

The Validity of Criminal Adultery Prohibitions After *Lawrence v. Texas*

“[O]ur Massachusetts magistracy . . . have not been bold to put in force the extremity of our righteous law against her. The penalty thereof is death. But in their great mercy and tenderness of heart they have doomed Mistress Prynne to stand only a space of three hours on the platform of the pillory, and then and thereafter, for the remainder of her natural life to wear a mark of shame upon her bosom.”¹

I. INTRODUCTION

Although Nathaniel Hawthorne has forever immortalized the crime of adultery as an icon of Massachusetts’ Puritan heritage, most are surprised to learn that adultery is still a crime in the Commonwealth – a felony, in fact, carrying a maximum sentence of three years in state prison.² The most recent successful prosecution under this statute took place just over twenty years ago in *Commonwealth v. Stowell*.³ Despite admission by the Supreme Judicial Court that the crime had “fallen into a very comprehensive desuetude,” the court upheld the conviction, explaining that the statute remained a judicially enforceable expression of public policy.⁴

Criminal statutes originally enacted in most states reflected the colonial understanding of adultery as primarily an offense against morality and, to a somewhat lesser extent, as an injury to the innocent spouse.⁵ Although many states have since repealed or modified these statutes, there are currently twenty-three states that continue to recognize adultery as a crime.⁶ Generally, modern

1. NATHANIEL HAWTHORNE, *THE SCARLET LETTER* 59 (Bantam Classic ed., Bantam Books 1986) (1850).

2. MASS. GEN. LAWS ch. 272, § 14 (2004).

3. 449 N.E.2d 357 (Mass. 1983).

4. *Id.* at 360–61 (quoting *Fort v. Fort*, 425 N.E.2d 754, 758 (Mass. App. Ct. 1981)).

5. See Martin J. Siegel, *For Better or For Worse: Adultery, Crime & the Constitution*, 30 J. FAM. L. 45, 48 (1991) (explaining Puritan anti-adultery laws aimed at safeguarding community morals); Jeremy D. Weinstein, Note, *Adultery, Law, and the State: A History*, 38 HASTINGS L.J. 195, 225-26 (1986) (discussing development of colonial adultery prohibitions); *infra* notes 25-33 and accompanying text (discussing early historical development of criminal adultery statutes). The Massachusetts statute is illustrative: the adultery prohibition is contained in Chapter 272, which lists “Crimes Against Chastity, Morality, Decency and Good Order.” MASS. GEN. LAWS ch. 272, § 14 (2004).

6. ALA. CODE § 13A-13-2 (2004); ARIZ. REV. STAT. § 13-1408 (2005); COLO. REV. STAT. § 18-6-501 (2003); FLA. STAT. ch. 798.01 (2003); GA. CODE ANN. § 16-6-19 (2004); IDAHO CODE § 18-6601 (Michie

adultery statutes prohibit sexual intercourse between a married person and an individual other than his or her spouse.⁷ These statutes, however, vary significantly by state as to elements of the offense, how and when the state may prosecute, and the punishment prescribed.⁸

Criminal statutes prohibiting adultery have traditionally withstood constitutional challenge as a reasonable state regulation that does not infringe upon any liberty interest.⁹ Nevertheless, the United States Supreme Court's 2003 decision in *Lawrence v. Texas*¹⁰ has recently reinvigorated debate over the viability of morality legislation and the extent to which the fundamental right to privacy will protect adult consensual sexual relationships.¹¹

Invalidating a Texas anti-sodomy statute, the *Lawrence* Court asked whether criminal conviction for "adult consensual sexual intimacy in the home violate[d] . . . vital interests in liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment."¹² Although the Court failed to explicitly declare sexual privacy a fundamental right, it held that the Texas statute "further[ed] no legitimate state interest which can justify its intrusion into the personal and private life of the individual."¹³ In his dissent, Justice

2004); 720 ILL. COMP. STAT. 5/11-7 (2004); KAN. STAT. ANN. § 21-3507 (2003); MASS. GEN. LAWS ch. 272, § 14 (2004); MICH. COMP. LAWS § 750.29 (2004); MINN. STAT. § 609.36 (2003); MISS. CODE ANN. § 97-29-1 (2004); N.H. REV. STAT. ANN. § 645:3 (2003); N.Y. PENAL LAW § 255.17 (Consol. 2004); N.C. GEN. STAT. § 14-184 (2004); N.D. CENT. CODE § 12.1-20-09 (2003); OKLA. STAT. tit. 21, § 871 (2004); R.I. GEN. LAWS § 11-6-2 (2004); S.C. CODE ANN. § 16-15-60 (Law. Co-op. 2003); UTAH CODE ANN. § 76-7-103 (2004); VA. CODE ANN. § 18.2-365 (2004); W. VA. CODE § 61-8-3 (2003); WIS. STAT. § 944.16 (2003).

7. See, e.g., COLO. REV. STAT. § 18-6-501 (2003); GA. CODE ANN. § 16-6-19 (2004); MICH. COMP. LAWS § 750.29 (2004).

8. See ALA. CODE § 13A-13-2 (2004) (requiring cohabitation as element of criminal adultery); ARIZ. REV. STAT. § 13-1408 (2004) (providing for prosecution only upon complaint of spouse); 720 ILL. COMP. STAT. 5/11-7 (2004) (requiring open and notorious relationship and prohibiting prosecution based on information provided on welfare applications); MASS. GEN. LAWS ch. 272, § 14 (2004) (punishing adultery by not more than three years in state prison); W. VA. CODE § 61-8-3 (2003) (punishing adultery by fine of not less than twenty dollars).

9. *Oliverson v. W. Valley City*, 875 F. Supp. 1465, 1467 (D. Utah 1995) (holding adultery statute constitutional as reasonable state regulation of sexual behavior); *Iowa v. Ronek*, 176 N.W.2d 153, 157 (Iowa 1970) (upholding adultery as crime against society and public); *Commonwealth v. Stowell*, 449 N.E.2d 357, 360 (Mass. 1983) (holding adultery statute not violative of fundamental privacy right); *City of Sherman v. Henry*, 928 S.W.2d 464, 471 (Tex. 1996) (concluding adultery not protected fundamental right).

10. 539 U.S. 558 (2003).

11. David M. Lieber, *Is Adultery Still a Crime After Lawrence?*, SEC. REV., Vol. 6, No. 2, 2004 at 14 (discussing potential impact of holding on criminal adultery statutes); Calvin Massey, *The New Formalism: Requiem for Tiered Scrutiny?*, 6 U. PA. J. CONST. L. 945, 962-65 (2004) (discussing broad potential impact of *Lawrence* holding on various consensual sex crimes); Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. 27, 27-33 (2003) (articulating breadth of interpretations regarding sexual privacy and moral-based law).

12. *Lawrence v. Texas*, 539 U.S. 558, 564 (2003); see also U.S. CONST. amend. XIV, § 1 (articulating right to due process).

13. See *Lawrence*, 539 U.S. at 578 (holding criminal sodomy statute unconstitutional). The language here may suggest that the *Lawrence* Court applied only the rational-basis review invoked by a non-fundamental liberty interest in holding that the statute furthered no "legitimate state interest." See *id.* By comparison, infringement upon a fundamental right must be justified by a "compelling state interest" to withstand strict

Scalia criticized the Court's holding as "the end of all morals legislation" and thus questioned the continuing validity of crimes such as fornication, bigamy, adultery, and incest.¹⁴

Whether criminal adultery statutes will ultimately survive *Lawrence* depends upon the boundaries of sexual privacy and the Court's willingness to accept more utilitarian interests—specifically, the state's interests in protecting the institution of marriage and preventing harm to the innocent spouse—as justification for state intrusion into private sexual relationships.¹⁵ The origin of sexual privacy itself is fundamentally grounded in the sanctity of the marital relationship.¹⁶ The Court has traditionally held this relationship and the institution of marriage in the highest esteem.¹⁷ The validity of criminal adultery statutes turns on the extent to which the state may impinge upon the sexual privacy of married individuals for the purpose of protecting them and their marriage.¹⁸

Despite strong public sentiment against adultery, it occurs with such frequency as to affect the majority of modern American marriages.¹⁹ While the public generally believes adultery to be immoral, few recognize it as a criminal act—in large part because those states that retain criminal prohibitions very rarely enforce them.²⁰ Nevertheless, the 2003 conviction of John Raymond

scrutiny. See *Reno v. Flores*, 507 U.S. 292, 301-02 (1993) (describing strict scrutiny standard of review applied to infringement upon fundamental rights); see also *infra* notes 138-139 and accompanying text (discussing type of interest implicated and level of review applied by *Lawrence* Court).

14. *Lawrence*, 539 U.S. at 599 (Scalia, J., dissenting) (criticizing majority opinion as invalidating numerous crimes justified on moral grounds).

15. See Keith Burgess-Jackson, *Our Millian Constitution: The Supreme Court's Repudiation of Immorality as a Ground of Criminal Punishment*, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 407, 415-16 (2004) (asserting necessity of replacing morality justification with harm or offense principles); Massey, *supra* note 11, at 965 (concluding *Lawrence* may require examination of utilitarian reasons for moral legislation); Sunstein, *supra* note 11, at 65-66 (discussing harm to spouse and marriage institution as alternative justification for adultery prohibition).

16. *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (holding contraceptive prohibition violates "sacred precincts of marital bedrooms").

17. *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978) (affirming fundamental right and describing marriage as foundation of family in society); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (declaring marriage a fundamental right vital to personal happiness); *Griswold*, 381 U.S. at 486 (describing marriage as noble association "intimate to the degree of being sacred"); *Skinner v. Oklahoma ex. rel. Williamson*, 316 U.S. 535, 541 (1942) (describing marriage as fundamental to human existence); *Maynard v. Hill*, 125 U.S. 190, 205 (1888) (describing marriage as most important relation in life).

18. Lieber, *supra* note 11, at 14 (articulating question presented).

19. See Mimi Hall, *Cheating Hearts, Mixed Feelings: Most Say Adultery is Wrong but Accept that it Happens*, USA TODAY, June 12, 1997, at 4A (describing results of USA Today/CNN/Gallop Poll). "Unless a married person is separated from his or her spouse, nine in [ten] people believe it's always or at least almost always wrong to have sex with someone else." *Id.* Experts estimate that seventy percent of married men and fifty percent of married women have engaged in adulterous relationships. See Phyllis Coleman, *Who's Been Sleeping in My Bed? You and Me, and the State Makes Three*, 24 IND. L. REV. 339, 339 n.2 (1991) (referencing various sociological studies); see also Siegel, *supra* note 5, at 45 (1991) (noting adultery affects most American marriages).

20. Siegel, *supra* note 5, at 45 (1991) (noting adulterers do not consider their conduct criminal because

Bushey Jr. in Virginia proved that one cannot dismiss criminal adultery statutes as mere anachronism.²¹

This Note will first examine the historical development of the crime and survey existing adultery statutes.²² It will then trace the development of the right to privacy and its application in the context of challenges to criminal adultery statutes.²³ Finally, this Note will explore the impact of *Lawrence* and discuss the continuing viability of adultery statutes.²⁴

II. HISTORICAL CONTEXT

A. Development of Criminal Adultery Prohibitions

The earliest prohibitions of adultery in western civilization are biblical.²⁵ At English common law, adultery was not a crime and was recognized as a secular offense only when so open and notorious as to constitute a public nuisance.²⁶ Instead, adultery was an ecclesiastical offense punishable under canon law as breach of marital vows.²⁷ Although secular authorities made adultery a capital crime by statute under the theocratic commonwealth of Oliver Cromwell, the crime was nullified after the Restoration and returned to the exclusive jurisdiction of the ecclesiastical courts.²⁸ The common law was, however, concerned with the effect of adulterous conduct by a married woman on inheritance and property rights, recognizing the “obvious danger of foisting spurious offspring upon her unsuspecting husband and bringing an illegitimate

laws not enforced); *see supra* note 19 and accompanying text (discussing public opinion toward adultery).

21. John F. Kelly, *Virginia Adultery Case Roils Divorce Industry; Conviction Draws Attention to Little-Used Law*, WASH. POST, Dec. 1, 2003, at B1 (reporting adultery prosecution of John Raymond Bushey). Bushey, a Virginia town attorney married eighteen years, originally pled guilty to adultery in district court in October of 2003. *Id.* He later withdrew the plea and at one time pledged to work with the ACLU to challenge the validity of the statute. Jonathan Turley, *Of Lust and the Law*, WASH. POST, Sep. 5, 2004, at B1. In August 2004, however, Bushey accepted a sentence of 20 hours of community service, thus ending hopes that his case would provide the vehicle for a constitutional challenge. *Id.*

22. *See infra* Part II.A (discussing historical development of adultery statutes); *infra* Part II.B (providing overview of existing adultery statutes).

23. *See infra* Part II.C (discussing development of privacy right); *infra* Part II.D (applying privacy right to adultery statutes).

24. *See infra* Part III (discussing impact of *Lawrence* upon viability of adultery prohibition).

25. *See Exodus* 20: 14 (declaring prohibition of adultery commandment from God); *Leviticus* 20: 10 (declaring adultery punishable by death); *Deuteronomy* 22: 22 (declaring adultery punishable by death).

26. *See* 2 CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW § 210, at 528 (15th ed. 1994) (detailing evolution of adultery as a criminal offense).

27. *Id.*

28. 4 WILLIAM BLACKSTONE, COMMENTARIES 64-65 (Garland Publishing, Inc. 1978). Blackstone explains that under Cromwell's theocracy, adultery was one of many offenses punished to further the government's interest in “extraordinary strictness and purity of morals.” *Id.* at 64; *see also* MODEL PENAL CODE § 213.6 note on adultery and fornication at 430 (Proposed Official Draft 1962) (detailing early history of adultery in England under ecclesiastical and common law).

heir into his family.”²⁹ Accordingly, secular courts treated adultery as a “private injury” and statutes imposed criminal sanctions for the birth of an illegitimate child.³⁰

Concerned with “moral corruption” prevalent in England since the Reformation, the Puritan colonists of New England reinstated the crime of adultery with a married woman as a capital offense.³¹ Colonial statutes addressed adultery primarily as an offense against community morals rather than a wrong against the husband.³² This Puritan legacy extended beyond New England as the colonial criminalization of adultery became state law in most jurisdictions and thus remained well into the twentieth century.³³

In the absence of ecclesiastical jurisdiction, early criminal prohibitions of adultery in the United States varied widely, reflecting the traditional divergence of philosophy between the canon and common-law courts of England.³⁴ In some states, only a married person could commit adultery in accord with the ecclesiastical understanding of adultery as breach of the marital vow.³⁵ In other states, an unmarried participant in an adulterous relationship with a married person would also be guilty of the crime.³⁶ Furthermore, some states prescribed that a sexual relationship would only constitute adultery where the woman was the married party in recognition of the common-law concern with

29. TORCIA, *supra* note 26, § 210, at 528-29; *see also* United States v. Hickson, 22 M.J. 146, 147 (C.M.A. 1986) (discussing development of criminal prohibition of adultery under military law).

30. BLACKSTONE, *supra* note 28, at 65 (discussing treatment of adultery by secular courts).

31. Siegel, *supra* note 5, at 48 (noting Puritans made adultery a capital offense); Weinstein, *supra* note 5, at 225 (noting Puritans revived adultery as capital offense in colonies after nullified in England by Reformation); *see also* Hawthorne, *supra* note 1, at 59 (discussing punishment of adulteress Hester Prynne in *The Scarlet Letter*).

32. *See* Siegel, *supra* note 5, at 48 (referencing Rhode Island statute forfeiting husband’s bond should wife fail to answer adultery charge); Weinstein, *supra* note 5, at 226 n.228 (citing same Rhode Island statute).

33. Siegel, *supra* note 5, at 48-49. As an illustration of Puritan influence beyond New England, Siegel references a statute enacted in the colony of Maryland in 1715 punishing adultery with a substantial fine or, if unable to pay, by corporal punishment. *Id.* This statute was later incorporated into the Code of Maryland and amended to impose a penalty of ten dollars. *Evans v. Murff*, 135 F. Supp. 907, 911 (D. Md. 1955). However, as of October 1, 2002, Maryland repealed its criminal adultery statute altogether. 2002 Md. Laws ch. 26, § 1.

34. *United States v. Clapox*, 35 F. 575, 578 (D. Or. 1888) (discussing establishment of adultery crime in colonies without ecclesiastical courts); TORCIA, *supra* note 26, § 211, at 530 & n.10 (tracing varied statutes to divergent views under canon law and common law).

35. *See* TORCIA, *supra* note 26, § 211, at 531 (articulating discrepancy in statutes). Many current statutes continue to recognize adultery as a crime only committed by married individuals and not unmarried partners in an adulterous relationship. *E.g.*, COLO. REV. STAT. § 18-6-501 (2003) (prohibiting sexual intercourse by married person other than with spouse); GA. CODE ANN. § 16-6-19 (2004) (defining adultery as crime committed by “a married person”); UTAH CODE ANN. § 76-7-103 (2004) (defining adultery as crime committed by “a married person”).

36. TORCIA, *supra* note 26, § 211, at 531 & n.11 (discussing statutes punishing adultery regardless of individual’s marital status). Numerous current statutes continue to punish both married and unmarried participants in an extramarital sexual relationship. *See, e.g.*, ARIZ. REV. STAT. § 13-1408 (2004) (defining crime of adultery as applied to married and unmarried persons); IDAHO CODE § 18-6601 (Michie 2004) (encompassing married and unmarried men and women in definition of adultery); MICH. COMP. LAWS § 750.29 (2004) (defining adultery as sexual intercourse when either party married to third person).

inheritance and property rights.³⁷

Although prosecution under criminal adultery statutes was common in the eighteenth and nineteenth centuries, enforcement significantly declined throughout the twentieth century.³⁸ Prior to World War II, the most significant legal deterrent to adultery was not criminal sanction, but rather the fault-based divorce system in which an adulterous spouse was subject to severely punitive financial treatment and automatic denial of child custody.³⁹ In 1955, the American Law Institute (ALI) cited widespread non-enforcement in declaring adultery laws “dead-letter statutes” subject to abuse by selective enforcement and blackmail, thereby “tend[ing] to bring the penal law into disrepute.”⁴⁰ The ALI omitted the offense from the text of its Model Penal Code adopted in 1962 and recommended the decriminalization of adultery and other consensual sexual acts, taking the position that “private immorality should be beyond the reach of the penal law.”⁴¹

B. Modern Criminal Adultery Law and Overview of State Statutes

Many states followed the ALI’s recommendation by repealing their own criminal adultery statutes.⁴² Most recently, the District of Columbia decriminalized the offense, effective in the spring of 2004.⁴³ Although

37. See TORCIA, *supra* note 26, § 211, at 531 & n.13 (noting under some statutes intercourse between unmarried woman and married man not considered adultery). Although most states have amended their statutes to apply equally to both sexes, Minnesota continues to recognize a gender distinction, punishing adultery only when committed by or with a married woman. MINN. STAT. § 609.36 (2003).

38. See Oliverson v. W. Valley City, 875 F. Supp. 1465, 1474 (D. Utah 1995) (discussing early history of enforcement). As enforcement of adultery laws declined nationally, it continued to be significant in Massachusetts into the twentieth century. *Id.* According to the commentary to the Model Penal Code, “arrests for adultery in 1948 were as follows: Baltimore three, Wilmington sixteen, Los Angeles four, Deluth two.” MODEL PENAL CODE § 213.6 note on adultery and fornication at 434 n.17 (Proposed Official Draft 1962). That same year, there were a surprising 242 arrests for adultery in Boston. *Id.* However, the most recent adultery conviction in Massachusetts was in 1983, at which time the court commented that the statute had “fallen into a very comprehensive desuetude.” Commonwealth v. Stowell, 449 N.E.2d 357, 360 (Mass. 1983).

39. Siegel, *supra* note 5, at 49 (explaining fault-based divorce system as alternative legal deterrent aside from criminal adultery prohibition).

40. MODEL PENAL CODE § 213.6 note on adultery and fornication at 434-36 (Proposed Official Draft 1962) (commenting on non-enforcement of adultery statutes). Adultery laws are sometimes invoked during divorce proceedings for “vindictive purposes” or to “gain leverage in lengthy settlement negotiations.” Andrea Sachs, *Handing Out Scarlet Letters: Antiquated Sex Laws Turn Into a Bludgeon for Divorcing Spouses*, N.Y. TIMES, Oct. 1, 1990, at 98.

41. MODEL PENAL CODE § 213.6 note on adultery and fornication at 439 (Proposed Official Draft 1962).

42. See CAL. PENAL CODE § 269a-269b, *repealed by* 1975 Cal. Stat. ch. 71, § 5; IOWA CODE § 702.1, *repealed by* 1976 Iowa Acts ch. 1245, § 526; KAN. STAT. ANN. § 21-908, *repealed by* 1969 Kan. Sess. Laws ch. 180, § 21-4701; KY. REV. STAT. ANN. § 436.070, *repealed by* 1975 Ky. Acts ch. 406, § 336; ME. REV. STAT. ANN. tit. 17, § 101, *repealed by* 1975 Me. Laws ch. 499, §5; NEB. REV. STAT. § 28-704, *repealed by* 1995 Neb. Laws 22, §1; N.J. STAT. ANN. § 2A: 88-1, *repealed by* 1978 N.J. Laws ch. 95 § 2C: 98-2; OR. REV. STAT. § 167.005, *repealed by* 1971 Or. Laws ch. 743, § 432; S.D. CODIFIED LAWS § 22-22-17, *repealed by* 1976 S.D. Laws ch. 158, §22-8; VT. STAT. ANN. tit. 13, §§ 201, 202, *repealed by* 1981 Vt. Acts & Resolves No. 223 (Adj. Sess.) §24; WASH. REV. CODE § 9.79.110, *repealed by* 1975 Wash Laws ch. 260, § 9A.92.010.

43. D.C. CODE ANN. § 22-201, *repealed by* 2004 D.C. Stat. 15-154 (repealing criminal adultery statute

legislation has been introduced to repeal criminal statutes in numerous other states, many legislators have found decriminalization too symbolically problematic or politically unpopular to undertake.⁴⁴ Adultery remains a crime in twenty-three states with punishment varying significantly by jurisdiction.⁴⁵ Moreover, existing statutes differ in the elements of the offense and when it may be prosecuted, reflecting various state interests underlying criminalization.⁴⁶

The majority of states define the crime of adultery as requiring only a single act of extramarital sexual intercourse.⁴⁷ In some jurisdictions, however, the offense requires more than an isolated clandestine act.⁴⁸ For example, the Illinois statute reflects the old common-law distinction, criminalizing adultery only when the relationship is “open and notorious.”⁴⁹ Similarly, the courts of Alabama have interpreted its statute to require open and notorious conduct.⁵⁰ Additionally, three other states limit the crime to adulterous cohabitation, defined by one jurisdiction as living in “an open state of adultery.”⁵¹ Such a

effective April 29, 2004).

44. *E.g.*, S.B. 176, 183rd Gen. Court (Mass. 2003) (proposing repeal of various “archaic crimes” including adultery); L.S.R. 527, 159th Gen. Court (N.H. 2004) (proposing repeal of criminal adultery statute); A.B. 1231, 226th Leg. Sess. (N.Y. 2003) (proposing repeal of criminal adultery statute). In 1987, a similar New Hampshire bill decriminalizing adultery passed in the House of Representatives 277-57, only to be defeated in the Senate 12-11 with one member absent. Alberta I. Cook, *Adultery Statute Survives Debate in New Hampshire*, NAT’L LAW J., April 20, 1987, at 14. One Senator who voted to retain the statute referenced the Ten Commandments and declining moral standards, arguing, “if we do pass legislation like this, the message will be that anything goes.” *Id.* Although adultery remains a crime in Alabama, the legislative commentary to the statute explains that “while there is strong sentiment that adultery should not be regulated by criminal sanction, the committee was of the opinion that the political success of a proposal formally to abolish this crime would, at the present time, be doubtful.” Commentary to ALA. CODE § 13A-13-2 (2004).

45. *See supra* note 6 (listing twenty-three existing statutes criminalizing adultery). *Compare* R.I. GEN. LAWS § 11-6-2 (2004) (punishing adultery as misdemeanor with maximum penalty of \$500), *and* W. VA. CODE § 61-8-3 (2003) (punishing adultery as misdemeanor by fine of not less than \$20), *with* MASS. GEN. LAWS ch. 272, § 14 (2004) (punishing adultery as felony with maximum of three years in state prison or fine of \$500), *and* OKLA. STAT. tit. 21, § 872 (2004) (punishing adultery as felony with maximum of five years in state prison or fine of \$500).

46. *See, e.g.*, ALA. CODE § 13A-13-2 (2004) (requiring cohabitation as an element of criminal adultery); ARIZ. REV. STAT. § 13-1408 (2004) (allowing prosecution only upon complaint of husband or wife); 720 ILL. COMP. STAT. 5/11-7 (2004) (requiring open and notorious relationship and prohibiting prosecution based on information provided on welfare applications).

47. *See, e.g.*, GA. CODE ANN. § 16-6-19 (2004) (criminalizing voluntary sexual intercourse with person other than spouse); MICH. COMP. LAWS § 750.29 (2004) (defining adultery as sexual intercourse of two persons when either is married to third person); MINN. STAT. § 609.36 (2003) (defining adultery as sexual intercourse between married woman and man other than husband).

48. *See, e.g.*, ALA. CODE § 13A-13-2 (2004) (criminalizing adulterous cohabitation); FLA. STAT. ch. 798.01 (2003) (defining crime as living in open state of adultery); 720 ILL. COMP. STAT. 5/11-7 (2004) (criminalizing adultery when open and notorious).

49. 720 ILL. COMP. STAT. 5/11-7 (2004) (requiring “open and notorious” behavior to constitute crime of adultery).

50. ALA. CODE § 13A-13-2 (2004); *Quartemas v. State*, 48 Ala. 269, 271 (1872) (defining adulterous conduct punished by statute as open and notorious cohabitation).

51. FLA. STAT. ch. 798.01 (2003) (defining crime as living in “open state of adultery”); MISS. CODE ANN. § 97-29-1 (2004); N.C. GEN. STAT. § 14-184 (2003). Additionally, Oklahoma limits prosecution to

requirement supports the rationale that the state punishes adultery “to prevent debasement of public morals by indecent example.”⁵² Traditionally, the “open and notorious” requirement was easily satisfied by public knowledge of the adulterous relationship.⁵³ More recently, in *Krause v. Village of Barrington Hills*,⁵⁴ the court held that although the adulterous activity of a “swingers’ club” was publicly acknowledged, sexual conduct occurring in private did not offend the public peace.⁵⁵ Thus the requirement that adulterous conduct be open and notorious “put ‘private’ conduct beyond the reach of criminal law.”⁵⁶

Statutes in four states criminalizing a single adulterous act provide that adultery prosecution may only commence upon complaint of the non-offending spouse.⁵⁷ Limiting prosecution to such instances suggests that “adultery is regarded as a wrong against the spouse rather than a more generalized flouting of community norms.”⁵⁸ Although such provisions have been challenged as an unconstitutional delegation of power to a private individual, courts have upheld

instances when either the conduct is open and notorious, or the offended spouse has complained. OKLA. STAT. tit. 21, § 871 (2004).

52. MODEL PENAL CODE § 213.6 note on adultery and fornication at 431 (Proposed Official Draft 1962). This rationale is widely recognized in jurisdictions with and without a provision requiring open and notorious conduct or cohabitation. *Id.* at 436 (describing community notions of ethical behavior as primary reason for punishing adultery); *see also, e.g.*, *People v. Bright*, 238 P. 71, 73 (Colo. 1925) (describing intent to punish disgraceful and scandalous conduct tending to demoralize society by example); *Luster v. State*, 2 So. 690, 692 (Fla. 1887) (describing intent to punish evil and disgraceful conduct tending to corrupt public morality); *People v. Cessna*, 356 N.E.2d 621, 623 (Ill. App. Ct. 1976) (describing intent to protect public from conduct flouting accepted standards of morality). In its commentary to the Model Penal Code, the American Law Institute noted that a requirement of open and notorious conduct would be advisable given this rationale because a discreet affair “would be no affront to community morals.” MODEL PENAL CODE § 213.6 note on adultery and fornication at 431-32 (Proposed Official Draft 1962).

53. *People v. Potter*, 49 N.E.2d 307, 309-10 (Ill. App. Ct. 1943) (upholding adultery conviction under statute requiring openness because neighbors aware of relationship).

54. 571 F. Supp. 538 (N.D. Ill. 1982).

55. *Id.* at 541-42 (holding adultery behind closed doors not open and notorious despite public knowledge of swingers’ club). A “swingers’ club” is an organization in which member couples exchange sexual partners. *Id.* at 540.

56. *Id.* at 542 n.3.

57. ARIZ. REV. STAT. § 13-1408 (2004) (allowing prosecution only upon complaint of husband or wife); MINN. STAT. § 609.36 (2003) (allowing prosecution only upon complaint of husband or wife); N.D. CENT. CODE § 12.1-20-09 (2003) (allowing prosecution only upon complaint of spouse of alleged offender); OKLA. STAT. tit. 21, § 871 (2004) (allowing prosecution either upon complaint of spouse or when open and notorious).

58. MODEL PENAL CODE § 213.6 note on adultery and fornication at 433 (Proposed Official Draft 1962). *Cf. Iowa v. Ronek*, 176 N.W.2d 153, 155-56 (Iowa 1970) (upholding Iowa adultery statute allowing prosecution only upon spousal request). As the court explains:

Adultery is an offense against the husband or wife of the guilty party, but it is nonetheless an offense against the public for that reason . . . The provision is grounded in the regard which the law has for the marital relation and the rights of the husband and wife to condone the wrongs of either toward the other. That the offender cannot be prosecuted except at the instance of the injured husband or wife does not render his crime any the less an offense against the public.

Id. *But see State v. Allison*, 220 N.W. 563, 564 (Minn. 1928) (describing offense as crime against state and not against other spouse despite prosecution provision).

them as a reasonable means of preventing state involvement in a matter the injured spouse would prefer to address privately.⁵⁹ Courts have recognized the incidental harm a criminal prosecution could cause to the injured spouse, and its ability to destroy an otherwise “salvageable marriage.”⁶⁰ Because many couples attempt reconciliation, the notoriety and public scrutiny of a criminal prosecution tends to decrease the probability that the marriage will survive.⁶¹ Thus, provisions limiting prosecution seek “to achieve some balance between punishment for the harms caused by the offense, and the increased harm to the family which prosecution would bring.”⁶²

Although states infrequently prosecute adultery, the existence of criminal prohibitions still has a significant impact on other legal proceedings.⁶³ For example, in a divorce proceeding, a spouse may invoke the Fifth Amendment’s privilege against self-incrimination to avoid disclosure of an adulterous relationship that could influence an award of alimony.⁶⁴ While adultery remains a crime in just less than half the states, most jurisdictions have abolished civil “heart balm” statutes, which provided a tort claim for relief in the form of financial compensation paid to the injured spouse.⁶⁵ Moreover, modern divorce statutes in all jurisdictions now allow for no-fault divorce, reflecting an understanding that a marital relationship may simply break down without the fault of either party.⁶⁶

C. *The Development of the Right to Privacy*

Out of the Supreme Court’s extreme reverence for the institution of marriage developed a privacy right which protects an individual’s most intimate

59. *Ronek*, 176 N.W.2d at 156 (upholding Iowa adultery statute allowing prosecution only upon spousal request); *Allison*, 220 N.W. at 564 (noting legislative intent of provision to allow for reconciliation).

60. *Ronek*, 176 N.W.2d at 156 (recognizing incidental harm prosecution may impose and its detrimental impact on reconciliation).

61. See *Coleman*, *supra* note 19, at 403-04 (discussing potential for spousal forgiveness and detrimental effects of prosecution on marriage). The recent prosecution of John Raymond Bushey Jr. in Virginia illustrates this point. See *supra* note 21 and accompanying text. Prosecution was commenced upon request not by his wife, but by his mistress upon termination of the affair. See *Turley*, *supra* note 21, at B1. Although Bushey at one point vowed to appeal and challenge the statute, he later accepted and served his sentence reportedly in the interest of ending the publicity of the trial and preserving his relationship with his wife. See *Kelly*, *supra* note 21, at B1.

62. *State v. Lynch*, 562 P.2d 1386, 1391 (Ariz. Ct. App. 1977).

63. See Note, *Constitutional Barriers to Civil and Criminal Restrictions on Pre- and Extramarital Sex*, 104 HARV. L. REV. 1660, 1672-74 (1991) [hereinafter *Constitutional Barriers*] (discussing various contexts in which adultery impacts civil proceedings).

64. See *Siegel*, *supra* note 5, at 54 (noting adultery crime may hamper domestic legal proceedings by allowing Fifth Amendment privilege); see also U.S. CONST. amend. V (providing protected right against self-incrimination).

65. See *Coleman*, *supra* note 19, at 402-03 (discussing abolished tort claims which once addressed adultery); *Siegel*, *supra* note 5, at 88-89 (discussing “heart balm” actions).

66. MODEL PENAL CODE § 213.6 note on adultery and fornication at 438 (Proposed Official Draft 1962) (describing concept underlying no-fault divorce).

decisions.⁶⁷ In *Griswold v. Connecticut*,⁶⁸ the Court invalidated a state law prohibiting the sale of contraceptives as a violation of the privacy right demanded by the sacred intimacy of the marital relationship.⁶⁹ The Court later extended this privacy right beyond the marital relationship in *Eisenstadt v. Baird*,⁷⁰ invalidating a Massachusetts law prohibiting contraceptive distribution to unmarried persons.⁷¹ The Court explained: “If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”⁷²

The opinions in *Griswold* and *Eisenstadt* provided the foundation for *Roe v. Wade*,⁷³ in which the Court invalidated a Texas law prohibiting abortion.⁷⁴ Although not absolute, the Court recognized the fundamental right of a woman to make certain intimately personal decisions as a protected exercise of her liberty under the Due Process Clause of the Fourteenth Amendment.⁷⁵ In *Carey v. Population Services*,⁷⁶ the Court again invoked the privacy right to invalidate a New York law prohibiting the distribution of contraceptives to minors.⁷⁷ The Court thus confirmed that the privacy right articulated in *Griswold* was not limited to married couples, but rather protected “individual decisions in matters of childbearing.”⁷⁸ Some courts have held that a right to engage in sexual intercourse is necessarily implied from such decisions because without such a corresponding right, the right to make decisions regarding childbearing would be meaningless.⁷⁹ The Supreme Court in *Carey* explicitly reserved the issue, commenting that it “has not definitely answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating [private consensual sexual] behavior among adults.”⁸⁰

67. *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (holding ban on sale of contraceptives to married couples unconstitutional). The Court described marriage as “a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred.” *Id.* at 486.

68. 381 U.S. 479 (1965).

69. *Id.* at 485-86 (articulating privacy right protecting decision of married couple to use contraception).

70. 405 U.S. 438 (1971).

71. *Id.* at 453-55 (invalidating prohibition of contraceptive distribution to unmarried persons on equal protection grounds).

72. *Id.* at 453.

73. 410 U.S. 113 (1973).

74. *Id.* at 153 (recognizing decision to terminate pregnancy as protected by privacy right).

75. *Id.* at 152-54. The right to terminate a pregnancy is not absolute; it is qualified by the compelling state interest in protecting both the health of the mother and the potentiality of viable human life through the trimester demarcation, allowing state regulation as the woman approaches term. *Id.* at 163-65.

76. 431 U.S. 678 (1977).

77. *Id.* at 681 (applying privacy right to invalidate prohibition of contraception distribution to minors).

78. *Id.* at 687 (explaining privacy right applied to married couples and individuals alike).

79. See *Doe v. Dulong*, 603 F. Supp. 960, 966-67 (E.D. Va. 1985) (invalidating Virginia statute prohibiting pre-marital sexual relations) *rev'd on standing grounds*, 782 F.2d 1202 (4th Cir. 1986); *State v. Saunders*, 381 A.2d 333, 340 (N.J. 1977) (invalidating fornication statute because decision to have sex similarly intimate to those implicating privacy right).

80. *Carey v. Population Servs. Int'l*, 431 U.S. 678, 689 n.5 (1977).

Nevertheless, several courts attempted to answer this question, recognizing an emerging right to sexual privacy developed in the *Griswold* line of cases.⁸¹ In *State v. Saunders*,⁸² the New Jersey Supreme Court invalidated a criminal fornication statute, explaining that the decision to engage in sex is at least as personal and intimate as the decision to use contraception.⁸³ Similarly, a handful of state supreme courts invalidated criminal sodomy statutes.⁸⁴ In *Post v. State*,⁸⁵ the Oklahoma Criminal Appeals Court overturned a heterosexual sodomy conviction, commenting that the privacy right articulated by the Supreme Court encompasses the right to choose sexual partners.⁸⁶

Nearly a decade after *Carey*, the Supreme Court finally addressed the extent to which the state may regulate private consensual sexual conduct in its five-to-four decision of *Bowers v. Hardwick*,⁸⁷ upholding a Georgia statute criminalizing sodomy.⁸⁸ The Court framed the issue as whether the Constitution conferred “a fundamental right upon homosexuals to engage in sodomy.”⁸⁹ Responding in the negative, the Court rejected the argument that sodomy was protected by the privacy right, asserting that no connection could be made between homosexual activity and family, marriage, or procreation.⁹⁰ Moreover, the Court noted that the *Griswold* line of cases in no way supported the claim that private sexual conduct between consenting adults is constitutionally protected from state regulation.⁹¹ The Court did not consider the right to engage in consensual sodomy fundamental because it was neither “implicit in the concept of ordered liberty,”⁹² nor “deeply rooted in this nation’s history and tradition.”⁹³ Furthermore, the *Bowers* Court held that morality constituted an adequate rational basis for state regulation of sexual conduct.⁹⁴

81. See, e.g., *People v. Onofre*, 415 N.E.2d 936, 940-41 (N.Y. 1980) (invalidating New York criminal sodomy statute); *Saunders*, 381 A.2d at 340 (invalidating fornication statute because decision to have sex similarly intimate to those implicating privacy right); *Post v. State*, 715 P.2d 1105, 1109 (Okla. Crim. App. 1986) (overturning heterosexual sodomy conviction because private consensual sex protected by privacy right).

82. 381 A.2d 333 (N.J. 1977).

83. *Id.* at 340 (describing considerations involved in both decisions as intimate and personal).

84. See *State v. Pilcher*, 242 N.W.2d 348, 359 (Iowa 1976) (invalidating Iowa criminal sodomy statute); *Onofre*, 415 N.E.2d at 940-41 (invalidating New York criminal sodomy statute); *Commonwealth v. Bonadio*, 415 A.2d 47, 50-52 (Pa. 1980) (invalidating Pennsylvania criminal sodomy statute).

85. 715 P.2d 1105 (Okla. Crim. App. 1986).

86. *Id.* at 1109 (explaining privacy includes right to select sexual partners).

87. 478 U.S. 186 (1986).

88. *Id.* at 189. Although the Georgia sodomy statute prohibited both homosexual and heterosexual sodomy, the case before the Court addressed sodomy only in the homosexual context and thus the Court reserved judgment on the constitutionality of the statute as applied to heterosexual relationships. *Id.*

89. *Id.* at 190 (stating issue before the Court).

90. *Id.* at 191 (describing sodomy as fundamentally different from other decisions protected by privacy right).

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

92. *Id.* at 192. (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

93. *Id.* at 192 (quoting *Moore v. City of E. Cleveland*, 431 U.S. 484, 503 (1977)).

94. *Id.* at 196 (holding morality a legitimate state interest justifying sodomy prohibition).

D. Application of Privacy Right to Adultery

Several courts have concluded that the right to privacy does not protect adulterous relationships.⁹⁵ Although dicta in various opinions supports this position,⁹⁶ the Supreme Court declined the opportunity to directly address the issue.⁹⁷ Moreover, courts have upheld state criminal adultery statutes as constitutional because they do not infringe upon any liberty interest.⁹⁸ In upholding the Massachusetts statute, the Supreme Judicial Court observed that, although the scope of protection offered by the privacy right to make “certain kinds of important decisions” regarding private sexual conduct remained undefined, one could not interpret the fundamental privacy right implicit in the concept of ordered liberty as prohibiting the prosecution of consenting adults who engage in adulterous conduct.⁹⁹ Similar holdings have relied upon the emphasis the Supreme Court has placed upon the marital relationship throughout the development of the privacy right, holding that “the protection of actual sexual intimacy appears to be confined to those persons in the marital relationship.”¹⁰⁰

Other courts, however, have reached the opposite conclusion, recognizing an

95. *E.g.*, *Oliverson v. W. Valley City*, 875 F. Supp. 1465, 1480 (D. Utah 1995) (upholding criminal adultery statute because extramarital sex not protected within penumbra of privacy); *Suddarth v. Slane*, 539 F. Supp. 612, 617-18 (W.D. Va. 1982) (upholding dismissal of police officer because adulterous affair not protected by privacy right); *Johnson v. San Jacinto Jr. College*, 498 F. Supp. 555, 576 (S.D. Tex. 1980) (upholding professor’s dismissal explaining privacy derived from marital relationship does not protect adultery).

96. *See Carey v. Population Servs. Int’l*, 431 U.S. 678, 703 (1977) (Powell, J., concurring) (asserting application of strict scrutiny to review all personal decisions regarding sex not required); *Griswold v. Connecticut*, 381 U.S. 479, 498 (1965) (Goldberg, J., concurring) (commenting on constitutionality of adultery and fornication prohibitions); *Poe v. Ullman*, 367 U.S. 497, 546 (1961) (Harlan, J., dissenting) (describing adultery prohibition as so firmly established that constitutional doctrine must build upon them).

97. *See generally Hollenbaugh v. Carnegie Free Library*, 439 U.S. 1052 (1978) (denying certiorari to judgment upholding dismissal from public service for refusal to conceal adulterous relationship). In his dissent, Justice Marshall noted that the employee’s adulterous relationship “closely resemble[d] the other aspects of personal privacy to which [the Court has] extended constitutional protection.” *Id.* at 1055 (Marshall, J., dissenting).

98. *E.g.*, *Oliverson*, 875 F. Supp. at 1480 (upholding criminal adultery statute); *Krause v. Village of Barrington Hills*, 571 F. Supp. 538, 541 n.2 (N.D. Ill. 1982) (asserting state may criminalize adultery “without violating constitutional rights of adulterers”); *Commonwealth v. Stowell*, 449 N.E.2d 357, 360-61 (Mass. 1983) (upholding criminal adultery statute).

99. *Stowell*, 449 N.E.2d at 360. The court, however, offered no explanation as to how the decision to commit adultery differed from other personal decisions within the scope of privacy protection. *See id.*

100. *Johnson*, 498 F. Supp. at 575; *accord Oliverson* 875 F. Supp. at 1480 (explaining sex outside marriage or contrary to marital integrity not encompassed within privacy right); *City of Sherman v. Henry*, 928 S.W.2d 464, 469-70 (Tex. 1996) (explaining adultery distinguishable from rights protected because antithetical to marriage and family). *But see Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (applying privacy right to protect non-married couples in private decisions). This rationale appears to conflict with the holding of *Eisenstadt*, in which the Court explained that the right of privacy protects the individual, whether married or single, from unwarranted governmental intrusion into fundamentally personal matters. *Id.* Under the reasoning of *Johnson*, one may argue that supplying contraception to unmarried persons is also antithetical to family and the marital relationship and should not be protected. *Cf. Johnson*, 498 F. Supp. at 575.

emerging fundamental right of sexual privacy in the *Griswold* line of cases which extends beyond the marital relationship.¹⁰¹ In *Briggs v. North Muskegon Police Department*,¹⁰² the Court of Appeals for the Sixth Circuit upheld a district court decision that explicitly identified sexual privacy as a fundamental right.¹⁰³ In a dissent to the Supreme Court's denial of certiorari, Justice White noted the widespread division among courts regarding the extent to which the privacy right protected individuals in sexual matters.¹⁰⁴ Similarly, in *Thorne v. City of El Segundo*,¹⁰⁵ the Court of Appeals for the Ninth Circuit held sexual activity sufficiently similar to matters such as contraception, abortion, marriage, and family life to fall within the zone of privacy protected by the Constitution.¹⁰⁶ Again, the Supreme Court denied certiorari and allowed the decision to stand.¹⁰⁷

Nevertheless, the Court effectively closed the door on sexual privacy with *Bowers v. Hardwick*.¹⁰⁸ The cases that followed addressed adultery with the same approach taken by the *Bowers* Court toward sodomy, narrowly framing the issue in terms of a fundamental right to commit adultery.¹⁰⁹ Following the framework of *Bowers*, courts refused to recognize such a right, explaining that it was neither "implicit in the concept of ordered liberty," nor "deeply rooted in this Nation's history and tradition."¹¹⁰ Upholding the Utah criminal statute in *Oliverson v. West Valley City*,¹¹¹ the court examined the development of the crime and concluded that "adultery is directly opposite to any aspect of an

101. See *supra* note 81 (referencing cases invalidating fornication and sodomy statutes as violation of privacy right). See generally *Briggs v. N. Muskegon Police Dept.*, 746 F.2d 1475 (6th Cir. 1984) (affirming police officer's fundamental right of sexual privacy infringed when fired for adulterous cohabitation), *cert. denied*, 473 U.S. 909 (1985); *Thorne v. City of El Segundo*, 726 F.2d 459 (9th Cir. 1983) (holding privacy right violated when police applicant denied employment because she admitted to adulterous relationship), *cert. denied*, 469 U.S. 979 (1984).

102. 746 F.2d 1475 (6th Cir. 1984).

103. *Id.* at *4-6 (affirming police officer's fundamental right of sexual privacy infringed when fired for adulterous cohabitation). The validity of Michigan's criminal adultery statute was not addressed because *Briggs* was not criminally charged. See *id.*; see also MICH. COMP. LAWS § 750.29 (2004).

104. *City of N. Muskegon v. Briggs*, 473 U.S. 909, 910 (1985) (White, J., dissenting) (asserting certiorari necessary to remedy lower court discrepancies in interpretation of privacy right).

105. 726 F.2d 459 (9th Cir. 1983), *cert. denied*, 469 U.S. 979 (1984).

106. *Id.* at 468 (holding privacy right violated when police applicant denied employment because admitted to adulterous relationship). Texas repealed its criminal adultery statute in 1973. *City of Sherman v. Henry*, 928 S.W.2d 464, 473 (Tex. 1996) (citing Act of June 14, 1973, 63d Leg., R.S., ch. 399, § 3, 1973 Tex. Gen. Laws 883, 922, *repealing* TEX. PENAL CODE ANN. § 499, (1925)).

107. See generally *Thorne v. City of El Segundo*, 469 U.S. 979 (1984) (denying certiorari).

108. See generally *Bowers v. Hardwick*, 478 U.S. 186 (1986) (upholding criminal sodomy prohibition).

109. Compare *id.* at 190 (upholding criminal sodomy statute because no fundamental right to engage in sodomy), with *Oliverson v. W. Valley City*, 875 F. Supp. 1465, 1482 (D. Utah 1995) (upholding Utah criminal statute because no fundamental right to adultery exists), and *City of Sherman v. Henry*, 928 S.W.2d 464, 470 (Tex. 1996) (upholding dismissal of police officer for adulterous affair because adultery not fundamental right).

110. *Oliverson*, 875 F. Supp. at 1482 (holding no fundamental right to adultery); *Henry*, 928 S.W.2d at 470 (holding no fundamental right to adultery).

111. 875 F. Supp. 1465 (D. Utah 1995).

historical right.”¹¹² Similarly, in *City of Sherman v. Henry*,¹¹³ the Supreme Court of Texas noted that “prohibitions against adultery have ancient roots,” and held that adultery was not a fundamental right.¹¹⁴

E. *Lawrence v. Texas*

In *Lawrence v. Texas*,¹¹⁵ the Supreme Court invalidated a criminal sodomy statute with a 6-3 decision overruling *Bowers*.¹¹⁶ Rather than addressing the challenge as an equal protection violation, the Court framed the issue as a question of sexual privacy.¹¹⁷ The *Lawrence* Court rejected the narrow approach taken by the *Bowers* Court, instead asking whether the Due Process Clause protected the private sexual conduct of the adults involved as an exercise of liberty.¹¹⁸

In answering this question, the Court re-examined the development of the right to privacy through the *Griswold* line of cases.¹¹⁹ The *Lawrence* majority adopted the analysis of Justice Stevens’ dissent in *Bowers*, determining that decisions made by married and unmarried persons alike concerning intimate physical relationships are a protected form of liberty.¹²⁰ Moreover, the Court criticized the *Bowers* analysis of tradition and dismissed the conclusion that prohibition of sodomy was deeply rooted in our nation’s history—noting in particular that sodomy statutes were rarely enforced and that many states had abolished their prohibitions.¹²¹ Thus, the Court recognized “an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.”¹²²

112. *Id.* at 1482. Although the *Bowers* Court relied exclusively upon morality as a legitimate state interest to support the criminalization of sodomy, the court in *Oliverston* deems various other interests—such as protection of the institution of marriage and family, prevention of harm to the innocent spouse, and prevention of disease—“compelling” to support the crime whether scrutinized under a strict standard or a rational basis standard. *Id.* at 1484-85.

113. 928 S.W.2d 464 (Tex. 1996).

114. *Id.* at 470. The court also found persuasive the fact that adultery was a crime at the time the Texas Constitution was ratified. *Id.* at 473. In her concurring opinion, Justice Owen strongly criticized this interpretation as “frozen in time,” commenting that if the scope of constitutional protection was thus limited, decisions regarding a woman’s right to terminate a pregnancy or interracial marriage could not stand. *Id.* at 476 (Owen, J., concurring).

115. 539 U.S. 558 (2003).

116. *Id.* at 578. “*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.” *Id.*

117. Compare *id.* at 564 (describing issue in terms of liberty under Due Process Clause of Fourteen Amendment), with *id.* at 579 (O’Connor, J., concurring) (relying on Equal Protection Clause to invalidate statute).

118. *Lawrence v. Texas*, 539 U.S. 558, 564 (2003) (stating issue before Court).

119. *Id.* at 564-68 (tracing development of fundamental privacy right).

120. *Id.* at 578 (referencing Stevens’ dissent from *Bowers* asserting privacy protection extends to married and unmarried persons).

121. *Id.* at 568-71 (criticizing *Bowers* representation of history of sodomy statutes).

122. *Lawrence*, 539 U.S. at 572.

The Court focused on the private and consensual nature of sodomy in this case as distinguished from conduct involving minors or others who may be susceptible to injury or coercion.¹²³ The Court explained that moral disapproval alone provided insufficient reason for upholding a law.¹²⁴ Thus, it held that the state cannot demean homosexuals by criminalizing their private sexual conduct, thereby inhibiting their ability to enter into lasting intimate relationships.¹²⁵ The Court concluded that the statute failed to further a legitimate state interest sufficient to justify its “intrusion into the personal and private life of the individual.”¹²⁶

In his dissent, Justice Scalia sharply criticized the majority holding as a slippery slope that could only result in the invalidation of several laws justified by moral disapproval.¹²⁷ By holding that the “promotion of majoritarian sexual morality” did not constitute a legitimate state interest, Scalia insists the majority opinion “effectively decrees the end of all morals legislation.”¹²⁸ Thus, he concluded that criminal laws against fornication, bigamy, adultery, adult incest, bestiality, and obscenity cannot survive.¹²⁹

III. CAN ADULTERY STATUTES SURVIVE *LAWRENCE*?

At first blush, Justice Scalia appears correct in his prediction that *Lawrence* is fatal to criminal adultery statutes to the extent that the conduct regulated is private and consensual, and moral disapproval provides insufficient justification for state intrusion.¹³⁰ The Court, however, stopped short of explicitly declaring a fundamental right to private sexual activity.¹³¹ Thus, the Court left open the door to more utilitarian justifications for the prohibition.¹³²

A. Sexual Privacy: Asking the Wrong Question and How Lawrence Changes the Analysis

The *Lawrence* Court rejected the narrow framing of the issue in *Bowers*,

123. *Id.* at 578 (describing private and consensual nature of conduct at issue).

124. *Id.* at 577-78 (adopting rationale of Stevens’ dissent from *Bowers* asserting morality insufficient justification for law).

125. *See id.* (explaining criminalization of sodomy demeans homosexuals and interferes with their private relationships).

126. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (stating holding of case).

127. *See id.* at 599 (Scalia, J., dissenting) (suggesting laws based on moral disapproval will no longer survive rational basis review).

128. *See id.* at 599 (Scalia, J., dissenting).

129. *Id.* at 599 (Scalia, J., dissenting) (listing moral-based crimes subject to attack under majority holding).

130. *See Lawrence*, 539 U.S. at 599 (Scalia, J., dissenting) (recognizing moral disapproval as insufficient justification for intrusion into personal lives).

131. *See id.* at 578 (explaining holding); *see also infra* notes 137-139 and accompanying text (discussing characterization of privacy right and the corresponding standard of review *Lawrence* imposed).

132. *See Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (explaining limited circumstances involved in present case).

suggesting a shift in right to privacy analysis toward a broader understanding of sexual privacy protected as an exercise of liberty under the Due Process Clause.¹³³ Rather than asking whether there exists a constitutional right to engage in any particular sexual conduct, the courts should instead determine whether the conduct is encompassed within a right to be free from government intrusion into private adult consensual sexual relationships.¹³⁴ As the *Lawrence* Court explained, laws prohibiting particular sexual acts “have more far-reaching consequences, touching upon the most private human conduct, sexual behavior.”¹³⁵ Thus, *Lawrence* would seem to suggest that courts should analyze future challenges to adultery statutes not in terms of a constitutionally-protected right to engage in extramarital sex, but rather as an infringement upon privacy.¹³⁶

Vast disagreement remains among the legal community as to whether the liberty interest articulated in *Lawrence* rises to the level of a fundamental right.¹³⁷ The decision lacks the conventional due process formula wherein the government may not interfere with a fundamental right absent a compelling justification.¹³⁸ Nor does the Court adhere to the traditionally deferential rational-basis analysis by holding that the statute furthered no legitimate state interest sufficient to justify its infringement upon the privacy of the individual.¹³⁹ While the decision is opaque, the emphasis upon the private

133. *Id.* at 566-67 (criticizing *Bowers* failure to adequately reflect scope of liberty interest at issue).

134. *See id.* (explaining proper scope of liberty interest). *But see* *Williams v. Attorney Gen. of Ala.*, 378 F.3d 1232, 1242 (11th Cir. 2004) (upholding criminal ban on sale of sex toys). The Eleventh Circuit rejected this broad approach, instead framing the issue in *Williams* as whether the Constitution protects a right to use sexual devices. *Id.* at 1242. In her dissent, Justice Barkett asserted that the majority improperly framed the issue, and thus “severely discount[ed] the extent of the liberty at stake.” *Id.* at 1257 (Barkett, J., dissenting).

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

136. *See id.* at 565-67 (explaining *Bowers* Court failed to appreciate extent of liberty at stake); *supra* note 109 and accompanying text (noting similarity in issue presented in *Bowers* with subsequent adultery cases).

137. Compare *Lawrence*, 539 U.S. at 594 (Scalia, J., dissenting) (explaining majority failed to describe fundamental right in application of only rational-basis review), and *Lofton v. Sec’y of the Dep’t of Children & Family Servs.*, 377 F.3d 1275, 1283 (11th Cir. 2004) (en banc) (Birch, J., concurring) (observing *Lawrence* did not announce new fundamental right), and *Mary Anne Case, Of “This” and “That” in Lawrence v. Texas*, 2003 SUP. CT. REV. 75, 83-85 (applying grammatical rules to determine only rational-basis review applied, not invoking fundamental right), with *Williams v. Attorney Gen. of Ala.*, 378 F.3d 1232, 1253 (11th Cir. 2004) (Barkett, J., dissenting) (describing ability to make decisions about sexual matters as fundamental right subject to heightened scrutiny), and Dale Carpenter, *Is Lawrence Libertarian?*, 88 MINN. L. REV. 1140, 1155 (2004) (reading *Lawrence* as declaring fundamental right of sexual autonomy), and Sunstein *supra* note 11, at 46 (suggesting *Lawrence* treats underlying right as fundamental subject to more than rational-basis review).

138. *See Reno v. Flores*, 507 U.S. 292, 301-02 (1993) (describing strict scrutiny standard of review applied to infringement upon fundamental rights). The due process clause of the Fourteenth Amendment “forbids the government to infringe certain ‘fundamental’ liberty interests . . . unless the infringement is narrowly tailored to serve a compelling state interest.” *Id.*; see also U.S. CONST. amend. XIV, § 1 (articulating guarantee of due process).

139. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (holding criminal sodomy statute failed to satisfy standard applied); see also *Wash. v. Glucksberg*, 521 U.S. 702, 728 (1997) (describing rational basis standard of review applied to infringement upon non-fundamental rights). With respect to an asserted right which is found not to be a fundamental liberty interest protected by the due process clause of the Fourteenth

nature of the conduct and the discussion of the privacy right developed in the *Griswold* line of cases may suggest that the Court intended to extend that fundamental right to protect adults in their private consensual sexual relationships.¹⁴⁰ At minimum, the Court appears to have applied “a more searching form of rational basis” analysis.¹⁴¹ This standard demands not merely a legitimate state interest, but also some degree of balance between the state interest and the “intrusion into the personal and private life of the individual.”¹⁴²

B. How Adultery Implicates this Privacy Right

Because adultery involves a private sexual relationship between consenting adults, it implicates a similar liberty interest to that addressed by the *Lawrence* Court.¹⁴³ The Court recognized that liberty provides substantial protection to adults in decisions regarding their private sexual conduct.¹⁴⁴ Arguably, the decision of an individual to commit adultery is such a decision—sufficiently similar to other personal choices regarding marriage, family, procreation, contraception, and sexuality as to fall within this protected zone of privacy.¹⁴⁵

Amendment, due process requires any state interference with such a right be “rationally related to legitimate government interests.” *Glucksberg*, 521 U.S. at 728. If the *Lawrence* Court did apply only rational basis review, it marks the first time the Court has invalidated a statute under the due process clause using this minimal standard. Massey, *supra* note 11, at 959 (noting traditionally deferential nature of rational basis review).

140. See *Lawrence*, 539 U.S. at 564-67 (tracing development of fundamental privacy right); see also Carpenter, *supra* note 137, at 1156-57 (citing *Griswold* discussion as placing *Lawrence* within context of fundamental right to private sexual conduct); Sunstein, *supra* note 11, at 47-48 (citing assimilation of *Lawrence* to *Griswold* cases as suggestion of fundamental right). If the Court did, in fact, view the statute as an infringement upon a fundamental right, its determination that not even a legitimate state interest existed would have thus precluded the necessity for the usual consideration of any compelling state interests. See *supra* notes 138-139 and accompanying text (describing distinction between strict scrutiny and rational basis review).

141. See *Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring) (suggesting Court has more stringently applied rational-basis review in past equal protection cases). Although in his dissent Justice Scalia refutes O'Connor's recognition of a more stringent rational-basis standard, the majority opinion—perhaps tellingly—does not. See *id.* at 601 (Scalia, J., dissenting).

142. See *id.* at 578 (qualifying determination that no legitimate interest exists with reference to justification for the intrusion). It has been suggested that the decision in *Lawrence* marks a trend away from highly structured tiered scrutiny toward a more fluid standard of review based upon the relative importance of the right asserted, the invidiousness of the state infringement, and the state interests at stake. Massey, *supra* note 11, at 996 (citing recent decisions in *Lawrence* and *Grutter v. Bollinger* as evidence of new trend).

143. See *Lawrence*, 539 U.S. at 564 (framing issue in terms of adult private consensual conduct).

144. *Id.* at 572 (noting emerging awareness that liberty protects adults in decisions regarding private sexual lives). As evidence of this emerging awareness, the Court cites the Model Penal Code's recommendation against “criminal penalties for consensual sexual relations conducted in private”—a recommendation which included the decriminalization of adultery as well as sodomy. *Id.* at 572 (quoting MODEL PENAL CODE § 213.2 cmt. 2, at 372 (Proposed Official Draft 1962)); see also *supra* notes 40-42 and accompanying text (discussing recommendations of ALI and subsequent repeal of numerous adultery statutes).

145. See *Hollenbaugh v. Carnegie Free Library*, 439 U.S. 1052, 1055 (1978) (Marshall, J., dissenting) (describing adulterous relationship as closely resembling other protected aspects of personal privacy); *Briggs v. N. Muskegon Police Dept.*, 563 F. Supp. 585, 588-89 (W.D. Mich. 1983) (discussing similarity between

Furthermore, the choice of one spouse regarding how to address the adultery of the other seems an intimately personal decision regarding the marital relationship worthy of protection from state intrusion.¹⁴⁶ Moreover, the mutual decision of a husband and wife to engage in a sexually non-monogamous marriage would seem to warrant protection as a private marital choice.¹⁴⁷ In the majority of jurisdictions where adultery remains a crime, however, each of these scenarios is subject to state intrusion.¹⁴⁸

C. Morality as a Basis of Criminal Law

To the extent that this intrusion into the private sexual lives of married individuals is aimed at promoting majoritarian moral ideals, it is unlikely that a criminal adultery prohibition would survive *Lawrence*.¹⁴⁹ The *Lawrence* Court overturned the *Bowers* holding that the promotion of morality constituted a legitimate state interest to justify the prohibition of sodomy.¹⁵⁰ Instead, the Court embraced Justice Stevens' dissent from *Bowers*, asserting that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice."¹⁵¹ Justice Scalia criticized the decision in his dissent from *Lawrence* as calling into question the validity of numerous statutes intended to promote morality.¹⁵² There remains, however, widespread disagreement

previously protected actions and defendant's extramarital living arrangement); Sunstein, *supra* note 11, at 66 (noting difficulty in distinguishing adultery prosecution from sodomy prosecution); *supra* notes 102-106 and accompanying text (discussing application of privacy right to adulterous relationships by some circuits). *But see* City of Sherman v. Henry, 928 S.W.2d 464, 469 (Tex. 1996) (holding adulterous relationship unlike recognized privacy rights).

146. *See* Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (invalidating statute prohibiting sale of contraception to married couples). How a married couple responds to adultery is an intimately personal decision falling within the "sacred precincts of the marital bedroom." *Cf. id.* at 485. State intrusion into that decision, however, can have an extremely detrimental effect on the potential for reconciliation. *See supra* text accompanying notes 59-61 (discussing negative impact of prosecution upon survival of marriage after adultery).

147. *See* Krause v. Village of Barrington Hills, 571 F. Supp. 538, 539-40 (S.D. Ill. 1982) (describing activities of "swingers" club wherein married and unmarried couples exchange partners); Siegel, *supra* note 5, at 56-58 (describing phenomenon of open marriage). One estimate asserts that about two percent of all married couples explicitly consent to extramarital sexual activity; this figure represents approximately 900,000 married couples. Siegel, *supra* note 5, at 56. Other estimates assert that five to fifteen percent of married couples have open marriages. Turley, *supra* note 21, at B1.

148. *See supra* note 48 and accompanying text (providing examples of typical adultery statutes). "American adultery statutes recognized no special excuse or justification, even though condonation, connivance, and recrimination are traditional defenses in divorce proceedings based on adulterous conduct." MODEL PENAL CODE § 213.6 note on adultery and fornication at 433 (Proposed Official Draft 1962).

149. *See supra* note 52 and accompanying text (explaining protection of community morality widely-recognized justification for adultery prohibition in many jurisdictions); *infra* notes ¹⁵¹-154 and accompanying text (discussing *Lawrence*'s impact upon moral-based justification for exercise of state police power).

150. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (declaring *Bowers* overruled).

151. *Id.* at 577-78 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

152. *Id.* at 599 (Scalia, J., dissenting). Scalia insists that the promotion of majoritarian sexual morality is

among the legal community as to whether *Lawrence* has, in fact, triggered the demise of all morality legislation.¹⁵³ Nevertheless, the Court undoubtedly considered morality an insufficient state interest to justify the infringement of anti-sodomy statutes upon the sexual privacy rights of homosexuals.¹⁵⁴ Like sodomy, the crime of adultery is historically grounded in the promotion of majoritarian sexual morality, dating back to the earliest Puritan prohibitions in colonial times.¹⁵⁵ Moreover, the prohibition of adultery involves state intrusion into the private sexual lives of married individuals that is analogous in many ways to that experienced by homosexuals.¹⁵⁶ Thus, after *Lawrence* it would seem the promotion of public morality could no longer justify the criminal prohibition of adultery.

D. The Harm Principle and Utilitarian State Interests in the Prohibition of Adultery

Although the *Lawrence* Court held that morality no longer constitutes a sufficient state interest to justify intrusion into the private lives of individuals, the Court does leave room for state regulation of some private consensual sexual activity.¹⁵⁷ Moreover, the Court suggests that state intrusion into personal relationships may be warranted in situations involving “injury to a person or abuse of an institution the law protects.”¹⁵⁸ Thus, the Court echoes the philosophy of John Stuart Mill, suggesting that limitation of individual liberty must be justified in terms of the harm a given conduct imposes upon others.¹⁵⁹ The Supreme Court of Pennsylvania similarly applied this concept,

“the same interest furthered by criminal laws against fornication, bigamy, adultery, adult incest, bestiality, and obscenity.” *Id.*; see also *supra* notes 127-129 and accompanying text (discussing Scalia’s dissent).

153. See, e.g., Carpenter, *supra* note 137, at 1157-58 (asserting morality still legitimate state interest, but insufficient to justify intrusion into fundamental right); Suzanne B. Goldberg, *Morals-Based Justification for Lawmaking: Before and After Lawrence v. Texas*, 88 MINN. L. REV. 1233, 1281-82 (2004) (concluding *Lawrence* marks inevitable demise of morality as exclusive justification for law); Sunstein, *supra* note 11, at 49-51 (applying concept of desuetude asserting only outdated moral judgments provide insufficient basis for criminal law).

154. See *Lawrence*, 539 U.S. at 578 (holding sodomy statute furthers no legitimate state interest to justify intrusion into private lives).

155. See *supra* note 1 (illustrating punishment of “righteous law” in Hawthorne’s novel set in Puritan colony of Massachusetts); *supra* note 5 (noting placement of Massachusetts adultery statute within chapter articulating crimes against morality); *supra* notes 25-28 and accompanying text (discussing origin and development of adultery prohibition); *supra* note 52 and accompanying text (explaining protection of community morality remains widely-recognized justification for adultery prohibition in many jurisdictions).

156. See *supra* notes 143-147 and accompanying text (discussing how adultery implicates sexual privacy right).

157. See *Lawrence v. Texas*, 539 U.S. 558, 577-78 (2003) (explaining immorality insufficient justification for prohibition under limited circumstances). Cf. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (quoting *Baird v. Eisenstadt*, 429 F.2d 1398, 1402 (1st Cir. 1970)) (explaining morality insufficient reason to prohibit contraceptive use by unmarried individuals without demonstrable harm).

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

159. See *id.* (stating “general rule” discouraging state from regulating personal relationships absent injury or abuse); see also Burgess-Jackson, *supra* note 15, at 415 (recognizing Millian harm principle in *Lawrence*).

invalidating the state's sodomy prohibition over twenty years ago.¹⁶⁰ In *Commonwealth v. Bonadio*,¹⁶¹ the court quoted Mill, explaining "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."¹⁶² Accordingly, the *Lawrence* Court specifically describes the conduct in question as not involving harm to any person or institution.¹⁶³ Thus, the Court touched upon the primary distinction between sodomy and adultery: adultery has the potential of causing harm to the innocent spouse, children, and the sacred institution of marriage.¹⁶⁴ A determination of whether criminal adultery statutes can survive *Lawrence*, therefore, requires an analysis of the utilitarian state interest in redressing this harm as justification for the prohibition.¹⁶⁵

I. "Injury to a person"

Adultery is not a "victimless crime" in that it often involves injury to a spouse or children and the emotional costs incurred are often substantial.¹⁶⁶ In many cases, adultery will lead to divorce and dissolution of the family unit.¹⁶⁷ Thus, one may view adultery as an offense against the spouse and family.¹⁶⁸ To the extent a prohibition of adultery seeks to redress the harm imposed upon third parties, it would seem to further a legitimate state interest.¹⁶⁹

See generally JOHN STUART MILL, ON LIBERTY (1859) (articulating harm principle).

160. *See* *Commonwealth v. Bonadio*, 415 A.2d 47, 50-52 (Pa. 1980) (invalidating sodomy statute as without justification in absence of harm to others).

161. 415 A.2d 47 (Pa. 1980).

162. *Id.* at 50-51 (quoting JOHN STUART MILL, ON LIBERTY (1859)).

163. *See* *Lawrence v. Texas*, 539 U.S. 558, 578 (2003). As the Court explains:

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. . . . The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle.

Id.

164. *Compare supra* notes 160-162 and accompanying text (discussing sodomy as conduct not imposing harm on others), *with infra* Part III.D.1 (discussing harmful effects of adultery upon spouse), *and infra* Part III.D.2 (discussing adultery's harmful effects on institution of marriage).

165. *See infra* Part III.D.1-2 (analyzing state interest in redressing harm to individual spouse and institution of marriage).

166. *See* *Oliverson v. W. Valley City*, 875 F. Supp. 1465, 1484 (D. Utah 1995) (discussing adultery's social costs).

167. *See id.* (discussing adultery's detrimental social impact); *Commonwealth v. Stowell*, 449 N.E.2d 357, 360 (Mass. 1983) (taking note of adultery's destructive impact on marital relationship); Siegel, *supra* note 5, at 57 (citing anecdotal evidence of one therapist finding half of adulterous couples divorce). *But see* MODEL PENAL CODE § 213.6 note on adultery and fornication at 438 (Proposed Official Draft 1962) (noting adultery symptomatic of marital breakdown rather than cause).

168. *See* *Iowa v. Ronck*, 176 N.W.2d 153, 155-56 (Iowa 1970) (describing adultery as primarily offense against spouse); MODEL PENAL CODE § 213.6 note on adultery and fornication at 433 (Proposed Official Draft 1962) (suggesting adultery may be regarded as wrong against spouse).

169. *See* *Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (suggesting state may interfere in relationship when

For criminal adultery statutes to survive *Lawrence*, however, one must balance the state interest in redressing this harm against the intrusion into the personal lives of those involved.¹⁷⁰ Some suggest that the degree of harm caused by adultery is often exaggerated.¹⁷¹ In relationships where a spouse consents to the extramarital sexual conduct of the other, there can be no presumption of harm.¹⁷² Even when consent is not given, criminal prosecution may infringe upon the marital relationship and “the rights of the husband and wife to condone the wrongs of either toward the other.”¹⁷³ An unwanted criminal prosecution tends to increase any harm to the innocent spouse and family and reduce the chances of reconciliation.¹⁷⁴ For these reasons, the state interest in redressing harm is likely insufficient to justify the extreme intrusion caused by traditional adultery statutes.¹⁷⁵

Modern statutes in some states allowing prosecution only upon a spouse’s request, however, ensure that the state will not infringe upon privacy except when adulterous conduct actually causes harm.¹⁷⁶ Moreover, such a provision allows an innocent spouse to avoid further harm and address adultery as a private matter between husband and wife.¹⁷⁷ Thus, those statutes requiring spousal complaint prior to adultery prosecution appear to best serve the state interest in redressing harm with the least intrusion into private lives of those involved.¹⁷⁸

2. “Abuse of an institution the law protects”

One may also view adultery as “an offense against the marriage relation.”¹⁷⁹

it involves injury to person).

170. *Id.* at 578 (noting lack of legitimate state interest to justify intrusion into private life); *see also supra* notes 141-142 and accompanying text (discussing standard of review applied by *Lawrence* Court).

171. *See Coleman, supra* note 19, at 411-12 (rebutting presumption adultery causes harm and suggesting monogamy unnatural); Siegel, *supra* note 5, at 56-57 (suggesting extramarital relationships may happily co-exist with or even enhance marriage); Mark Strasser, *Sex, Law and the Sacred Precincts of the Marital Bedroom: On State and Federal Right to Privacy Jurisprudence*, 14 NOTRE DAME J.L. ETHICS & PUB. POL’Y 753, 783 (2000) (noting some couples claim adulterous relationships have strengthened their marriages).

172. *See Coleman, supra* note 19, at 413 (explaining harm caused by violation of trust not applicable when consent is given); Siegel, *supra* note 5, at 56-57 (discussing consensual open marriage).

173. *See Iowa v. Ronek*, 176 N.W.2d 153, 156 (Iowa 1970) (upholding Iowa adultery statute allowing prosecution only upon spousal request).

174. *See supra* notes 60-63 and accompanying text (discussing detrimental impact of adultery prosecution upon attempted reconciliation).

175. *See supra* notes 166-173 and accompanying text (balancing harm to spouse and family against intrusion of prosecution).

176. *See supra* note 57 (listing four states which allow prosecution only upon spouse’s complaint).

177. *See supra* notes 60-63 and accompanying text (discussing how adultery prosecution may result in even greater harm).

178. *See supra* text accompanying note 62 (describing spousal complaint provision as achieving balance between punishment for harm and intrusion into family).

179. *S. Sur. Co. v. Oklahoma*, 241 U.S. 582, 586 (1916) (describing adultery as a crime against marriage); *see also Oliverson v. W. Valley City*, 875 F. Supp. 1465, 1484 (D. Utah 1995) (describing adultery as offense against marital relationship); *Commonwealth v. Stowell*, 449 N.E.2d 357, 360 (Mass. 1983) (quoting Supreme

The Court has traditionally held the intimate relationship between husband and wife and the institution of marriage in the highest esteem.¹⁸⁰ Moreover, the Court has recognized the extreme significance of marriage within society as “fundamental to our very existence and survival.”¹⁸¹ Accordingly, states regulate various aspects of the marital relationship.¹⁸² Given this concern with the institution of marriage, the Massachusetts Supreme Judicial Court held that the state had “a legitimate interest in prohibiting conduct which may threaten that institution.”¹⁸³ Adultery has been described as “the antithesis of marriage” because it tends to undermine the relationship and lead to divorce.¹⁸⁴

The privacy right recognized by the *Lawrence* Court is deeply intertwined with the ability to enter lasting intimate relationships.¹⁸⁵ Since its inception, the Court has firmly grounded the right to make decisions regarding private sexual behavior in the sanctity of marriage.¹⁸⁶ Although the Court has applied this right to situations involving unmarried individuals, *Lawrence* reinforces the connection between sexuality and lasting intimate relationships.¹⁸⁷ “When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring.”¹⁸⁸ The Court explains that liberty protects the right to choose to enter such a committed relationship.¹⁸⁹ By contrast, one may argue that extramarital sexual relationships lack this enduring quality and instead tend to have a detrimental impact upon the personal bond between husband and wife.¹⁹⁰ Thus, the prevention of harm to the institution of marriage appears a legitimate justification for intrusion upon the privacy of those who have chosen to enter a

Court in upholding Massachusetts statute).

180. See *supra* note 17 (citing numerous examples of Supreme Court reference to importance of marriage).

181. *Loving v. Virginia*, 388 U.S. 1, 11 (1967); see also *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (describing marriage and procreation as fundamental to existence and survival).

182. See generally MASS. GEN. LAWS ch. 207 (regulating marriage, including who may marry and procedures for valid marriage).

183. *Stowell*, 449 N.E.2d at 360 (upholding Massachusetts criminal adultery statute).

184. *City of Sherman v. Henry*, 928 S.W.2d 464, 469-70 (noting adultery undermines marital relationship and describing conduct as antithesis of marriage).

185. *Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (explaining liberty protects homosexuals in decision to enter enduring intimate relationships).

186. See *supra* notes 67-69 and accompanying text (describing privacy right first articulated in *Griswold* as grounded in marital relationship).

187. See *Lawrence*, 539 U.S. at 567 (describing sexuality as one element of enduring bond); see also *Eisenstadt v. Baird*, 405 U.S. 438, 453-55 (1971) (extending privacy right to encompass decision of unmarried couples to use contraception).

188. *Lawrence*, 539 U.S. at 567 (describing sexuality intimacy as one element of lasting personal relationship).

189. *Id.* (describing decision to enter intimate relationships as within protected liberty right).

190. See *Commonwealth v. Stowell*, 449 N.E.2d 357, 360 (Mass. 1983) (quoting *S. Sur. Co. v. Oklahoma*, 241 U.S. 582, 586 (1916)) (noting adultery’s destructive impact on marital relationship). Cf. *Lawrence*, 539 U.S. at 567 (explaining liberty protects decision of homosexuals to engage in sexual conduct indicative of enduring relationship).

marital relationship.¹⁹¹

E. Practical Considerations

Although theoretically, the state interest in redressing harm may justify the prohibition of adultery, in practice, the criminal law is largely inadequate to achieve this objective.¹⁹² Like criminal sodomy statutes, many states have repealed criminal adultery statutes and those that retain the prohibition rarely enforce it.¹⁹³ Enforcement techniques could prove even more invasive into personal privacy than criminalization itself.¹⁹⁴ Lack of enforcement suggests the prevailing view that police resources are better spent elsewhere.¹⁹⁵ When prosecution does occur, it tends to increase harm to an innocent spouse and family and decrease the likelihood that the marriage will survive.¹⁹⁶ Furthermore, the overwhelming prevalence of adultery in our society proves that criminal prohibition is not a deterrent.¹⁹⁷ States have repealed tort causes of action that more directly addressed the harm to an innocent spouse.¹⁹⁸ States have also replaced fault divorce laws, which penalized an adulterous spouse

191. See *supra* notes 185-190 and accompanying text (discussing state interest in protection of marriage itself).

192. See *supra* Part III.D. (analyzing sufficiency of state interest in redressing harm against individuals and institution of marriage).

193. See *Bowers v. Hardwick*, 478 U.S. 186, 193-94 (1986) (noting twenty-four states and District of Columbia retained criminal sodomy prohibition); *id.* at 198 n. 2 (Powell, J., concurring) (noting history of nonenforcement suggested moribund character of laws criminalizing private consensual conduct); *supra* note 38 and accompanying text (discussing decline in enforcement of adultery prohibitions); *supra* note 42 (citing numerous repealed criminal adultery statutes).

194. See MODEL PENAL CODE § 213.6 note on adultery and fornication at 435 (Proposed Official Draft 1962) (noting discovery and proof of offense nearly impossible and likely to involve unseemly surveillance techniques). Cf. *Griswold v. Connecticut* 381 U.S. 479, 485-86 (1965) (describing idea of police search of bedrooms for evidence of contraceptive use as repulsive).

195. See MODEL PENAL CODE § 213.6 note on adultery and fornication at 434 (Proposed Official Draft 1962) (suggesting non-enforcement reflects belief crime of adultery wastes limited resources). The ALI notes that, while for many years, adultery was the sole grounds for divorce in New York, many divorces were granted with very few arraignments under the state's criminal law. *Id.* at 434-35.

196. See *supra* notes 59-61 and accompanying text (discussing prosecution's tendency to increase harm to spouse and decrease chance of reconciliation).

197. See *Coleman*, *supra* note 19, at 399 n.2 (estimating seventy percent of men and fifty percent of women have or will commit adultery); see also *Constitutional Barriers*, *supra* note 63, at 1671 n.79 (citing various estimates of the percentage of individuals engaged in adultery). One author notes that estimates rely heavily upon self-reporting, which suggests that actual rates may be even higher. *Constitutional Barriers*, *supra* note 63, at 1671 n.79.

198. See *supra* note 65 and accompanying text (discussing abolished "heart balm" actions). Prevalent in the 1920s and 1930s, "heart balm" tort cases often awarded an innocent spouse with extensive damages intended to redress "degradation, distress and mental anguish." Siegel, *supra* note 5, at 89 (quoting *Botwinick v. Anneberg*, 198 N.Y.S. 151, 153 (N.Y. App. Div. 1923)). In Massachusetts, the torts of alienation of affection, criminal conversation, and breach of contract to marry have been replaced in the general laws with language explicitly stating that each "shall not constitute an injury or wrong recognized by law, and no action, suit or proceeding shall be maintained therefor [sic]." MASS. GEN. LAWS ch. 207, § 47a (2004) (abolishing breach of contract to marry claim); MASS. GEN. LAWS ch. 207, § 47b (2004) (abolishing claims of alienation of affection and criminal conversation).

financially and impacted child custody decisions.¹⁹⁹ Modern divorce laws recognize the complexity of the marital relationship and allow for dissolution without a “legal determination of fault,” reflecting an understanding that adultery may be a symptom rather than the cause of a failed marriage.²⁰⁰

IV. CONCLUSION

The criminalization of adultery in the United States is firmly grounded in our Puritan tradition as an offense against morality. At one time recognized in almost every jurisdiction, adultery remains a crime in just under half of the states today. The Supreme Court’s recent ruling in *Lawrence v. Texas*, however, suggests that morality is no longer a sufficient justification for the intrusion into private life that an adultery prosecution would impose. If adultery statutes are to survive, the traditional state interest in promoting majoritarian sexual morality must be replaced by the more utilitarian state interest in preventing harm to the individuals involved and to the institution of marriage.

Accordingly, those statutes that reflect this modern justification are better positioned to survive constitutional challenge than those that criminalize a more general flouting of community norms. Criminal prohibitions that punish adultery without regard to the intimate marital choices involved may only increase harm to an innocent spouse. Such prohibitions also fail to recognize the possibility that a married couple may choose to consent to or condone adulterous behavior, eliminating any presumption of harm. Statutes allowing prosecution only upon complaint of the innocent spouse, however, best achieve the state interest in redressing harm with the least invasion into private sexual behavior and the marital realm.

Although the *Lawrence* Court stopped short of declaring a fundamental right to adult consensual sexual behavior, it recognized a trend over the last half century toward greater protection of private matters pertaining to sex. This “emerging awareness” that liberty provides some protection to adults in decisions about their consensual sexual relationships emanates from the Court’s extreme reverence for the marital relationship. Thus, the same privacy interest that protects individuals in their choice of sexual partners should protect married couples in the intimate decision of how to conduct their marriage.

Whether adultery should remain a crime may ultimately depend upon practical considerations. Despite statistics revealing that an overwhelming percentage of spouses commit adultery, those states that retain the prohibition almost never enforce it. These archaic criminal statutes are among the last vestiges of state involvement in the consensual sexual relationship of married

199. See *supra* text accompanying note 39 (discussing fault-based divorce).

200. MODEL PENAL CODE § 213.6 note on adultery and fornication at 438 (Proposed Official Draft) (discussing modern no-fault divorce statutes).

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couples. The marital relationship is as complex as it is intimate; regardless of whether adultery is a symptom or cause of breakdown—or the couple salvages the relationship—the criminal law has no place within the “sacred precincts of marital bedrooms.”²⁰¹

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201. *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965).