Notes

APPLYING *LAWRENCE*: TEENAGERS AND THE CRIME AGAINST NATURE

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ABSTRACT

The Supreme Court's decision striking down a Texas statute prohibiting homosexual conduct in Lawrence v. Texas *is vague in many ways. The opinion failed to articulate both the contours of the right the Court was recognizing and the level of scrutiny courts should apply when enforcing the right. When a question concerning the rights of minors arises under* Lawrence*, the answer is even more obscure. The Supreme Court of North Carolina faced precisely this question in a 2007 decision, in which the court considered whether* Lawrence *prohibited the state from prosecuting a minor for engaging in nontraditional sexual activity when the minor legally could have engaged in traditional, vaginal intercourse. This Note argues for an extension of* Lawrence*'s right to sexual privacy to minors when those minors may otherwise lawfully consent to sexual activity.* Lawrence *held the state may only infringe an adult's right to sexual privacy when the state has some interest other than moral aversion to the sexual act itself. The Supreme Court has also held that minors generally share an adult's right to privacy unless the state has a significant interest unique to the context of minors to justify the infringement. Because the state has no interest other than moral aversion when regulating the form of a minor's sexual activity, this Note argues* Lawrence *should also protect minors.*

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INTRODUCTION

At fourteen, R.L.C. was already involved in a sexual relationship with his twelve-year-old girlfriend, O.P.M.[1] Despite their youth, the adolescents had already engaged in vaginal intercourse on several occasions. In North Carolina, their conduct was lawful: North Carolina's age-of-consent laws permit sexual acts between minors as long as one partner is no more than three years older than the other.[2] In addition to vaginal intercourse, however, the adolescents had also engaged in oral sex. Unlike vaginal intercourse, this conduct was problematic. North Carolina prohibits the "crime against nature,"[3] more commonly known as sodomy. Even though many think of sodomy as a pseudonym for homosexual activity, traditional prohibitions of sodomy include even heterosexual oral sex.[4] Because he engaged in heterosexual sodomy, R.L.C. was adjudicated a felony delinquent, even though the vaginal intercourse was completely lawful.[5] In *In re R.L.C.*,[6] the Supreme Court of North Carolina upheld his conviction.[7]

Although the U.S. Supreme Court's decision in *Lawrence v. Texas*[8] perhaps appeared to prohibit R.L.C.'s prosecution when it struck down a Texas statute prohibiting homosexual conduct, the Court's opinion did not explain how far *Lawrence*'s holding reaches. As this Note interprets *Lawrence*, prohibitions of sodomy *between adults* are unconstitutional violations of an individual's due process right to privacy.[9] But the Court did not explain whether *Lawrence* applies to minors. The Supreme Court of North Carolina

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

2. N.C. GEN. STAT. § 14-202.2(a) (2000) (criminalizing "indecent liberties with children" when the alleged perpetrator is "a person who is under the age of 16 years" only when the alleged victim "is at least three years younger than the defendant"); *see also* N.C. GEN. STAT. § 14-27.2(a)(1) (2000 & Supp. 2007) (addressing the sexual activity of minors with persons over the age of sixteen); N.C. GEN. STAT. §§ 14-27.4(a)(1), 14-27.7A (2000) (same). Section 14–202.2(a) governs the actions of R.L.C. and O.P.M., as all of the other age-of-consent statutes deal with sexual activity between minors and persons over the age of sixteen.

3. *See* N.C. GEN. STAT. § 14-177 (2000) ("If any person shall commit the crime against nature, with mankind or beast, he shall be punished as a Class I felon.").

4. *See, e.g.*, State v. Harward, 142 S.E.2d 691, 692 (N.C. 1965) (defining "the crime against nature" as sexual "acts between humans *per anum* and *per os*," that is, acts of anal and oral sex).

5. *In re R.L.C.*, 643 S.E.2d at 924.

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

7. *Id.* at 924.

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

9. *See infra* Part I.C.

distinguished *Lawrence* and upheld R.L.C.'s felony conviction, holding that minors do not share the same constitutional right to privacy.[10] In this conclusion, North Carolina is not alone: a month after *R.L.C.*, the Supreme Court of Virginia echoed this analysis in *McDonald v. Commonwealth*,[11] determining that *Lawrence* did not invalidate a statute graduating an otherwise misdemeanor sexual offense involving vaginal intercourse with a minor to a felony when that same contact involved oral sex.[12]

This Note argues that *R.L.C.* was wrongly decided. The constitutional right to privacy adults hold extends to minors in many circumstances. When the state determines that minors may lawfully engage in sexual activity, the right to privacy should prevent it from singling out nontraditional sexuality for prosecution.[13] Though *Lawrence* itself left the status of minors who engage in sodomy in doubt, other decisions of the U.S. Supreme Court have held that minors have the same right to privacy as adults unless the state has a significant interest unique to the context of minors.[14] As this Note argues, though the state has a significant interest in protecting minors from the harms of premature sexual activity, after *Lawrence*, the state does not have a significant interest in singling out nontraditional activities that develop within a relationship the state has otherwise sanctioned. Laws governing the sexuality of minors must treat traditional and nontraditional sexuality the same.

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

11. McDonald v. Commonwealth, 645 S.E.2d 918 (Va. 2007).

12. *Id.* at 924–25. Conceptually, *McDonald* was very similar to *In re R.L.C.*, 643 S.E.2d at 921, as both addressed the question of sodomy involving minors. The state has an interest in preventing sexual contact between minors and adults, however, and the issue in *McDonald* was a question over degree of punishment rather than criminality in general. Therefore, the constitutional analysis of *McDonald* differed slightly from *R.L.C.* This Note concentrates solely on the constitutional issues criminality raises.

13. This Note refers to oral sex as a "nontraditional sexual activity" because state criminal codes have historically called it "sodomy" to discredit it. Survey data the U.S. Centers for Disease Control and Prevention has collected, however, indicate that an overwhelming majority of young-to-middle-aged Americans engage in this conduct. *See* WILLIAM D. MOSHER, ANJANI CHANDRA & JO JONES, SEXUAL BEHAVIOR AND SELECTED HEALTH MEASURES: MEN AND WOMEN 15–44 YEARS OF AGE, UNITED STATES, 2002, at 25 (Nat'l Ctr. for Health Statistics, Advance Data Report No. 362, 2005), *available at* http://cdc.gov/nchs/data/ad/ad362.pdf (reporting that 90.1 percent of males and 88.3 percent of females aged 25–44 have engaged in oral sex).

14. *See, e.g.*, Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 74–75 (1976) (holding that minors have a right to seek abortions and states may not restrict that right by permitting parental vetoes).

Part I briefly addresses the legal background of both age-of-consent statutes and sodomy, including the Supreme Court's decision in *Lawrence*, its reception by commentators, and how courts have applied it in North Carolina and Virginia. Part II analyzes the competition between the state's interest in protecting minors and minors' interests in sexual privacy. It demonstrates how, when the state has decided to permit minors to engage in vaginal intercourse, minors' liberty interests in sexual privacy prevent the state from regulating the form of their sexual activity. Finally, Part III discusses the policy implications of the decisions in *R.L.C.* and *McDonald*. It observes a disconnect between statutory ages of consent and statutory regulation of minors' sexual activity. It calls for stronger protection for minors engaging in sexual activity and a heightened awareness of the residual animosity toward nontraditional sexuality underlying these decisions.

I. ADOLESCENCE, *LAWRENCE V. TEXAS*, AND THE AGE OF CONSENT

A. Statutory Regulation of Sex and Lawrence v. Texas

By the age of seventeen, approximately two-thirds of all adolescents have engaged in consensual sexual activity.[15] This high percentage forces states to create statutory regimes to protect adolescents from their own lack of maturity and from potential exploitation by adults. Generally, states create these regimes on a sliding scale. The state institutes an "age of consent,"[16] which establishes the age at which the law presumes an adolescent is capable of consenting to sexual activity.[17] In North Carolina that age is sixteen years old.[18] In addition, states often create a "peer exception" to these laws when both parties are minors of similar

15. *See* MOSHER ET AL., *supra* note 13, at 25 (reporting that 63.5 percent of seventeen-year-old males and 64.0 percent of seventeen-year-old females have engaged in opposite-sex sexual contact and that 6.6 percent of seventeen-year-old males and 5.1 percent of seventeen-year-old females have engaged in same-sex sexual contact).

16. The "age of consent" is the "age at which a person may engage in any sexual conduct permitted to adults within that state." RICHARD A. POSNER & KATHARINE B. SILBAUGH, A GUIDE TO AMERICA'S SEX LAWS 44 (1996).

17. CAROLYN E. COCCA, JAILBAIT: THE POLITICS OF STATUTORY RAPE LAWS IN THE UNITED STATES 1 (2004) ("Those 'under age' are deemed incapable of giving valid consent to [sexual] activity."); *see also* POSNER & SILBAUGH, *supra* note 16, at 44–64 (collecting a fifty-state survey of age-of-consent laws).

18. *See* N.C. GEN. STAT. § 14-202.1 (2000) (criminalizing sexual activity between a minor under the age of sixteen and an adult more than five years older than the minor).

ages.[19] In North Carolina, for example, it is lawful for a minor under sixteen years old to engage in sexual contact with another minor when the difference of their ages is within three years.[20] According to a state official in Kansas, one rationale for this sliding-scale exception is that "it is impossible to identify which child is the victim and which is the perpetrator."[21]

This discussion is not meant to oversimplify the law concerning the sexual activity of adolescents. These laws "def[y] easy characterization."[22] In every state, the law differs on several policy choices: the age of participants, the types of activities the statute covers, the penalties for violations, whether minor participants of the same age are prosecuted, and what maximum range of ages still satisfies the peer exception if it does exist.[23]

Further complicating the law governing adolescent sexuality, age-of-consent statutes do not singularly protect the sexual wellbeing of minors. In addition to establishing complex regimes regulating teenage sexuality, many states have historically prohibited certain forms of sexual activity among adults and minors alike.[24] For example, since the reign of Henry VIII, the law has prohibited crimes against nature regardless of the age of its participants.[25] Many American states, including North Carolina, have maintained this tradition, interpreting this prohibition of sodomy to forbid any form of sexual activity other than vaginal intercourse.[26] This prohibition can even include oral sex between heterosexual couples.[27] Before *Lawrence*,

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19. *See, e.g.*, *id.* § 14.202.2 (criminalizing sexual activity between a minor under the age of sixteen and another minor more than three years older).

20. *Id.*

21. Aid for Women v. Foulston, 427 F. Supp. 2d 1093, 1099 (D. Kan. 2006). Not all states agree with this exception. Illinois concluded that when two underage minors have sex, "each is the victim of the other" and can be prosecuted. *In re* T.W., 685 N.E.2d 631, 635 (Ill. App. Ct. 1997) (interpreting title 720, section 5/12-15 of the Illinois Code, which contains no peer exception).

22. WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, SEXUALITY, GENDER AND THE LAW 142 (2d ed. 2004).

23. COCCA, *supra* note 17, at 2.

24. *See, e.g.*, N.C. GEN. STAT. § 14-184 (criminalizing fornication and adultery).

25. *See* Bowers v. Hardwick, 478 U.S. 186, 193 n.5 (1986) (tracing the origins of North Carolina's sodomy statute to a statute passed under Henry VIII); *see also* POSNER & SILBAUGH, *supra* note 16, at 65 (tracing the source of the criminalization of sodomy to the era of Henry VIII and to even older church law).

26. *See* POSNER & SILBAUGH, *supra* note 16, at 65–71 (collecting a fifty-state survey of sodomy laws and noting the lack of a uniform definition of sodomy).

27. *Id.* at 65.

because sodomy was illegal for anyone in these states, courts applied age-of-consent laws alongside the prohibition on sodomy, which created a bifurcated approach to regulating the wellbeing of minors: an adolescent's participation in vaginal intercourse could be lawful because it did not violate the age-of-consent law even though that same adolescent's participation in oral sex was unlawful.[28]

Until 2003, the constitutionality of this bifurcated framework seemed well established because the Supreme Court had upheld the prohibition of sodomy in its 1986 decision in *Bowers v. Hardwick*.[29] Under *Bowers*, the same rule applied to adults and minors: vaginal intercourse was legal when oral sex was not.[30] The Supreme Court revisited the sodomy issue in 2003, however. In *Lawrence v. Texas*, the Court considered the constitutionality of a Texas statute that only prohibited sexual activity between members of the same sex.[31] The Court ruled that the petitioners were "free as adults to engage in [oral sex] in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution."[32] *Lawrence* expressly overruled *Bowers*.[33] It also implied that its holding went further than merely striking down statutes targeting homosexuality—*Lawrence* appears to have invalidated sodomy statutes whether they regulate heterosexual or homosexual couples.[34]

Unfortunately for the lower courts that must apply *Lawrence*, the U.S. Supreme Court did not clearly explain the contours of the right it was recognizing. At the end of the opinion, the Court issued a final,

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28. *See, e.g.*, *In re* R.L.C., 643 S.E.2d 920, 924 (N.C. 2007) (ruling that the state may punish sodomy between minors as a felony under the general crime-against-nature statute rather than statutes governing vaginal intercourse between minors). This Note calls this division between age-of-consent regulation and sodomy prohibitions the "bifurcated approach," as it regulates the sexual behavior of minors under two disconnected frameworks.

29. *See* Bowers v. Hardwick, 478 U.S. 186, 190–91 (1986) (ruling that general prohibitions of sodomy did not violate the Due Process Clause).

30. *See id.* (upholding Georgia's general prohibition of sodomy). This discussion describes the system that existed in states that still had sodomy statute. For a fifty-state survey of sodomy laws, see POSNER & SILBAUGH, *supra* note 16, at 65–71.

31. Lawrence v. Texas, 539 U.S. 558, 563 (2003).

32. *Id.* at 564.

33. *Id.* at 578.

34. The Court implicitly applied its holding to laws affecting heterosexual activity as well as statutes like the ones before it that prohibited only homosexual activity. *See id.* at 575 ("Were we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants.").

unexplained caveat: "The present case does not involve minors."[35] This caveat leaves a curious question: because many states only have statutes that criminalize sodomy involving minors and adults alike, it is not immediately clear what effect *Lawrence* has in cases in which one or both of the participants is a minor. In other words, has the bifurcated approach survived *Lawrence*, or do minors possess some version of this right under the Constitution?

B. Applying Lawrence *to Age-of-Consent Laws*

Courts have not resolved how to apply *Lawrence* to cases involving minors. Most state appellate decisions on point have only addressed prosecutions based on statutes specifically prohibiting sodomy involving minors rather than the general prohibitions on sodomy implicitly struck down in *Lawrence*.[36] In the summer of 2007, the supreme courts of North Carolina and Virginia did consider cases in which minors were prosecuted under general sodomy statues. But neither decision resolved how *Lawrence* affects cases involving minors, because both courts dismissed the constitutional challenge by taking the caveat regarding minors at face value, holding that because *Lawrence* did not involve minors, it did not apply to minors.[37]

The Supreme Court of North Carolina was the first high court after *Lawrence* to consider the constitutionality of prohibiting minors from engaging in the crime against nature when traditional sexual activity is lawful. In *R.L.C.*, the court determined that a minor could be prosecuted for having oral sex with another minor even though their vaginal intercourse was lawful.[38]

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35. *Id.* at 578. The Court made this observation along with several others. The Court continued,

> 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.

Id.

36. *See* People v. Hofsheier, 129 P.3d 29, 32–33 (Cal. 2006) (considering a statute punishing oral sex with a minor more severely than a statute punishing vaginal intercourse with a minor); Wilson v. State, 631 S.E.2d 391, 392 (Ga. Ct. App. 2006) (considering a statute prohibiting sodomy specifically between minors that punished the actor more severely than a statute prohibiting sex between minors); State v. Limon, 122 P.3d 22, 24 (Kan. 2005) (addressing statutes that punished homosexual sodomy with minors more severely than traditional sexual relationships).

37. *In re* R.L.C., 643 S.E.2d 920, 922 (N.C. 2007); McDonald v. Commonwealth, 645 S.E.2d 918, 921 (Va. 2007).

38. *In re R.L.C.*, 643 S.E.2d at 921, 923–24.

When R.L.C. was fourteen years old, he engaged in sexual intercourse and oral sex with O.P.M., his twelve-year-old girlfriend.[39] Over a year later, while police were questioning O.P.M. about an unrelated incident, she informed an officer of her sexual history with R.L.C.[40] When confronted, R.L.C. admitted he had engaged in oral sex with O.P.M. "two [or] three times."[41] Consequently, R.L.C. was adjudicated a criminal delinquent for committing "the crime against nature."[42] Significantly, his "crime against nature" was having *oral* sex with his girlfriend;[43] under state law, his vaginal intercourse with O.P.M. was lawful.[44]

Appealing his prosecution, R.L.C. raised three issues before the state supreme court: first, under principles of statutory interpretation, the legislature did not intend to criminalize his conduct; second, the statute as it was applied to him violated the Due Process Clause; and third, the "crime-against-nature" statute was facially unconstitutional under *Lawrence*.[45] The high court affirmed his felony conviction.[46] First, the court concluded that the legislature had intended to treat sodomy differently than vaginal intercourse and other sexual acts prohibited by the state's age-of-consent statutes.[47] Second, the court rejected the as-applied due process challenge. Because R.L.C. did not claim his asserted privacy right was fundamental, the court conducted a rational basis review and concluded that the statute was "rationally related to [the] legitimate government purpose of preventing sexual

39. *Id.* at 921.

40. *Id.*

41. *Id.* (alteration in original) (quoting R.L.C.).

42. *Id.*

43. *See* State v. Harward, 142 S.E.2d 691, 692 (N.C. 1965) (defining oral sex as a "crime against nature").

44. *See* N.C. GEN. STAT. § 14-27.2(a)(1) (2000 & Supp. 2007) (criminalizing, as first-degree rape, vaginal intercourse between a victim under the age of thirteen and a defendant who "is at least 12 years old and is at least four years older than the victim"); N.C. GEN. STAT. § 14-27.4(a)(1) (2000) (criminalizing, as first-degree sexual offense, vaginal intercourse between a victim under the age of thirteen and a defendant who "is at least 12 years old and is at least four years older than the victim"); *id.* § 14-27.7A (criminalizing vaginal intercourse or a sexual act with a victim who is thirteen, fourteen, or fifteen years old when the defendant is at least four years older than the victim and not married to the victim); *id.* § 14-202.2(a) (criminalizing indecent liberties between children when the defendant is under sixteen and the victim is at least three years younger than the defendant).

45. *In re R.L.C.*, 643 S.E.2d at 922–24.

46. *Id.* at 922, 924–25.

47. *See id.* at 924 (holding that although age-of-consent statutes "did not constrain R.L.C.'s sexual activity in this instance[,] . . . . the crime against nature statute did").

conduct between minors."[48] The court did not directly address the third issue, whether North Carolina's statute was facially unconstitutional after *Lawrence*, because R.L.C. had not properly preserved the facial challenge for appeal.[49]

The Supreme Court of Virginia echoed the reasoning of the North Carolina court a month later.[50] In *McDonald v. Commonwealth*, the court determined that the state could prosecute an adult on felony sodomy charges for having oral sex with sixteen- and seventeen-year-old girls, even though vaginal intercourse with them was only a misdemeanor.[51] William McDonald was in his midforties when he engaged in separate incidents of "sexual intercourse and oral sodomy" with two girls, ages sixteen and seventeen.[52] McDonald was convicted of four counts of sodomy under a Virginia law prohibiting oral sex.[53] McDonald appealed his conviction, ultimately reaching the Supreme Court of Virginia.[54]

McDonald argued that Virginia law, properly interpreted, did not criminalize his conduct and that the sodomy statute was unconstitutional both facially and as applied.[55] The Supreme Court of Virginia, however, rejected McDonald's statutory construction. McDonald observed that one statute prohibited any sexual contact with minors under fifteen and another prohibited only "sexual intercourse" between an adult and a minor fifteen years old or older;[56] he contended that, together, these statutes set the age of consent for sexual activity other than vaginal intercourse at fifteen years old, making his conduct lawful.[57] The court disagreed, determining that the statutes created a bifurcated approach that permitted the state to prosecute sodomy without regard to the age-of-consent statutes.[58]

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48. *Id.* at 924–25.

49. *Id.* at 922.

50. McDonald v. Commonwealth, 645 S.E.2d 918, 921, 923–24 (Va. 2007).

51. *Id.* at 919, 923–24.

52. *Id.* at 919.

53. *See* VA. CODE ANN. § 18.2-361(A) (2004 & Supp. 2008) (prohibiting anyone from "carnally know[ing] any male or female person by the anus or by or with the mouth").

54. *McDonald*, 645 S.E.2d at 919, 921.

55. *Id.* at 921.

56. VA. CODE ANN. § 18.2-371.

57. *McDonald*, 645 S.E.2d at 923.

58. *See id.* at 923–24 (holding that the sodomy statute applied to sexual conduct by minors irrespective of age-of-consent statutes).

Like North Carolina, the Virginia court did not consider the facial challenge to the statute's constitutionality, finding that the defendant had not preserved the argument for appeal.[59] Although the Virginia court did address the as-applied challenge, it did so in the same cursory fashion as its counterpart in *R.L.C.* According to the court, because *Lawrence* observed that "[t]he present case does not involve minors,"[60] "[n]othing in *Lawrence* . . . prohibits the application of the sodomy statute to conduct between adults and minors."[61] Thus, Virginia may constitutionally punish sodomy with a minor more aggressively than vaginal intercourse with a minor.[62]

Both North Carolina and Virginia preserved the longstanding bifurcated approach to regulating the sexual activity of minors, which treats traditional and nontraditional sexual activity differently. This bifurcation leads to a seemingly absurd result: in North Carolina, two minors may lawfully have vaginal intercourse, but they are felons if they have oral sex until reaching maturity—when *Lawrence* and the Due Process Clause protect their privacy.[63] Likewise, gay and lesbian adolescents endure a more restrictive age of consent in practice because they may not engage in any sexual activity until they reach the age of majority, when North Carolina and Virginia are forced to recognize their rights under *Lawrence*.

This result is unconstitutional, however, because *Lawrence* teaches that singling out the nontraditional sexuality of adolescents when they may lawfully engage in vaginal intercourse violates their liberty interests under the Due Process Clause. To reach this conclusion, one must first consider exactly what protections *Lawrence* articulated, which Section C addresses. Second, one must recognize the broader context of minors' rights under the Constitution, which exist in tension with the state's special powers to protect minors. Part II presents this analysis.

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59. *Id.* at 921.

60. *Id.* at 924 (quoting Lawrence v. Texas, 539 U.S. 558, 578 (2003)).

61. *Id.*

62. *See id.* at 923 ("[T]he sodomy statute stands alone and without age restrictions concerning consent.").

63. *See In re* R.L.C., 643 S.E.2d 920, 923–25 (N.C. 2007) (enforcing the state's sodomy statute against a teen for engaging in oral sex when he could have lawfully engaged in vaginal intercourse).

C. Defining the Scope of Lawrence*'s Holding*

The Supreme Court's decision in *Lawrence v. Texas* has been described as "famously obtuse."[64] *Lawrence* held that Texas's prohibition of sodomy between members of the same sex was unconstitutional. Beyond this decision, exactly what the Court concluded is less clear.[65]

First, the *Lawrence* Court failed to explain whether its holding is limited to laws and conduct targeting homosexuals or whether it protects heterosexual conduct as well. *Lawrence* suggests that the Supreme Court intended to strike down all prohibitions of sodomy as a violation of the right to privacy. Had the Court not intended this result, *Lawrence* would have relied on the Equal Protection Clause rather than the Due Process Clause. In her concurring opinion, Justice O'Connor argued that the Texas statute, which prohibited only same-sex sodomy, violated only the Equal Protection Clause by targeting homosexuals.[66] Writing for the majority, Justice Kennedy disagreed: "Were we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants."[67]

Additionally, the majority overruled precedent upholding general sodomy laws. Justice O'Connor favored relying on the Equal Protection Clause to avoid conflicting with the Court's prior decision in *Bowers v. Hardwick*,[68] which had held that general sodomy statutes do not violate homosexuals' due process privacy rights.[69] The *Lawrence* majority, however, expressly overruled *Bowers*, holding

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64. Jamal Greene, *Beyond* Lawrence*: Metaprivacy and Punishment*, 115 YALE L.J. 1862, 1868 (2006).

65. *See id.* ("*Lawrence*'s incontrovertible result was that Texas's prohibition on same-sex sodomy violated the Due Process Clause, and that *Bowers v. Hardwick* was wrong, both in methodology and in outcome, the day it was decided. *Lawrence* is otherwise famously obtuse.").

66. *Lawrence*, 539 U.S. at 579 (O'Connor, J., concurring in the judgment).

67. *Id.* at 575 (majority opinion).

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

69. *See id.* at 190–91 (1986) (ruling that general prohibitions on sodomy do not violate the Due Process Clause). The difference in the treatment of homosexuals can be seen within the statutes themselves. *Compare* GA. CODE ANN. § 16-6-2(a)(1) (2007) ("A person commits the offense of sodomy when he or she performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another."), *with* TEX. PENAL CODE ANN. § 21.06(a) (Vernon 2003) ("A person commits an offense if he engages in deviate sexual intercourse with another individual of the *same sex*." (emphasis added)), *invalidated by Lawrence*, 539 U.S. at 558.

that prohibitions on sodomy—whether or not they were limited to homosexual conduct—violated a liberty interest protected by the Due Process Clause of the Fourteenth Amendment.[70] The Supreme Court did not need to overrule *Bowers* if it merely intended to grant Lawrence relief from the Texas statute as applied to him because it could have done so on equal protection grounds. Therefore, by relying on the Due Process Clause, the best interpretation of *Lawrence*'s majority opinion is that the Supreme Court held that the due process right to privacy protects all nontraditional sexuality from the scrutiny of the state, rather than just homosexual relationships.

The majority opinion failed to articulate, however, whether the recognized right should be considered fundamental.[71] Though the Court relied on its privacy-rights jurisprudence, and the Court historically has treated privacy as a fundamental right and applied strict scrutiny, the *Lawrence* Court focused its discussion on the right of the state to regulate morality, an interest typically subject to rational basis review.[72] By holding that the state's asserted interest in morality was insufficient, it is possible the Court applied some form of heightened review.[73] The question remains unresolved.

Some have read *Lawrence* as articulating a fundamental right. In his essay on *Lawrence*, for example, Professor Tribe claims the Court established a fundamental substantive due process right protecting gay and lesbian relationships that warrants strict scrutiny.[74] Though the Court failed to expressly articulate the level of scrutiny, he argues, "[t]he practice of announcing such a standard . . . is of relatively recent vintage . . . and has not shown itself worthy of being enshrined as a permanent fixture in the armament of constitutional analysis."[75] According to Tribe, "the strictness of the Court's standard" is "obvious" because of both what the Court did and what the Court

70. *Lawrence*, 539 U.S. at 578.

71. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 846 (3d ed. 2006) ("[T]he Court in Lawrence did not articulate the level of scrutiny to be used.").

72. *Id.* This reading of *Lawrence* has been adopted by the Eleventh Circuit. *See* Williams v. Att'y Gen., 378 F.3d 1232, 1238 (11th Cir. 2004) (applying rational basis review to Alabama's ban on the sale of "sex toys" and the concomitant burden on an individual's ability to use the devices).

73. *See* CHEMERINSKY, *supra* note 71, at 846 (discussing the confusion over *Lawrence*'s standard of review and citing other scholarship discussing its meaning).

74. Laurence H. Tribe, Lawrence v. Texas*: The "Fundamental Right" that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1916–17 (2004).

75. *Id.*

said.[76] First, the Court relied on precedents such as *Griswold v. Connecticut*[77] and *Roe v. Wade*,[78] in which the Court explicitly applied strict scrutiny.[79] Second, the Court "invoked the talismanic verbal formula of substantive due process" throughout the opinion, albeit with the words in a different order: for example, the Court declared that the case addressed the "'protection of *liberty* under the Due Process Clause [that] has a *substantive* dimension of *fundamental* significance in defining the rights of the person.'"[80]

If this reading by Professor Tribe and others is correct, then, and *Lawrence* does create a fundamental right, what is the nature of that liberty interest? For Professor Tribe, the right is one to be free from having the state "stigmatiz[e] . . . intimate personal relationships between people of the same sex."[81] According to him, the Court held that individuals have a liberty interest in engaging in sodomy, like other forms of nonprocreative sexual activity, because sexual conduct "can be but one element in a personal bond that is more enduring."[82] The Court's focus was on the relationship aspect of the constitutional question: "To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse."[83] Tribe goes on to explain why *Lawrence* was about more than a prohibition of same-sex sodomy: society has conflated sodomy with homosexuality, and therefore any prohibition on sodomy, even a prohibition on sodomy between opposite-sex couples, is an invitation to stigmatize and demean the relationships of homosexuals.[84]

Professor Tribe does not present his views as the definitive interpretation of *Lawrence*. Many commentators have concluded that the *Lawrence* right to liberty is fundamental, though using different

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76. *Id.* at 1917.

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

78. Roe v. Wade, 410 U.S. 113 (1973).

79. *See id.* at 155 ("Where certain fundamental rights are involved, the Court has held that regulation limiting these rights may be justified only by a compelling state interest." (internal quotation marks omitted)).

80. *See* Tribe, *supra* note 74, at 1916–17 (alteration in original) (quoting Lawrence v. Texas, 539 U.S. 558, 565 (2003)).

81. *Id.* at 1904.

82. *Id.* at 1904–05 (quoting *Lawrence*, 539 U.S. at 567).

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

84. Tribe, *supra* note 74, at 1906.

reasoning.[85] Still others, however, disagree that *Lawrence* articulated a fundamental right in the first place.

The Eleventh Circuit, for example, has taken this view. In *Lofton v. Secretary of the Department of Children and Family Services*,[86] the Eleventh Circuit considered whether to apply *Lawrence* to a Florida law prohibiting a homosexual couple from adopting children.[87] The court concluded that *Lawrence* did not create a fundamental right to sexual privacy that would trigger strict scrutiny. Of most significance to the court was that *Lawrence* had applied only rational basis review, rather than strict scrutiny, which would have been required had the Court considered the liberty fundamental.[88] In addition, the Eleventh Circuit held the *Lawrence* opinion failed to apply the "two primary features"[89] of fundamental-rights inquiries that the Supreme Court established in *Washington v. Glucksberg*.[90] In *Glucksberg*, the Court held that the test of whether an asserted right is fundamental is whether it is "deeply rooted in this Nation's history and tradition"[91] and "implicit in the concept of ordered liberty."[92] In addition, to recognize such a right as fundamental, the Court must provide a "careful description of the asserted fundamental liberty interest."[93] According to the Eleventh Circuit, *Lawrence* did not satisfy either of these requirements, and therefore the asserted right was not fundamental.[94]

Regardless of whether *Lawrence* articulates a fundamental right, however, the Court did recognize some form of right based on substantive due process. In addition, whatever the nature of that liberty, the right is one that trumps the state's interests in promoting traditional notions of morality.

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85. *See* Greene, *supra* note 64, at 1868–75 (discussing various scholarly interpretations of *Lawrence* and arguing the Court recognized a fundamental right to autonomy when making status-defining decisions).

86. Lofton v. Sec'y of the Dep't of Children & Family Servs., 358 F.3d 804 (11th Cir. 2004).

87. *Id.* at 806.

88. *Id.* at 817 (citing Lawrence v. Texas, 539 U.S. 558, 586 (2003) (Scalia, J., dissenting)).

89. *Id.* at 816.

90. Washington v. Glucksberg, 521 U.S. 702 (1997).

91. *Id.* at 720–21 (quoting Moore v. City of E. Cleveland, 431 U.S. 494, 504 (1977)).

92. *Id.* (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

93. *Id.*

94. *Lofton*, 358 F.3d at 817.

This was the conclusion of the Fifth Circuit in *Reliable Consultants, Inc. v. Earle*.[95] In *Reliable Consultants*, the court considered whether to apply *Lawrence* to a Texas statute prohibiting the sale of sex toys.[96] Texas argued that *Lawrence* did not apply because the case was limited to statutes that target a specific class of people, such as homosexuals. The court disagreed with such a narrow reading, holding the Supreme Court's decision to rely on due process rather than equal protection indicated the right was much broader.[97] According to the court, "The right [*Lawrence*] recognized was . . . a right to be free from governmental intrusion regarding 'the most private human contact, sexual behavior.'"[98] On that reading, *Lawrence* established a right for all people, both gay and straight, to engage in private intimate conduct free from government intrusion.[99] The Fifth Circuit also explained that how the Supreme Court had phrased the constitutional question in *Lawrence* reinforced its conclusion that the Court's focus was on protecting privacy rather than conduct.[100] It observed that the *Lawrence* Court must have found a right to sexual privacy because the question presented considered whether "convictions for *adult consensual sexual intimacy*" violate due process.

The Fifth Circuit's interpretation of the question presented in *Lawrence* makes even more sense when compared with the question presented in *Bowers*. Indeed, the main difference between *Bowers* and *Lawrence* is not the answer those opinions delivered but the questions those Courts answered.[101] In *Bowers*, the Court somewhat facetiously addressed the question "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in

95. *See* Reliable Consultants, Inc. v. Earle, 517 F.3d 738, 745 (5th Cir. 2008) (noting that in *Lawrence* "[t]he Court expressly rejected the State's rationale by adopting Justice Stevens' view in *Bowers* as 'controlling' and quoting Justice Stevens' statement that 'the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice'" (quoting *Lawrence*, 539 U.S. at 577–78)).

96. *Id.* at 740–41.

97. *Id.* at 744.

98. *Id.* (quoting *Lawrence*, 539 U.S. at 564).

99. *Id.* Before reaching its conclusion, the Fifth Circuit considered and disagreed with the Eleventh Circuit's conclusion that *Lawrence* did not recognize a right to sexual privacy. *Id.* at 743 n.23, 745 n.33.

100. *Id.* at 744. Professor Tribe makes a similar argument. *See* Tribe, *supra* note 74, at 1900.

101. Tribe, *supra* note 74, at 1899–900.

sodomy."[102] The answer to *that* question was implied in its form—the Constitution does not address sexuality at all. In *Lawrence*, however, the Court framed the question differently: "Whether petitioners' criminal convictions for adult consensual sexual intimacy in the home violate their vital interests in liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment."[103] In the *Lawrence* formulation, the question focused entirely on the intimacy of the activity without mentioning the particular form of that intimacy. For the Supreme Court, it was irrelevant whether the state was attempting to punish oral sex or vaginal intercourse between consenting parties. Because the form of sexual expression was irrelevant to the Court's constitutional analysis, the best interpretation of *Lawrence* is that it recognizes constitutional protection for private, intimate relationships.[104]

Though it recognized that the *Lawrence* court had established a right to sexual privacy, the Fifth Circuit also acknowledged that the Supreme Court left unresolved whether that right is fundamental.[105] The Fifth Circuit held it was not necessary to resolve this question, however, because the Supreme Court had expressly recognized the right, whether it is fundamental or otherwise, and the Court had "carefully delineated the types of governmental interest that are constitutionally insufficient to sustain a law that infringes on this substantive due process right."[106] Principal among those insufficient interests was the state's interest in promoting morality.[107]

As the Fifth Circuit observed,[108] by adopting Justice Stevens's dissent in *Bowers v. Hardwick*, *Lawrence* held that moral aversion toward sodomy does not justify states infringing individuals' rights to sexual privacy.[109] In *Bowers* Justice Stevens had argued that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice."[110] Revisiting the issue in *Lawrence*, the Court quoted Justice Stevens and then held that "Justice Stevens'

102. Bowers v. Hardwick, 478 U.S. 186, 190 (1986).
103. *Lawrence*, 539 U.S. at 564.
104. Tribe, *supra* note 74, at 1899–900.
105. Reliable Consultants, Inc. v. Earle, 517 F.3d 738, 744 (5th Cir. 2008).
106. *Id.* at 745.
107. *Id.*
108. *Id.*
109. Lawrence v. Texas, 539 U.S. 558, 578 (2003).
110. Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting).

analysis, in our view, should have been controlling in *Bowers* and should control here."[111] In the next sentence, the Court expressly overruled *Bowers*.[112] Thus, the Court reversed itself and endorsed Justice Stevens's view that morality is not a sufficient governmental interest to justify prohibiting sodomy.

Without reaching the fundamental rights question, the Fifth Circuit's view of *Lawrence* supports the conclusion that *Lawrence* created at least some right to sexual privacy, and the state may not infringe this right unless it has some reason other than moral aversion. This view also supports the conclusion that *R.L.C.* and *McDonald* were wrongly decided: singling out the nontraditional sexuality of adolescents when they may lawfully engage in vaginal intercourse violates their liberty interest just as much as it violates the interests of adults. To reach this conclusion, one must consider *Lawrence* in the broader context of the tension that exists between the special powers of the state to protect minors on the one hand and minors' substantive due process rights on the other.

II. MINORS, THE STATE, AND SODOMY

Minors' constitutional rights exist in tension with the state's special powers to regulate minors' affairs. On one hand, in *In re Gault*[113] the Supreme Court famously announced that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."[114] In a case that served as the foundation of much of the jurisprudence concerning the nature of minors' rights in comparison to the rights of adults, the Court held that adolescent defendants have the same basic constitutional protections as adult defendants during criminal trials.[115] This fundamental premise that minors have constitutional rights has led the Court to assert other rights of minors, including certain rights to freedom of speech,[116] freedom from unreasonable searches and

111. *Lawrence*, 539 U.S. at 578.

112. *Id.*

113. *In re* Gault, 387 U.S. 1 (1967).

114. *Id.* at 13.

115. *Id.* at 33–34, 41, 55, 57. For a discussion of how *In re Gault* has served as a foundation of the jurisprudence of the rights of minors and the history of minors' rights overall, see Chad M. Gerson, *The Abortion Rights of Adolescents Should Be Coextensive with Those of Adults: A Theoretical Framework*, 23 T.M. COOLEY L. REV. 443, 454–58 (2006).

116. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 505–06 (1969).

seizures,[117] and the right to due process when facing suspension from school.[118]

On the other hand, under the doctrine of *parens patriae*, the state can protect minors even when doing so would violate the rights of adults.[119] Ordinarily, the state regulates the activities of adults under its police power. The doctrine of *parens patriae*, however, gives the state additional authority to regulate minors. The Supreme Court has justified this enhanced power of the state on three grounds: (1) the peculiar vulnerability of children; (2) minors' inability to make critical decisions in an informed, mature manner; and (3) the importance of parents in child rearing.[120] Thus, minors share the constitutional rights adults enjoy, but the state can infringe those rights for reasons not sufficient for adults. For example, the state can constitutionally establish the age at which minors may lawfully engage in sexual activity.[121]

This Note argues, however, that when it comes to prohibiting nontraditional sexual activity in a context in which traditional sexual activity is legal, the state does not have any interest under either *parens patriae* or its inherent police power to forbid nontraditional sexual activity. Once the state determines that minors are capable of giving their consent to engage in traditional forms of sexual contact, prohibiting oral sex between the minors violates their liberty rights under the Due Process Clause.

This Part explains why the privacy rights of minors protect them from prosecution for sodomy when traditional sexuality is legal. Section A demonstrates that the Supreme Court has held that minors enjoy the same privacy rights as adults unless the government has a significant interest in protecting minors that does not exist for adults. Because the state does not have an interest in prohibiting minors from engaging in some kinds of sexual contact but not others, Section A argues that courts should extend *Lawrence* to protect the rights of

117. New Jersey v. T.L.O., 469 U.S. 325, 337–38 (1985).

118. Goss v. Lopez, 419 U.S. 565, 574 (1975).

119. DOUGLAS E. ABRAMS & SARAH H. RAMSEY, CHILDREN AND THE LAW: DOCTRINE, POLICY AND PRACTICE 14–16 (3d ed. 2007).

120. Bellotti v. Baird, 443 U.S. 622, 634 (1979).

121. *See, e.g.*, Jones v. State, 640 So. 2d 1084, 1086 (Fla. 1994) ("[S]exual exploitation of children is a particularly pernicious evil that sometimes may be concealed behind the zone of privacy that normally shields the home . . . . The state unquestionably has a very compelling interest in preventing such conduct." (alteration in original) (quoting Schmitt v. State, 590 So. 2d 404, 410 (Fla. 1991))).

minors. Section B analyzes the state's interest in regulating the sexual activity of minors. It concludes that, after *Lawrence*, a state's interest in prohibiting minors from engaging in oral sex is no greater than its interest in prohibiting minors from engaging in vaginal intercourse, requiring the state to regulate the two activities equally. Section C bolsters this conclusion, arguing that other courts have rejected the state's interest in preserving morality when deciding minors' rights under equal protection claims rather than due process challenges. Finally, Section D contends that the North Carolina and Virginia high courts improperly interpreted how the Due Process Clause applies to the rights of minors who engage in nontraditional sexual activities.

A. The Liberty Interests of Minors Engaging in Sexual Activity

Lawrence v. Texas held that adults enjoy a liberty interest in choosing the form of their sexual expression.[122] Although the Court also stated that the case "d[id] not involve minors,"[123] *Lawrence* does not rule out extending this right to minors. In cases addressing the rights of minors, the Supreme Court has consistently held that minors enjoy rights similar to those of adults absent a unique state interest. Examining the *Lawrence* Court's caveat in context shows that *Lawrence* did not necessarily depart from this basic principle.

1. *The Other Caveats.* The *R.L.C.* and *McDonald* courts contended that the Court's caveat about minors preserves the prohibition of sodomy between minors,[124] but that interpretation is not the only plausible one. The caveat may have only meant that the general right to sexual privacy—which *Lawrence* found the Due Process Clause confers—did not affect *other* statutes regulating the age at which minors can lawfully engage in sexual activity. In other words, Justice Kennedy perhaps was explaining that the general right to sexual privacy did not prohibit a state from enacting age-of-consent

122. *See* Lawrence v. Texas, 539 U.S. 558, 578 (2003) ("The State cannot demean [gay people's] existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government."); *see also supra* Part I.C.

123. *Lawrence*, 539 U.S. at 578.

124. *See In re* R.L.C., 643 S.E.2d 920, 925 (N.C. 2007) ("*Lawrence* is distinguishable from the instant case by the very language of *Lawrence*. . . . This juvenile case does involve minors."); McDonald v. Commonwealth, 645 S.E.2d 918, 924 (Va. 2007) (emphasizing the *Lawrence* opinion's caveat that its holding did not apply to minors in the Virginia Supreme Court's decision to uphold applying the state's sodomy law to the defendant).

statutes generally, rather than saying that a state may forbid sodomy between minors.

Comparing the caveat concerning minors with other caveats in the *Lawrence* opinion strengthens this interpretation, as Justice Kennedy included these other caveats in the same paragraph and used parallel sentence construction.[125] In addition to minors, the Court noted that the case in *Lawrence* did not involve rape, prostitution, or same-sex marriage.[126] But these legal concerns are unrelated to sodomy laws. Rape and prostitution were not prosecuted as sodomy, either at common law or under modern penal codes.[127] Same-sex marriage is an entirely separate constitutional question, not a criminal offense. Thus, Justice Kennedy may have intended the caveat paragraph to guide the right of sexual privacy in the context of other laws rather than preserve the Texas statute, and general sodomy laws for application to factually different situations. Regardless of how this caveat is to be interpreted, however, the Court itself acknowledged it is only a statement of dicta, because the case did not involve minors.[128] Therefore, the caveat should not be interpreted to single-handedly deny minors any liberty interest in sexual privacy, which would depart from other Supreme Court precedent.[129]

2. *The Privacy Rights of Minors in Other Contexts.* Supreme Court precedent existing before *Lawrence* indicates that minors enjoy a right to privacy similar to, though not as extensive as, the right to privacy adults hold. The Court asserted as much in both *Planned Parenthood of Central Missouri v. Danforth*[130] and *Carey v. Population*

125. *See Lawrence*, 539 U.S. at 578 ("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.").

126. *Id.*

127. *See* POSNER & SILBAUGH, *supra* note 16, at 5–34, 155–87 (describing the regulatory approach of all fifty states to issues of rape, sexual assault, and prostitution). Prosecutors occasionally bring sodomy charges instead of traditional rape and prostitution charges to increase potential penalties, but these cases are really prosecuting the underlying conduct—rape or prostitution—not the crime against nature itself. *See, e.g.*, State v. Thomas, 891 So. 2d 1233, 1237–38 (La. 2005) (upholding a felony conviction for committing the crime against nature when the state could have charged the defendant with prostitution, a misdemeanor).

128. *Lawrence*, 539 U.S. at 578.

129. *See* Bellotti v. Baird, 443 U.S. 622, 634 (1979) (establishing a three-part test to determine when minors' rights are less than those adults enjoy).

130. Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 74 (1976).

Services International,[131] which addressed minors' rights to obtain abortions and contraception. In *Danforth*, the Supreme Court held that a state may not create a parental veto over a minor child's decision to have an abortion.[132] According to the Court, "[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights."[133] Although the Court noted that "the State has somewhat broader authority to regulate the activities of children than of adults," the law would only be constitutional if "there is any significant state interest in conditioning an abortion on the consent of a parent or person *in loco parentis* that is not present in the case of an adult."[134] Concluding the state lacked such an interest, the Court held the requirement of parental consent was unconstitutional.[135]

The Supreme Court applied this "unique significant interest" standard to a minor's right to privacy again in *Carey v. Population Services International*, in which the Court considered a statute that prohibited distributing contraceptives to minors under the age of sixteen.[136] In a series of fractured opinions, the Court concluded that completely denying minors access to contraception was unconstitutional.[137] Six Justices reached this conclusion by applying a test similar to the "unique significant interest" test articulated in *Danforth*.[138] According to the plurality, "the right to privacy in

131. Carey v. Population Servs. Int'l, 431 U.S. 678, 694 (1977) (plurality opinion). For a summary of the Justices' positions in Carey, see *infra* note 137.

132. *Danforth*, 428 U.S. at 74.

133. *Id.*

134. *Id.* at 74–75.

135. *Id.* at 75.

136. *Carey*, 431 U.S. at 681. The statute provided that only pharmacists could distribute contraceptives and could not distribute them to minors. *Id.*

137. *See id.* at 694–95 (expressing the view of four Justices that the state lacked a significant interest in burdening minors' rights to privacy by preventing minors from obtaining contraceptives); *id.* at 702 (White, J., concurring in part and concurring in the result) (expressing the view that the statute did not "measurably contribute[]" to the state's offered justification of deterring minors' sexual activity); *id.* at 707–08 (Powell, J., concurring in part and concurring in the judgment) (expressing the view that the statute was unconstitutional as applied to minors between the ages of fourteen and sixteen who were lawfully married but could not exercise their right to privacy within that marital relationship); *id.* at 715 (Stevens, J., concurring in part and concurring in the judgment) (expressing the view that the statute did not contribute to the state's asserted interest of deterring minors' sexual activity).

138. For a description of the opinions of the four-Justice plurality, the opinion of Justice White, and the opinion of Justice Stevens, as well as a summary of their views, see *supra* note 137.

connection with decisions affecting procreation extends to minors as well as to adults."[139] These four Justices concluded that minors' rights to privacy include a right to access contraception because adults have that privacy right and the state had failed to identify a significant state interest that justified infringing a fundamental right to protect minors.[140] Though the remaining two Justices did not agree minors have a fundamental right to access contraceptives, they did apply the same *Danforth* "significant interest" test the plurality used when concluding the statute was unconstitutional under rational basis review.[141]

Thus, under these two Supreme Court cases, minors enjoy the same rights to privacy as adults when making procreation decisions. Minors share this privacy right with adults because the government lacks a "significant state interest . . . that is not present in the case of an adult."[142] It should be noted, however, that this standard is less stringent than the one applied to burdens on adults' fundamental rights. Based on the state's power under *parens patriae*, state action only needs to survive the "significant state interest" test rather than the "compelling state interest test" courts usually apply to adults' privacy rights.[143] This less stringent standard is in deference to the state's role as protector and in light of the particular vulnerability of children. After *Lawrence*, however, the state does not have an interest in singling out nontraditional sexual activity, even under the doctrine of *parens patriae*. Therefore, based on the theory of modeling minors' rights to privacy on the rights of adults *Danforth* and *Carey* articulate, the protections of *Lawrence* should be extended to minors.

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139. *Carey*, 431 U.S. at 693.

140. *Id.* at 693–96. Though the plurality concluded minors have a right to contraceptives, the plurality declined to rule on the larger question of whether minors have a right "to engage in private consensual sexual behavior." *Id.* at 694 n.17.

141. Justices White and Stevens appear to have applied rational basis review to the statute because they concluded the state lacked any interest to support the statute while simultaneously concluding the statute did not infringe a fundamental right of minors. *Id.* at 702 (White, J., concurring in part and concurring in the result); *id.* at 715 (Stevens, J., concurring in part and concurring in the judgment); *see also supra* note 137.

142. Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 75 (1976).

143. *Carey*, 431 U.S. at 693.

B. The State's Interest in Singling out Nontraditional Sexuality

In the case of a right to sexual privacy, the state's interest in prohibiting sodomy is no greater than its interest in prohibiting minors from engaging in traditional sexual activity. As Part I.C discussed, *Lawrence* held that the government's interest in promoting morality by itself does not justify infringing the due process liberty interest in sexual privacy.[144] Although the state has an important interest in regulating the sexual activity of minor children, the state has no interest in singling out nontraditional sexual activity. Therefore, the age of consent should be the same for both.

The state does have an interest in regulating the sexual behaviors of adolescents.[145] A state may constitutionally regulate the age of consent of its minor children by criminalizing their sexual activity to protect them from injury.[146] Age-of-consent laws are constitutional because they meet the "unique significant interest" standard—the state can decide that minors lack the maturity to give adequate consent, and so the state has a significant interest in protecting minors from harm.[147]

This extremely significant state interest does not transfer, however, to regulating the form of sexual expression that takes place in a setting that the state has deemed otherwise safe for the minor. By allowing the minor to engage in vaginal intercourse, North Carolina effectively concedes that those minors are capable of giving their consent. Unlike age-of-consent laws, sodomy laws are justified solely on the basis of morality, which *Lawrence* deemed an insufficient state interest.[148] Because morality is an interest "present in the case of an

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144. *See supra* notes 106–12 and accompanying text.

145. *See Carey*, 431 U.S. at 695 n.17 (declining to decide whether minors have an independent right to sexual privacy that would prohibit all government regulation).

146. *See* Lawrence v. Texas, 539 U.S. 558, 567 (2003) (counseling "against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries *absent injury to a person* or abuse of an institution the law protects" (emphasis added)).

147. *See Danforth*, 428 U.S. at 74–75 (defining the test as whether "there is any significant state interest in conditioning an abortion on the consent of a parent or person *in loco parentis* that is not present in the case of an adult"); *see also* FRANKLIN E. ZIMRING, AN AMERICAN TRAVESTY: LEGAL RESPONSES TO ADOLESCENT SEXUAL OFFENDING 125–26 (2004) ("The justification for adult punishment—the exploitation of the young—is missing from settings in which both participants are young."); Kate Sutherland, *From Jailbird to Jailbait: Age of Consent Laws and the Construction of Teenage Sexualities*, 9 WM. & MARY J. WOMEN & L. 313, 315 (2003) ("The justification usually put forward for age of consent laws is the protection of young persons from sexual exploitation by adults.").

148. *See supra* note 108 and accompanying text.

adult," unless the state can identify some other reason, such as evidence that prohibiting sodomy protects minors from injury, then *Danforth* and *Carey* suggest minors should possess a right to sexual privacy coextensive with adults.

The Supreme Court of Florida has recognized these dual interests of the state—protecting minors from injury and safeguarding their morality. In *B.B. v. State*,[149] the court determined that the state's interest in preventing adult sexual exploitation trumps the minor's right to privacy under the state constitution but the state's interest in safeguarding morality does not.[150] In *B.B.*, a sixteen-year-old was charged with a felony for having vaginal intercourse with another sixteen-year-old under a statute punishing intercourse with a person less than eighteen years old who was of "previous chaste character."[151] According to the court, the Florida state constitution confers privacy rights on both adults and minors, which include a right to sexual privacy.[152] Therefore, the court considered whether "the statute furthers a compelling state interest through the least intrusive means."[153] Searching for a state interest in the minor-minor context, the court said the statute was "designed to protect the youth of [Florida] . . . from the initial violation of their actual condition of sexual chastity."[154] In other words, the state's interest was safeguarding the morality of minors. The court determined, however, that adjudicating minors as delinquents was not "the least intrusive means of furthering . . . the State's compelling interest."[155] Thus, the statute violated B.B.'s constitutional right to sexual privacy.[156] Concededly, the court did not conclude morality could never justify state action, even in the context of privacy rights; it only determined that morality was not a sufficient interest to justify criminalizing an activity in which the minor has a privacy interest.[157] This conclusion is

149. B.B. v. State, 659 So. 2d 256 (Fla. 1995).

150. *Id.* at 259–60.

151. *Id.* at 257–58.

152. *Id.* at 259.

153. *Id.* (quoting *In re* T.W., 551 So. 2d 1186, 1193 (Fla. 1989)).

154. *Id.* (quoting Deas v. State, 161 So. 729, 730 (Fla. 1935) (per curiam)).

155. *Id.*

156. The Florida Supreme Court was analyzing B.B.'s right to privacy under the Florida Constitution rather than the U.S. Constitution. *Id.* at 257. The Florida court's analysis nevertheless assists this Note's argument because the court addressed the state's interests in regulating the sexual behavior of minors.

157. *See id.* at 260 ("At present, we will not debate morality in respect to the statute or debate whether this century-old statute fits within the contemporary 'facts of life.'").

not that far from the conclusion in *Lawrence*, which did not completely deny the existence of a state interest in morality either;[158] rather, *Lawrence* held it was not a sufficient interest to justify burdening the right to sexual privacy.[159]

The Florida court's analysis distinguishing regulation based on morality from regulation based on potential injury is instructive. The *B.B.* court emphasized this difference by explaining its earlier decision in *Jones v. State*,[160] which considered a statute that criminalized sexual activity between an adult and a minor.[161] As the *B.B.* court explained, in *Jones*, the court had held that the privacy rights of minors "do not vitiate the legislature's efforts to protect minors from the conduct of others. 'Sexual exploitation of children is a particularly pernicious evil that sometimes may be concealed behind the zone of privacy . . . . The state unquestionably has a very compelling interest in preventing such conduct.'"[162]

In *B.B.* and *Jones*, therefore, the Supreme Court of Florida recognized two possible state interests in regulating the sexuality of minors. First, the state could have an interest in protecting children from harm or injury from the sexual exploitation of adults. The Florida court held that this interest is sufficient to overcome minors' rights to sexual privacy.[163] Second, the state could have an interest in safeguarding the morality of minors. The Supreme Court of Florida determined, however, that preserving morality is not a sufficient reason to criminalize sexual activity between minors.[164]

These two interests are also applicable to the privacy interests of minors engaging in nontraditional sexual activity. Age-of-consent laws serve states' legitimate interests in protecting minors from exploitation. Once the state has determined that the minors are not in danger and may engage in vaginal intercourse, however, the state can no longer assert its interest to prevent the minor from choosing nontraditional forms of sexual activity such as oral sex. To do so

158. *See* Reliable Consultants, Inc. v. Earle, 517 F.3d 738, 745 n.36 (5th Cir. 2008) ("Our holding in no way overtly expresses or implies that public morality can never be a constitutional justification for a law. We merely hold that after *Lawrence* it is not a constitutional justification for [the statute outlawing selling sex toys].").

159. *See supra* note 108 and accompanying text.

160. Jones v. State, 640 So. 2d 1084 (Fla. 1994).

161. *Id.* at 1086.

162. *B.B.*, 659 So. 2d at 259 (quoting *Jones*, 640 So. 2d at 1086).

163. *Id.*

164. *Id.*

would allow the state to assert its interest in promoting morality over minors' interests in privacy by criminalizing their conduct. Both the *Lawrence* and *B.B.* decisions counsel against this result.

In sum, the Due Process Clause permits the state to regulate minors' nontraditional sexual activity only to the degree it regulates traditional forms of sexual expression. Although the state has an interest in protecting minors from harms premature sexual activity causes generally, it has no additional interests in the context of oral sex. Courts should interpret the Constitution to require the law to treat both traditional and nontraditional forms equally, moral aversion notwithstanding.

C. The State's Interest and Equal Protection

The equal protection jurisprudence that has emerged based on *Lawrence* bolsters the conclusion that the state lacks a significant enough interest to justify singling out nontraditional sexual activity among minors. Though *Lawrence* was decided under the Due Process Clause, several state high courts have extended its analysis to conclude that the Equal Protection Clause prohibits states from punishing different types of sexual contact differently.[165] These cases support the view that minors have a due process right to engage in nontraditional sexual activity when the state approves of their participation in traditional forms of sexual behavior.

In *State v. Limon*,[166] the Supreme Court of Kansas concluded that the Equal Protection Clause prohibits a state from punishing acts of sodomy with minors more severely than acts of traditional sexual activity.[167] In *Limon*, a male, one week past his eighteenth birthday, was convicted of engaging in oral sex with another male who was only fifteen.[168] Under Kansas law, a sentence for sexual activity with a minor was fifteen times longer when the minor was of the same sex than with a minor of the opposite sex.[169] The court applied rational

165. *See, e.g.*, People v. Hofsheier, 129 P.3d 29, 41–42 (Cal. 2006) (concluding that requiring a defendant convicted of oral sex with a minor to register as a sex offender when he would not have had to do so if convicted of vaginal intercourse with a minor violated equal protection under the U.S. Constitution). *But see* State v. Thomas, 891 So. 2d 1233, 1237–38 (La. 2005) (holding solicitation for sodomy could be constitutionally punished more severely than solicitation for vaginal intercourse).

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

167. *Id.* at 38.

168. *Id.* at 24.

169. *Id.* at 29.

basis review to this grossly differential treatment, calling on the state to demonstrate a legitimate governmental interest rationally related to imposing a longer sentence on Limon's conduct.[170] The state maintained it had multiple legitimate state interests that would withstand rational basis review: specifically, preserving traditional sexual mores, preserving historical notions of appropriate adolescent sexual development, protecting adolescents from coercive relationships, and protecting adolescents from the health risks of sexual activity.[171] The court rejected each of these arguments.

The *Limon* court quoted *Lawrence*, holding that "[t]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice."[172] The court said both preserving sexual mores and preserving historical notions of appropriate adolescent sexual development were justifications expressing mere "moral disapproval," which could not justify punishing this conduct criminally.[173] In addition, the court could find no evidence or legislative findings that sexual activity with a minor of the same sex was any more coercive or carried any greater risks to a minor's health than did the same conduct with a minor of the opposite sex.[174] Finding no rational basis to support the disproportionate sentence for the same conduct, the court held that the Kansas law violated the Equal Protection Clause.[175] Thus, the Kansas Supreme Court concluded that the state lacks a sufficient interest to justify treating traditional and nontraditional sexual activity differently.

Kansas is not the only state high court to conclude that punishing nontraditional sexual activity more harshly than traditional activity violates equal protection principles. In *People v. Hofsheier*,[176] the Supreme Court of California also addressed this question. In that case, a twenty-two-year-old male was convicted of engaging in oral sex with a sixteen-year-old.[177] Though California law at the time required anyone convicted of such an offense to register for life as a sex offender, California curiously did not require lifetime registration

170. *Id.* at 30.
171. *Id.* at 34.
172. *Id.* (quoting Lawrence v. Texas, 539 U.S. 558, 577 (2003)).
173. *Id.* at 35.
174. *Id.* at 35–36.
175. *Id.* at 38.
176. People v. Hofsheier, 129 P.3d 29 (Cal. 2006).
177. *Id.* at 32.

for persons convicted of unlawful sexual intercourse with a minor.[178] The defendant appealed, arguing that the disproportionate punishment for oral sex denied him equal protection of the law.[179]

The *Hofsheier* court first considered whether two or more groups of similarly situated persons existed.[180] Rejecting the state's contention that people convicted of different crimes were not similar, the court concluded that "[t]he only difference between the two offenses is the nature of the sexual act."[181] The court applied rational basis review to the equal protection claim because it did not implicate a suspect class or fundamental right, considering whether the government had any legitimate interest in preserving this disparate treatment.[182] The Supreme Court of California concluded that the state has no interest to support disparate punishments for oral sex with a minor versus sexual intercourse with a minor.[183] In other words, California reached the same conclusion as Kansas: the state lacks an interest in treating nontraditional sexual activity differently than traditional sexual activity.

D. Seeking the State's Interest in R.L.C.

The situations in *R.L.C.* and *McDonald* are comparable to those the supreme courts of Kansas and California considered. Though the California and Kansas cases relied on equal protection rather than the due process issue raised in *R.L.C.* and *McDonald*, all four cases sought to identify a state interest to weigh against the right being infringed. The underlying rationale of *Lawrence* shows that under either due process or equal protection review, the state lacks a significant enough interest to justify singling out nontraditional sexual activity.

The Supreme Court of North Carolina attempted to discern the government's interests in prohibiting sodomy between minors when vaginal intercourse is lawful. According to the court, the government had an "interest in preventing sexual conduct between minors," and sodomy, "[l]ike vaginal intercourse, . . . carries with it a risk of

178. *Id.*
179. *Id.*
180. *Id.* at 36.
181. *Id.* at 37.
182. *Id.* at 38–42.
183. *Id.* at 41.

sexually transmitted diseases."[184] Neither of these interests is sufficient to justify infringing the right to privacy, however. First, if the state intended to prevent minors from engaging in sexual conduct in *R.L.C.*–like situations, then it would also have made vaginal intercourse between minors unlawful in the same circumstances.[185] The state's contention is similar to the one Justice Powell dismissed in his *Carey* opinion, in which he argued that the state's decision to allow the same minors to marry, which "sanctions sexual intercourse between the partners," contradicted the state's interest in deterring minors from engaging in sexual intercourse.[186] Prohibiting oral sex but not vaginal intercourse does not deter minors from engaging in sexual conduct: if anything, it may encourage them to escalate their sexual interactions to avoid criminal activity.

Second, the North Carolina court itself acknowledged that both vaginal intercourse and oral sex carry the risk of sexually transmitted disease.[187] Adolescents are significantly less likely to contract sexually transmitted diseases when engaging in oral sex versus vaginal sex.[188] In addition, vaginal intercourse involves an additional risk: teenage pregnancy. Because oral sex raises a much lower risk of diseases and other complications and the state has no other interest in uniquely prohibiting it, North Carolina is most likely attempting to maintain animosity toward a nontraditional sexual practice the Supreme Court has held the Constitution protects. Though even an incorrect fear of disease arguably could survive rational basis review, the Supreme Court's decision in *Lawrence* did not explicitly apply rational basis review to the question of sexual privacy. *Lawrence* left unclear precisely what level of scrutiny it was applying.[189] *Lawrence* was explicit, however, in stating that a state's animosity toward nontraditional sexual relationships was not a permissible state interest

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

185. *See* N.C. GEN. STAT. § 14-27.2(a)(1) (2000 & Supp. 2007) (criminalizing only sexual activity between a minor under the age of thirteen and anyone more than three years older). R.L.C. was only two years older than his twelve-year-old girlfriend. *In re R.L.C.*, 643 S.E.2d at 922.

186. Carey v. Population Servs. Int'l, 431 U.S. 678, 707 (1977) (Powell, J., concurring in part and concurring in the result).

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

188. Bonnie L. Halpern-Felsher et al., *Oral Versus Vaginal Sex Among Adolescents: Perceptions, Attitudes, and Behavior*, 115 PEDIATRICS 845, 848 (2005).

189. *See* CHEMERINSKY, *supra* note 71, at 846 (discussing various interpretations of the standard applied in *Lawrence*).

in the due process context when considering a right to sexual privacy.[190]

In North Carolina and Virginia, the high courts ruled that their states may punish sodomy between minors more severely than vaginal intercourse, even when sexual intercourse is not a criminal offense. *Lawrence* held that prohibitions on sodomy between adults, however, cannot be justified on the basis of moral aversion, and because states lack any other compelling state interest, prohibitions on sodomy are unconstitutional violations of the right to privacy. *Danforth* and *Carey* held that minors may possess the same rights to privacy as adults unless the state has a significant state interest unique to the context of minors. But as the high courts of Florida, Kansas, and California have concluded, states lack a significant interest to justify burdening a minor's right to sexual privacy once that state has concluded minors may lawfully consent to sexual activity in general. Therefore, even though North Carolina and Virginia have enhanced powers to regulate the activities of minors under the doctrine of *parens patriae*, they do not have the power to regulate the form of sexuality expressed within the relationships they sanction. The protections of *Lawrence v. Texas* should be extended to minors.

III. THE IMPLICATIONS OF *R.L.C.* AND *MCDONALD*

Much more than the defendants' liberty was at stake in *R.L.C.* and *McDonald*. Not at issue was whether the state could regulate minors' sexual activity: if the legislatures of North Carolina and Virginia wanted to prohibit minors from engaging in any sexual activity, they likely could constitutionally do so.[191] Rather, these cases raised two overarching issues. First and most importantly, how can states best protect minors from harm? Second, what, if anything, remains of the longstanding animosity toward nontraditional sexual activity? These questions are interrelated.

Lawrence created a problem beyond mere confusion over minors' rights to privacy: it cast doubt on the sufficiency of pre-*Lawrence* penal codes that purportedly protect minors from sex-based harms. As Virginia's statutory system indicates, states have relied on general prohibitions of sodomy when determining how to

190. Lawrence v. Texas, 539 U.S. 558, 577 (2003).

191. *See Carey*, 431 U.S. at 695 n.17 (declining to decide whether minors have an independent right to sexual privacy that would prohibit all governmental regulation).

criminalize teenage sexual activity.[192] Virginia's age-of-consent laws only address vaginal intercourse with a minor,[193] creating a loophole in the scheme if other sodomy laws are invalid. McDonald sought to take advantage of this loophole, arguing that, because the literal language of the statute only criminalized vaginal intercourse and not oral sex, he was innocent of any criminal offense.[194] Although McDonald's argument was technically correct, the legislature's omission likely resulted from its reliance on the general prohibition against sodomy to do the rest of the work to protect minors from sexual predators. It is entirely possible, however, that the Virginia legislature would have intended to punish oral sex between them at least to the same extent it punishes vaginal intercourse. Yet if *Lawrence* took the sodomy statute out of the picture by invalidating it, the remaining code does not punish oral sex with a minor. Thus, following *Lawrence*, legislatures should revisit their penal codes to ensure both that they are adequately protecting children and that their laws do not violate minors' rights to privacy.

In addition to exposing the inadequacy of existing law to constitutionally protect minors, *R.L.C.* and *McDonald* suggest that animosity toward nontraditional sexuality is very much alive, even though the Supreme Court attempted to dispel it.[195] In their willingness to treat nontraditional sexual activity more harshly than traditional sex, the Virginia and North Carolina courts are not alone. These cases are part of a larger history, dating at least to the reign of Henry VIII, of legal animosity toward nontraditional sexuality.[196] Continuing this tradition, *R.L.C.* and *McDonald* join other cases outside the context of minors that have resisted *Lawrence*'s landmark decision and unfairly condemned nontraditional sexual activity. For example, several courts have distinguished the private actions of Lawrence and his partner from more public contexts. State high courts have concluded that sodomy prosecutions are still valid when

192. *See* VA. CODE ANN. § 18.2-371 (2004 & Supp. 2008) (criminalizing only vaginal intercourse with a minor older than fifteen as a misdemeanor, rather than other forms of sex).

193. *Id.*

194. *See* McDonald v. Commonwealth, 645 S.E.2d 918, 923 (Va. 2007) (arguing that the statute governing statutory rape refers only to "sexual intercourse" and does not address other sexual acts).

195. *See Lawrence*, 539 U.S. at 577 ("[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice . . . ." (quoting Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting))).

196. *See supra* note 25 and accompanying text.

the accused committed the act in public (as a charge added to public indecency accusations)[197] or when the case involves prostitution (as a charge added to prostitution charges).[198] Similarly, the Eleventh Circuit held *Lawrence* has no bearing on Alabama's ban on the sale of sex toys because the state has an interest in preserving "public morality."[199] Others have addressed this public-private distinction,[200] and it represents another way—other than the age of the participants—that courts have limited *Lawrence* to its facts to avoid recognizing nontraditional sexual behavior as legitimate.

Animosity toward oral sex is archaic; it represents a fundamental incomprehension of the reality of teenage sexuality. According to a study by the Centers for Disease Control and Prevention, 44 percent of males and 42 percent of females between the ages of fifteen and seventeen have engaged in oral sex in the United States.[201] Under the law the supreme courts of North Carolina and Virginia articulated, nearly half of the teenagers in North Carolina and Virginia are felons. Moreover, by the time these teenagers reach their midforties, approximately 90 percent of them will have engaged in oral sex.[202] Without the Supreme Court's *Lawrence* decision, nearly all of the people in both North Carolina and Virginia would be felons under the same general prohibition of sodomy under which R.L.C. was convicted.

These statistics cast serious doubt on whether the legislatures of these states actually intended the results their supreme courts reached or whether these courts' decisions were rather the result of the legislatures' failures to update their penal codes following the Supreme Court's decision in *Lawrence*. Oral sex is no longer regarded as nontraditional—it is typical. When 90 percent of a state's

197. Singson v. Commonwealth, 621 S.E.2d 682, 685–86 (Va. Ct. App. 2005) (distinguishing the facts of *Lawrence* from sodomy offenses committed in public rather than in the defendant's home).

198. State v. Thomas, 891 So. 2d 1233, 1238 (La. 2005) (distinguishing *Lawrence* from cases in which the sodomy charges related to prostitution).

199. Williams v. Att'y Gen., 378 F.3d 1232, 1235–36 (11th Cir. 2004).

200. *See, e.g.*, 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, 188 (2008) (noting a North Carolina court's interpretation of *Lawrence* as invalidating the crime-against-nature statute when applied to private, but not public, sexual conduct).

201. MOSHER ET AL., *supra* note 13, at 25.

202. *See id.* (citing data showing that 90.1 percent of males and 88.3 percent of females aged 25–44 have engaged in oral sex).

population could be considered a felon, enforcing these statutes defies logic. Thus, in addition to revisiting their penal codes to ensure that state laws adequately protect minors from sexual exploitation, states should ensure that their statutory regimes reflect modern sexual mores.

These decisions and the continuing animosity toward nontraditional sexuality they appear to exhibit also may produce the opposite of the law's intended result: they expose the vast majority of teenagers who engage in oral sex to new harms the criminal justice system may cause. One of the principal focuses of the Supreme Court in *Lawrence* was the stigma associated with prohibiting sodomy. That stigma comes, as Professor Tribe suggests, from degrading the sexual relationship in which individuals participate in nontraditional sexual acts.[203] According to the Supreme Court, "[w]hen homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres."[204] That logic extends beyond application to just homosexuals: when the state makes nontraditional sexuality criminal, that declaration invites people to subject its participants—gay and straight—to discrimination and humiliation. Adolescents struggling with the development of their sexuality need encouragement from the state, not humiliation.

CONCLUSION

R.L.C., *McDonald*, and this Note address a situation in which a minor willfully participates in consensual but nontraditional sexual activity when traditional sex would have been lawful. Admittedly, as Justice Timmons-Goodson of the North Carolina Supreme Court wrote, "[s]exual activity by young people with limited life experience and education *is* troubling."[205] But this concern does not justify outlawing only some kinds of sexual behavior. When the state has decided minors may lawfully engage in sexual intercourse, courts should understand the protections *Lawrence* articulated to prevent states from policing the specific acts in which those minors engage.

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203. *See* Tribe, *supra* note 74, at 1904 ("[T]he prohibition's principal vice was its stigmatization of intimate personal relationships between people of the same sex . . . .").

204. Lawrence v. Texas, 539 U.S. 558, 575 (2003).

205. *In re* R.L.C., 643 S.E.2d 920, 926 (N.C. 2007) (Timmons-Goodson, J., dissenting) (internal quotation marks omitted).

Lawrence implied that the statutory regimes of many states are unconstitutional and may no longer adequately protect minors. *Lawrence* held that adults possess a right to sexual privacy, which the state may not infringe for morality alone. Because the Supreme Court has held that minors share similar rights to privacy when the state lacks a unique interest to justify burdening that right, the protections of *Lawrence* should be extended to minors. Thus, legislatures should revisit their outdated sodomy laws, some of which have existed since the reign of Henry VIII.[206] If they redraft these statutes, legislatures should consider the implications of due process and equal protection: laws governing the sexual activity of minors should only regulate nontraditional sexual activity to the same extent that the state prohibits traditional sexual contact. Animosity toward the nontraditional does not justify disparate treatment.

The long reign of Henry VIII needs to end.

206. *See supra* note 25 and accompanying text.