is no

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41. An analogy to the First Amendment doctrine of "time, place, and manner" limits on speech is instructive. Government can regulate speech in the public forum as long as that speech is permitted somewhere. The fundamental right to speech, therefore, gives some ground to a content-neutral regulation of public conduct. If a right to speech can be regulated in public, a privacy right should, *a fortiori*, be amenable to limitations in public fora.

42. The public health dimension of prostitution has been widely documented. See, e.g., Micolé Bingham, *Nevada Sex Trade: A Gamble for the Workers*, 10 YALE J.L. & FEMINISM 69, 74 (1998).

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

doubt that the form of physical intimacy that she offered to two undercover police officers for money—oral sex—falls within North Carolina’s definition of the crime against nature.<sup>44</sup> Nor is there doubt that, under *Lawrence*, criminalization of that form of physical intimacy is, without more, unconstitutional.<sup>45</sup> And, as discussed, making solicitation a criminal offense is valid only if the solicited conduct is actually a crime.<sup>46</sup>

Nevertheless, a North Carolina Court of Appeals panel upheld the charge, declaring, in conclusory fashion: “As the *Lawrence* court expressly excluded prostitution and public conduct from its holding, the State of North Carolina may properly criminalize the solicitation of a sexual act it deems a crime against nature.”<sup>47</sup> It is unclear whether the *Pope* court relied on the prostitution or public conduct exception, but neither choice saves the solicitation of the crime against nature as a criminal offense under current North Carolina statutory law.

The prostitution exception in *Lawrence* is unavailing because solicitation of the crime against nature is not a prostitution offense. The prostitution exception, at most, admits of a valid governmental interest in regulating the *commercialization* of intimacy.<sup>48</sup> The exception cannot *create* criminal liability where none existed before. Rather, the exception merely reserves for states the option of criminalizing prostitution. On this score, North Carolina has a prostitution statute and has chosen to limit that statute to vaginal, heterosexual sex.<sup>49</sup> Teresa Pope offered to perform a different form of physical intimacy—one that falls outside the prostitution statute.

Nor can *Pope* logically rely on the “public conduct” exception in *Lawrence*. This is because the exception refers to sexual conduct itself—which Ms. Pope never actually performed—and not to mere conversations about it.<sup>50</sup> Indeed, the First Amendment implications of a law criminalizing speech about otherwise legal conduct are significant. A general solicitation offense is, at bottom, a content-specific speech regulation that prohibits the communication of one message while leaving other messages unaffected. As such, it is subject to strict

44. The *Pope* court relied on *State v. Stiller*, 590 S.E.2d 305, 307 (N.C. Ct. App. 2004) (the crime against nature “is broad enough to include all forms of oral and anal sex”). Interestingly, *Stiller* was decided after *Lawrence*, but without reference to it.

45. *State v. Whiteley*, 616 S.E.2d 576, 580–81 (N.C. Ct. App. 2005) (holding that *Lawrence* invalidated the crime-against-nature offense with regard to oral sex conducted in private and with the consent of both adult participants).

46. See 21 AM. JUR. 2d *Criminal Law* § 181 (2005) (“The gist of the offense is incitement; the policy behind the prohibition of solicitation is to protect people from exposure to inducements to commit or join in the commission of a crime.”).

47. *Pope*, 608 S.E.2d at 116.

48. Although the *Lawrence* Court did not explain its exception, demonstrable health and safety considerations provide a valid basis for governmental regulation of intimacy-for-hire—grounds that exist independently of a mere disapproval of the form of intimate physical conduct.

49. *State v. Richardson*, 300 S.E.2d 379, 380–81 (N.C. 1983). See *supra* notes 10–12 and accompanying text.

50. Though the record is silent on the point, even if Ms. Pope had offered to perform her services in public (thereby potentially bringing her solicited conduct within the *Lawrence* exception for public conduct) an appropriate charge might have been solicitation of a sex-in-public offense, rather than solicitation of the crime against nature (which lacks a public conduct element).

scrutiny.<sup>51</sup> Ordinarily, criminal solicitation laws overcome the First Amendment on either of two theories. One is that words encouraging another to commit a crime are not protected under the First Amendment because they are likely to lead to imminent unlawful conduct.<sup>52</sup> Alternatively, solicitation laws advance the compelling governmental interest in preventing crime.<sup>53</sup> Under either theory, the solicitation offense is justified by the illegal nature of the solicited act.<sup>54</sup> In Teresa Pope's case, because the conduct—oral sex—is protected under *Lawrence*, the First Amendment would bar criminalization of mere solicitation of that conduct.

#### V. REFORM OF NORTH CAROLINA'S SOLICITATION LAWS REQUIRES LEGISLATIVE ACTION, NOT JUDICIAL FIAT

There is little doubt that North Carolina retains the authority to criminalize the commercialization of sexual activity. The state's authority, however, is subject to the rule that the "creation and expansion of criminal offenses is the prerogative of the legislative branch of the government."<sup>55</sup> Echoing this rejection of contemporary judge-made criminal law, the United States Supreme Court held that "because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity."<sup>56</sup>

In the more than three years since *Lawrence*, North Carolina's General Assembly has failed to address the prostitution or crime-against-nature statutes. In the absence of legislative action, punishment of prostitution involving forms of intimacy other than vaginal, heterosexual sex could only be accomplished by

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51. *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2003) (holding that a law applying only to cable transmissions with sexual content was content-specific and therefore subject to strict scrutiny). Speech about sex is subject to somewhat different First Amendment standards, including an exception for obscenity laws. Though obscenity might be implicated in the extreme case, it is irrelevant here because it would likely apply equally to public discussion of hetero- and homosexual practices alike.

52. The controlling case for incitement speech is *Brandenburg v. Ohio*, holding that the First Amendment does not protect speech that is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action." 395 U.S. 444, 447 (1969).

53. *See Lorillard Tobacco Co. v. Reilly*, 533 U.S. 535, 579 (2001) ("The harm that the State seeks to prevent is the harm caused by the unlawful activity that is solicited; it is unrelated to the commercial transaction itself.").

54. An alternative justification for regulating the type of speech at issue here—prevention of moral offense to others—has generally been rejected. *See, e.g., Carey v. Population Servs. Int'l*, 431 U.S. 678, 701 (1977) (striking down a prohibition on advertisements of contraceptives where sale and use of contraceptives is otherwise legal); *Cohen v. California*, 403 U.S. 13 (1971) (holding that, absent additional justifications, the fact that obscene or offensive words might cause distress to others was insufficient to regulate the speech).

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

56. *United States v. Bass*, 404 U.S. 336, 348 (1971) (citations omitted). Both *Beale* and *Bass* necessarily apply to modern judge-made crimes, and not to common law developed prior to enactment of North Carolina's reception statute. *See infra* note 63 and accompanying text. This reasoning is analogous to that underlying the Rule of Lenity. *See BLACK'S, supra* note 8, at 1359 ("[A] court, in construing an ambiguous criminal statute . . . should resolve the ambiguity in favor of the more lenient punishment."). Here, however, the principle applies to the definition of the crime, rather than to its punishment.

judicial lawmaking: either expanding the scope of the prostitution statute or creating a new crime by adding a commercial element to the crime against nature.

The prostitution statute cannot be amended or expanded by judicial fiat because it has long been the rule in North Carolina that “criminal statutes should be strictly construed.”<sup>57</sup> As the United States Supreme Court has explained, “when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate before we choose the harsher alternative, to require that Congress [i.e. any legislature] should have spoken in language that is clear and definite.”<sup>58</sup> Indeed, the North Carolina Supreme Court applied this principle in construing the scope of the prostitution statute in the *Richardson* case, holding that “[i]f the legislature wishes to include within [the prostitution statute] other sexual acts . . . it should do so with specificity.”<sup>59</sup> Unless and until the General Assembly acts, therefore, the prostitution statute remains limited to criminalizing vaginal, heterosexual intimacy-for-hire.<sup>60</sup>

Nor should North Carolina courts rely on a theory of common-law authority to criminalize conduct.<sup>61</sup> Although North Carolina is among the states that continue to recognize common-law crimes, the state does not tolerate judicial creation of wholly new crimes.<sup>62</sup> Rather, by virtue of its reception statute, North Carolina has merely adopted the common law as it stood in England at the time North Carolina began writing its own laws.<sup>63</sup> And although constructive notice might be imputed where the elements of an ancient crime are part of the existing body of common law, there is no authority to suggest that a court can, in response to the constitutional invalidation of a common-law crime,

57. *State v. Hearst*, 567 S.E.2d 124, 128 (N.C. 2002); *Beale*, 376 S.E.2d at 4.

58. *Bass*, 404 U.S. at 347.

59. *Richardson*, 300 S.E.2d at 381.

60. This result is compelled by judicial constraint consistent with North Carolina precedent. Judicial expansion of the prostitution statute in a given case might further be inconsistent with the Due Process Clause, U.S. CONST. amend. XIV, for lack of notice, although this would not be true for subsequent applications of the new rule.

To the extent that a common-law prostitution offense may have existed and included forms of physical intimacy other than vaginal, heterosexual intimacy-for-hire, it was undoubtedly superseded by statute. *See, e.g.*, *State v. Holmon*, 244 S.E.2d 491, 493 (N.C. Ct. App. 1978) (“Since the new statute . . . supersedes the common-law crime of kidnapping, common-law kidnapping no longer exists in North Carolina.” (citation omitted)); *accord* N.C. GEN. STAT. § 14-1 (receiving only “such parts of the common law . . . not abrogated”).

61. Such a course might garner legitimacy from the General Assembly’s enactment of a reception statute, which arguably implies intent to criminalize the crime against nature in both commercial and non-commercial settings. However, absent more express and specific guidance, judicial authority to legislate the criminal law would lack meaningful constraint.

62. *See Beale*, 376 S.E.2d at 3–4 (holding that the court lacks the authority at common law to expand the definition of murder to include the death of an unborn fetus).

63. N.C. GEN. STAT. § 14-1. (“All such parts of the common law as were heretofore in force and use within this State . . . which has not been otherwise provided for in whole or in part, not abrogated, repealed, or become obsolete, are hereby declared to be in full force within this State.” (emphasis added)). *See also Beale*, 376 S.E.2d at 2 (applying the common law as it existed when the reception statute was first enacted in 1715).

unilaterally revive that crime by refashioning its elements on a case-by-case basis.<sup>64</sup>

Unmoored to either statutory or common-law authority in the wake of *Lawrence*, North Carolina courts are adrift on a course of case-by-case definition of the state's criminal laws relating to sexual conduct. The confusion over "solicitation" laws seen in *State v. Pope* is just one example. Two other recent cases demonstrate how, absent legislative action, courts are scrambling to adapt criminal statutes by creating new crimes. In *State v. Whiteley*,<sup>65</sup> a defendant appealed a crime-against-nature conviction on *Lawrence* grounds.<sup>66</sup> The Court of Appeals admitted that because the acts were private, between adults, and non-commercial, conviction could only be constitutional after *Lawrence* if the conduct were not consensual.<sup>67</sup> So, the court grafted onto the statute a new non-consent element.<sup>68</sup>

In a second case, *In re R.L.C.*, the same court upheld a crime-against-nature conviction involving minors.<sup>69</sup> Under the logic of *Whiteley*, the conviction could not stand unless the minor age of the participants was an element of the offense. Had the case involved vaginal—rather than oral—sex, the defendant's conduct would have fallen under the rape statute, which does not criminalize conduct between minors of similar age.<sup>70</sup> However, because the chosen form of sexual conduct fell under the crime-against-nature statute, which has no like-age exception (or, indeed, any age requirement at all), the court upheld the conviction and "reject[ed] defendant's suggestion that we graft age requirements into [the crime-against-nature statute] which the General Assembly has not seen fit to enact."<sup>71</sup>

The reasoning of the *R.L.C.* court defies logic. If the crime-against-nature conviction is valid only because of the age of the participants, then what law determines the age of sexual minority? The court, as a matter of logic, *must* have grafted *some* age element to save the statute after *Lawrence*.<sup>72</sup> Further, in crafting that age requirement, what is the court's authority to ignore the legislature's

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64. This is true even if a new common-law offense were made prospective only to moot the notice issue.

65. 616 S.E.2d 576 (N.C. Ct. App. 2005).

66. *Id.* at 577.

67. *Id.* at 581 ("[T]o be constitutional post-*Lawrence* on the facts of this case, the State must prove beyond a reasonable doubt that defendant committed the sexual act . . . and that such an act was non-consensual.").

68. *Id.* (finding prejudicial error for "failure to instruct [the jury] on each *element* of a crime" (emphasis added)); *State v. Scott*, 331 N.C. 39, 46 (1992) (pre-*Lawrence* decision holding that "[c]onsent . . . is not a defense to crime against nature").

69. 635 S.E.2d 1, 4 (N.C. Ct. App. 2006), *appeal pending*, No. 531A06 (N.C.).

70. *See id.* at 2-4 (responding to defendant's argument criminalization of non-procreative—but not procreative—sex is invalid after *Lawrence*).

71. *Id.* at 4.

72. The court alternatively rests on the apparently public nature of the conduct to escape unconstitutionality under *Lawrence*. *Id.* at 5. However, under this alternative, the public nature of the conduct would, under *Whiteley*, have necessarily have become an element "grafted" onto the offense.

most recent articulation of the age of sexual minority in the statutory rape context?<sup>73</sup>

The result of these cases is a haphazard, piecemeal approach to defining the criminal law that is unpredictable at best and unconstitutionally vague at worst. Each defendant is left to challenge the constitutionality of each crime-against-nature charge, rolling the dice to see whether the facts of his or her case may constitute a new, judge-made offense.<sup>74</sup> The United States Supreme Court has consistently rejected the notion that the criminal law can “set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large.”<sup>75</sup> North Carolina, however, is doing precisely that by shifting the legislative function from the General Assembly to the courts.<sup>76</sup>

Judicial lawmaking in this area deprives North Carolina residents of clear notice of the law. North Carolina’s Supreme Court has declared that “citizens subject to [a] statute may not be required to guess at their peril as to its true meaning.”<sup>77</sup> At present, however, individuals are forced to guess the effect on North Carolina statutes of the *Lawrence* decision—a decision that is seemingly intentionally vague.<sup>78</sup> The vagueness concerns the extent to which the crime-against-nature statute is still valid. Even if it is commonly known what conduct historically qualified as a “crime against nature” in North Carolina,<sup>79</sup> and even if cases like *Pope*, *Whiteley*, and *R.L.C.* have revived criminality of that conduct in certain contexts, very little could be understood about what conduct that might

73. See *id.* at 6–8 (dissent) (surveying 1979 and 1995 amendments to laws regulating sexual activity involving minors and concluding that “our General Assembly has dictated that there is no legitimate state interest in the regulation of minors less than three years apart in age, absent the use of force.”).

74. Four other *Lawrence*-based challenges to criminal laws have reached the North Carolina Court of Appeals level, all involving minors. In each case, criminality derived from the age of the participants under *statutorily defined* age limits, and not from the form of sexual conduct at issue. See *State v. Browning*, 629 S.E.2d 299 (N.C. Ct. App. 2006) (statutory rape); *State v. Moore*, 606 S.E.2d 127 (N.C. Ct. App. 2004) (statutory rape); *State v. Oakley*, 605 S.E.2d 215 (N.C. Ct. App. 2004) (sexual activity by a substitute parent); *State v. Clark*, 588 S.E.2d 66 (N.C. Ct. App. 2003) (statutory rape).

75. *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (quoting *United States v. Reese*, 92 U.S. 214, 221 (1876)).

76. *Beale*, 376 S.E.2d at 4 (“The creation and expansion of criminal offenses is the prerogative of the legislative branch of the government”); *State ex rel. Atkinson v. Wilson*, 332 S.E.2d 807, 810–11 (W. Va. 1984) (reciting policy reasons why courts should defer creation or expansion of crimes to the legislature).

77. *State v. Graham*, 233 S.E.2d 615, 620 (N.C. Ct. App. 1977).

78. The *Lawrence* decision is notorious for its delicate avoidance of key issues such as whether a fundamental right is implicated, coquettishly referring instead to “fundamental decisions” and “fundamental propositions.” Compare *Lawrence*, 539 U.S. at 586 (Scalia, J., dissenting) (“[N]owhere does the Court’s opinion declare that homosexual sodomy is a ‘fundamental right’ under the Due Process Clause . . .”) with *Lawrence Tribe, Lawrence v. Texas: The “Fundamental Right” that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1955 (2004) (“What is truly ‘fundamental’ in substantive due process, *Lawrence* tells us, is not the set of specific acts that have been found to merit constitutional protection, but rather the relationships and self-governing commitments out of which those acts arise . . .”).

79. *State v. Poe*, 252 S.E.2d 843, 845 (N.C. Ct. App. 1979) (holding that the crime against nature statute was not unconstitutionally vague because persons of reasonable intelligence know what constitutes a crime against nature).

next be criminalized by judicial lawmaking. After *Lawrence*, it is clear that the vast majority of acts of physical intimacy are constitutionally protected and may only be criminalized in limited cases.<sup>80</sup> The North Carolina General Assembly, however, has refused to redraw the statutory lines in light of that decision.

When it comes to commercial solicitation of sex, not even North Carolina courts are clear on what the law is. The *Pope* decision, discussed previously, erroneously conflated the term “solicitation,” used to describe an inchoate criminal offense at common law, with “prostitution.” Further, in addition to this confusion over “solicitation,” the *Whiteley* and *R.L.C.* cases demonstrate that North Carolina courts are now legislating the state’s criminal sex laws, deciding on their own which new elements to graft onto otherwise unconstitutional criminal offenses.

The United States Supreme Court has held that a criminal statute is unconstitutionally vague when ordinary people cannot understand what conduct is prohibited.<sup>81</sup> An ordinary person could be forgiven for thinking that a mere invitation to engage in otherwise legal sexual conduct would not be a crime. Indeed, an ordinary person could be forgiven for failing to guess correctly how North Carolina courts would next amend the laws in light of *Lawrence*. The people of North Carolina deserve clear guidance from their General Assembly about what is and is not criminal behavior.

## VI. CONCLUSION

It has been nearly four years since the *Lawrence* opinion brought uncertainty to North Carolina’s laws regulating sexual activity. And yet, while *Lawrence* has unquestionably invalidated many of these laws, the General Assembly has failed to revisit the affected statutes and clarify the criminal law. The result has been an expanding patchwork of judge-made law as courts struggle to fill in the holes in violation of the principle of separation of powers between the judicial and legislative branches. Although *Lawrence* does invalidate laws that interfere with an individual’s right to choose between forms of physical intimacy, states still have ample authority to regulate sexual activity. Rather than leave this task to the courts, the General Assembly should reform North Carolina statutes in a way that does not regulate individual choices between forms of physical intimacy but instead clarifies the circumstances—such as a commercial exchange—that would make any sexual conduct a crime.

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80. Although void-for-vagueness cases generally deal with statutes that are vague as to their applicability to different situations, the reasoning is the same in cases like *Pope*, where it is unclear whether a statute is constitutional as applied to different situations.

81. *Kolender*, 461 U.S. at 357.