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Jordan Carr Peterson

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ABSTRACT

Eighteen years after the Supreme Court held in Lawrence v. Texas *that a law criminalizing sodomy violated the constitutional guarantee to substantive due process, individuals are still arrested, prosecuted, convicted, and incarcerated pursuant to statutes that are the material equivalent of the one at issue in* Lawrence. *Though this seems both strange and unfair, it is neither unusual nor accidental. Because the constitutional order renders the judiciary a passive institution and radically fragments authority across a polycentric collection of governments, noncompliance with judicial decisions is endemic to American institutional design.*

While the Lawrence *decision cast unflagging constitutional disapproval on statutes criminalizing private, consensual, nonprocreative intercourse, multiple states continue to enforce criminal prohibitions on sodomy on the theory that* Lawrence *only proscribes inequitable applications of categorical sodomy bans, as opposed to leaving them unenforceable entirely. This Article thus represents the first comprehensive examination of how criminal prohibitions on sodomy have stubbornly survived their own intended death.*

States enforce laws criminalizing sodomy through both direct prosecution as well as collateral means, namely, by requiring individuals convicted under bans on consensual sodomy to register as sex offenders. This Article maintains that a faithful reading of Lawrence *demands the wholesale abandonment of laws facially criminalizing private, consensual sexual intimacy, and recommends the legislative repeal of programs enabling both direct and collateral enforcement of categorical prohibitions on sodomy.*

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I. INTRODUCTION

> *"This case thus requires us to decide when the threat of continued enforcement is enough to reanimate a zombie law and bring it from the statutory graveyard into federal court."* – Pool v. City of Houston[1]

How do laws die? The simplest answer is legislative repeal; if sufficient majorities in a legislative body agree, existing statutes may be excised from their jurisdiction's code by subsequently enacting a repeal bill.[2] The less simple answer is negative judicial review. American courts famously have the authority – of, some argue, extraconstitutional provenance[3] – to proscribe the enforcement of laws, policies, and practices enacted or implemented by coordinate public institutions if the reviewing court deems such actions unconstitutional.[4] The power to repeal affords legislatures the capacity to eliminate laws they disfavor rapidly, while judicial review sounds a more protracted death knell for unconstitutional

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[1] Pool v. City of Houston, 978 F.3d 307, 309 (5th Cir. 2020).

[2] *See, e.g.*, Jordan M. Ragusa & Nathaniel A. Birkhead, *Parties, Preferences, and Congressional Organization: Explaining Repeals in Congress from 1877 to 2012*, 68 POL. RES. Q. 745 (2015) (examining congressional repeals of major legislation and arguing that legislative repeal is more likely given greater agenda control by legislative majorities and when a party has been in the minority for longer); Christopher R. Berry, Barry C. Burden & William G. Howell, *After Enactment: The Lives and Deaths of Federal Programs*, 54 AM. J. POL. SCI. 1 (2010) (concluding that variation in the partisan composition of Congress influences the durability of federal policy programs); Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665 (2002) (assessing the maxim that current legislatures may not bind future legislatures from enacting policies the current legislature disfavors, including but not limited to repealing the current legislature's own legislation).

[3] *See* ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962) (arguing that the framers did not intend federal courts to have the power of judicial review whatsoever); *but see* SYLVIA SNOWISS, JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION (1990) (suggesting the ratifying generation intended to grant courts the power of judicial review but that their aim was for such ability to be seldom exercised); Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1128–46 (1987) (contending that the original understanding of the American political order permitted judicial invalidation of legislative enactments not only on constitutional grounds, but also based on a host of other moral and ethical principles).

[4] *See generally* Marbury v. Madison, 5 U.S. 137 (1803). While the conventional wisdom and much scholarship suggests *Marbury* was the first instance of judicial review by the Supreme Court, more recent research suggests a more robust tradition of judicial review in the pre–*Marbury* early republic. William Michael Treanor, *Judicial Review Before* Marbury, 58 STAN. L. REV. 455 (2005).

laws and policies because court decisions are not self-executing.[5] To wit, although American courts enjoy expansive prerogative to participate in forming public policy by passing constitutional judgment on legislative or regulatory decisions, they lack the ability to ensure officials and institutions will adhere to their commands.[6] Consequently, though a judicial pronouncement that a given statute or class of statutes facially violates the Constitution likely spells the functional end for the laws in question, the peculiarities of American institutional design furnish them with an escape hatch to a fruitful afterlife.

In 2003, the Supreme Court of the United States held in *Lawrence v. Texas* that a Texas statute imposing criminal prohibitions on individuals who engage in same-sex sexual intimacy violated the substantive guarantees of due process by infringing on individuals' constitutional rights to liberty and privacy.[7] The decision engendered, however, neither the automatic repeal of state statutes criminalizing sodomy at the time *Lawrence* was decided, nor the cessation of police, prosecutorial, and administrative practices enforcing criminal prohibitions on sodomy.[8] While several state legislatures formally repealed their sodomy bans after *Lawrence*, this decision was not immediate.[9] Even now in some states that elected not to repeal their statutes criminally prohibiting sodomy after *Lawrence*, the imposition of criminal sanctions and administrative burdens pursuant to sodomy bans proceeds apace. These practices continue as some courts postulate that *Lawrence* only constrains the *application* of blanket prohibitions on sodomy to private, consensual sex, rather than enjoining the enforcement of such statutes altogether.[10] Any hope, then, that *Lawrence* would instantaneously render statutes criminalizing private, consensual sexual conduct inoperable – what I call the mirage of automatic invalidation – proves quixotic.[11]

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[5] *See, e.g.*, Gramm–Leach–Bliley Act § 101, S.900, 106th Congress § 1 (deregulating certain business practices for financial institutions by explicitly repealing sections 20 and 32 of the Banking Act of 1933, commonly known as the Glass–Steagall Act). In contrast to repeal legislation, it may take months or even years for negative judicial review to have the court's intended effect on presumably unconstitutional practices. *See* Josh Blackman, *The Irrepressible Myth of* Cooper v. Aaron, 107 GEO. L.J. 1135, 1140–53 (2019) (detailing the complicated implementation process of school desegregation in the years after the remedial holding in *Brown v. Board of Education II* requiring desegregation with "all deliberate speed").

[6] *See infra* Part II–A.

[7] Lawrence v. Texas, 539 U.S. 558, 578 (2003).

[8] *See infra* Parts II–C and II–D.

[9] *See infra* Part II–B.

[10] *See infra* Parts II–C and II–D.

[11] *See infra* Part II–A. The phenomenon I describe as the mirage of automatic invalidation is similar to what Jonathan Mitchell has elsewhere called the "writ–of–erasure fallacy," in reference to the tendency to equate the power of judicial review

This Article analyzes the legal means through which the criminal regulation of sodomy has survived its own intended death at the hands of the Supreme Court and contends that the survival of sodomy bans is enabled by both linguistic imprecision in the *Lawrence* decision along with the decentralized structure of American government. Part I traces the history of criminal prohibitions on consensual sexual behavior in the United States, and reads the Supreme Court's decision in *Lawrence*, for all its promise, as vivifying the afterlife of criminal prohibitions on sodomy. Part II examines the state of sodomy laws after *Lawrence*, and details how police, prosecutors, and judges offend the substantive thrust of that decision through the continued deprivation of rights and liberties pursuant to statutes that, on their face, violate the *Lawrence* rule. Part III offers remedial suggestions for legislative and judicial officials to bring policy in their jurisdiction into harmony with the letter and spirit of *Lawrence*. Part IV concludes by recommending legislation that clearly proscribes both the direct and collateral enforcement of sodomy bans.

II. THE REGULATION OF CONSENSUAL SEXUAL BEHAVIOR IN THE UNITED STATES

A. Laws Criminalizing Sodomy: A Brief History

Certain classes of sexual conduct (whether engaged in publicly or privately) have been regulated as "crimes against nature" in the United States and its colonial predecessors in British North America since the eighteenth century.[12] Indeed, the early Puritan settlers in New England –

with an absolute judicial veto on legislation. Jonathan F. Mitchell, *The Writ–of–Erasure Fallacy*, 104 VA. L. REV. 933, 951–69 (2018). Whereas Mitchell's important research concentrates specifically on correcting the fallacious assumption that judicial decisions constitutionally disapproving of statutes and preliminary injunctions forbidding the enforcement of a law erase statutes or suspend their application, as well as identifying the consequences of the fallacy, I examine in detail the procedural mechanisms by which public officials have been able to evade compliance with the Supreme Court's holding in *Lawrence*. *See id.*

[12] *See generally* WILLIAM N. ESKRIDGE, DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA, 1861–2003 (2008) (tracing the history of sodomy regulations in the United States over time and arguing that reform of statutes prohibiting sodomy was encumbered by the fragmentation of authority in American government). The first known anti–sodomy statute in the present-day United States appeared nearly as early as possible after the establishment of permanent British settlements in North America, as sodomy – along with rape and adultery – was prohibited as a capital offense by the colonial code of Virginia enacted in 1610. *Id.* at 17. Over time, statutes banning nonprocreative intercourse have gone by different names. Historically, "crime against nature" was the most common designation, and crime against nature statutes typically were understood (though did not explicitly enumerate as much) to ban sodomy and

a group notorious for its willingness to express moral reprobation – have been said to have "reserved their strongest condemnations for sodomy."[13] These prohibitions, however, were neither English nor Puritan innovations, instead tracing their ancestry as so many prohibitions do to the expansive universe of behavioral regulations in the Levitical code.[14] While seemingly convinced that crimes against nature advanced any number of moral interests, legislators responsible for drafting these early prohibitive statutes predominantly failed to specify with much precision which sexual behaviors qualified as crimes against nature.[15] These imprecisions, in turn, afforded courts substantial latitude in exactly which nonprocreative sexual activities statutorily qualified for prohibition.[16]

At some point in its history, every U.S. state has imposed criminal prohibitions on some array of sexual practices legally characterizable as sodomy, even if such acts occurred between consenting adults.[17] Though statutes regulating so-called crimes against nature originally applied only to anal intercourse and bestiality, by the end of the nineteenth century some state legislatures began to alter their criminal codes to include fellatio in their statutory definition of sodomy.[18] In those states whose legislators did nothing to amend the relevant statutes to criminalize oral

bestiality. In more recently drafted statutes, sodomy is named as the offense. *See generally id.*

[13] GEOFFREY R. STONE, SEX AND THE CONSTITUTION: SEX, RELIGION, AND LAW FROM AMERICA'S ORIGINS TO THE TWENTY–FIRST CENTURY 78 (2017).

[14] Henry F. Fradella, *Legal, Moral, and Social Reasons for Decriminalizing Sodomy*, 18 J. CONTEMP. CRIM. JUST. 279, 280. Early Judaic law was rather unlike its ancient Greek and Roman contemporaries in its condemnation of sodomy, but the spread of Christianity throughout Europe over the course of the last millennium encouraged the regulation of sexual behavior as both an ecclesiastical as well as a legal matter. *Id.* at 281.

[15] ESKRIDGE, DISHONORABLE PASSIONS, *supra* note 12, at 2–3. Social scientists and philosophers posit that a variety of human psychological impulses provide sufficient enabling conditions for the enactment of sodomy regulations. For instance, social psychologists have found that the emotion of disgust is strongly associated with homophobic attitudes, suggesting that disgust at nontraditional sexual behavior likely also motivates criminalizing homosexual intimacy. *See* Bunmi O. Olatunji, *Disgust, scrupulosity, and conservative attitudes about sex: Evidence for a mediational model of homophobia*, 42 J. RES. PERSONALITY 1364 (2008). Likewise, scholars have noted that the judicial and legislative construction of sexually nonconforming practices as socially undesirable may be driven by the construction of a narrative that associates sexual nonconformity with predation. Larry Cata Backer, *Constructing a "Homosexual" for Constitutional Theory: Sodomy Narrative, Jurisprudence, and Antipathy in United States and British Courts*, 71 TUL L. REV. 529, 554–67 (1996).

[16] ESKRIDGE, DISHONORABLE PASSIONS, *supra* note 12, at 2–3.

[17] Bowers v. Hardwick, 478 U.S. 186, 193 (1986), *overruled by* Lawrence v. Texas, 593 U.S. 558 (2003); WILLIAM N. ESKRIDGE, GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET 328–37 (1999).

[18] ESKRIDGE, DISHONORABLE PASSIONS, *supra* note 12, at 2, 50–51.

intercourse explicitly, entrepreneurial judges and law enforcement officers began to interpret extant prohibitions on crimes against nature as proscribing fellatio.[19] As the United States population – and particularly its gay male population – grew increasingly urban over the course of the twentieth century, the number of arrests for sodomy rose drastically.[20] Recognizing that it represented a serious logistical difficulty for law enforcement officers to apprehend violators of crime against nature laws *in flagrante delicto*,[21] jurisdictions increasingly employed criminal prohibitions on the solicitation of sodomy as well as "degeneracy" to target both male and female sex workers for surveillance and harassment.[22] After the Stonewall uprising in 1969, and as social and political inequities experienced by the gay community came into somewhat sharper relief, enforcement of sodomy prohibitions in many major cities became less vigorous.[23] Whereas prior to Stonewall only Illinois had ceased to impose criminal sanctions for sodomy as a matter of state law, in the decade following the uprising sodomy was decriminalized by a further twenty-one states.[24] Nevertheless, by the 1980s, sodomy remained criminally punishable in about half of U.S. states, and – as *Bowers v. Hardwick* would demonstrate – statutes criminalizing sodomy continued to form the legal basis for deprivations of liberty as a result of adults engaging in private, consensual sexual behavior.[25]

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[19] *Id.* at 51. With some regularity, the legal incorporation of fellatio (and, though less frequently, cunnilingus) into the acts prohibited by crime against nature statutes proceeded by functionally equating anal and oral sex by grouping them together conceptually as forms of nonprocreative sexual activity. *Id.* at 51–53.

[20] *Id.* at 57.

[21] This term refers to catching an individual in the act of committing a crime, and is used with particular frequency to refer to the commission of illegal sex acts.

[22] *Id.* at 57–59.

[23] *Id.* at 166–72; Robert O. Self, *Sex in the City: The Politics of Sexual Liberalism in Los Angeles, 1963–79*, 20 GENDER & HISTORY 288 (2008).

[24] Melinda D. Kane, *Social Movement Policy Success: Decriminalizing State Sodomy Laws, 1969–1998*, 8 MOBILIZATION: AN INT'L Q. 313 (2003). By 1979, sodomy was decriminalized in Connecticut, Colorado, Oregon, Delaware, Hawaii, Ohio, New Hampshire, North Dakota, California, Maine, New Mexico, Washington, Indiana, Iowa, South Dakota, West Virginia, Nebraska, Vermont, Wyoming, Alaska, and New Jersey, following the initial decriminalization by Illinois in 1961. *Id.* at 315. Other states decriminalized on a discriminatory basis: by the time that *Bowers v. Hardwick* was decided in 1986, sodomy was decriminalized for different–sex but not same–sex partners in Arkansas, Kansas, Kentucky, Missouri, Montana, Nevada, and Texas. ESKRIDGE, GAYLAW, *supra* note 17, at 150.

[25] Anne B. Goldstein, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants of* Bowers v. Hardwick, 97 YALE L.J. 1073 (1988).

B. The Affirmation of Sodomy Regulations in Bowers v. Hardwick

Because many states continued to impose criminal sanctions for sodomy well into the 1980s, a coalition of advocacy organizations joined lead counsel Laurence Tribe in a facial challenge to the constitutionality of Georgia's sodomy statute that was heard before the Supreme Court in 1986.[26] In *Bowers v. Hardwick*, the Supreme Court held that the Georgia law criminalizing sodomy did not violate respondent Hardwick's constitutional right to privacy as the Constitution does not confer "a fundamental right upon homosexuals to engage in sodomy."[27] Employing rational basis review, Justice White, writing for the majority, emphatically rejected the notion that extant privacy jurisprudence stood "for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription."[28] By construing the legal question much more narrowly than the Eleventh Circuit – which ruled in favor of Hardwick – the majority conceptually demarcated the conduct rendered criminally punishable by the Georgia sodomy law as meaningfully different from the sorts of intimate behavior protected by the constitutional right to privacy.[29]

In holding that consensual, same-sex sexual activity between adults was not protected as a fundamental right under substantive due process,[30] the Court declined to extend the same sort of privacy-oriented constitutional protections as they previously had to activities including, but not limited to, nonprocreative marital intercourse,[31] nonprocreative vaginal intercourse outside of marriage,[32] and abortion.[33] The Court in *Bowers* found its limiting principle by purporting to interpret prior jurisprudence that protected these other, sufficiently fundamental rights as representing only the notion that individuals enjoy "a fundamental individual right to decide whether or not to beget or bear a child," conveniently disqualifying same-sex intimacy from any constitutional

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[26] Gerard V. Bradley, *Remaking the Constitution: A Critical Reexamination of the* Bowers v. Hardwick *Dissent*, 25 WAKE FOREST L. REV. 501, 503 (1990). Among others, the amici included the National Gay Rights Advocates, the National Organization for Women, the American Psychological Association, the Presbyterian Church USA, and the attorneys general of New York and California. *Id*

[27] Bowers v. Hardwick, 478 U.S. 186, 190 (1986), *overruled by* Lawrence v. Texas, 593 U.S. 558 (2003).

[28] *Id.* at 191.

[29] *Id.* at 190–92.

[30] *See* Marc S. Spindelman, *Reorienting* Bowers v. Hardwick, 79 N. C. L. REV. 359, 362 (2001).

[31] Griswold v. Connecticut, 381 U.S. 479 (1965).

[32] Eisenstadt v. Baird, 405 U.S. 438 (1972).

[33] Roe v. Wade, 410 U.S. 113 (1973).

safeguard.[34] In addition to its doctrinal argument, the *Bowers* majority demonstrated an originalist conception of the Fourteenth Amendment.[35] The Court offered the numerous state-level criminal prohibitions on sodomy in existence at the time of the Amendment's ratification as supporting justification for refusing to bring sexual intimacy between consenting adults of the same sex within the ambit of the Amendment's protection.[36] For nearly two decades afterward, *Bowers* controlled federal constitutional questions on statutes criminalizing sodomy, though both state courts of last resort as well as state legislatures proceeded to revise laws governing consensual, nonprocreative sexual behavior through the 1990s and early 2000s.[37]

C. Lawrence v. Texas *and the Promise of Deregulating Consensual Sexual Behavior*

By 2003, fourteen U.S. states still had criminal prohibitions for sodomy on their books.[38] The Supreme Court reviewed the constitutionality of these remaining bans by granting certiorari to two individuals convicted of violating a Texas statute that provides "[a] person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex,"[39] where deviate sexual intercourse is defined as "any contact between any part of the genitals of one person and the mouth or anus of another person; or the penetration of the genitals or

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[34] *Bowers*, 478 U.S. at 190. Scholars have criticized the *Bowers* decision's reading of relevant precedent for not recognizing a right to bodily integrity outside of pregnancy as well as for positing that earlier cases foreclosed the possibility of a constitutional right to consensual intimacy between adults. ESKRIDGE, GAYLAW, *supra* note 17 at 156; Donald H. J. Hermann, *Pulling the Fig Leaf off the Right to Privacy*, 54 DEPAUL L. REV. 909, 936 (2005). Likewise, it is not unlikely that antagonism toward gay individuals, or at least gay sex, animated the majority in *Bowers* – which called Hardwick's constitutional claims "at best, facetious." Thomas B. Stoddard, Bowers v. Hardwick: *Precedent by Personal Predilection*, 54 U. CHI. L. REV. 648, 655 (1987).

[35] *See Bowers*, 478 U.S. at 191.

[36] *Id.* at 194–95. The Court in *Bowers*, however, neglected to evaluate through its own originalist prism whether it made any difference that oral sex – the offense for which Hardwick was arrested – was not included in any state's statutory definition of sodomy until 1879, over a decade after the ratification of the Civil War Amendments. ESKRIDGE, GAYLAW, *supra* note 17, at 24–25.

[37] *See* Kane, *supra* note 24, at 315. Between *Bowers* and *Lawrence*, sodomy was decriminalized by courts in Kentucky, Tennessee, Montana, Georgia, Maryland, Minnesota, Arkansas, and Massachusetts, and by state legislatures in Nevada, Rhode Island, and Arizona. *Id.*

[38] *See id.* Prior to *Lawrence*, statutory criminal prohibitions on sodomy were retained in Alabama, Florida, Idaho, Kansas, Louisiana, Michigan, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Texas, Utah, and Virginia. *Id.*

[39] TEX. PENAL CODE ANN. § 21.06(a) (2021).

the anus of another person with an object."[40] Writing for the majority, Justice Kennedy pronounced that "*Bowers* was not correct when it was decided, and it is not correct today,"[41] and that the Texas statute at issue impermissibly burdened the petitioners' liberty interests as "adults may choose to enter upon this [sexual] relationship in the confines of their homes and their own private lives and still retain their dignity as free persons."[42]

The majority also explicitly rejected the *Bowers* Court's narrow formulation of the relevant constitutional question by maintaining that "[t]o say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward."[43] The *Lawrence* holding was a watershed moment for both civil libertarians broadly as well as the gay and lesbian advocacy community specifically, for whom it "generated a palpable euphoria,"[44] leading to speculation that the decision might "prove to be one of the most important civil rights cases of the twenty-first century" or even "the *coup de grâce* to legal moralism administered after a prolonged, brutish, tedious, and debilitating struggle against liberal legalism in its various criminal law representations."[45] While by directly overruling *Bowers* the *Lawrence* Court created a new constitutional space for the protection of consensual sexual behavior, substantial constraints remained on the operative scope of the central holding in *Lawrence* that significantly limit the decision's substantive effect.[46]

The Court in *Lawrence* rejected both the doctrinal and historical analysis supplied by the *Bowers* majority.[47] In examining "whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment,"[48] the *Lawrence* majority found ample support in the Court's precedents related to both liberty and privacy for invalidating criminal prohibitions on consensual sexual conduct between adults and held that

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[40] *Id.* §§ 21.01(1)(A)–(B) (2021).

[41] Lawrence v. Texas, 539 U.S. 558, 578 (2003).

[42] *Id.* at 567.

[43] *Id.*

[44] Marc Spindelman, *Surviving* Lawrence v. Texas, 102 MICH. L. REV. 1615, 1618 (2004).

[45] Danaya C. Wright, *The Logic and Experience of Law:* Lawrence v. Texas *and the Politics of Privacy*, 15 U. FLA. J. L. & PUB. POL'Y 403, 403 (2004); Bernard E. Harcourt, *Foreword: You Are Entering a Gay and Lesbian Free Zone: On the Radical Dissents of Justice Scalia and Other (Post–) Queers – [Raising Questions About* Lawrence, *Sex Wars, and the Criminal Law]*, 94 J. CRIM. L. & CRIMINOLOGY 503, 503–504 (2004).

[46] *See infra* Part II.

[47] *See Lawrence*, 539 U.S. at 564–78.

[48] *Id.* at 564.

"[t]he Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."[49] Likewise, the majority maintained that "the historical grounds relied upon in *Bowers* are more complex than the majority opinion and the concurring opinion by Chief Justice Burger indicate" and that "[t]heir historical premises are not without doubt and, at the very least, are overstated."[50] Though the decision made no mention of its effect for sodomy prohibitions in jurisdictions other than Texas, there is little reason to doubt the breadth of its intended operation – at least within the universe of sodomy regulations – due to the sweeping language employed by Justice Kennedy in rejecting the state's proffered arguments for the constitutionality of its sodomy statute.[51]

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[49] *Id.* at 578. Justice Scalia took special umbrage with this formulation of the central holding in *Lawrence*, which by his contention reflected that the majority employed rational basis review, rather than one of the heightened forms of scrutiny typically employed upon the alleged encumbrance of a fundamental right. *Id.* at 586 (Scalia, J., dissenting). By contrast, Laurence Tribe has defended the pragmatism and flexibility of the majority's approach to substantive due process in *Lawrence*. Laurence Tribe, Lawrence v. Texas: *The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1898 (2004) (noting that in *Lawrence* "the Court gave short shrift to the notion that it was under some obligation to confine its implementation of substantive due process to the largely mechanical exercise of isolating 'fundamental rights' as though they were a historically given set of data points on a two–dimensional grid, with one dimension representing time and the other representing a carefully defined and circumscribed sequence of protected primary activities"). The doctrinal complexity of the opinion was characterized more succinctly by Nan Hunter who offered that "[t]he Supreme Court's decision in *Lawrence v. Texas* is easy to read, but difficult to pin down." Nan D. Hunter, *Living with* Lawrence, 88 MINN. L. REV. 1103, 1103 (2004).

[50] *Lawrence*, 539 U.S. at 571 (majority). In rejecting the *Bowers* Court's contention that the long history of statutes criminalizing sodomy gave meaningful constitutional cover to sodomy prohibitions in the late twentieth century, the *Lawrence* majority noted that "there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter," that "[l]aws prohibiting sodomy do not seem to have been enforced against consenting adults acting in private," and that "American laws targeting same–sex couples did not develop until the last third of the 20th century." *Id.* at 568–70. The *Lawrence* Court, then, seemed to recognize that many public policies whose application specifically targeted gays and lesbians were rooted in an anti–gay animus that did not arise until after Stonewall. *See* William Eskridge, *Body Politics:* Lawrence v. Texas *and the Constitution of Disgust and Contagion*, 57 FLA. L. REV. 1011, 1014–20 (2005) (detailing the extensive efforts of the Save Our Children campaign to rescind county–level protections proscribing employment discrimination based on sexual orientation in Dade County, Florida, and elsewhere, as well as to prevent gay individuals from being eligible to adopt children).

[51] *See Lawrence*, 539 U.S. at 578 ("The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government"). Justice Scalia, in dissent, famously believed the downstream

Although criminalizations of sodomy have functioned with some regularity as mechanisms to enshrine formally the stigmatization of homosexuality in law,[52] not all prohibitions on sodomy explicitly target nonprocreative intercourse between members of the same sex for criminalization as did the Texas "homosexual conduct" statute challenged in *Lawrence*.[53] This distinction mattered in particular for Justice O'Connor, herself a part of the original *Bowers* majority, as she concurred in the outcome of *Lawrence* but did not subscribe to the Court's substantive due process analysis.[54] Instead, Justice O'Connor advocated for the retention of the core holding in *Bowers* – that substantive due process did not bar criminal prohibitions on sodomy so long as such statutes apply equally to homosexual and heterosexual intimacy. Justice O'Connor simultaneously claimed the Texas "homosexual conduct" statute should fail to survive rational basis review pursuant to the Equal Protection Clause as the law "treats the same conduct differently based solely on the participants" and "makes homosexuals unequal in the eyes of the law by making particular conduct – and only that conduct – subject to criminal sanction."[55] For Justice O'Connor, then, prohibitions on sodomy and crimes against nature are not facially invalid due to their unreasonable interference with a constitutionally protected liberty interest, but rather, *may* be unconstitutional if by their discriminatory terms or through their discriminatory application they visit sufficient inequities upon politically vulnerable groups so as to violate the constitutional guarantee to equal protection under the law.[56] This more conservative

consequences of *Lawrence* would extend far beyond the invalidation of criminal prohibitions on sex between consenting adults, inveighing that "[s]tate laws against bigamy, same–sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of *Bowers'* validation of laws based on moral choices." *Id.* at 590 (Scalia, J., dissenting).

[52] *See* William Eskridge, Hardwick *and Historiography*, 1999 U. ILL. L. REV. 631, 632–33 (1999).

[53] *See, e.g.*, GA. CODE. ANN. § 16–6–2(a)(1) ("A person commits the offense of sodomy when he or she performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another"). Even the Texas prohibition against sodomy did not always target gay sex as explicitly as the statute challenged in *Lawrence* did. While the state's original crime against nature statute (enacted in 1860) was mum on precisely what sexual conduct it sought to penalize – indeed, the law was so vague that Texas courts regularly overturned convictions pursuant to it until 1879, when the state legislature repealed the requirement that criminal laws be "expressly defined" in order to be enforceable – the Texas sodomy statute as revised in 1973 and as challenged in *Lawrence* did not attempt even the barest sleight of hand to conceal which part of the population it sought to target. Dale Carpenter, *The Unknown Past of* Lawrence v. Texas, 102 MICH. L. REV. 1464, 1469–72 (2004).

[54] *Lawrence*, 539 U.S. at 579.

[55] *Id*. at 581 (O'Connor, J., concurring).

[56] *See id.* at 579–85 (majority opinion).

privacy jurisprudence – rejected by the majority in *Lawrence* – would dramatically limit the extent to which the Constitution protects individuals' right to engage in criminalization by the states.

While contemporary reactions to the *Lawrence* holding either celebrated its forceful defense of individual liberty or lamented it for promoting tolerance of homosexuality, the decision itself went to some lengths in clarifying what exactly the case did *not* concern.[57] Most likely to inoculate itself against the parade of horribles cited by Justice Scalia's dissent as potential ramifications of the *Lawrence* rule going forward,[58] the decision stipulated in relevant part:

> The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime.[59]

In this paragraph clarifying the scope of the *Lawrence* rule, the majority enumerated a series of circumstances involving sexual conduct that by implication remain constitutionally regulable despite the central holding in the instant case.[60] Namely, the exceptions paragraph suggests that the substantive due process doctrine as articulated in *Lawrence* was not intended to mandate the invalidation of criminal prohibitions on sex between adults and minors, forcible sex, commercial sex, or public sex, and instead makes evident that the engine driving the majority's critical evaluation of the Texas homosexual conduct law was the burden imposed by the statute on private, consensual sexual intimacy between adults.[61] In fact, as of the date of this publication, no concerted legal effort has been made to employ *Lawrence* as a mechanism for invalidating any of the criminal prohibitions enumerated above. What the Court neglected to

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[57] *Id.* at 578.

[58] *See supra* note 51 and accompanying text.

[59] *Lawrence*, 539 U.S. at 578.

[60] *Id.*

[61] *Id.* The exceptions paragraph also maintains that *Lawrence* should not be read as an endorsement of the notion that there exists any federal constitutional protection for same–sex marriage, but this did not stop Justice Kennedy from citing *Lawrence* as a supporting authority in decisions invalidating both federal and state same–sex marriage bans in the 2010s. *Id.*; *see, e.g.*, Obergefell v. Hodges, 576 U.S. 644, 667 (2015); United States v. Windsor, 570 U.S. 744, 772 (2013).

consider, however, and the object of inquiry in Part II below, is the possibility that the core holding in *Lawrence* – by my reading, that statutes criminalizing private sexual intimacy between consenting adults should be unenforceable against *any* conduct – might be construed so narrowly that it would permit states to continue imposing deprivations of individuals' liberty and property, both directly and indirectly, as a result of criminal statutes facially proscribing sodomy.[62] In other words, despite all its promise for the deregulation of consensual sexual conduct, the impact of the *Lawrence* decision is constrained by a nontrivial omission: the absence of precise and thorough guidelines for ensuring compliance with the constitutional demands both specified in and implied by the holding.[63]

III. LIFE AFTER *LAWRENCE*: THE MIRAGE OF AUTOMATIC INVALIDATION

The *Lawrence* decision is important not only for what it contains, but also for what it does not.[64] As I detailed in Part I, the majority in *Lawrence* took conscious steps using the exceptions paragraph to reassure its skeptics that a diverse swath of prohibitions on sexual conduct would remain constitutionally viable even after the decision explicitly overruled *Bowers v. Hardwick*,[65] and held that the Texas homosexual conduct *statute* – not merely its application – infringed on the substantive rights guaranteed by due process.[66] The decision does not, however, denote with any precision how states should proceed to revise their criminal or administrative codes to ensure consistency with the majority's reading of substantive due process in the wake of the *Lawrence* ruling.[67] This Part argues that the absence of precise and thorough remedial guidelines to direct policy implementation in the *Lawrence* holding – though by no means a unique feature of that decision – confers excessive discretion on state judicial and prosecutorial officials to interpret selectively and narrowly their constitutional obligations under *Lawrence* and, in so doing,

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[62] *Lawrence*, 539 U.S. at 562, 578; *see* discussion *infra* Part II. Mary Anne Case was nearly alone among prominent scholars in that she almost immediately recognized that the promise of the *Lawrence* holding might prove illusory or incomplete, though the concerns she raises – largely related to linguistic ambiguity in the decision – are separate from those I discuss in this Article. Mary Anne Case, *Of "This" and "That" in* Lawrence v. Texas, 55 SUP. CT. REV. 75, 83 ("Although I hope I am wrong, I can imagine that, in the same way as *Bowers* turned out … in the end not to be as bad as was feared for the progress of gay rights, *Lawrence* may turn out not to be as good as many now hope").

[63] *Lawrence*, 539 U.S. at 578.

[64] *See id.*

[65] 478 U.S. 186 (1986); *Lawrence*, 539 U.S. at 578 ("*Bowers*…ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled").

[66] *Id.*

[67] *See id*.

enables the continued (if limited) persistence of exactly the sort of legal regime that the *Lawrence* Court ostensibly intended to eradicate.[68] In Part II-A, I provide an overview of the complications inherent in judicially directed alterations to public policy in a polity where governance is characterized by the radical fragmentation of authority; then, in Parts II-B through II-E, I analyze the manner in which legislative, judicial, and prosecutorial decisions made subsequent to *Lawrence* have allowed statutes criminally regulating sodomy to endure.[69]

A. Implementing Judicial Decisions in a Decentralized Polity

Thanks largely to the power of judicial review, courts play a more central role in the policy process in the United States than in many other advanced industrial democracies.[70] In a formal sense, judicial review permits United States courts to strike down actions by legislative, executive, and even other judicial officials if such actions are inconsistent with the U.S. Constitution.[71] Beyond this well-established conceptualization of judicial review as a negative power – i.e., the capacity to invalidate legislative and administrative policies they gauge as unconstitutional – scholars also understand the combination of judicial review alongside certain other features of the American constitutional

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[68] *See id*.

[69] *See id.*

[70] *See generally* GORDAN SILVERSTEIN, LAW'S ALLURE: HOW LAW SHAPES, CONSTRAINS, SAVES, AND KILLS POLITICS 1–3 (2009) (maintaining that "[l]aw and politics cannot be disentangled in the United States" and that this relationship "has something to do with American political culture itself"); MARTIN SHAPIRO & ALEC STONE SWEET, ON LAW, POLITICS, & JUDICIALIZATION (2002) (noting in their study of the judicialization of politics that while other countries in the post–World War II era have adopted some form of judicial review, the practice is most common and most closely associated with the United States); JUDITH N. SHKLAR, LEGALISM: AN ESSAY ON LAW, MORALS, AND POLITICS 12 (1964) (suggesting that "[i]f many lawyers, in America especially, do recognize that the courts do legislate and make basic social choices, this is less true and even less accepted in other countries" and that in the United States "both the nature of the issues placed before the courts and the greater scope of choice available put the judiciary inevitably into the very midst of the great political battles of the nation"); Lawrence Baum, *The Supreme Court in American Politics*, ANN. REV. POL. SCI. 161 (2003) (detailing the extent of judicial interventions in American public policy throughout the second half of the twentieth century); Jonathan D. Casper, *The Supreme Court and National Policy Making*, 70 AM. POL. SCI. REV. 50 (1976) (arguing that the Supreme Court provides more than simply a rubber stamp for the policy preferences of the elected branches).

[71] *See* Martin v. Hunter's Lessee, 14 U.S. 304, 344 (1816) (holding that the United States Supreme Court could overrule state courts of last resort as regards disputes over federal law); Marbury v. Madison 5 U.S. 137 (1803) (involving one of the first prominent instances of negative judicial review by the United States Supreme Court vis–à–vis a federal statute).

order as positively encouraging judicial participation in the policy process.[72] More particularly, as political polarization in Congress increases, and when nonuniform partisan control across the Presidency and the chambers of Congress abets legislative gridlock, courts increasingly fill the vacuum resulting from inaction in the elected branches by providing answers to policy questions considered either too controversial or politically sensitive by officials concerned with reelection.[73] Even when federal elected institutions are not gridlocked, courts participate actively in determining the distribution of rights, duties, and obligations in the American polity. Specifically, judicial decisions fill interstitial gaps in the terms of legislation, regulation, or existing judicial precedent by providing a definitive legal interpretation of ambiguous or imprecise language whose meaning is the subject of litigation.[74]

Despite the enormous authority enjoyed by American courts exercising judicial review, the enforcement of judicial decisions, by and large, occurs through a constitutional leap of faith.[75] In other words, even if the Supreme Court holds that a given state law or practice is unconstitutional on its face, there exists no guarantee that the state in question – let alone states where equivalent or substantially comparable statutes, rules, or practices are also in place[76] – will immediately cease

[72] *See, e.g.*, Jeb Barnes, *Adversarial Legalism, the Rise of Judicial Policymaking, and the Separation–of–Powers Doctrine*, *in* MAKING POLICY, MAKING LAW: AN INTERBRANCH PERSPECTIVE 35, 35–36 (Mark C. Miller & Jeb Barnes eds., 2004) (arguing that the fragmentation of authority across American institutions has "placed courts at the center of important political and policy disputes almost since [the country's] founding" and detailing how an excessively formalistic conception of the separation of powers encourages the underestimation of American judicial power).

[73] *See* Jeb Barnes, *Bringing the Courts Back In: Interbranch Perspectives on the Role of Courts in American Politics and Policy Making*, 10 ANN. REV. POL. SCI. 25, 27–28 (2007) (contending that the structure of the U.S. government incentivizes "games of political 'hot potato,' in which each branch tries to fob off controversial issues on another").

[74] *See, e.g.*, THOMAS M. KECK, JUDICIAL POLITICS IN POLARIZED TIMES (2014) (detailing the increase in the employment of litigation as a means attempting to resolve divisive political issues); James J. Brudney, *The Supreme Court as Interstitial Actor: Justice Ginsburg's Eclectic Approach to Statutory Interpretation*, 70 OHIO ST. L.J. 889, 911–12 (2009) (describing courts as participating in an ongoing dialogue with other public institutions through their corrections of legislative policy).

[75] *See, e.g.*, Kevin C. Walsh, *Judicial Departmentalism: An Introduction*, 58 WM. & MARY L. REV. 1713, 1729 (2017) (maintaining that judicial determinations of public policy only create obligations as judgments for the parties, through the law of remedies, and as precedent for other courts, but – unlike proponents of judicial supremacy – that judicial decisions do not bind legislative or executive ventures into constitutional interpretation).

[76] The expectation that states should cease enforcing a statute if it is comparable to one from another state declared constitutionally deficient by the Supreme Court has been called judicial universality by Josh Blackman. Blackman, *supra* note 5, at 1155–59.

enforcing the law or engaging in the practice.[77] For this reason, while a judicial decision (from the Supreme Court or otherwise) bringing a policy into constitutional disrepute is a necessary first step in preventing continued implementation, the announcement of the holding alone is not a sufficient condition for ensuring enforcement of the policy ceases. I refer to this common expectation – the assumption that the immediate consequence of negative judicial review is the abandonment of the practice deemed unconstitutional – as the mirage of automatic invalidation.

While United States courts may be uniquely well-suited to contribute to the process of formulating public policy, they lack the requisite institutional characteristics to participate as meaningfully in policy implementation.[78] In particular, it is a challenge for United States courts to guarantee compliance with their holdings due to (1) the fundamental passivity of American judicial institutions,[79] and (2) the decentralization of political authority in the American federal system.[80] Institutional passivity complicates the implementation of judicially constructed public policy because United States courts are constitutionally barred from issuing decisions or directives in the absence of an active case or controversy; powerless to root out instances of noncompliance independently, they must instead wait for litigants to discover or experience defiance of judicial rulings and bring suit themselves as a

[77] *See*, *e.g.*, Mark Golub, *Remembering Massive Resistance to School Desegregation*, 31 L. & HIST. REV. 491 (2013) (chronicling the difficulty of implementing the *Brown v. Board of Education* holding throughout the southern United States, where recalcitrant officials engaged in a program of so–called massive resistance to school integration).

[78] *See* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 15–21 (1991) (arguing that institutional and organizational features of American courts lead to special challenges for the enforcement of judicial policy revisions).

[79] *See* U.S. CONST. art. III, § 2 (delineating the constitutional case or controversy requirement, which limits U.S. judicial power to those instances in which there exists a live dispute, and thus prohibits courts from issuing advisory opinions or unsolicited remedial holdings as to do so would constitute deciding disputes in which litigants have not brought a case).

[80] *See* JAMES Q. WILSON, BUREAUCRACY 298–300 (1989) (contrasting the concentration of political authority in parliamentary systems with the policy process in the United States which he compares to a "barroom brawl" where "[a]nybody can join in, the combatants fight all comers and sometimes change sides, no referee is in charge, and the fight lasts not for a fixed number of rounds but indefinitely or until everybody drops from exhaustion"). In addition to the multiplicity of institutions in the national government responsible for the development of public policy – the product of the horizontal fragmentation of authority across legislative, executive, and judicial branches as well as the abundance of policy–relevant agencies, offices, and bureaus in the administrative state – American political power is also vertically divided between the national government and the fifty state governments which retain powers not delegated to federal institutions. U.S. CONST. amend. X.

corrective action.[81] Assuming that an adequate remedy for noncompliance exists – itself not always a certainty – judicial passivity nevertheless shifts the burden for monitoring and reporting the compliance status with a given ruling to stakeholder groups and individuals in the polity. If such interested parties encounter public institutions ignoring (whether willfully or negligently) a judicial decision but are unaware of their legal rights to initiate litigation challenging noncompliance – or are unable or unwilling to contest non-implementation themselves – American courts lack the authority to launch the pursuit of legal recourse independently.

The challenges presented by judicial passivity for the enforcement of court decisions are magnified by the decentralization of political authority in the United States. As the Constitution divides power vertically between national and state governments, and horizontally through the separation of powers into legislative, executive, and judicial functions at both the national and state levels, the responsibility for formulating and implementing public policy in the United States is fragmented across hundreds of thousands of individuals.[82] The separation of powers presents a challenge to the consistent enforcement of judicial rulings as American courts lack directly accountable agents responsible for affirmatively overseeing the implementation phase of a court decision.[83] Rather, courts rely on cooperation by officials serving in the myriad other public institutions whose compliance is required for judicial decisions to be

[81] *See* U.S. CONST. art. III, § 2.

[82] This crude estimate of hundreds of thousands is based on the following: in addition to the 535 members of the U.S. Congress, there are hundreds of judges serving in the federal judiciary and, according to the Congressional Research Service, over 2 million members of the federal executive branch civilian workforce even excluding the postal service. JULIE JENNINGS & JARED C. NAGEL, CONG. RESEARCH SERV., R43590, FEDERAL WORKFORCE STATISTICS SOURCES: OPM AND OMB (2020). Though presumably not all 2 million federal civil servants have expansive policy discretion, many do; when added to the population of state legislators – according to the NCSL, there are 7383 across the United States – as well as state judges and bureaucrats as well as local (city and county) public officials, it would seem the crude estimate offered here may in actuality be a conservative one. *See Number of Legislators and Length of Terms in Years*, NAT'L CONF. ST. LEGISLATURES, https://www.ncsl.org/research/about–state–legislatures/number–of–legislators–and–length–of–terms.aspx [https://perma.cc/8HJ2-FSJE] (last visited Jan. 25, 2021).

[83] *See* Clifford J. Carrubba and Christopher Zorn, *Executive Discretion, Judicial Decision Making, and Separation of Powers in the United States*, 72 J. POL. 812, 822–23 (2010) (finding that the executive branch's willingness to comply with U.S. Supreme Court holdings is inconsistent and incomplete, as "[h]igh court influence critically depends upon indirect enforcement of its decisions by the public"); *but see* David S. Law, *A Theory of Judicial Power and Judicial Review*, 97 GEO. L.J. 723, 732 (2009) (arguing that "[t]he ability of courts to mobilize the public against the government means that government disobedience of courts carries potentially severe consequences.").

effectively implemented.[84] This includes, so far as substantive criminal law is concerned, the expectation that law enforcement will cease arresting individuals for allegedly having committed offenses if the relevant statutory criminal prohibition – or one substantially comparable to it from another state – has been found unconstitutional by the Supreme Court. Likewise, if for some reason an individual experiences a deprivation of their rights or liberties as a result of allegedly having violated a presumptively unconstitutional law, inferior courts (whether federal or state) reviewing the arrest or conviction are generally expected to follow established Supreme Court precedent and refuse to permit the enforcement of the invalidated prohibition.[85]

The lesson passed down from history and reinforced by contemporary experience (including the subject matter of this Article), is that common expectations about the enforcement of judicial decisions – corollaries to the mirage of automatic invalidation – may easily be frustrated by entrenched noncooperation, or even active defiance, among recalcitrant officials including but not limited to judges, legislators, police, and prosecutors.[86] Further, the decentralization of political authority presents an even more vexing difficulty given the passivity of the American judiciary: if, for instance, multiple states refuse to cease enforcement of laws presumed unconstitutional based on a decision by the Supreme Court, preventing continued noncompliance with the holding may require initiating separate litigation in each noncooperative jurisdiction. This inefficiency – among the pathologies inherent in a federal system – substantially raises the costs associated with eradicating localized resistance to judicially directed policy revisions.

Taken together, the passivity of judicial institutions and the decentralization of political authority in the United States generate serious complications for ensuring that the legal, social, and economic effects of court rulings are not circumscribed as a result of either deliberate or

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[84] ROSENBERG, *supra* note 78, at 15 (maintaining that "for Court orders to be carried out, political elites, electorally accountable, must support them and act to implement them").

[85] *See id.* at 18 (noting that appellate courts rely on the willingness of trial courts to implement their holdings as "[o]nly rarely do appellate courts issue final orders," leaving "lower–court judges with a great deal of discretion").

[86] Thoroughgoing, organized noncompliance with *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954) throughout the American South is probably the most prominent example of this phenomenon. *See id.* at 39–106 (making the case that widespread integration of public facilities and expansion of voting rights occurred primarily as a function of legislative and executive, rather than judicial, action). More recently, some local officials attempted to avoid compliance with the Supreme Court's decision to invalidate state–level same–sex marriage bans in *Obergefell v. Hodges*, 576 U.S. 644 (2015), though nothing even approaching the campaign of massive resistance in the South after *Brown*. *Brown*, 347 U.S. at 483; Tiffany C. Graham, Obergefell *and Resistance*, 84 UMKC L. REV. 715, 725–31 (2016).

negligent noncompliance with judicial decisions. To overcome these institutional obstacles foists considerable demands on both litigants and advocates to ferret out acts of noncompliance across many geographic subunits and then navigate legal challenges in multiple fora across the polycentric system of American government. The remaining subsections of Part II analyze the manner in which public officials have approached the criminalization of sodomy after *Lawrence v. Texas*, and present evidence suggesting that due to precisely the sort of institutional constraints on the judiciary discussed here, criminal prohibitions on sodomy – rather than being the object of automatic invalidation – have survived their intended death.[87]

B. Formal Changes to State Sodomy Prohibitions after Lawrence

By the time *Lawrence* was decided, the majority of U.S. states had decriminalized consensual sodomy but statutory prohibitions on consensual sodomy or crimes against nature remained enforceable in

[87] 539 U.S. 558 (2003). My argument is consistent with Howard Wasserman's contention that constitutional adjudication rests on the principle (among others) that "[c]onstitutionally defective laws do not disappear or cease to be law following a judicial ruling," that a "Court's declaration of constitutional invalidity...does not mean the law ceases to take effect or ceases to [] exist once it has taken effect." Howard Wasserman, *Precedent, Non–Universal Injunctions, and Judicial Departmentalism: A Model of Constitutional Adjudication*, 23 LEWIS & CLARK L. REV. 1077, 1080 (2020).

fourteen states:[88] Alabama,[89] Florida,[90] Idaho,[91] Kansas,[92] Louisiana,[93] Michigan,[94] Mississippi,[95] Missouri,[96] North Carolina,[97] Oklahoma,[98]

[88] These remaining statutory prohibitions on sodomy are comparable in many regards to the state statutes enacted to organize racial segregation that were not repealed for decades after *Brown*. Brown v. Bd. of Educ. of Topeka, 347 U.S. 483 (1954); *see Still on the Books: Jim Crow and Segregation Laws Fifty Years after* Brown v. Board of Education*, a Report on Laws Remaining in the Codes of Georgia, Louisiana, Mississippi, Missouri, South Carolina, Virginia, and West Virginia,* 2006 MICH. ST. L. REV. 460 (2006) *[hereinafter Still on the Books]*. By contrast, however, while laws segregating public facilities were not widely enforced once massive resistance came to an end, the tendency for jurisdictions to continue enforcing criminal prohibitions on sodomy I examine in Parts II–C and II–D may not yet be in its decline. *Still on the Books*; *see also* discussion *infra* Part II–C and II–D.

[89] ALA. CODE §§ 13A-6-63 to -64 (2013). In 2019, the Alabama state legislature amended the state's regulations on sexual conduct by striking the term "deviate sexual intercourse" from the code, formerly defined as "[a]ny act of sexual gratification between persons not married to each other involving the sex organs of one person and the mouth or anus of another," but then instead created a new statutory definition of "sodomy," defined as "[a]ny sexual act involving the genitals of one person and the mouth or anus of another person." S.B. 320, 2019 Reg. Sess. (Al. 2019). Under the revised statutes, sodomy remains a criminal offense in the event that the act is forcible, one party lacks the physical or mental capacity to give consent, or there is a sufficiently large age gap between the parties. ALA. CODE §§ 13A-6-63 to -64 (2019). The provision from the pre–revision code which had defined deviate sexual intercourse as only occurring between unmarried persons had been found by a state appellate court to violate equal protection in 1986 but had not yet been revised prior to the 2019 legislative session. Joseph A. Colquitt, *The Alabama Criminal Code – 25 Years and Counting*, 56 ALA. L. REV. 967, 988–89 (2005).

[90] FLA. STAT. § 800.2 (2021). Florida's original crimes against nature statute was struck down by the state supreme court for unconstitutional vagueness in 1971, but the same court held concurrently that anal and oral sex could still be prosecuted pursuant to the state's unnatural and lascivious conduct statute. Franklin v. State, 257 So.2d 21, 24 (Fla. 1971).

[91] IDAHO CODE § 18–6605 (2021).

[92] KAN. STAT. ANN. § 21–5504 (2011), *invalidated by* State v. Franco, 319 P.3d 551 (Kan. Ct. App. 2014).

[93] LA. STAT. ANN. § 14:89 (2018), *invalidated by* La. Electorate of Gays and Lesbians, Inc. v. Connick, 902 So.2d 1090 (La. Ct. App. 2005).

[94] MICH. COMP. LAWS § 750.158 (2021). In addition to sodomy, the Michigan code penalizes acts of "gross indecency." *Id.*

[95] MISS. CODE ANN. § 97–29–59 (2021); *but cf.* Doe v. Hood, 345 F. Supp. 3d 749, 762 (D. Miss. 2018) (calling into doubt constitutional validity of Mississippi sodomy statute).

[96] MO. REV. STAT. § 566.060 (2005).

[97] N.C. GEN. STAT. § 14–177 (2021), *invalidated by* State v. Whiteley, 616 S.E.2d 576 (N.C. Ct. App. 2005).

[98] OKLA. STAT. tit. 21, § 886 (2021).

South Carolina,[99] Texas,[100] Utah,[101] and Virginia.[102] In other states, statutes criminally sanctioning sodomy or crimes against nature remained on the books but had been invalidated by state courts prior to *Lawrence*.[103]

While the decision in *Lawrence* appears rather clearly to render any continuing efforts to criminalize private, consensual sexual conduct impermissible, few of the states whose sodomy prohibitions were still operable in early 2003 took affirmative steps to formally repeal their statutes criminalizing sodomy after the decision was handed down. However, state legislatures in Alabama, Missouri, Utah, and Virginia revised their state codes in the years following *Lawrence* to approach consistency with the Court's endorsement of constitutional protections for private, consensual sexual behavior.[104] In Alabama, the legislature revised the state's criminal code in 2019 by excising the prohibition on deviate sexual intercourse and replacing it with criminal prohibitions on sodomy involving the use of force, sex with minors, or where one party lacks capacity to consent.[105] This followed an earlier action by the Missouri state legislature, which amended its sodomy statute to criminalize only nonconsensual or forcible sodomy.[106] The state legislatures of Virginia and Utah followed a similar trajectory, altering their states' criminal codes

[99] S.C. ANN. § 16–15–120 (2021).

[100] TEX. PENAL CODE. ANN. § 21.06(a) (2021), *invalidated by* City of Dallas v. England, 846 S.W.2d 957 (Tex. Crim. App. 1993).

[101] UTAH CODE ANN. § 76–5–403 (2019).

[102] VA. CODE ANN. § 18.2–361 (2014), *invalidated by* MacDonald v. Moose, 710 F.3d 154 (4th Cir. 2013).

[103] *See, e.g.*, Powell v. State, 510 S.E.2d 18, 26 (Ga. 1998) (holding that the Georgia sodomy statute upheld by the U.S. Supreme Court in *Bowers* was a violation of the right to privacy as protected in the Georgia Constitution); Gay & Lesbian Advocates & Defs. v. Attorney Gen., 763 N.E.2d 38, 40 (Mass. 2002) (holding that private, consensual sexual conduct cannot be constitutionally criminalized in Massachusetts).

[104] Lawrence v. Texas, 539 U.S. 558 (2003); *see infra* notes 106–107 and accompanying text.

[105] *See supra* note 89 and accompanying text.

[106] *Compare* MO. REV. STAT. § 566.060 (2019) (stipulating that a person commits sodomy "if he or she has deviate sexual intercourse with another person who is incapacitated, incapable of consent, or lacks the capacity to consent, or by the use of forcible compulsion"), *with id.* § 566.090(1) (2005) (criminalizing sexual misconduct, which is defined as engaging in "deviate sexual intercourse with another person of the same sex"). Unlike the Alabama definition, the Missouri statutes' definition of deviate sexual intercourse, still in effect today, does not limit deviate sexual intercourse to sex between unmarried persons. MO. REV. STAT. § 566.010(3) (2021). Prior to both the Missouri statute's modification as well as *Lawrence*, the Missouri sexual misconduct law was invalidated for counties in the northwestern part of the state by the Missouri Court of Appeals for the Western District, which held that defendants could only be convicted of sexual misconduct if the state could prove that the defendant's sexual partner did not consent to the act. *Lawrence*, 539 U.S. at 558; State v. Cogshell, 997 S.W.2d 534, 537 (Mo. Ct. App. 1999).

to ensure as a legislative matter that private, consensual sodomy was no longer formally a criminal offense in 2014 and 2019, respectively.[107] In addition to these four states, legislators in Maryland and Montana enacted bills to repeal prohibitions on sodomy that remained in their states' codes despite pre-*Lawrence* litigation in each state's courts having invalidated the sodomy bans.[108]

Prior to the Virginia General Assembly's decision to decriminalize sodomy in 2014, the commonwealth's crimes against nature statute was already of doubtful constitutionality due to *Lawrence*.[109] In *MacDonald v. Moose*, the Fourth Circuit interpreted *Lawrence* to hold that the provision of the Virginia crimes against nature statute criminalizing sodomy was facially unconstitutional.[110] In 2005, William Scott MacDonald was convicted of criminal solicitation based on a state court's finding that he had solicited oral sex from a young woman.[111] The Virginia statute on criminal solicitation imposes felony sanctions on "[a]ny person who commands, entreats, or otherwise attempts to persuade another person to commit a felony other than murder."[112] Therefore, some predicate felonious offense whose commission was solicited by the accused is a necessary condition for a criminal solicitation conviction.[113] In MacDonald's case, the predicate for the solicitation charge was the offer

[107] *See* VA. CODE ANN. § 18.2–361 (2014) (defining crimes against nature as bestiality and incest); *see also* S.B. 14, 2014 Sess. (Va. 2014) (removing sodomy from the statutory list of crimes against nature in § 18.2–361); *Compare* UTAH CODE ANN. §§ 76–5–403(1)–(3) (2017) (making it a class B misdemeanor if someone "engages in any sexual act with a person who is 14 years of age or older involving the genitals of one person and mouth or anus of another person") *with id.* § 76–5–403 (2019) (criminalizing only forcible sodomy).

[108] H.B. 81, 441st Gen. Assemb., Reg. Sess. (Md. 2020) ((repealing the criminal prohibitions on sodomy from §§ 3–321 and 3–322 of the state's criminal code as well as striking sodomy from the list of statutory examples of "sexual molestation or exploitation" in the definitions statute governing procedures in the state's juvenile proceedings at § 3–801(aa)(5)); *compare* MONT. CODE ANN. § 45–2–101(20) (1997) (defining deviate sexual relations as "sexual contact or sexual intercourse between two persons of the same sex or any form of sexual intercourse with an animal") *with id.* § 45–2–101(21) (2019) (defining deviate sexual relations only as sexual intercourse with an animal)l; Williams v. Glendening, No. 98036031/CL–1059, 1998 WL 965992, at *7 (Md. Cir. Ct. Oct. 15, 1998) (clarifying that the Maryland sodomy ban should not apply to private, consensual sex); Gryczan v. State, 942 P.2d 112, 123 (Mont. 1997) (holding that Montana's deviate sexual conduct statute violates the right to privacy protected by Article II, Section 10 of the Montana Constitution).

[109] Lawrence v. Texas, 539 U.S. 558 (2003); *see supra* note 102 and accompanying text.

[110] 710 F.3d 154, 166 (4th Cir. 2013); *see Lawrence*, 539 U.S. at 558.

[111] MacDonald v. Moose, 710 F.3d 154, 157–158 (4th Cir. 2013).

[112] VA. CODE ANN. § 18.2–29 (2021).

[113] *See id.*

to commit what remained on the Virginia books as sodomy.[114] At trial, MacDonald unsuccessfully moved to dismiss the criminal solicitation charge "on the ground that the predicate felony – the anti-sodomy provision – violated his due process rights."[115] After his conviction, MacDonald initiated federal proceedings, where the Eastern Virginia District Court rejected his claim that the sodomy prohibition was unconstitutional as applied "because the Commonwealth had properly treated seventeen-year-olds as children, and because the *Lawrence* decision had stressed that '[t]he present case does not involve minors,' the anti-sodomy provision could constitutionally serve as a predicate offense under the solicitation statute."[116] The District Court thus attempted to locate a constitutional stopgap for the Virginia crimes against nature statute (which banned all sodomy, regardless the age or consent status of the participants) in *Lawrence*'s exceptions paragraph by reading that case as forbidding the criminalization of private, nonprocreative sex between consenting adults, but not proscribing the enforcement of sodomy bans so long as the conduct underlying the charge qualifies under one of *Lawrence*'s exceptions.[117]

MacDonald appealed from the Eastern District of Virginia to the Fourth Circuit Court of Appeals, where a three-judge panel endorsed his theory of *Lawrence*'s scope.[118] The Fourth Circuit panel recognized a broad conception of the constitutional safeguards protecting private, consensual sexual intimacy, maintaining that "[i]n *Lawrence*, the Supreme Court plainly held that statutes criminalizing private acts of consensual sodomy between adults are inconsistent with the protections of liberty assured by the Due Process Clause of the Fourteenth Amendment."[119] The Court elaborated further that because the *Lawrence* majority unambiguously overruled *Bowers*, and because the Virginia crimes against nature statute was "materially indistinguishable from" the Georgia statute at issue in *Bowers*, faithful adherence to *Lawrence* compels the conclusion "that the anti-sodomy provision, prohibiting sodomy between two persons without any qualification, is facially unconstitutional."[120]

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[114] *MacDonald*, 710 F.3d at 157–158; *see id.*

[115] *MacDonald*, 710 F.3d at 157.

[116] *Id.* at 159 (quoting Lawrence v. Texas, 539 U.S. 558, 578 (2003)).

[117] Lawrence v. Texas, 539 U.S. 558, 578 (2003); *see supra* notes 60–63 and accompanying text.

[118] *MacDonald*, 710 F.3d at 159, 167. Namely, MacDonald asserted that "the Virginia courts have impermissibly interpreted *Lawrence* as authorizing them to recast the anti–sodomy provision – which by its terms bans all sodomy offenses – and apply the provision solely to sodomy offenses that involve minors." *Id.* at 160.

[119] *Id.* at 163 (citing *Lawrence*, 539 U.S. at 578).

[120] *Id.* at 163–67. The *MacDonald* majority did not dispute the abstract possibility that *some* criminal regulations of sodomy are in all likelihood constitutionally permissible pursuant to *Lawrence*'s exceptions paragraph so long as the prohibitions are drafted in more specific terms than the Virginia crimes against

The Fourth Circuit, thus, adamantly rejected the constitutional integrity of a state statute that criminalizes sodomy if the law is drafted without any qualifying or explicatory criteria that make clear the statute's prohibitions do not apply to private, consensual sex between adults.[121] Perhaps of equal significance, the Court's holding suggests that a statute criminalizing the type of behavior deemed constitutionally protected by *Lawrence* is invalid not only in the context of direct enforcement (as in *Lawrence*), but also if employed indirectly as a statutory felony predicate to a criminal solicitation charge.[122] As discussed at greater length in Parts II-C and II-D below, there are common, ongoing practices in a number of states that employ both pre- and post-*Lawrence* sodomy convictions to justify the imposition of legal, administrative, and financial burdens on individuals in a manner that contravenes the notion articulated in *MacDonald* that neither direct nor collateral enforcement of statutes criminalizing consensual sodomy is constitutionally sound.[123]

Contrary, then, to conventional wisdom in both the legal academy and popular imagination, to assert that *Lawrence* invalidated all sodomy laws is an oversimplification, and few states took steps formally to repeal criminal prohibitions on sodomy in their jurisdiction after 2003.[124] Rather, *Lawrence* cast explicit constitutional disapproval on the criminalization of private sexual intimacy between consenting adults, but through the exceptions paragraph let multiple avenues remain which state regulations on sexual behavior might nevertheless survive.[125] To be clear, I take no steps here to dispute that there may exist compelling policy rationales for criminalizing some of the conduct left constitutionally eligible for sanction by the exceptions paragraph (e.g., sex with young children, sexual intercourse in which a party does not or cannot consent). I argue, however,

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nature had been. *Id.* at 165–66. The Fourth Circuit maintained, however, that amending the state's sodomy law to pass constitutional muster was a legislative, rather than a judicial, task, as "[t]he [Supreme] Court's ruminations [in *Lawrence*] concerning the circumstances under which a state might permissibly outlaw sodomy, however, no doubt contemplated deliberate action by the people's representatives, rather than by the judiciary." *Id.* at. 165.

[121] *See id.* at 166–67. Some critics disagree with the Fourth Circuit's treatment of the Virginia crimes against nature statute, alleging that rather than "treating [the crimes against nature statute] as partially facially unconstitutional, the Fourth Circuit should have treated it as the Virginia courts did: unenforceable in those circumstances in which its enforcement would infringe on the personal liberty interests recognized in *Lawrence*, but otherwise enforceable." Kevin C. Walsh, *Observations on* MacDonald v. Moose, 65 S. C. L. REV. 951, 960 (2014).

[122] *Lawrence*, 539 U.S. at 578–79.

[123] *See infra* Part II–D.

[124] *See generally* MISS. CODE ANN. §§ 45–33–23(h)(xi), 97–29–59; GA. CODE. ANN. § 42–1–12(a)(10)(B)(v); S.C. CODE ANN. § 23–3–430(C)(11); N.C. GEN. STAT. § 14–177; IDAHO CODE ANN. § 18–6605; LA. STAT. ANN. § 14:89(A)(2) (2006).

[125] *See Lawrence,* 539 U.S. at 578.

that to permit the continued imposition of criminal liability – whether directly or indirectly – pursuant to state laws that on their face penalize private sexual intimacy between consenting adults perverts the core rule in *Lawrence* even if, as in *MacDonald*, the specific conduct the state sought to punish in a given case would itself have been illegal had the prohibitory statute been more carefully drafted. As I demonstrate below, the criminal regulation of sodomy has endured after *Lawrence* through precisely the kinds of maneuvers rejected in *MacDonald*, and in the subsections that follow, I catalog the direct and indirect means by which criminal prohibitions on sodomy have survived their own purported death.

C. Direct Enforcement of Sodomy Laws After Lawrence

Developments in the criminal regulation of sodomy over the past two decades suggest that *Lawrence* slowed down the imposition of criminal sanctions pursuant to statutes that on their face prohibit private, consensual, nonprocreative intercourse, but it did not stop the enforcement of such laws altogether. Through the combination of legislative refusal to repeal statutes criminalizing private, consensual sodomy and judicial reluctance to read *Lawrence*'s constitutional directive with the appropriate breadth, several states – as well as the United States military[126] – have shown little interest in ceasing to enforce laws that seem to violate the core rule from *Lawrence*.[127] The following is intended to constitute neither an argument for decriminalizing the sexual practices prosecuted in the subsequent discussion, nor a normative justification of the conduct; rather, I contend that should public officials wish to impose criminal prohibitions on the forms of sexual behavior suggested by *Lawrence*'s list of exceptions, they should follow the letter and spirit of *Lawrence* by doing so pursuant to statutes tailored to criminalize that – and only that – conduct.

The ongoing employment of statutes facially criminalizing private, consensual, nonprocreative sexual intercourse to regulate sexual behavior in Louisiana, Idaho, and North Carolina is illustrative of the tendency in some states to continue treating sodomy bans as remaining enforceable in

[126] *See* United States v. Marcum, 60 M.J. 198, 203 (C.A.A.F. 2004) (holding that *Lawrence* did not facially invalidate the ban on sodomy in the Uniform Code of Military Justice, and creating a three–part as–applied analysis for military courts to discern whether enforcement of the UCMJ sodomy prohibition in a given case does or does not violate *Lawrence*).

[127] *See, e.g.*, State v. Gomez–Alas, 477 P.3d 911, 918 (Idaho 2020) (interpreting *Lawrence* as only creating "a constitutional prohibition against criminalizing the private sexual conduct of two consenting adults" but not against a statute that does so on its face).

at least some circumstances after *Lawrence*.[128] In 2003, Tina Thomas appeared before a Louisiana trial court charged with soliciting an undercover police officer to engage in "unnatural carnal copulation for compensation" in violation of the Louisiana crime against nature statute.[129] The trial court granted Thomas's motion to quash by reading *Lawrence* as rendering the Louisiana crime against nature statute constitutionally inoperable.[130] Interpreting *Lawrence* as standing for the proposition that "all persons" deserve freedom from government interference "in deciding their sexual activities and preferences providing the relationship involves consenting adults," the Court held that the statute violated the substantive due process guarantee to liberty.[131] Further, the trial court noted that had Thomas offered the undercover agent vaginal – rather than oral – intercourse, she would instead have been charged with prostitution (a misdemeanor in Louisiana) rather than a crime against nature (a felony).[132] Thus, the trial court emphasized the inequity inherent in statutes that establish as official state policy an enhanced punitive regime governing the primary sexual behavior practiced by those desiring same-sex intimacy as compared with vaginal intercourse.[133] On appeal, however, the Supreme Court of Louisiana called the trial court's "reliance on *Lawrence…*misplaced," and interpreted *Lawrence* as analytically irrelevant due to its reference to commercial sex in the exceptions paragraph.[134] Further, the Court held that the provision of the crime against nature statute pursuant to which Thomas was charged (which criminalized solicitation of unnatural carnal copulation) was severable from the portion of the statute facially criminalizing consensual sexual conduct and thus remained enforceable.[135]

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[128] LA. STAT. ANN. § 14:89(A)(2) (2006); IDAHO CODE ANN. § 18–6605; N.C. GEN. STAT. § 14–177.

[129] State v. Thomas, 891 So.2d 1233, 1234 (La. 2005); LA. STAT. ANN. § 14:89(A)(2) (2006).

[130] *Thomas*, 891 So.2d at 1234–35.

[131] *Id.* at 1234.

[132] *Id.*

[133] *Id.*

[134] *Id.*

[135] At the time *Thomas* was decided, Louisiana regulated consensual sodomy via two subsections of the crime against nature statute. *Compare* LA. STAT. ANN. § 14:89(A)(1) (2006) (criminalizing "[t]he unnatural carnal copulation by a human being with another of the same sex or opposite sex") *with* LA. STAT. ANN. § 14:89(A)(2) (2006) (criminalizing "[t]he solicitation by a human being of another with the intent to engage in any unnatural carnal copulation for compensation"). After multiple revisions to the code subsequent to *Lawrence*, Louisiana still criminalizes consensual crimes against nature as well as the solicitation of crimes against nature separately using substantially comparable language, but now codified in different sections of the code, possibly due to consistent biennial reports by the Louisiana State Law Institute Constitutional Laws Committee to the state legislature suggesting the consensual sodomy ban is unconstitutional. *Unconstitutional Statutes Biennial Report*

Although in *Thomas* the Louisiana Supreme Court avoided passing direct judgment on the facial constitutionality of the state's prohibition on consensual crimes against nature by focusing on the subsection of the Louisiana code criminalizing solicitation, the Court's language betrays its likely estimation of the consensual sodomy ban's constitutional merit.[136] Namely, the Court read *Lawrence* as leaving "unaffected *charges* involving public conduct or prostitution."[137] The *Lawrence* Court, however, demonstrated its judgment that an *entire statute* was unenforceable, rather than simply invalidating a *charge* entered pursuant to that statute.[138] More importantly, the Louisiana law criminalizing consensual crimes against nature is the functional equivalent of the Georgia statute upheld as constitutional in *Bowers*, which *Lawrence* unambiguously overturned.[139] By interpreting *Lawrence* as governing *charging* decisions pursuant to statutes that facially criminalize consensual sodomy – rather than the constitutionality of such statutory regulations altogether – the Supreme Court of Louisiana demonstrates its understanding of *Lawrence* as an as-applied judgment proscribing the criminal prosecution of private, consensual, nonprocreative intercourse, but *not* the enactment of statutes that can only be interpreted to exempt private, consensual sex from criminal sanction through the most laborious mental gymnastics.[140]

The Idaho Court of Appeals has also read *Lawrence* as forbidding prosecutors from charging defendants with crimes against nature for engaging in private, consensual, nonprocreative intercourse, but as otherwise not affecting the Idaho sodomy ban, which imposes a minimum five-year prison sentence for "[e]very person who is guilty of the infamous crime against nature."[141] In *State v. Cook*, the Idaho appellate court reviewed a claim by Jack Cook, who had been charged with the felony

to the Legislature, LA. STATE L. INST. CONST. L. COMM. 36 (Mar. 13, 2018) https://lsli.org/files/reports/2018/2018%20Unconstitutional%20Statutes%20Biennial%20Report.pdf [https://perma.cc/Z7GS-ASR8].

[136] *See Thomas*, 891 So.2d at 1235–38.

[137] *Id.* at 1238 (emphasis added).

[138] Lawrence v. Texas, 539 U.S. 558, 578 (2003) ("The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual").

[139] *See* GA. CODE. ANN. § 16–6–2(a)(1); LA. STAT. ANN. § 14:89(A)(1) (2006). Unlike the Texas statute at issue in *Lawrence*, the Georgia and Louisiana sodomy bans criminalize nonprocreative sexual intercourse between both same–sex and opposite–sex couples. *See* GA. CODE. ANN. § 16–6–2(a)(1); LA. STAT. ANN. § 14:89(A)(1) (2006).

[140] *See, e.g.*, LA. STAT. ANN. § 14.89(A)(1) (2019) (criminalizing unnatural carnal copulation regardless of consent, venue, the existence of a transactional relationship between the parties, or their ages).

[141] State v. Cook, 192 P.3d 1086 (Idaho Ct. App. 2008); IDAHO CODE ANN. § 18–6605.

crime against nature for performing fellatio on an individual with Down's Syndrome in a gym sauna.[142] Cook pleaded guilty to having oral sex with another individual, but the information charging Cook stipulated neither that the act took place in public nor that the other individual could not consent.[143] As such, Cook appealed on the grounds that per the terms of the information he could have faced a conviction based on private, consensual sex as well.[144] The Idaho Court of Appeals rejected Cook's claim as he had "not shown that he was prosecuted for conduct that occurred in private and with an adult who could and did consent," and held that Cook not "admit[ting] some details of the underlying allegations when he pled guilty is not relevant."[145] Like the Louisiana Supreme Court in *State v. Thomas*, then, the Idaho Court of Appeals interpreted *Lawrence* as demanding only an as-applied review of a law that facially criminalizes consensual sexual behavior.[146]

The North Carolina Court of Appeals has also approvingly cited *Lawrence*'s exceptions paragraph in its entirety to support its judgment that the North Carolina sodomy ban does not facially violate substantive due process.[147] Defendant Gregory Paul Whiteley appealed his conviction under the North Carolina crime against nature statute arguing the statute was facially unconstitutional. The appellate court charged that the exceptions paragraph "clearly indicates that state regulation of sexual conduct involving minors, non-consensual or coercive conduct, public conduct, and prostitution falls outside the boundaries of the liberty interest protecting personal relations and is therefore constitutionally permissible."[148] Just as the Louisiana Supreme Court focused myopically on whether a charging decision pursuant to a statute criminalizing consensual sex violated Tina Thomas's constitutional guarantee to liberty, the North Carolina Court of Appeals considered the "regulation" of sexual behavior in an analytic vacuum, paying no heed to whether the relevant laws pursuant to which the state elects to "regulate" sexual conduct from the exceptions paragraph criminalize private, consensual, nonprocreative sex.[149] Whiteley had been charged with second degree rape, second degree

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[142] *Cook*, 192 P.3d at 1086.

[143] *Id.* at 1087.

[144] *Id.*

[145] *Id.* at 1088.

[146] *See id.* (holding that "Cook failed to meet his burden of proof in establishing that I.C. § 18–6605 is unconstitutional *as applied to his case*") (emphasis added).

[147] State v. Whiteley, 616 S.E.2d 576, 579–582 (N.C. Ct. App. 2005); N.C. GEN. STAT. § 14–177.

[148] *Whiteley*, 616 S.E.2d at 580.

[149] State v. Thomas, 891 So.2d 1233, 1238 (La. 2005); *Whiteley*, 616 S.E.2d at 580. The North Carolina Supreme Court has endorsed the approach taken by the court of appeals in *Whiteley* by rejecting an as–applied challenge to the constitutionality of the North Carolina crime against nature statute being used to adjudicate a fourteen year old boy as delinquent for receiving fellatio from a twelve year old girl even

sexual offense, and crimes against nature (all stemming from the same alleged offense) but was only convicted on the sodomy charge.[150]

On appeal, Whiteley argued that the trial court's jury instructions as to the crime against nature statute violated the *Lawrence* rule because jurors were not informed that the North Carolina sodomy ban should not be construed to criminalize consensual nonprocreative intercourse, and instead were told that they should return a guilty verdict on the crime against nature charge if Whiteley "committed an unnatural sex act."[151] Although the appellate court found in Whiteley's favor by holding that as applied, his conviction pursuant to the North Carolina sodomy law was in error, the case nevertheless illustrates the suboptimality of convicting individuals for forcible nonvaginal sex, commercial nonvaginal sex, public nonvaginal sex, or nonvaginal sex with minors pursuant to laws that facially criminalize *all* nonvaginal intercourse.[152] Perhaps most troublingly, *Whiteley* demonstrates the possibility that laws indiscriminately prohibiting sodomy (i.e., criminalizing the sexual practice without clear statutory language stipulating the ban only applies to forcible sex, etc.) may encourage overzealous prosecutors to obtain convictions for crimes against nature as a consolation prize when they fail – as the prosecution in *Whiteley* did – to prove conclusively the necessary elements of other, more serious crimes, of which nonprocreative sex is also an element.[153]

In construing *Lawrence* as prescribing as-applied inquiries into whether prosecutorial and adjudicative choices in a given case do or do not target regulable sexual behavior per the exceptions paragraph, states permit the continued imposition of criminal sanctions on individuals pursuant to statutes which are materially indistinguishable from the Texas law characterized by the Supreme Court in *Lawrence* as invading the autonomy of consenting adults over their private sexual lives.[154] Refusing

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though other state laws regulating sexual behavior do not impose criminal sanctions for minors who have sex so long as they are less than three years apart in age solely because the case, unlike *Lawrence*, "does involve minors." *In re R.L.C.*, 643 S.E.2d 920, 921–25 (N.C. 2007).

[150] *Whiteley*, 616 S.E.2d at 578.

[151] *Id.* at 581. As of at least 2019, the North Carolina Pattern Jury Instructions now cite *Whiteley* and recommend that courts inform jurors hearing prosecutions for crimes against nature that they must find both that the defendant committed an "unnatural sex act" and that the activity involved sex with a minor, forcible sex, sex for monetary remuneration, or public sex. NORTH CAROLINA CONFERENCE OF SUPERIOR COURT JUDGES, NORTH CAROLINA PATTERN JURY INSTRUCTIONS FOR CRIMINAL CASES § 226.10A (2019) (Crime against Nature – Persons. G.S. 14-177.).

[152] *Whiteley*, 616 S.E.2d at 582–583.

[153] *See id.* at 578.

[154] *See* Lawrence v. Texas, 539 U.S. 558, 578 (2003). Of course, the Texas statute at issue in *Lawrence* criminalized homosexual sodomy specifically, but the Court went to substantial lengths in basing its decision to proscribe the enforcement

to interpret *Lawrence* as facially invalidating statutes that clearly prohibit private, consensual, nonprocreative sex (even if the statute is by convention or rule no longer applied to such conduct) constructively invites entrepreneurial prosecutors to continue charging individuals with crimes against nature – in particular, as in *Whiteley*, when convicting on a related offense might prove impracticable – in hopes that courts will be sympathetic to their claims that the nonprocreative sex they have chosen to prosecute satisfies one of the *Lawrence* exceptions.[155] Further, engaging in as-applied challenges to regulations of sodomy necessarily demands highly individualized inquiries into the factual circumstances in a given case to determine whether or not the behavior is permissibly subject to prosecution and conviction per *Lawrence*. This vests unwarranted discretion in the judiciary to distinguish constitutionally worthy claims from frivolous ones, and may even lead to systematic inequities should certain classes of defendants become more likely than others to prevail on their as-applied challenges to prosecutions for crimes against nature. By contrast, rather than opening a Pandora's Box of ad hoc judicial determinations regarding constitutional merit, parsing *Lawrence* as categorically requiring nonenforcement of statutes that facially criminalize conduct including private, consensual, nonprocreative intercourse instead places the onus on legislators to enact prohibitory statutes whose terms meet the minimum constitutional standards associated with substantive due process.[156]

D. Collateral Enforcement of Sodomy Laws After Lawrence

In addition to the direct enforcement of sodomy laws that facially criminalize the exact behavior prosecuted in *Lawrence v. Texas*, some states impose collateral burdens on individuals with sodomy convictions by making crimes against nature a registrable offense for their state's sex offender registry.[157] This includes both direct registration requirements for individuals with (pre- and post-*Lawrence*) in-state sodomy convictions, as well as indirect registration requirements for those with

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of the Texas law on due process rather than equal protection to clarify that the relevant constitutional deficiency was the statute's interference with private sexual autonomy rather than the legal distinction based on sexual identity. *See id.*

[155] *Whiteley*, 616 S.E.2d at 578.

[156] *See infra* Part III–A.

[157] *See, e.g.*, GA. CODE ANN. § 42–1–12(a)(10)(B)(v) (making it a "dangerous criminal offense" for which registration and community notification are required if an individual was convicted under § 16–6–2, the provision of the Georgia code making it a criminal offense if an individual "performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another," and precisely the statute at issue in *Bowers*); S.C. CODE ANN. § 23–3–430(C)(11) (making "buggery" a registrable offense in South Carolina).

out-of-state sodomy convictions via statutory terms that incorporate sex offender registration criteria from other states.[158] As a result, many individuals incur separate, sequential burdens – arrest, trial, incarceration, probation, and then registration – based on convictions pursuant to statutes that on their face criminally prohibit private, consensual, nonprocreative intercourse.[159] These collateral consequences create significant disruptions in the lives of individuals who – while their actions may be consistent with the conduct deemed criminally regulable without violating due process by the Supreme Court in *Lawrence* – were convicted using statutory language that facially infringes the constitutional guarantee to liberty in one's private sexual affairs.[160]

Any criminal conviction involves collateral consequences.[161] Crimes that statutorily qualify for sex offender registration, however, impose uniquely onerous additional costs on registrants for three reasons. First, sex offense convictions trigger highly emotional reactions among the public, and research suggests that the enhancement of punitive consequences for sex crimes is rooted in emotional reactions to media narratives of crimes involving sex as well as popular overestimation of recidivism rates among those convicted of sex offenses.[162] Second, federal law dictates that sex offense convictions become extraordinarily public affairs, as states are required to maintain a registry of individuals convicted of sex offenses and to ensure that the information collected from individuals convicted of sex offenses is "available on the Internet, in a manner that is readily accessible to all jurisdictions and to the public."[163]

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[158] *See* GA. CODE ANN. § 42–1–12(a)(10)(B)(v) (directly listing sodomy as a registrable offense); MISS. CODE ANN §§ 45–33–23(h)(xi), 97–29–59 (making "unnatural intercourse" – defined as "the detestable and abominable crime against nature committed with mankind or with a beast" – a registrable offense in Mississippi); MISS. CODE ANN § 45–33–23(h)(xx) (requiring registration in Mississippi for "[a]ny other offense resulting in a conviction in another jurisdiction which, if committed in this state, would be deemed to be such a crime without regard to its designation elsewhere"). The consequence of the former provision is to make out–of–state sodomy convictions registrable in Mississippi even if they were not registrable in the state of conviction. MISS. CODE ANN §§ 45–33–23(h)(xi), 97–29–59.

[159] *See generally* MISS. CODE ANN §§ 45–33–23(h)(xi), 97–29–59; GA. CODE ANN. § 42–1–12(a)(10)(B)(v); S.C. CODE ANN. § 23–3–430(C)(11); N.C. GEN. STAT. § 14–177; IDAHO CODE ANN. § 18–6605; LA. STAT. ANN. § 14:89(A)(2) (2006).

[160] *See infra* notes 162–67 and accompanying text.

[161] *See, e.g.*, Kathleen M. Olivares, et al., *The Collateral Consequences of a Felony Conviction: A National Study of State Legal Codes 10 Years Later*, 60 FED. PROB. 10, 10 (1996) (examining the manner in which state criminal codes create collateral costs for those convicted of felonies).

[162] James F. Quinn et al., *Societal Reaction to Sex Offenders: A Review of the Origins and Results of the Myths Surrounding Their Crimes and Treatment Amenability*, 25 DEVIANT BEHAV. 215, 217–226 (2004).

[163] 34 U.S.C. § 20912(a). The federal statute governing registration for individuals convicted of sex offenses – known colloquially as the Sex Offender

Third, the period during which registration is compulsory for those convicted of sex offenses can last from fifteen years to the remainder of the individual's life.[164] Likely as a result of the distinct burden associated with sex offense convictions, research demonstrates that individuals convicted of sex offenses and required to register experience a host of negative collateral consequences in their lives.[165] In a 2005 survey of persons with sex offense convictions, at least one fifth of respondents reported that they experienced either the loss of their job, denial of a promotion at work, loss or denial of a place to live, being treated rudely in a public place, having lost a friend who found out about their registration, being harassed in person, or receiving harassing or threatening telephone calls or emails as a result of their registration status.[166] This litany of ancillary ramifications associated with sex offender registration and notification presents significant barriers to the social and psychological reintegration of individuals convicted of sex offenses into the community after their incarceration.[167]

Registration and Notification Act (SORNA) – punishes noncompliance with a ten percent reduction in Byrne grants to the state. *Id.* § 20927(a) (establishing the information to be collected from individuals convicted of sex offenses and included in the state registry). Jurisdictions are required to exempt from disclosure the identity of sex offense victims, the social security number of individuals convicted of sex offenses, and information regarding arrests of individuals convicted of sex offenses that did not lead to convictions and are given the option to exempt other information such as the employer and educational institution of individuals convicted of sex offenses. *Id.* § 20920(b)–(c).

[164] *Id.* § 20915(a) (delineating that the required registration period for those convicted of sex offenses differs based on whether they are classified as having committed a Tier I, Tier II, or Tier III offense, in escalating order of seriousness). Individuals convicted of sex offenses and required to register pursuant to SORNA can reduce their required registration period if they maintain what the statute calls a "clean record." *Id.* § 20915(b).

[165] *See* Richard Tewksbury, *Collateral Consequences of Sex Offender Registration*, 21 J. CONTEMP. CRIM. JUST. 67, 74–78 (2005).

[166] *Id.* at 75. For some of the items on the survey – loss of job, loss or denial of a place to live, having lost friends, and being harassed in person – the proportion of respondents who reported such negative experiences was nearly or greater than one half, and over ten percent of respondents reported having been assaulted or asked to leave a business as a result of their registration status. *Id.* These survey results were largely replicated in subsequent qualitative research, as well. Richard Tewksbury & Matthew Lees, *Perceptions of Sex Offender Registration: Collateral Consequences and Community Experiences*, 26 SOC. SPECTRUM 309, 331 (2006). Research also suggests negative emotional consequences for the family members of individuals convicted of sex offenses due to the registration and community notification requirements. Richard G. Zevitz et al., *Sex Offender Community Notification: Managing High Risk Criminals or Exacting Further Vengeance?*, 18 BEHAV. SCI. L. 375, 381 (2000).

[167] *See id.*

States violate the *Lawrence* rule by collaterally sanctioning individuals convicted pursuant to statutes facially criminalizing private, consensual sodomy through sex offender registration and notification requirements. Likewise – as illustrated in ongoing litigation surrounding Mississippi's requirement that individuals convicted of sodomy register as sex offenders – procedural rules governing eligibility for post-conviction relief have the potential to thwart legal attempts to obtain judicial exemption of persons convicted under laws facially criminalizing sodomy from the registration requirement.[168] In *Doe v. Hood*, Arthur Doe sought to challenge his inclusion on the Mississippi sex offender registry (MSOR) based on his 1977 conviction pursuant to the state's law criminalizing "unnatural intercourse."[169] While a federal district court agreed that the unnatural intercourse statute "appears to be unconstitutional" and that Doe "should not be subjected to the stigmatizing requirements imposed by the MSOR," the court deferred judgment on the constitutionality of the statute until a state court determines whether Doe is barred from relief since he has not met the requirement that his original prosecution conclude through a favorable determination under the United States Supreme Court's decision in *Heck v. Humphrey*.[170] The outcome for Arthur Doe, then, turns on whether Mississippi courts agree with the state that Doe has an avenue for habeas relief in state courts via the Uniform Post-Conviction Collateral Relief Act, in which case federal claims related to his prosecution and conviction would be barred by *Heck* pending the outcome of a state appeal for post-conviction relief.[171] Individuals convicted pursuant to presumptively unconstitutional sodomy bans and forced to register as sex offenders thus face a daunting procedural obstacle to receiving exemptions from registration and notification requirements as the prospect of a *Heck* bar precluding their claim significantly deters affected parties from seeking relief.

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[168] Doe v. Hood, 345 F. Supp. 3d 749, 754–756 (S.D. Miss. 2018).

[169] *Id.* at 750–51; MISS. CODE ANN. § 97–29–59.

[170] *Hood*, 345 F. Supp. 3d at 751–756; Heck v. Humphrey, 512 U.S. 477, 486–487 (1994). There is a prodigious amount of legal scholarship criticizing *Heck* on various grounds, including negative evaluations of the favorable termination rule for creating unreasonable complications if individuals incarcerated in state prisons seek post–conviction relief (typically via 42 U.S.C. § 1983) but lack access to habeas relief. *See* Note, *Defining the Reach of* Heck v. Humphrey*: Should the Favorable Termination Rule Apply to Individuals Who Lack Access to Habeas Corpus?*, 121 HARV. L. REV. 868, 889 (2008) (arguing that federal claims should not be barred for imprisoned persons in state courts if they are unable to pursue state habeas relief).

[171] *Hood*, 345 F. Supp. 3d at 755–56; MISS. CODE ANN. § 99–39–5 (2013). Specifically, the Mississippi statute governing post–conviction relief demands that motions for post–conviction relief after a guilty plea (as in Doe's case) be filed within three years after a conviction is entered, but the state supreme court has exempted claims regarding fundamental rights from this procedural limitation. *Id.* § 99–39–5(2); Rowland v. State, 42 So.3d 503, 508 (Miss. 2010).

Other states employ similar statutory measures to target conduct involving consensual, nonprocreative intercourse for particular condemnation and interpose the state judiciary to arbitrate claims by individuals seeking exemption from state sex offender registration requirements. Until 2010, Louisiana made the solicitation of anal or oral sex a registrable offense (crime against nature by solicitation), but did not require registration for the solicitation of vaginal intercourse (chargeable only under the state's prostitution statute).[172] In *Doe v. Jindal*, the court for the Eastern District of Louisiana held that the state's practice of having "created two classifications of similarly (in fact, identical) situated individuals who were treated differently (only one class is subject to mandatory sex offender registration)" bore "no rational relation to any legitimate government objective," and thus failed rational basis review.[173] Though this prohibition involved commercial sex – approved for regulation by *Lawrence*'s exceptions paragraph – the case is instructive for discerning the state's attitude toward oral and anal sex versus vaginal intercourse and the differential rationale for making solicitation of one a registrable offense versus the other. In *Doe*, the state attempted to justify its enhanced treatment of crimes against nature by solicitation versus prostitution "because Crime Against Nature by Solicitation is a lesser offense to which other registrable offenses can be pleaded down to."[174] This argument, which, among other things, traffics in the dissemination of hackneyed stereotypes about same-sex intimacy and AIDS and was characterized as "patent hypothetical speculation" by the Court in *Doe*, does not persuasively justify the state's preferred policy of punishing conduct involving nonprocreative intercourse more stringently than vaginal sex.[175]

Although the Louisiana state legislature amended its statutory framework governing registration after *Doe v. Jindal* to allow individuals convicted of a crime against nature by solicitation to petition for relief from registration and notification requirements, the current registration statute nevertheless subjects the decision whether to grant such petitioners relief to a judge in the court where those individuals were originally convicted.[176] Thus, after differentially burdening individuals convicted for solicitation of nonvaginal sex for years after *Lawrence*– rather than automatically rescinding the registration and notification requirement for

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[172] Doe v. Jindal, 851 F. Supp. 2d 995, 998–99 (E.D. La. 2012).

[173] *Id.* at 1007.

[174] *Id.* at 1008.

[175] *See, e.g.*, Celia Kitzinger & Elizabeth Peel, *The De–Gaying and Re–Gaying of AIDS: Contested Homophobias in Lesbian and Gay Awareness Training*, 16 DISCOURSE & SOC'Y 173, 177 (2005) (discussing the historical tendency of associating HIV/AIDS with gay sex practices and of portraying "gay men…as a dangerous threat to public safety").

[176] LA. STAT. ANN. § 15:542(F)(3)(a).

individuals convicted of a crime against nature by solicitation prior to the statutory equalization between solicitation of vaginal and nonvaginal intercourse – the Louisiana code now places the responsibility on convicted persons themselves to petition for relief.[177] This burden not only extends to Louisiana residents with convictions for crimes against nature by solicitation, but also levies convoluted obligations on individuals who move to another state after a conviction for crimes against nature by solicitation in Louisiana and must then petition for deregistration in their new home state.[178]

Precise, systematic data on the number of registrants per state who have registered as sex offenders due to a sodomy conviction are hard to come by due to significant non-transparent registry data in some states.[179] Although Mississippi does not offer a comprehensive database of registered sex offenders online,[180] the Court in *Doe v. Hood* noted that "[a]pproximately 35 Mississippi residents have convictions for Unnatural Intercourse or an out-of-state statute that criminalizes oral or anal sex with no additional elements" and that "[o]f these, about 22 individuals are registered on the MSOR."[181] Georgia, however, both requires individuals

[177] *See id.*

[178] *See* Doe v. Hood, 345 F. Supp. 3d 749, 751–52 (S.D. Miss. 2018) (describing the process by which a class of individuals convicted for crimes against nature by solicitation in Louisiana eventually reached an agreement with the state in *Doe v. Hood* to have themselves and other individuals with Louisiana "CANS" convictions removed from the Mississippi sex offender registry).

[179] *See, e.g.*, *Sex Offender Registry*, ALA. L. ENF'T AGENCY, https://www.alea.gov/node/270 [https://perma.cc/3K4H-7PRY] (last visited February 5, 2021) (allowing users to search for registered offenders by address, name, city, compliance status, or email address, but neither allowing users to search for registered offenders *by convicted offense* nor supplying a downloadable file with all offenders by state). A representative from the ALEA confirmed by email that the agency does not provide a statewide list of registrants without a formal records request. E-mail from ALEA Rep. to Jordan Carr Peterson, Assistant Professor Pol. Sci., Sch. Pub. & Int'l Affs., N.C. State U. (Oct. 27, 2020) (on file with author); E-mail from ALEA Rep. to Jordan Carr Peterson, Assistant Professor Pol. Sci., Sch. Pub. & Int'l Affs., N.C. State U. (Oct. 28, 2020) (on file with author). In some other states that continue to enforce facial criminal prohibitions on crimes against nature against individuals who engage in behavior from the exceptions paragraph in *Lawrence*, a sodomy conviction is not registrable. *See* N.C. GEN. STAT. § 14–208.6(5) (delineating the registrable "sexually violent offense[s]" which include rape, sexual battery, sexual exploitation of a minor, and incest, among others, but exclude crimes against nature, despite sodomy remaining a criminal offense in the state).

[180] *See Mississippi Sex Offender Registry*, STATE OF MISS. DEPT. OF PUB. SAFETY, http://state.sor.dps.ms.gov/SearchOffender.aspx [https://perma.cc/YT99-48UJ] (last visited February 5, 2021) (allowing users to search for individuals on the MSOR by name, within a geographic radius around an address or zip code, or in a given county).

[181] *Hood*, 345 F. Supp. 3d at 753.

convicted of sodomy to register as sex offenders[182] and makes its sex offender registry publicly available online in its entirety.[183] Data from the Georgia Sex Offender Registry indicate that over 250 individuals are registered as sex offenders in the state due to a sodomy conviction, and that at least one person in ninety of Georgia's 189 counties is registered as a sex offender stemming from a sodomy conviction.[184] Of these individuals, nearly three quarters (73.5%) were convicted for sodomy within Georgia, whereas the remainder (26.5%) were convicted of sodomy or its equivalent out of state but nevertheless required to register in Georgia, including states such as Maryland, New York, and Virginia, in which laws facially criminalizing sodomy have been repealed.[185] In the figure below, I present a graphical representation of the Georgia sex offender registry data that reflects the individuals listed on the Georgia registry based on sodomy. Convictions are not racially representative of either the registry or the overall state population.[186] Among those on the registry for sodomy, 50.2% were reported as White, whereas 49.8% were reported as Black. This suggests Black individuals are overrepresented among sodomy registrants in Georgia compared to their share of the broader population in the state and the total population on the registry: statewide, Georgia is 57.8% White and 31.9% Black, and among

[182] GA. CODE ANN. § 42–1–12(a)(10)(B)(v).

[183] *See Georgia Sex Offender Registry*, GA. BUREAU OF INVESTIGATION https://gbi.georgia.gov/services/georgia-sex-offender-registry [https://perma.cc/NWU2-GLYK] (last visited February 5, 2021).

[184] *Id.* The nomenclature for the sodomy convictions in the Georgia registry is somewhat inconsistent, but 257 of the crimes listed in the database and for which individuals have currently registered as sex offenders contain the word "sodomy" or its statutory equivalent. *Id.* This includes 35 registrants whose crime is listed as "Sodomy," 171 registrants whose crime is listed as "Sodomy – Felony," and scattered other offenses that either specify the degree of the crime in one of various forms (e.g., "Sodomy 1st," "Sodomy 1st Deg," "Sodomy 1st Degree," "Sodomy I," etc.), contain two offenses (e.g., "Sodomy Kidnapping," "Sodomy Sexual Assault," etc.), or go by a different name entirely ("crimes against nature," as this is the statutory offense in Louisiana, where two of the convictions occurred). *Id.* Since the Georgia database does not supply the statute pursuant to which individuals were convicted, it is impossible to discern much more about the circumstances giving rise to the offenses coded "Sodomy" or "Sodomy – Felony." *Id.*

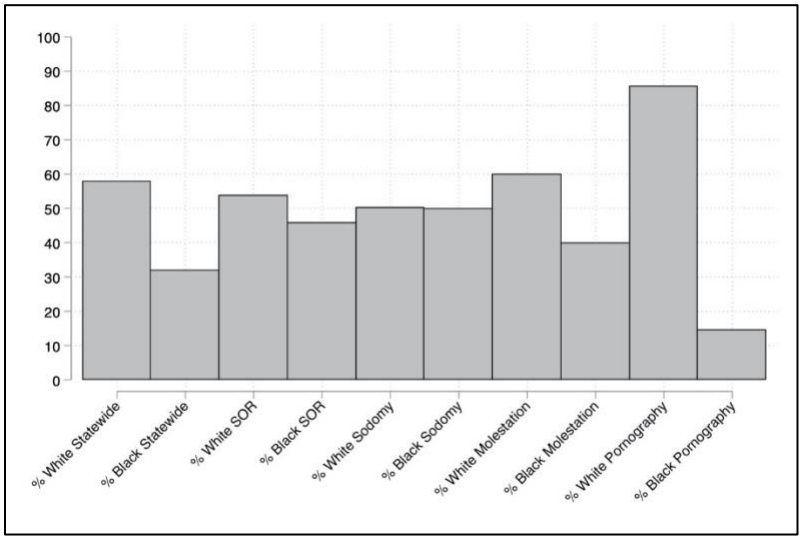
[185] *Id.*

[186] *Id.* Of the more than 23,000 individuals listed on the registry, all but 182 were reported as being either Black or White. *Id.* These 182 individuals of other races are included in the denominator to calculate the percentages appearing in the figure, but I do not present percentage data broken out by offense for other races due to the small subsample. *Id.*

individuals registered as sex offenders, 53.5% are White and 45.7% are Black.

Figure: **Racial Makeup of Georgia Sex Offender Registry**

The vertical bars indicate the proportion of individuals who are White or Black (1) statewide according to the 2019 Census estimate; (2) on the sex offender registry (SOR); (3) among individuals with sodomy convictions on the SOR; (4) among individuals with child molestation convictions on the SOR; and (5) with computer pornography convictions on the SOR, all as of February 2021.



Individuals on the Georgia sex offender registry with sodomy convictions reported as Black are also overrepresented compared with the individuals compelled to register due to convictions for child molestation or computer pornography, among whom 39.9% and 14.4% were reported as Black, respectively.

Though the data presented here represent only an exploratory glimpse at the state of sex offender registration in Georgia, these descriptive findings indicate that Black individuals in the state make up a disproportionate share of individuals on the sex offender registry altogether, as well as a disproportionate share of individuals registered as sex offenders due to sodomy convictions.[187] These racial disparities

[187] These data are, of course, consistent with broader, prominent scholarly narratives regarding mass incarceration as a tool of racial oppression. *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010) (suggesting that "tough–on–crime" policies, in particular those initiated by the Nixon and Reagan administrations, have had profound and disproportionately negative effects on Black Americans).

suggest that there may be significant social inequities perpetuated by the implementation of sex offender registration and notification requirements, and future scholarship would do well to examine these inequities systematically. This, alongside the procedural impediments for individuals with sodomy convictions seeking deregistration discussed earlier, suggests that the continued imposition of sex offender registration and notification requirements on individuals convicted pursuant to statutes facially criminalizing consensual sodomy is by no means a trivial burden. Rather, the requirement that individuals with convictions under consensual sodomy bans register as sex offenders is at best constitutionally suspect as it represents the collateral enforcement of a public policy deemed unconstitutional in *Lawrence*.[188] Furthermore, at this juncture, scholars remain unable to estimate precisely the scope of the deprivations occurring through such registration and notification requirements due to widespread unavailability of comprehensive sex offender registry data as well as the tendency of such requirements to evade review through procedural constraints on post-conviction relief.[189]

E. Sodomy Laws and the Persistence of Stigmatization

Even in the absence of direct or collateral enforcement, the presence of laws criminalizing private, consensual, nonprocreative intercourse on American statute books advances a retrograde conception of gay men and lesbians as a criminal class.[190] Well before *Lawrence* was decided, scholars recognized the employment of criminal prohibitions on sodomy as a means through which the state could enshrine the social otherness of gay men and lesbians in law.[191] Criminalizing the modal form of sex for gay men already cast a long shadow of opprobrium on a marginalized population when such statutes were considered constitutionally sound.[192] Indeed, among the most persuasive explanations for the sweeping language in the *Lawrence* decision is that "the very *fact* of criminalization, even unaccompanied by any appreciable number of prosecutions, can cast already misunderstood or despised individuals into grossly stereotyped roles, which become the source and justification for treating those

[188] Lawrence v. Texas, 539 U.S. 558, 559 (2003).

[189] *See* HARV. L. REV. *supra* note 170, at 875.

[190] *See* Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws*, 35 HARV. C.R.–C.L. L. REV. 103, 112–13 (2000) (describing the function of laws criminalizing sodomy as establishing a formal sexual hierarchy in which gay men and lesbians are a criminal class).

[191] *See id.* at 114 ("The symbolic function of sodomy laws is similar to Jim Crow laws in that a primary purpose of both types of law is to condemn an entire class of Americans as immoral, inferior, and not deserving of society's tolerance and protection.").

[192] *See id.*

individuals less well than others."[193] Even today, nearly twenty years after *Lawrence*, some states refuse to repeal statutes indiscriminately criminalizing sodomy under a constitutional regime that maintains "[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."[194] It is exceedingly difficult to justify the decision to let private, consensual sodomy remain a criminal offense per the terms of state law if the statutes serve little purpose other than recreational stigmatization.

Moreover, law is an expression of public values, and it bears consideration exactly which values criminal prohibitions on sodomy advance.[195] Statutes criminalizing sodomy – even if entirely unenforced – represent the formalization of public contempt for the sexual practices most common among a minority subgroup of the population whose youth regularly experience verbal harassment, physical assault, or rejection by their families,[196] and are nearly five times as likely to commit and attempt suicide.[197] Speaking after the repeal of his state's crimes against nature statute in 2014, gay Virginia State Senator Adam Ebbin cast his chamber's unanimous decision to abandon the discriminatory and sexually restrictive policy in terms that demonstrate he understood the public values undergirding repeal: "The law was a terrible, symbolic insult … Once the governor signs it, I am glad that all consenting adults will finally be treated as adults."[198] Although the preceding subsections of this Article establish with certainty that laws facially proscribing sodomy *are* still directly and collaterally enforced, even unenforced regulations of private, consensual, nonprocreative intercourse would further no ends other than the continued stigmatization of all individuals who engage in same-sex intimacy.[199]

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[193] Tribe, *supra* note 49 at 1896.

[194] *Lawrence*, 539 U.S. at 575.

[195] William J. Hall, *Psychosocial Risk and Protective Factors for Depression Among Lesbian, Gay, Bisexual, and Queer Youth: A Systematic Review*, 65 J. HOMOSEXUALITY 263, 264–65 (2018).

[196] *Id.*

[197] Zachary Giano, et al., *Identifying Distinct Subgroups of Lesbian, Gay, and Bisexual Youth for Suicide Risk: A Latent Profile Analysis*, 67 J. ADOLESCENT HEALTH 194, 194 (2020).

[198] Lou Chibbaro Jr., *Va. Lawmakers Repeal Sodomy Ban in Unanimous Vote*, WASH. BLADE (Mar. 7, 2014), https://www.washingtonblade.com/2014/03/07/va-lawmakers-repeal-sodomy-ban-unanimous-vote/ [https://perma.cc/7Q57-QPUE].

[199] Ragusa & Birkhead, *see e.g.*, *supra* note 2, at 745.

IV. PATHS FORWARD: HARMONIZING POLICY WITH THE LETTER AND SPIRIT OF *LAWRENCE*

A. Legislative Remedies

The simplest solution to criminal prohibitions on sodomy lingering in state codes is for state legislatures to repeal the prohibitory statutes. This has already been accomplished in a handful of states that continued to have enforceable sodomy bans at the time *Lawrence* was decided, as detailed in Part II-B above,[200] and repeal is well within the powers of those state legislatures in jurisdictions that continue to enforce statutory prohibitions on sodomy despite the constitutional shadow looming over such laws.[201] For reasons I discuss subsequently, however, legislative repeal of sodomy laws represents a necessary but *not* a sufficient condition for ensuring the entire footprint of criminal prohibitions on consensual sexual behavior is erased due to regimes of collateral enforcement that burden individual liberty based on sodomy convictions indirectly.

Repeal has several advantages over judicial action. First, legislative repeal lends democratic legitimacy to the decriminalization of consensual sexual behavior. Repeal sends an unequivocal signal from the branch of government with the lawmaking prerogative in a separation of powers framework that the state has no intention of imposing criminal sanctions on individuals for their private, consensual sexual conduct. Second, legislative repeal would, in all likelihood, accelerate the decriminalization of sodomy as state legislatures have the capacity to remove statutory prohibitions from their state's code effective immediately. This stands in contrast to the piecemeal abandonment of legislation criminalizing sodomy after *Lawrence*, which has resulted in the patchwork quilt of (non)compliance conditions across the country and which has continued to prove so catastrophic for individuals who engage in sexual conduct prosecuted under sodomy bans.[202] Further, in addition to ending direct enforcement, repeal would swiftly contribute to reducing the stigmatization of same-sex sexual intimacy described in Part II-E. Third, legislative repeal of sodomy prohibitions can end the criminalization of consensual sexual behavior with finality. Since legislation – unlike a judicial decision – does not grant dissatisfied parties the right to appeal or use other dilatory tactics to avoid compliance, a legislative determination

[200] *See supra* Part II-B.

[201] *See e.g.*, Staff Reports, *Md. sodomy law officially repealed*, WASH. BLADE (October 1, 2020) https://www.washingtonblade.com/2020/10/01/md-sodomy-law-officially-repealed/ [https://perma.cc/3DSV-VVGC].

[202] *See supra* notes 89–102 (listing states which have not repealed sodomy laws).

to cease the criminal prohibition of sodomy would likely represent the final word on the subject.[203]

Legislative repeal of sodomy prohibitions is an important step toward ensuring the public policy of regulating sexual behavior becomes more consistent with the letter and spirit of the *Lawrence* holding. Legislation repealing sodomy bans, however, is on its own insufficient because simply repealing an existing prohibition fails to remedy inequities in the justice system stemming from collateral enforcement as described in Part II, subpart D above.[204] In particular, a repeal bill on its own would fail to end the practice of requiring that individuals convicted pursuant to statutes criminalizing sodomy prior to repeal to register as sex offenders.[205] State legislatures, then, should also enact legislation unambiguously establishing that the state forbids its justice department from requiring individuals to register with their state's sex offender registry due to convictions for sodomy or crimes against nature, and specifying that individuals are not required to register as sex offenders whether the sodomy convictions occurred in state or out of state, and whether their convictions were before or after *Lawrence*. Legislation should also retroactively deregister any individuals with convictions pursuant to categorical sodomy bans rather than placing the burden to deregister on registrants themselves.[206] This legislative modification of qualifying offenses to state sex offender registries is a necessary additional step toward guaranteeing that *both* direct *and* collateral enforcement of statutes prohibiting sodomy come to an end.

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[203] *The Legislative Process*, U.S. H.R., https://www.house.gov/the-house-explained/the-legislative-process [https://perma.cc/LT8H-H4VK] (last visited May 19, 2021). The sole exceptions to this claim would be if either (1) repeal legislation delayed or deferred decriminalization for any reason; or (2) a group of legislators elected subsequent to the repeal of a sodomy ban made the choice to recriminalize sodomy via a new statute. *Getting Rid of Sodomy Laws: History and Strategy That Led to the Lawrence Decision*, ACLU, https://www.aclu.org/other/getting-rid-sodomy-laws-history-and-strategy-led-lawrence-decision [https://perma.cc/LX5S-RR5J] (last visited May 19, 2021). The political logic behind the first possibility is unclear, and I do not believe such hypothetical legislation would be properly classified as a repeal bill in any event. The second possibility seems unlikely for legislators concerned with the reelection imperative given the political unpopularity of criminalizing sodomy according to a series of public opinion polls conducted by Gallup, in which a majority of respondents have not supported making consensual gay or lesbian sex illegal since the late 1980s, and in whose most recent wave fully 72 percent of respondents oppose the criminalization of gay sex. *Gay and Lesbian Rights*, GALLUP, https://news.gallup.com/poll/1651/gay–lesbian–rights.aspx [https://perma.cc/R4W6-PYZ9] (last visited January 30, 2021).

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

[205] *See* MacDonald, 710 F.3d at 163–67.

[206] *See e.g.*, *Georgia Sex Offender Registry*, *supra* note 183.

B. Judicial Remedies

While legislative actions to repeal statutory sodomy prohibitions and prevent collateral enforcement of sodomy regulations are the most straightforward solution to the enduring afterlife of criminal prohibitions on sodomy, the judiciary can also act to alleviate the burden on those deprived of rights and liberties in violation of *Lawrence*.[207] Namely, courts should interpret the *Lawrence* decision at its word, and maintain that the criminal regulation of consensual sodomy facially violates the constitutional guarantee to substantive due process.[208] Should the opportunity arise, the Supreme Court itself could articulate that *Lawrence* facially invalidated the Texas homosexual conduct law and mandate the nonenforcement of statutes criminalizing private, consensual sodomy.[209] This leaves in place regulations specifically enumerating only those sorts of practices deemed constitutionally eligible for criminal prohibitions in the exceptions paragraph, but forces states only to charge and convict pursuant to legislation that cannot be read to impose criminal sanctions for private, consensual, nonprocreative intercourse.[210] Likewise, the Court could read *Lawrence* as prohibiting not only the direct enforcement of criminal prohibitions on sodomy, but also the indirect enforcement via sex offender registration and notification requirements.[211] To accomplish the latter, the Court need simply interpret the *Lawrence* holding as proscribing the imposition of any criminal or administrative burden, including but not limited to direct prosecution as well as the onerous demands associated with sex offender registration detailed in Part II, subpart D above.[212] Although the implementation of a holding along these lines might involve the same sorts of complications described in Part II, subpart A due to judicial passivity and decentralized political authority, a judicial reimagining of *Lawrence* that clarifies the operative scope of the holding as rendering laws indiscriminately criminalizing nonprocreative sexual intercourse constitutionally intolerable could substantially reduce the semantic ambiguity associated with the original decision and thus leave far less discretion for those implementing the holding to evade its requirements.

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[207] *See e.g.*, Williams v. State, 184 So. 3d 1064, 1067 (Ala. Crim. App. 2015).

[208] *See Lawrence*, 539 U.S. at 599.

[209] *Homosexuality and the Constitution: A Legal Analysis of the Supreme Court Ruling in* Lawrence v. Texas, EVERYCRSREPORT.COM (May 26, 2005) https://www.everycrsreport.com/reports/RL31681.html#TOC2_7 [https://perma.cc/ZJ9V-27JB].

[210] *Lawrence*, 539 U.S. at 578.

[211] *See e.g.*, *id.* at 578–79 (describing broad implications and protections against state sodomy laws as violating the Due Process Clauses of Fifth and Fourteenth Amendment).

[212] *Id.* (explaining a broad protection provided by the Due Process Clauses).

In addition to action in the appellate judiciary, trial courts also have the capacity to minimize avoidance of the *Lawrence* rule in states where prosecutors seek to continue charging and convicting individuals pursuant to statutes criminalizing sodomy.[213] In particular, trial courts could exercise their equitable discretion to enter permanent injunctive relief requiring nonenforcement of any statutes that could be read to impose criminal sanctions for private, consensual, nonprocreative sexual intercourse.[214] Likewise, either state or federal courts could enjoin state departments of justice from requiring individuals with sodomy convictions to register as sex offenders as doing so imposes a burden prohibited by *Lawrence*.

For the reasons discussed earlier, I believe legislative efforts to harmonize state policies with the letter and spirit of the *Lawrence* decision would provide the most efficacious solution to the persistence of sodomy regulations.[215] It may be, however, that certain state legislatures demonstrate little interest in (or actively oppose) formally decriminalizing private, consensual, nonprocreative sexual intercourse within their jurisdictions. For instance, the Louisiana House of Representatives rejected a bill in 2014 that would have removed consensual, same-sex intercourse from their state code's list of crimes against nature by a vote of 66 to 27.[216] In such cases of legislative intransigence, courts offer a secondary venue in which litigants have the capacity to press for modifications their legislatures are unwilling to grant.

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[213] *How Courts Work*, AM. BAR ASSOC., https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/pretrial_appearances/ [https://perma.cc/E2DD-NQMF] (last visited May 19, 2021).

[214] *See* Weinberger v. Romero–Barcelo, 456 U.S. 305, 312 (1982) (holding courts are afforded the power to grant the "extraordinary" equitable remedy of a permanent prohibitory injunctions in the event litigation involves an "irreparable injury and the inadequacy of legal remedies"). The scholarly literature criticizing the employment of universal injunctions by federal district courts is vast and the debate over such remedies lies outside the scope of this Article. *See* Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 418, 419 (2017) (arguing injunctive relief should not bind groups or individuals outside the parties to specific litigation); *but see* Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065, 1088–99 (2018) (contending that in some cases nationwide injunctions are the sole means by which courts can provide plaintiffs with complete relief and ensure parties situated similarly to the plaintiff are not unduly harmed).

[215] *See supra* Part III–A.

[216] CRIME: Amends crime against nature and aggravated crime against nature relative to certain provisions held to be unconstitutional, H.B. 12, Louisiana House of Representatives (2014); HBS Final Passage Roll Call Vote, Louisiana House of Representatives (2014) (indicating that 67 members of the state house rejected H.B. 12, 27 members voted in favor, and 11 were absent or abstained).

V. CONCLUSION

The criminal regulation of sodomy is rooted in centuries of homophobia, and it survives today.[217] Although the *Lawrence* decision maintained – in no uncertain terms – that laws facially criminalizing sodomy burdened fundamental constitutional rights, linguistic imprecision in the decision afforded pro-enforcement proponents sufficient latitude to prop up a zombie regime of presumptively unconstitutional statutes.[218] Likewise, the stubborn persistence of criminal prohibitions on sodomy via both direct and collateral enforcement draws attention to the inherent challenges for effective implementation of judicial decisions in American government.[219] The deliberate fragmentation of political authority serves important public interests,[220] but permits – or even invites – noncompliance given dedicated and geographically concentrated resistance. *Lawrence*, then, left unfinished business in its wake.

The continued enforcement of laws facially criminalizing sodomy proceeds by claiming that *Lawrence* only demands judicial interference with sodomy convictions if such statutes have been enforced against private, consensual sexual activity between adults, regardless how narrowly the statutory terms are drawn.[221] This claim rests on the implicit assumption that society can trust law enforcement, prosecutors, and judicial officials to decide equitably that the application of categorical sodomy bans does not burden the constitutional guarantee to liberty.[222] In light of well-documented limitations on the promotion of sexual freedom and gay rights by both courts and law enforcement in the past, this assumption is ill-advised.[223] Rather than placing our collective faith in the equitable enforcement of statutes that criminalize private, consensual, nonprocreative sex on their face, *Lawrence* demands the nonenforcement

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[217] *See* ESKRIDGE, DISHONORABLE PASSIONS, *supra* note 12.

[218] Lawrence v. Texas, 539 U.S. 558, 560 (2003).

[219] ESKRIDGE, DISHONORABLE PASSIONS, *supra* note 12.

[220] *See* THE FEDERALIST, NO. 51 (Signet ed.) ("In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments").

[221] *See, e.g.*, *Bowers v. Hardwick*, 478 U.S. 186, 189–90 (1986).

[222] *Id.*

[223] *Id.* at 190–91; *see, e.g.*, Kristina B. Wolff & Carrie L. Cokely, *"To Protect and to Serve?: An Exploration of Police Conduct in Relation to the Gay, Lesbian, Bisexual, and Transgender Community,* 11 SEXUALITY & CULTURE 1, 9–21 (2007) (detailing negative behavior by law enforcement toward GLBT individuals who filed incident reports with the Minneapolis police); Jared Leighton, *"All of Us Are Unapprehended Felons": Gay Liberation, the Black Panther Party, and Intercommunal Efforts Against Police Brutality in the Bay Area,* 52 J. SOC. HIST. 860, 860–61 (2019) (describing concerns in the early gay liberation movement over police violence toward gay people).

of such laws regardless of the conduct enforcement is intended to target.[224] To maintain the direct enforcement of laws facially criminalizing sodomy, as well as the imposition of collateral consequences for sodomy convictions through mandatory registration and notification in a public repository intended to deter violent sex crimes, is constitutionally unsustainable as continued application of such laws is inconsistent with the most rudimentary conception of individual liberty.[225] Legislative repeal of statutes facially criminalizing sodomy coupled with appropriate reforms of statutory sex offender registration requirements represents the most effective means to finish, finally, what *Lawrence* started.

[224] Lawrence v. Texas, 539 U.S. 558, 578–79 (2003).
[225] *Id.*