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Marriage, Monogamy, and Affairs: Reassessing Intimate Relationships in Light of Growing Acceptance of Consensual Non-Monogamy

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Marriage, Monogamy, and Affairs: Reassessing Intimate Relationships in Light of Growing Acceptance of Consensual Non-Monogamy

Linda S. Anderson*

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I. Introduction

The time is ripe to explore ways we might recognize new forms of intimate associations. The United States Supreme Court has just made same-sex marriage available and legally recognized in every state.¹ The relationship world has changed.² Cohabitation has become widely accepted.³ Sixty-eight percent of all intimate unions for women surveyed between 1997 and 2001 began as cohabitation.⁴ Of those intimate unions that led to marriage, ninety-six percent of women and ninety-three percent of men in the marriages lived with their first spouse before marrying that person.⁵

The headline of a recent *Time* magazine asked “Is Monogamy Over?”⁶ News agencies across the globe spent several weeks reporting about the data breach of Ashley Madison, the infamous dating website for married

1. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604–08 (2015) (holding that the right to marry is a fundamental right and that couples of the same sex cannot be deprived of that right and liberty).

2. See CASEY E. COPEN, KIMBERLY DANIELS, JONATHAN VESPA & WILLIAM D. MOSHER, 49 NATIONAL HEALTH STATISTICS REPORT 1 (2012) (describing how marriages were more delayed than in the past with cohabitation contributing to the delay).

3. See *id.* at 2 (showing trends and group differences in current marital status).

4. See *id.* (explaining that cohabitation has increasingly become the first co-residential union formed among young adults in the United States).

5. See *id.* at 8 (stating that about fifty-seven percent of ever-married women and sixty percent of ever-married men cohabitated prior to first marriage).

6. See TIME, *Is Monogamy Over?*, Sept. 21, 2015 (providing different arguments for and against monogamy and the nuclear family model).

people.⁷ The release and popularity of *Fifty Shades of Grey*, as a series of three books and then as a movie, have allowed discussion of BDSM practices to become more commonplace.⁸ All of these events are indicators that society's views about marriage and intimate relationships are expanding.

Marriage and intimate relationships are evolving but the law still restricts people from choosing to build fulfilling relationships. Marriage is restricted to two adults.⁹ Those who choose to create intimate associations without the legal benefit of marriage are potentially violating criminal statutes regarding fornication¹⁰ or cohabitation.¹¹ Married individuals who develop intimate relationships with someone other than their spouse violate adultery statutes.¹² And those who attempt to marry someone when they

7. See Danny Yadron, *Hackers Target Users of Infidelity Website Ashley Madison: Cyberattack Could Expose Millions of Users' Personal Information*, WALL ST. J., (July 20, 2015, 7:43 PM), <http://www.wsj.com/articles/affair-website-ashley-madison-hacked-1437402152> (describing how an intruder threatened to release real names and personal preferences of site's millions of users unless it was shut down).

8. See generally E.L. JAMES, *FIFTY SHADES FREED* (2012); E.L. JAMES, *FIFTY SHADES DARKER* (2012); E.L. JAMES, *FIFTY SHADES OF GREY* (2011); *FIFTY SHADES OF GREY* (Universal Pictures 2015).

9. See Elizabeth F. Emens, *Monogamy's Law: Compulsory Monogamy and Polyamorous Existence*, 29 N.Y. U. REV. L. & SOC. CHANGE 277, 361 (2004) (stating that marriage laws in all fifty states prevent multiple parties from marrying one another).

10. Seven states continue to carry criminal prohibitions against fornication in their criminal codes. See, e.g., IDAHO CODE ANN. §18-6603 (West 2015)

Any unmarried person who shall have sexual intercourse with an unmarried person of the opposite sex shall be deemed guilty of fornication, and, upon conviction thereof, shall be punished by a fine of not more than \$300 or by imprisonment for not more than six months or by both such fine and imprisonment; provided, that the sentence imposed or any part thereof may be suspended with or without probation in the discretion of the court.

720 ILL. COMP. STAT. ANN. 5/11-40 (West 2015); MASS. GEN. LAWS ANN. Ch. 272 § 18 (West 2015); MINN. STAT. ANN. § 609.34 (West 2015); MISS. CODE ANN. § 97-29-1 (West 2015); S.C. CODE ANN. § 16-15-60 (2015); UTAH CODE ANN. § 76-7-104 (West 2015).

11. See MICH. COMP. LAWS ANN. § 750.335 (West 2015); MISS. CODE ANN. § 97-29-1 (West 2015).

12. Twenty-two U.S. jurisdictions carry adultery prohibitions in their criminal codes: ALA. CODE § 13A-13-2 (West 2015); ARIZ. REV. STAT. ANN. § 13-1408 (2015); FLA. STAT. ANN. § 798.01 (West 2015); GA. CODE ANN. § 16-6-19 (West 2015); IDAHO CODE ANN. § 18-6601 (West 2015); 720 ILL. COMP. STAT. ANN. 5/11-35 (West 2015.); KAN. STAT. ANN. § 21-5511 (West 2015); MASS. GEN. LAWS ANN. ch. 272 § 14 (West 2015); MD. CODE ANN. CRIM. LAW §10-501 (West 2015); MICH. COMP. LAWS ANN. § 750.31 (West 2015); MINN. STAT. ANN. § 609.36 (West 2015); MISS. CODE ANN. § 97-29-1 (West 2015); N.Y. PENAL LAW § 255.17 (McKinney 2015); N.D. CENT. CODE ANN. § 12.1-20-09 (West 2015); OKLA. STAT. ANN. tit. 21 § 871 (West 2015); R.I. GEN LAWS ANN. § 11-6-2 (West 2015); S.C. CODE ANN. § 16-15-60 (2015); UTAH CODE ANN. § 76-7-103 (West 2015); VA. CODE ANN. § 18.2-

already have a spouse are guilty of bigamy and may face serious criminal penalties.¹³ The effect of these restrictions is to force everyone to create dyadic pairings as intimate associations, and to expect sexual exclusivity once that dyad is created.¹⁴ These legal restrictions regarding sexual interactions and intimate relationships no longer reflect the practices and behaviors that are prevalent in today's society.¹⁵ Continuing to allow the legal restrictions to exist, even if they have fallen into desuetude, leaves a lingering cloud over those who make choices other than traditional marriage,¹⁶ and prevent those who might choose other options from being able to do so with full disclosure and consent.¹⁷ Even the lawmakers are aware that the laws are antiquated and rarely enforced.¹⁸ For example, commentary associated with Alabama's criminal statute addressing adultery states:

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.

The number of liaisons which are illegal under Alabama law is, undoubtedly, very high. On the other hand, arrests and prosecutions are rare. This belief is consistent with studies conducted elsewhere.

The conclusion is clear that existing criminal law has been notoriously unsuccessful in stamping out adultery, and it is unlikely that anyone will ever launch a program of enforcement on a scale sufficient to make criminal penalties a significant risk in philandery. It also follows that the reluctance of public officials to enforce the law is resulting in an informal abolition of any criminal stigma. While sympathizing with the

365 (West2015); WIS. STAT. ANN. § 944.16 (West 2015).

13. *See, e.g.*, W. VA. CODE ANN. § 61-8-1 (West 1923)

Any person, being married, who, during the life of the former husband or wife, shall marry another person in this State, or, if the marriage with such other person take place out of this State, shall thereafter cohabit with such other person in this State, shall be guilty of a felony, and, upon conviction, shall be confined in the penitentiary not less than one nor more than five years.

14. *See* Emens, *supra* note 9, at 308 (“In the legal realm, adultery statutes target violations of the exclusivity norm.”).

15. *See id.* at 281 (questioning why the two-person requirement of marriage is so widely accepted when many practice adultery or serial divorce and remarriage).

16. *See id.* at 364 (explaining how legal restrictions stand as emblems of the expectations of monogamy).

17. *See id.* at 368 (stating that consent could be understood as a feature of the relationship).

18. *See id.* at 364 (mentioning how adultery laws are rarely enforced).

argument that continuation of a “dead letter” statute may tend to bring the criminal law into disrespect, the committee felt that formal repudiation of the adultery offense was premature. Moreover, it may prove useful on occasions, as for example in plea bargaining.¹⁹

Recent debate about same-sex marriage has caused people to identify characteristics that make marriage special.²⁰ Writing for the majority in the Supreme Court’s latest assessment of marriage, Justice Kennedy described it thusly: “No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In becoming a marital union, two people become something greater than they once were . . . [M]arriage embodies a love that may endure even past death.”²¹ I argue that marriage, and all intimate relationships, are very important—to our emotional and spiritual well-being. Many non-marital intimate relationships embody the same ideals. But all of these, whether formally recognized as a legal marriage or established informally without benefit of government recognition, are also unique, and we should all have the freedom to create a marriage or build intimate relationships with others in ways that allow for maximum fulfillment. This requires removing or modifying some of the current restrictions around intimate relationships and behaviors.

My goal is not to question the constitutionality of restrictions on marriage and intimate relationships. Fighting that battle requires an unusual combination of events, parties, and legal issues, which may eventually cause incremental changes in the manner specific relationships are configured or recognized. Instead, I want to demonstrate how we can legislatively change the limitations imposed on marital and other intimate relationships so those who seek alternatives to the traditional arrangements can do so without the threat of criminal action, and with clear understandings about the nature of the relationships they choose to enter.²² My hypothesis is that expanding the ways we can come together to form intimate relationships will lead to stronger family bonds, fewer divorces, and more tolerance of lifestyles that are now considered “alternative.”²³

19. ALA. CODE § 13A-13-2 Commentary (1975).

20. *See generally* Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

21. *Id.* at 2608.

22. *See infra* Part VIII (proposing a new legislative approach in today’s changed world).

23. *See* Emens, *supra* note 9, at 278 (“One reason monogamy is so important to us is that we are so terrorized by what we imagine are the alternatives to it.”) (quoting ADAM PHILLIPS, MONOGAMY 98 (1996)).

What I am suggesting is an acknowledgment of the various ways people form intimate relationships today, without the secrecy, and with openness about choices that will protect parties from the harm that the current climate of secrecy and illicit behavior causes.²⁴ I propose that we allow intimate partners to choose the form of the relationship, with full disclosure and consent of those involved.²⁵ Many people will continue to choose traditional monogamy, in the form of marriage, whether heterosexual or homosexual.²⁶ Traditional marriage implies sexual exclusivity and emotional bonds to only one person.²⁷ Some couples may agree to the same sort of arrangement, including the exclusivity regarding sexual interactions and emotional bonding, without formally entering into a marriage. For the purposes of this Article, I see no critical distinction between these arrangements and will refer to these interchangeably as traditional marriage or traditional monogamy, despite the fact that the latter option is technically not marriage. Others may choose something that looks slightly different, and these different arrangements are where we can allow room for individual variety by eliminating some of the existing prohibitions related to intimate relationships, and expanding the legally recognized forms of marriage.²⁸

Once a couple is married, the parameters of their relationship are left for them to determine.²⁹ Courts have been loath to interfere, and have only inserted themselves into the relationship at the beginning and end of marriages.³⁰ Yet, even so, the legislatures of many states do insert themselves in these relationships, albeit indirectly, by criminalizing extra-marital sex.³¹ Eliminating these prohibitions, and those that prohibit other forms of non-marital sex between consenting adults, would allow each of us to negotiate the boundaries of our intimate relationships to maximize our

24. *See infra* Part II.B. (discussing the consequences of unenforced criminal law).

25. *Infra* Part VIII.B.

26. *Infra* Part VIII.

27. *See* *Boddie v. Conn.*, 401 U.S. 371, 383 (1971) (“[Marriage] is a fundamental human relationship.”).

28. *See infra* Part VII (explaining that permanent monogamy is no longer the expected norm).

29. *See infra* Part VIII (providing an example of a relationship contract).

30. *See* Adrienne D. Davis, *Regulating Polygamy: Intimacy, Default Rules, and Bargaining for Equality*, 110 COLUM. L. REV. 1955, 1993 (2010) (stating that family law has little to say in between the marriage formation and dissolution licensing structure).

31. *See infra* Part III (explaining why politicians are reluctant to repeal these criminal statutes).

happiness and individualize the relationship to best suit the needs of those involved.

An alternative to traditional monogamy would allow individuals in committed, intimate relationships to choose, together, to allow consensual non-monogamy, or what some call ethical non-monogamy.³² Those familiar with these terms may immediately think of polyamory.³³ Those less familiar may think of polygamy.³⁴ Though our legal history has strongly disfavored polygamy for some legitimate reasons, I suggest that the option of ethical non-monogamy be included in the realm of possibilities.³⁵ As Part V points out, there are logistical concerns with polyamory and polygamy that suggest now may not be the time to formally recognize these forms of relationships, but the prohibitions can be eliminated, as a first step, and as a way to provide committed intimate partners the ability to establish the parameters of their relationship as they see fit. Eliminating prohibitions on extra-marital sex or non-marital sex allows for open relationships, a form of ethical non-monogamy. Open relationships differ slightly from polyamory, mostly in the level of involvement between all those involved in the relationship, and sometimes in the level of commitment to the relationships outside of the original.³⁶

All of these potential relationship choices involve similar characteristics. All require those involved to be very self-aware—to understand what they are doing and why they are making that choice. Because relationships involve more than one person, these alternative forms also require well-developed communication skills, radical honesty, and a great deal of trust among those participating in the relationship.³⁷

It is likely that many people are engaging in behaviors that look a great deal like polyamory or open relationships, but they are doing so in secret, without honest communication and trust. This eventually leads to emotional harm and, at times, the end of a committed relationship. If, instead, people

32. See *infra* Part VIII (discussing ethical non-monogamy as a marriage couple able to freely develop sex intimacies with others).

33. See *infra* Part V (discussing plural marriages).

34. *Id.*

35. *Infra* Part VIII.

36. See Maura I. Strassberg, *The Challenge of Post-Modern Polygamy: Considering Polyamory*, 31 CAP. U. L. REV. 439, 444 (2003) (evaluating the political consequences of polyamory relationships).

37. See *id.* at 456–57 (describing the need for openness and consent in multi-partner relationships); see also Emens, *supra* note 9, at 283 (discussing the societal and legal implications of polyamorous relationships).

engaged in these behaviors with the full knowledge and consent of their partners, one might predict that fewer innocent spouses would be hurt, fewer marriages would end in divorce, and fewer families would be fractured into smaller units. In many situations, families would grow to look more like the extended families of the past, where multiple adults were involved in supporting each other and the children in the family. Hillary Clinton made famous the proverb “it takes a village to raise a child.”³⁸ Our current restrictions on the forms and expectations of intimate relationships make that village less likely to form, and once formed, less likely to be a stable influence. Expanding the options of relationship forms to include consensual non-monogamy can enhance the village effect by allowing parents to include additional intimate partners in the family that is available for parenting.

Following this Introduction, Part II of this Article looks at the way marriage and intimate relationships have been regulated in recent times, including the areas of these relationships that have been protected from legal regulation. Part III will identify the ways behavior that might be consensual and non-monogamous is currently discouraged. Laws governing intimate relationships have existed since the founding of our country.³⁹ At the time they were enacted there may have been legitimate reasons for creating them.⁴⁰ But given the changes in society, especially regarding women’s rights, divorce, child support, and the acceptance of single parenting, these laws now serve only to discourage behaviors that consenting adults might find beneficial.⁴¹ Part III examines the way these laws prevent intimate partners from engaging in behaviors that each finds acceptable, even though the actual enforcement of the law may have fallen into desuetude.

Part IV tackles the sensitive subject of consent and sexual assault crimes. Here, the article examines the role of BDSM practices in some intimate relationships and the potential criminal sanctions for these

38. Though this saying was incorporated into the title of a book by Hillary Rodham Clinton, and another by Jane Cowan-Fletcher, its exact origin is unknown. HILLARY RODHAM CLINTON, *IT TAKES A VILLAGE: AND OTHER LESSONS CHILDREN TEACH US* (1996); JANE COWAN-FLETCHER, *IT TAKES A VILLAGE* (1999).

39. See JoAnne Sweeny, *Undead Statutes: The Rise, Fall, and Continuing Uses of Adultery and Fornication Criminal Laws*, 46 LOY. U. CHI. L.J. 127, 134 (2014) (explaining the history of laws governing intimate relationships).

40. *Id.* at 133.

41. See Alicia Brokars Kelly, *Navigating Gender in Modern Intimate Partnership Law*, 14 J. L. & FAM. STUD. 1, 35–41 (2012) (discussing problems with gender roles in the law in our modern era).

activities. This Part looks at the element of consent in BDSM practices and suggests that evidence of consent be allowed as a potential defense to sexual assault charges. Admittedly, this is a sensitive topic, yet as the American Law Institute is currently revising the Model Penal Code sections involving sex offenses,⁴² now is the time to make these suggestions.

Part V briefly addresses the idea of plural marriage. Though this Article does not advocate for recognition of such arrangements, this Part identifies many of the reasons for at least eliminating the restriction against plural marriage. At the same time, as further explained in Part V, the complications involved in regulating and recognizing plural marriages differ from the other alternative arrangements discussed here, and are therefore beyond the scope of this Article. Still, the time is quickly approaching to tackle these concerns.

Part VI looks at efforts to legislate moral behavior and the change in acceptance of the use of morality as the sole reason for legislation. Part VII focuses on the importance of consent in all aspects of intimate relationships and non-criminal sexual interactions. Finally, Part VIII concludes by suggesting new options for intimate relationship structures and how such new structures that allow consensual non-monogamy can benefit the individuals involved, and potentially strengthen long-term relationships rather than harming them.

II. The Regulation and Protection of Marriage

A. Marriage as a Fundamental Right

The United States Supreme Court has repeatedly recognized marriage as a fundamental right. Support for this conclusion has been based on rights to liberty, privacy, association, and identity.⁴³ The Court first acknowledged

42. See MODEL PENAL CODE, *Sexual Assault and Related Offenses*, Discussion Draft No. 2 (April 28, 2015), <https://www.ali.org/projects/show/sexual-assault-and-related-offenses/> (reexamining the the Model Penal Code's approach to sex offenses) (on file with author).

43. See, e.g., *Meyer v. Nebraska*, 262 U.S. 390, 390 (1923) (“[Liberty] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children.”); *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (“[Marriage] is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.”); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (“At the heart of liberty is the right

the importance of marriage while declaring the power of the legislature to control it.⁴⁴ Though marriage “creat[es] the most important relation in life” and has “more to do with the morals and civilization of a people than any other institution” the legislature still has authority to regulate aspects of the marriage.⁴⁵ The legislature can “prescribe the age at which parties may contract to marry, the procedure or form essential to constitute marriage, the duties and obligations it creates, its effect upon the property rights of both, present and prospective, and the acts which may constitute grounds for its dissolution.”⁴⁶

While attempting to identify the parameters of the liberty guaranteed by the Due Process Clause of the Fourteenth Amendment, the Court explained that liberty protected by the Due Process Clause involved “not merely freedom from bodily restraint, but also the rights of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, [and] to marry”⁴⁷

When declaring racial restrictions limiting who could marry unconstitutional, the Court described marriage as “one of the ‘basic civil rights of man,’ fundamental to our very existence and survival” and noted “[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”⁴⁸ Later, addressing the due process right of indigent parties to access the court system to dissolve the marriage, the Court described marriage as “involv[ing] interests of basic importance to our society” and a “fundamental human relationship.”⁴⁹ Later cases continued to include marriage as a fundamental right, protected against unwarranted state intrusion.⁵⁰

to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”).

44. *See* *Maynard v. Hill*, 125 U.S. 190, 205–06 (1888) (deciding that a legislature has the authority to create laws governing divorce).

45. *Id.*

46. *Id.*

47. *Meyer*, 262 U.S. at 399.

48. *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

49. *Boddie v. Connecticut*, 401 U.S. 371, 376, 383 (1971).

50. *See* *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639–40 (1974) (“This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.”); *Moore v. City of E. Cleveland*, 431 U.S. 494, 499 (1977) (plurality) (“[W]hen the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to

*B. Rights to Intimate Relationships Today**1. Same-Sex Marriage*

In the most recent Supreme Court pronouncement regarding marriage, *Obergefell v. Hodges*,⁵¹ Justice Kennedy, writing for the majority described the liberty interest protected by the Constitution as one that “includes certain specific rights that allow persons, within a lawful realm, to define and express their identity.”⁵² Continuing to review the history of marriage in the United States, Justice Kennedy pointed out some of the significant changes in that institution over time, including the fact that marriages are no longer arranged for political, religious, or financial concerns (though there may still be marriages that are based on these interests, most people enter a marriage for emotional reasons), and concepts such as coverture, where the couple is treated as a “single, male-dominated entity” no longer exist.⁵³

Writing for the majority of the Court, Justice Kennedy identified attributes of marriage that have been identified as essential by Supreme Court precedents. These include the idea that personal choice about marriage is part of an individual’s right to autonomy, and is “among the most intimate [decisions] that an individual can make.”⁵⁴ Additionally, marriage is about commitment to another,⁵⁵ and protects individual’s rights

which they are served by the challenged regulation.”); *Carey v. Population Services Int’l*, 431 U.S. 678, 684–85 (1977) (“[I]t is clear that among the decisions that an individual may make without unjustified government interference are personal decisions relating to marriage, procreation, contraception, family relationships, and child rearing and education.”); *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (“[T]he right to marry is of fundamental importance for all individuals.”); *Turner v. Safley*, 482 U.S. 78, 95 (1987) (“[T]he decision to marry is a fundamental right” and an “expression of emotional support and public commitment.”); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (“These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.”); *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996) (“Choices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as ‘of basic importance in our society,’ rights sheltered by the Fourteenth Amendment against the State’s unwarranted usurpation, disregard, or disrespect.”).

51. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015) (concluding that same-sex couples may not be denied the fundamental right of marriage).

52. *Id.* at 2593.

53. *Id.* at 2595.

54. *Id.* at 2599.

55. *Id.*

to determine whether to procreate and how to raise children should they be a result of the marriage.⁵⁶ Finally, marriage allows access to societal support as well as responsibility towards society. These rights and responsibilities involve tax, inheritance and property rights; evidentiary privilege to avoid testifying against a spouse; hospital access and rights to make medical decisions on behalf of a spouse; adoption rights; survivor's benefits; recognition on birth and death records; worker's compensation benefits; health insurance benefits; and child custody, support, and visitation rights.⁵⁷ Spouses are also limited by some professional ethics rules and by campaign finance restrictions.⁵⁸

All of the characteristics, rights, and responsibilities related to marriage involve how parties to the marriage interact with the rest of society. Decisions that are personal, between those were party to the marriage, are protected from state intrusion. Once recognized by the state, the details of the arrangement between the parties to the marriage are private and individual or couple determined. The *Obergefell* majority recognized the decisions about marriage, and its individual parameters, are based on "many personal, romantic, and practical considerations . . ." ⁵⁹ and that these decisions, even to marry someone of the same sex, involve "only the rights of two consenting adults whose marriages would pose no risk of harm to themselves or third parties."⁶⁰

2. Expanding Intimate Relationship Rights

As the *Obergefell* court expanded the right to marry to same-sex couples, it relied on an earlier decision related to intimate relationships, *Lawrence v. Texas*,⁶¹ to acknowledge that individuals have the right to engage in private sexual conduct without fear of criminal sanctions.⁶²

56. *Id.* at 2601.

57. *Id.*

58. *Id.*

59. *Id.* at 2607.

60. *Id.*

61. *See* *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003) (explaining that constitutional protections allow individuals to engage in their own private sexual conduct without government interference).

62. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (2015) (citing *Lawrence*, 539 U.S. at 578).

According to *Lawrence v. Texas*, the liberty protected by the Due Process Clause “presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.”⁶³ Consequently, consenting adults are free to engage in sexual conduct of their choosing without state interference. According to the *Lawrence* court, decisions “concerning the intimacies of [married persons’] physical relationship . . . are a form of “liberty” protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons.”⁶⁴

As the next Part describes, if adults truly have a protected right to engage in consensual sexual conduct without interference from the state, then the application of certain criminal statutes violates these rights. Currently, in some states, cohabiting is a crime.⁶⁵ Twenty-one states still have statutes criminalizing adultery,⁶⁶ and, in all states, certain forms of BDSM sexual activity are sex crimes with no potential to raise consent as a defense.⁶⁷ For those who practice alternative lifestyles, such as BDSM, those who are involved in open relationships and polyamorous relationships, and those who engage in consensual swinging, the existence of these criminal statutes, and especially the application of assault criminal statutes, restricts their right to engage in consensual sexual conduct without interference from the state.

III. Criminalizing and Discouraging Consensual Choices Regarding Intimate Sexual Behavior

This Part addresses the crimes of adultery, fornication, and cohabitation. Though criminal sanctions related to BDSM activities create the same type of impediment to free choices about consensual sexual intimacy, the criminalization of those activities is more complicated, and deserves an analysis all its own. This will happen in Part IV.

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

64. *Id.* at 578 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

65. See Emens, *supra* note 9 (discussing the societal and legal reaction to polyamorous relationships).

66. See Deborah L. Rhode, *Adultery: An Agenda for Legal Reform*, 11 STAN. J. C.R. & C.L. 179, 180 (2015) (examining the constitutional issues with criminal prosecutions for adultery in the United States).

67. See Margo Kaplan, *Sex-Positive Law*, 89 N.Y.U. L. REV. 89, 118–22 (2014) (analyzing how law and legal discourse undervalue the importance of sexual pleasure).

Despite the fact that cohabitation, either prior to marriage, or as an alternative to marriage, is well accepted among most members of society, several states still explicitly prohibit cohabitation.⁶⁸ Additionally, eight states explicitly criminalize fornication (sexual intercourse between people not married to each other).⁶⁹ And, though rarely prosecuted in recent years, statutes criminalizing adultery still exist in twenty-two jurisdictions.⁷⁰

A. Historical Justifications for Criminalizing Intimacy

Originally enacted to enforce Christian morals,⁷¹ these statutes were enforced rigorously and publicly in the 1600s and 1700s.⁷² Prosecution for fornication and adultery was used to force fathers of illegitimate children to provide for the children rather than relying on public assistance.⁷³ Additionally, both fornication prosecutions and adultery prosecutions were used to encourage women to remain chaste until marriage, and married women to remain faithful to their husbands, guaranteeing that any offspring would belong to the husband rather than some other sexual partner.⁷⁴

Early prosecutions for adultery focused on the innocent spouse as the victim, and in some jurisdictions prosecution required a complaining spouse, where without a complaint from the wronged spouse, the courts

68. MICH. COMP. LAWS ANN. § 750.335 (West 2015); MISS. CODE ANN. § 97-29-1 (West 2015).

69. *See, e.g.*, IDAHO CODE ANN. § 18-6603 (West 2015) (“Any unmarried person who shall have sexual intercourse with an unmarried person of the opposite sex shall be deemed guilty of fornication.”). *See also generally* 720 ILL. COMP. STAT. ANN. 5/11-40 (West, 2015); MASS. GEN. LAWS ANN. ch. 272 § 18 (West 2015); MINN. STAT. ANN. § 609.34 (West 2015); MISS. CODE ANN. § 97-29-1 (West 2015); S.C. CODE ANN. § 16-15-60 (2015); UTAH CODE ANN. § 76-7-104 (West 2015).

70. ALA. CODE § 13A-13-2 (West 2015); ARIZ. REV. STAT. ANN. § 13-1408 (2015); FLA. STAT. ANN. § 798.01 (West 2015); GA. CODE ANN. § 16-6-19 (West 2015); IDAHO CODE ANN. § 18-6601 (West 2015); 720 ILL. COMP. STAT. ANN. 5/11-35 (West 2015.); KAN. STAT. ANN. § 21-5511 (West 2015); MASS. GEN. LAWS ANN. ch. 272 § 14 (West 2015); MD. CODE ANN. Criminal Law § 10-501 (West 2015); MICH. COMP. LAWS ANN. § 750.31 (West 2015); MINN. STAT. ANN. § 609.36 (West 2015); MISS. CODE ANN. § 97-29-1 (West 2015); N.Y. PENAL LAW § 255.17 (McKinney 2015); N.D. CENT. CODE ANN. § 12.1-20-09 (West 2015); OKLA. STAT. ANN. tit. 21 § 871 (West 2015); R.I. GEN LAWS ANN. § 11-6-2 (West 2015); S.C. CODE ANN. § 16-15-60 (2015); UTAH CODE ANN. § 76-7-103 (West 2015); VA. CODE ANN. § 18.2-365 (West2015); WIS. STAT. ANN. § 944.16 (West 2015).

71. Sweeny, *supra* note 39, at 133.

72. *Id.* at 134.

73. *Id.* at 137–38

74. *Id.* at 139.

were reluctant to prosecute and increase the humiliation the victim might suffer.⁷⁵ Some criminal statutes today continue to require a complaint from a wronged spouse in order to prosecute someone for adultery.⁷⁶

Fornication, on the other hand, has consistently been viewed as a crime against “public decency and morality.”⁷⁷ Like adultery prosecutions, fornication prosecutions also allow the states to impose support obligations for any illegitimate children.⁷⁸

In the 1970s and 1980s, as the Supreme Court expanded privacy rights related to sexual activity, regardless of marital status,⁷⁹ prosecutions under adultery and fornication statutes decreased significantly.⁸⁰ Today, especially in light of the Supreme Court’s decision in *Lawrence v. Texas*, adultery, fornication, and cohabitation statutes have become obsolete. In 1955, the American Law Institute removed adultery from the Model Penal Code and many states decriminalized adultery as well.⁸¹ However, many of these statutes remain on the books because, without prosecution, no one has standing to challenge the statute.⁸² Consequently, though unlikely there remains the potential for criminal charges to be brought against those who engage in the socially accepted, yet legally criminal acts.⁸³ Legislators and politicians feel little pressure to repeal these statutes: the statutes are not often prosecuted, the statutes reflect a desire to enforce a level of morality, and repealing the statutes may imply that the legislators condone the prohibited behaviors.⁸⁴

75. *Id.* at 146–47.

76. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-1408 (2015) (“No prosecution for adultery shall be commenced except upon complaint of the husband or wife.”).

77. Sweeny, *supra* note 39, at 147.

78. *Id.* at 147–48.

79. *See Eisenstadt v. Baird*, 406 U.S. 438, 453 (1972) (extending the right of privacy related to childbirth and contraception to single people); *Carey v. Population Servs. Int’l*, 431 U.S. 678, 694–95 (1977) (extending the right of privacy related to procreation and contraception to minors).

80. Sweeny, *supra* note 39, at 149.

81. Martin J. Siegel, *For Better or For Worse: Adultery, Crime & the Constitution*, 30 J. FAM. L. 45, 49 (1991–1992).

82. Sweeny, *supra* note 39, at 170–71.

83. *Id.* at 170.

84. *Id.* at 173; Siegel, *supra* note 81, at 49–50. One example of the reason the statutes still exist is captured in practice commentary provided with New York’s adultery statute:

The Temporary Commission on Revision of the Penal Law and Criminal Code ‘recommended that the offense of adultery (former Penal Law §§ 100–103) be omitted from the revised Penal Law. A majority of the Commission was of the opinion that the basic problem is one of private rather than public morals, and

B. Collateral Consequences of Unenforced Criminal Law

Though the threat of criminal prosecution is remote, the fact that adultery, fornication, and cohabitation are prohibited can affect other legal proceedings. Family courts may consider adultery when making alimony awards.⁸⁵ Public servants such as police officers or teachers may lose their jobs for engaging in criminal activity,⁸⁶ and politicians are subjected to public scandal as a result of indiscretions that are still technically criminal infractions.⁸⁷

C. Evidence of Criminal Behavior Despite the Laws

The recent data breach of the dating site for married people, Ashley Madison, demonstrates how widespread adultery may be among married couples. The website, which facilitates extra-marital affairs, and advertises with a slogan “life is short, have an affair,” claims more than 37 million members.⁸⁸ Though this number is unverified and likely highly exaggerated, analysis of the 36,397,896 e-mail addresses released by the hackers found 66%, or 24,039,705 email addresses were valid.⁸⁹ Admittedly, the data include e-mail addresses originating in other countries, and simply registering with the service does not mean that an individual has

that its inclusion in a criminal code neither protects the public nor acts as a deterrent. It was further noted that proscribing conduct which is almost universally overlooked by law enforcement agencies tends to weaken the fabric of the whole penal law. The Legislature, however, rejected the Commission's recommendation and enacted § 255.17 (L.1965, c. 1037)' Denzer and McQuillan, Practice Commentary to Penal Law § 255.17, McKinney's Penal Law (1967).

William Donnino, Practice Commentary to Penal Law § 255.17 (McKinney 2015).

85. Siegel, *supra* note 81, at 54.

86. *Id.*

87. Kathy Kiely & Thomas M. Defrank, *President Clinton Admits to Having an Inappropriate Relationship with Monica Lewinsky in 1998*, N.Y. DAILY NEWS, August 18, 2015 (originally published by the *Daily News* on August 18, 1998), <http://www.nydailynews.com/news/politics/clinton-admits-relationship-lewinsky-1998-article-1.817191>; Tim Padgett, *Sanford's Sex Scandal: Assessing the Damage*, TIME, June 25, 2009, <http://content.time.com/time/politics/article/0,8599,1907036,00.html>.

88. Danny Yadron, *Hackers Target Users of Infidelity Website Ashley Madison*, WALL ST. J., July 20, 2015, <http://www.wsj.com/articles/affairwebsiteashleymadisonhacked-1437402152>.

89. Travis Keith, *The Ashley Madison Hack in Seven Charts*, COLUMN FIVE, August 24, 2015, <http://www.columnfivemedia.com/the-ashley-madison-hack-in-8-charts>.

conducted an extra-marital affair. But, the prevalence of those who were at least considering an extramarital affair suggests that adultery is alive and well.

By some accounts, half of all married men have committed adultery, and up to 40% of married women have done so.⁹⁰ Not all marriages end as a result of extra-marital affairs. Many people report happy marriages despite the extramarital activity.⁹¹

Approval, or at least acceptance, of premarital and extramarital sex has increased as contraceptives have become more effective and available. At the same time attitudes about sex have shifted, and women have become more independent and less economically reliant on men for support. These changes in attitude resulted in an increase in the rates and acceptance of premarital sex and adultery.⁹²

D. Criminalizing Protected Behaviors

Decisions regarding premarital and extramarital sex seem to be exactly the types of decisions that are protected by the right of privacy articulated in *Lawrence* and *Obergefell*. If adults have the constitutionally protected right to engage in sexual conduct of their choosing, without interference from the state,⁹³ and “personal choices central to individual dignity and autonomy”⁹⁴ include intimate choices, then how can the choice to engage in premarital or extramarital sex be removed from the set of protected personal choices? The decision to commit adultery is a decision relating to marriage and family relationships even if it is a choice that society does not want to condone.⁹⁵ Likewise, the decision to engage in premarital sex is a decision involving “intimate choices that define personal identity and beliefs,”⁹⁶ and even if others may find this offensive to their religious beliefs, those religious objections “cannot be law and public policy with the imprimatur of the state.”⁹⁷

90. Siegel, *supra* note 81, at 55.

91. *Id.* at 57.

92. Sweeny, *supra* note 39, at 148.

93. *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003).

94. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597–98 (2015).

95. Siegel, *supra* note 81, at 71.

96. *Obergefell*, 135 S. Ct. at 2597–98.

97. *Id.* at 2602.

If choices regarding premarital sex and extramarital affairs are part of the fundamental right to privacy, then decisions to cohabit without the formalities of marriage are also protected choices. Moreover, the choice of living with a partner falls within an additional protection, the freedom to associate, a liberty protected by the First Amendment.⁹⁸

1. Justifications for Adultery Prohibitions are no Longer Justified

Assuming choices regarding cohabitation, premarital sex, and extramarital sex are protected under the fundamental right to privacy, the only reason these choices can be restricted is to protect a compelling state interest.⁹⁹ Martin Siegel presents a thorough analysis of the constitutional implications surrounding adultery, explaining how adultery falls within protected fundamental rights and what state interests are offered in support of continuing to criminalize this activity.¹⁰⁰

Siegel identifies several potential state interests: “prevention of disease and illegitimate children, the preservation of the institution of marriage and the safeguarding of general community morals.”¹⁰¹ The simple fact that these laws are no longer enforced demonstrates that the interests are no longer compelling.¹⁰² Even so, Siegel goes on to demonstrate how criminalizing adultery to prevent disease is not narrowly tailored enough to have an effect on disease rates and is under-inclusive, since “disease does not discriminate between extramarital sex and all other types of sex.”¹⁰³ Additionally, the goal of preventing problems related to illegitimate children is over-inclusive, since the prohibition against adultery applies equally to those who are fertile and those were not.¹⁰⁴

The states’ interest in protecting the marital relationship is based on protecting an innocent spouse, and protecting the institution of marriage itself.¹⁰⁵ The lack of prosecution of adulterers negates any interest in protecting spouses. Even if the statutes were enforced, it is difficult to explain how imposing a criminal sentence on an adulterer will protect the

98. See generally Siegel, *supra* note 81, at 76–81.

99. See generally *id.*

100. See generally *id.* See also generally Sweeny, *supra* note 39.

101. Siegel, *supra* note 81, at 87.

102. *Id.*

103. *Id.* at 88.

104. *Id.*

105. *Id.*

wounded spouse. In fact, the exact opposite is likely, as criminal sanctions and notoriety impose additional hardships on those involved.¹⁰⁶

The argument that adultery laws protect the institution of marriage may have had some traction when marriage was a more permanent institution. However, in light of the ability of spouses to terminate a marriage for any reason, criminalizing adultery in order to prevent sexual dalliances serves no purpose. If a couple can end the marriage and consequently end the sexual exclusivity implied by that marriage, any attempts to force that sexual exclusivity is fruitless.¹⁰⁷

Finally, justification for criminalizing adultery may be based on protecting community morals.¹⁰⁸ The use of morals justifications has been found insufficient to represent a compelling state interest. In *Romer v. Evans*,¹⁰⁹ the Supreme Court explicitly found that generalized community animus was not only insufficient as a compelling interest, but it did not even qualify as a legitimate state interest.¹¹⁰ Morals-based legislation is unsustainable,¹¹¹ so asserting the protection of community morals as a reason to infringe upon a fundamental right is untenable.

2. Justifications for Fornication and Cohabitation Restrictions Are no Longer Valid

Similar justifications have been suggested as support for legislation criminalizing fornication and cohabitation.¹¹² Just as attempting to prohibit extramarital sex will not prevent the spread of disease, since disease does not discriminate between marital sex and non-marital sex, this justification for prohibiting fornication and cohabitation also fails. The availability of birth control, paternity testing, and acceptance of single parenthood leaves the idea of protecting illegitimate children standing high and dry. And, given the fact that marriage is no longer a permanent institution, prohibiting non-marital sex offers no protection of that institution. Finally, suggesting

106. Siegel, *supra* note 81, at 90.

107. *Id.* at 90–91.

108. *Id.* at 92.

109. 517 U.S. 620 (1996).

110. *Id.* at 632.

111. Linda Anderson, *Legislative Oppression: Restricting Gestational Surrogacy to Married Couples is an Attempt to Legislate Morality*, 42 U. BALT. L. REV. 611, 649 (Summer 2013).

112. *See generally* Sweeny, *supra* note 39, at 170.

that fornication and cohabitation violates societal mores may not be supported by the statistics about the number of people who engage in these behaviors. Additionally, these justifications are no longer viable in light of the Supreme Court's assertion 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."¹¹³

Despite the potential arguments that criminal statutes prohibiting cohabitation, fornication, and adultery are unconstitutional, the lack of prosecution of these crimes means they are unable to be challenged. This lack of prosecution acts as evidence that could eliminate the statutes, and it also acts as a method of preserving the statutes because no one can demonstrate standing to mount a challenge.¹¹⁴

IV. BDSM Activity

Though the likelihood of being criminally prosecuted for cohabiting, fornicating, or engaging in adultery is remote, that is not the case for another alternative sexual behavior—BDSM.¹¹⁵ Though millions of people engage in BDSM activities, those who do not often consider the practice perverted or deviant. Until 2010, those who practiced BDSM were considered mentally ill.¹¹⁶ The fact that some practitioners have been criminally prosecuted adds fuel to the fire and increases the stigma associated with these activities.¹¹⁷

113. *Lawrence v. Texas*, 539 U.S. 558, 577–78 (2003).

114. *See Sweeny*, *supra* note 39, at 170–71 (discussing how fornication and adultery statutes remain on the books despite lack of prosecution as a way for the legislature to disapprove of these acts).

115. BDSM generally refers to bondage, discipline, dominance, submission and sadomasochism.

116. Merissa Nathan Gerson, *BDSM Versus the DSM: A History of the Fight that got Kink Declassified as Mental Illness*, THE ATLANTIC, (Jan. 13, 2015), <http://www.theatlantic.com/health/archive/2015/01/bdsm-versus-the-dsm/384138/> (last visited Apr. 14, 2016) (discussing that prior to 2010 BDSM could be used against a person in family court because of the classification in the DSM) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

117. *See Kaplan*, *supra* note 67, at 115–17 (describing the effect that criminalization of BDSM behavior has on the BDSM community).

A. A BDSM Primer

Before addressing the problems associated with criminal restrictions on BDSM activities, it is important to be clear about exactly what these activities entail. First, and foremost, BDSM involves consensual erotic or sexual activity.¹¹⁸ Typically there is some form of power exchange, where one party consents to the other having the power to control him or her. This may involve psychological control, such as domination or humiliation. It may also involve consenting to be bound or restrained in some manner, or to be subjected to some form of corporal punishment.¹¹⁹ In some BDSM situations the parties agree that one may inflict pain upon the other. When this is part of the BDSM dynamic the pain is experienced as a desirable and pleasurable sensation.¹²⁰ If the participants consent to the infliction of pain it is always because the person experiencing the pain has requested this. That person retains the complete power to cause the pain to be ceased immediately, even though consent to inflict such pain was freely given.¹²¹

One of the hallmarks of the BDSM community is the emphasis on safe, sane, and consensual behavior.¹²² Because practitioners understand that they are engaging in behaviors, and using implements that have the potential to cause harm, the focus on safety ensures that the risk of harm is

118. *Id.* at 116.

119. *See id.* at 116 (“BDSM encompasses a range of sexual activities between consenting adults that includes bondage, domination and submission, and sadomasochistic activity.”).

120. *Id.* at 117. The National Coalition for Sexual Freedom, an advocacy group for consenting adults in the BDSM-Leather-Fetish, Swing, and Polyamory Communities, explains sadomasochism, the SM aspects of BDSM, as

a sexual orientation or behavior among two or more adult partners. The behavior may include, but is not limited to, the use of physical and/or psychological stimulation to produce sexual arousal and satisfaction. Usually one partner will take an active role (top or dominant) and the other will take a passive role (bottom or submissive). SM practitioners can be heterosexual, bisexual, homosexual, transgendered or intersex individuals.

What is SM? Introduction, National Coalition for Sexual Freedom (hereinafter *NCSF*), <https://ncsfreedom.org/key-programs/education-outreach/what-is-sm/item/381-what-is-sm?-sm-is-sexual-orientation-or-behavior.html> (last visited Apr. 14, 2016) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

121. *See* Kaplan, *supra* note 67, at 117 (discussing the safe word as a way for a person in a BDSM relationship to withdraw consent).

122. Monica Pa, *Beyond the Pleasure Principle: The Criminalization of Consensual Sadomasochistic Sex*, 11 TEX. J. WOMEN & L. 51, 61 (2001); *NCSF*, *supra* note 120; Kaplan, *supra* note 67, at 117.

monitored and minimized.¹²³ The reference to sane behavior reflects the recognition that, without consent the activities would cause emotional harm rather than physical pleasure. This principle also helps dispel the idea that people who engage in BDSM activities are suffering from a mental disorder.¹²⁴ Like many other forms of sexual activity that had been considered psychological disorders, engaging in BDSM activity does not rise to the level of a psychological disorder unless it interferes with a person's everyday life.¹²⁵ Though individuals may experience "intense sexual arousal from the act of being humiliated, beaten, bound, or otherwise made to suffer"¹²⁶ or "intense sexual arousal from the physical or psychological suffering of another person,"¹²⁷ neither of these behaviors rises to the level of a disorder unless the person also suffers psychosocial difficulties as the result of the behavior, or engages in this behavior with a non-consenting individual.¹²⁸

And finally, BDSM is consensual. Unlike many other erotic or sexual interactions where those involved simply fumble through the interactions without knowing exactly where the boundaries will appear, the practice of BDSM involves explicit consent to clearly negotiated parameters. "'Consent' is considered the 'first law' of S/M sex—the moral dividing line between S/M and brutality. Consent is required to be voluntary, knowing, explicit, and with full understanding of previously agreed to parameters. The ongoing consent of the participants is required, and constructive consent is never sufficient."¹²⁹ Limits are defined. Expectations are explained. And most importantly, methods of communicating when consent is being withdrawn are spelled out clearly.¹³⁰ Often, this negotiation involves creating a "safe word" that conveys to the other party the need to stop, immediately. Safe words are necessary because, at times BDSM scenes involve the use of physical force, restraint, or threat of harm despite

123. See Kaplan, *supra* note 67, at 117 (describing the dominant person in a BDSM as monitoring the safety of the submissive so as to ensure there is not too much physical harm).

124. See *id.* at 117–18 (describing that part of the reason the BDSM community self-describes as "sane" is to dispel the stigma that BDSM is only practiced by people who are mentally unwell).

125. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (hereinafter *DSM-5*) 694–97 (2013).

126. *Id.* at 694.

127. *Id.* at 695.

128. *Id.* at 694–97.

129. Pa, *supra* note 122, at 61.

130. See Kaplan, *supra* note 67, at 117 (describing the use of a safe word in BDSM relationships).

the objection of the person being subjected to the force, restraint or threat. This is one situation where “no” does not usually mean no, but the use of the safe word (something very different than no) clearly means consent has been withdrawn or a limit has been reached.¹³¹

B. Criminal Prosecution of BDSM Activity

Unlike those who engage in the types of sexual behavior discussed earlier, those who engage in BDSM practices have faced criminal prosecution.¹³² Most of the criminal cases have involved charges of assault, or assault and battery.¹³³ (Whichever term is used, the charges usually stem from statutes that prohibit causing, or attempting to cause bodily injury to another.) Whether based on a lack of understanding of the sexual nature of BDSM activities or from the similarity to non-consensual assaults, criminal charges for these behaviors have typically been brought under traditional assault and battery prohibitions rather than sex assault statutes. The focus has been on the violent aspect of the interaction, rather than the sexual aspect.¹³⁴ By choosing to proceed under traditional assault and battery statutes prosecutors remove any possibility of consent being introduced as a potential defense to the allegations underlying the charge.¹³⁵

Courts have been reluctant to believe that individuals might actually choose to submit to the types of activities that are common BDSM practices. In *People v. Samuels*, the California Court of Appeal refused to allow a defendant to assert consent as a defense to charges of aggravated

131. *Id.*

132. *See* Pa, *supra* note 122, at 64–71 (describing the various criminal cases that have been reported in the United States and England).

133. *See id.* (describing that participants in S/M relationships have been prosecuted for criminal assault).

134. *See id.* at 79 (“The consensual agreement of the parties’ (sic) is overridden by judicial and academic readings of S/M sex as uncivilized or undignified violence.”).

135. *See* *People v. Samuels*, 250 Cal. App. 2d 501, 513 (Cal. Ct. App. 1967) (holding consent is available as a defense to assault or battery only in the context of sports like football, boxing or wrestling); *Govan v. State*, 913 N.E. 2d 237, 242 (Ind. Ct. App. 2009) (holding that even when there are sexual overtones, consent is not available as a defense if a deadly weapon is involved); *State v. Collier*, 372 N.W.2d 303, 307 (Iowa Ct. App. 1985) (refusing to include the possibility of consent to S/M activity as a “sport, social or other activity” which would allow a consent defense); *Commonwealth v. Carey*, 974 N.E. 2d 624, 631 (Mass. 2012) (refusing to extend *Lawrence* ruling regarding consensual sexual relations to situation where a person “might be injured [or coerced]”); *People v. Jovanovic*, 700 N.Y.S. 2d 156, 169 n.5 (N.Y. App. Div. 1999) (stating consent unavailable as a defense for assault that “causes injury or carries a risk of serious harm”).

assault.¹³⁶ Even though the charges were based on a report related to the processing of film that depicted the defendant within another man, and were not based on a complaint by the recipient of the whipping, the court was unwilling to consider the consensual nature of the interaction even though the volunteer only suffered red marks and bruising.¹³⁷ The court appeared to believe the volunteer was somehow mentally impaired or otherwise not normal, as it reasoned that “[it] is a matter of common knowledge that a normal person in full possession of his faculties does not freely consent to the use, upon himself, of force likely to produce great bodily injury.”¹³⁸

In a recent case where the alleged victim testified that she “asked [the] defendant to inflict the bruising and wanted him to do so,” urging him to continue despite his reluctance, the California Court of Appeal still refused to consider the potential consent to negate the crime of assault.¹³⁹ The court acknowledged that consent was a defense to charges of rape, kidnapping, sexual battery and burglary and in those instances the lack of consent is an element of the crime itself.¹⁴⁰ But, lack of consent is not an element of charges of “torture, infliction of corporal injury on a cohabitant, and criminal threats.”¹⁴¹ Furthermore, the court noted that courts throughout the country have refused to allow consent as a defense when there is serious bodily injury, even if it is the result of consensual sadomasochistic activity.¹⁴²

Prosecutors and courts alike continue to prosecute nonconsensual BDSM as a criminal assault rather than a form of sexual assault, even when there are sexual overtones to the activity.¹⁴³ In *Golden v. State*, a defendant was convicted of battery for branding his girlfriend and whipping her with a cord because, despite the sexual/BDSM nature of the actions, a deadly weapon was involved.¹⁴⁴

136. *Samuels*, 250 Cal. App. 2d at 513.

137. *Id.*

138. *Id.* at 513–14.

139. *People v. Davidson*, No. D064880, 2015 WL 4751166, at *7 (Cal. Ct. App. Aug. 12, 2015) (unreported).

140. *Id.*

141. *Id.*

142. *Id.*

143. *See Golden v. State*, 913 N.E. 2d 237, 242 (Ind. Ct. App. 2009) (describing that it is against public policy to allow consent to negate battery when there are sexual overtones and a deadly weapon is used).

144. *Id.*

Regardless of the fact that BDSM practitioners seek and take actions that result in injury (though usually not serious bodily injury), and may need to feel coerced into certain situations or actions, courts refuse to include this within the realm of protected consensual sexual activity. In *Commonwealth v. Carey*,¹⁴⁵ the Massachusetts Supreme Judicial Court determined that consent is immaterial when the activity involves the potential for bodily harm.¹⁴⁶ Here the court acknowledged that, in light of the U.S. Supreme Court's decision in *Lawrence*, individuals had a right to engage in private consensual sexual behavior, but noted that *Lawrence* limited that right to situations where there was no threat of bodily harm, so prosecution of consensual sexual activity when bodily harm was involved was possible.¹⁴⁷

The use of criminal assault statutes that prevent a defendant from claiming a defense based on consent changes the view of transgressions in BDSM practices from transgressions beyond an agreed-upon boundary to physical attacks for hostile purposes. To do so is to misunderstand the entire nature of a BDSM relationship. Additionally, the fact that courts view temporary "injuries" such as pain caused by a clamp placed on the skin or by hot wax being dropped onto the skin, or the pain associated with being spanked by wooden spoon, as serious bodily injury belies the fact that there is more at play than protecting the public interest and preventing citizens from serious harm.¹⁴⁸

According to the Model Penal Code, "serious bodily injury" means "injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss of impairment of the function of any bodily member or organ."¹⁴⁹ Though there are certainly instances where BDSM transgressions can result in serious bodily injury, choosing to include all BDSM activities within this definition goes too far.

145. 974 N.E.2d 624 (Mass. 2012).

146. *See id.* at 631–32 (noting that a right to sexual privacy is outweighed by the state's interest in protecting people from violence).

147. *Id.* at 631.

148. Pa, *supra* note 122, at 72.

149. MODEL PENAL CODE § 210.0(3) (2014).

V. Plural Marriages

A. Polygamy

A discussion of alternative relationship forms would not be complete without at least a brief discussion of polygamy. Like cohabitation, fornication, and adultery, polygamy is specifically prohibited by law through the criminal prohibition of bigamy.¹⁵⁰ Most Americans picture only one form of polygamy when considering this arrangement. The historical conflict between the Mormon church and the United States, in connection with the state of Utah's admission to the United States, focuses American views on a form of polygamy that involves one husband and multiple wives.¹⁵¹ This form of polygamy is known as polygyny. The converse is polyandry—one wife with multiple husbands.¹⁵² In the United States, it is estimated that between thirty thousand and one hundred thousand people practice polygamy, in the form of polygyny.¹⁵³ Professor Adrienne Davis provides a clear overview of the issues related to the typical picture of polygamy. Professor Davis outlines the arguments for and against these arrangements¹⁵⁴ and then describes issues that would arise if states were to decriminalize and regulate plural marriages.¹⁵⁵ To address the issues she identifies if states were to regulate plural marriage, Davis suggests rules addressing the formation, expansion, and dissolution of such marriages be governed by rules similar to those found in partnerships.¹⁵⁶

150. See, e.g., MONT. CODE ANN. §45-5-611 (establishing a fine and imprisonment for the offense of bigamy); OR. REV. STAT. ANN. §163.515 (classifying the crime of bigamy as a Class C felony).

151. See *Plural Marriages and Families in Early Utah*, LDS.ORG, <https://www.lds.org/topics/plural-marriage-and-families-in-early-utah?lang=eng> (last visited Apr. 14, 2016) (describing the existence of plural marriages through the church in the late 1800s and early 1900s) (on file with the Washington & Lee Journal of Civil Rights and Social Justice).

152. Davis, *supra* note 30, at 1965; Den Otter, *Three May Not be a Crowd: The Case for a Constitutional Right to Plural Marriage*, 64 EMORY L.J. 1977, 1983 (2015).

153. See Cassiah M. Ward, Note, *I Now Pronounce You Husband and Wives: Lawrence v. Texas and the Practice of Polygamy in Modern America*, 11 WM & MARY J. WOMEN & L. 131, 132 (2004) (“Experts estimate that more than thirty thousand—and as many as one hundred thousand—Fundamentalist Mormons currently practice polygamy in Utah, Arizona, Canada, and Mexico.”). See also generally Davis, *supra* note 30, at 1968.

154. See generally Davis, *supra* note 30, at 169–79.

155. See generally *id.* at 1989–98.

156. See generally *id.* at 2001–25.

While Davis' ideas about the ways to handle plural marriages seem logical, they continue to focus primarily on plural marriages involving one husband and multiple wives. The suggestion implied by this focus is that the intimate connections flow between the husband and each of the wives separately. But this picture leaves out a potential form of plural marriage altogether—a form where intimate connections are created between all members of the marriage. Sometimes coined “group marriage,”¹⁵⁷ those who practice this form of polygamy (though without the legal recognition of marriage) often refer to the arrangement as polyamory or polyfidelity.¹⁵⁸

B. Polyamory

Polyamorous arrangements “vary as to the number of people involved, the sexes of those involved, the sexualities of those involved, the level of commitment of those involved, and the kinds of relationships pursued.”¹⁵⁹ These arrangements reflect the variety of social practices that are becoming more evident and accepted in today's society. Polyamorous relationships may appear similar to traditional polygyny or polyandry, or they might include homosexual and bisexual individuals and their respective relationships as well.¹⁶⁰ In addition, the range of relationship forms is enormous, running the gamut from an “individual who has multiple, concurrent but discrete dyadic relationships with others”¹⁶¹ to a “triad, consisting of two or three dyadic relationships, depending on whether each of the three is sexually involved with the other two or whether only one of the three is sexually involved with the other two.”¹⁶² The nature of the relationships may vary as well. Some look like traditional marriage relationships with long-term commitments, while others may be sporadic short-term relationships that are more like dating relationships than long-term commitments.¹⁶³

157. See Den Otter, *supra* note 152, at 1983 (defining group marriage as between any combination of men and women).

158. See Strassberg, *supra* note 36, at 439 (discussing the coining of the terms polyamory and polyfidelity).

159. *Id.* at 440.

160. See *id.* at 441 (discussing the ways in which polyamory differs from traditional polygamous relationships).

161. *Id.* at 444.

162. *Id.* at 444.

163. See *id.* at 445 (discussing the variation of commitment between partners in polyamorous relationships).

Though plural marriages and polyamorous relationships are alternatives worth considering, the complications that would arise for these relationships to be recognized and regulated are complicated enough that it is likely to be some time before such recognition occurs, if it does. However, the growing visibility and social acceptance of alternative intimate arrangements adds support to the idea that the time has come to eliminate criminal sanctions for intimate behaviors, and provide ways to protect those who wish to explore such arrangements.

VI. Efforts to Legislate Morality

Some decisions that we make are so personal that government interference makes no sense. Humans have basic needs, individual desires, and individual beliefs that cannot be altered by courts, legislators, executives, or any other bodies that may attempt to impose other beliefs on all. Basic human needs, desires, and individual beliefs are so personal that government interference of any type will never be satisfactory.

The United States was founded on principles of liberty¹⁶⁴ and of freedom from oppression and governmental interference.¹⁶⁵ Originally, our founding fathers were concerned about religious persecution. They ventured across the Atlantic in search of a place where they were free to follow their own religion rather than being forced to follow the edicts of the king. Yet today, citizens of the United States are subjected to the same sort of restrictions on liberty that caused our forefathers to flee their homeland. Over time, government interference in our personal lives grew. Legislators attempted to influence personal behaviors. Gift tax laws influence the way assets are transferred.¹⁶⁶ More recently, laws requiring medical providers to honor living wills and medical directives caused people to consider how they wished to be treated in certain critical situations.¹⁶⁷

Yet all of these legislative schemes were, and are, optional. They all involve personal decisions, yet none of them force a particular decision upon the individual. One who wishes to behave differently than the legislation encourages is still free to make that choice and accept the consequences for doing so.

164. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

165. THE FEDERALIST NO. 51 (James Madison).

166. DAVID JOULFAIAN, U.S. DEP'T OF THE TREAS., THE FEDERAL GIFT TAX: HISTORY, LAW, AND ECONOMICS, OTA PAPER 100, 25 (Nov. 2007).

167. *See, e.g. generally*, FLA. STAT. ANN. §§ 765.301–765.309.

A. Early Legislation Targeted Morality

Even though our forefathers were attempting to avoid the imposition of a specific religion or belief system, they still chose to control behaviors that were considered amoral. Criminal statutes prohibited harming others. The balance between individual liberty and protecting members of society required some personal restrictions, as it still does today.

In his book *On Liberty*, John Stuart Mill differentiated between actions that caused harm to others, and actions that only affected one's self.¹⁶⁸ Looking specifically at morals legislation, he approved of legislation that prevented an individual's choice to engage in behavior that would harm another who had not agreed to that harm.¹⁶⁹ Even so, early legislation banned personal behaviors that did not affect others. Statutes controlling decorum, and banning certain activities were enacted to prevent individuals from debasing themselves and somehow debasing society as a result. As described earlier in this Article, some of these restrictions affected decisions about intimate relationships.¹⁷⁰

At the time, some of those restrictions made sense, because the behaviors they restricted may have caused consequences to others. For instance, fornication statutes, restricting intercourse between unmarried individuals, provided protection for women from becoming pregnant and having to support a child alone. When most women did not work outside the home, this may have been a reasonable restriction, or at least a defensible one. Arguably, adultery statutes served a similar purpose.

So, despite a strong belief in personal liberty, early legislators enacted laws designed to control individual morality. At the time, our country was much more homogeneous than today. Most people shared common ideas about morality. Fewer diverse opinions and diverse lifestyles existed to challenge those societal mores. But, as our world became smaller, travel between various areas of the country and the world became easier; living situations, lifestyles, and families became more diverse; and we moved from a more agrarian society to an industrial society, those social mores

168. JOHN STUART MILL, ON LIBERTY 141–44 (Walter Scott Publishing Co. 1901) (Jan. 10, 2011), <https://www.gutenberg.org/files/34901/34901-h/34901-h.htm> (last visited Apr. 14, 2016) (describing that once a person's actions effect those around them then society has jurisdiction over those actions) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

169. *Id.*

170. *Supra* Part III.D., IV.B.

began to blur destroying any consensus about many things our recent ancestors took for granted.

When we look at law, whether statutory or case law, we usually consider the circumstances at the time the law was created. This is more explicitly considered when evaluating common law. *Stare decisis* requires that we look at previous decisions made in similar circumstances. These circumstances include the societal norms and mores at the time of the decision. Changes in the common law arise when precedent cases are distinguished because the situations differ enough to warrant a different result.¹⁷¹ Statutes, however, are a bit more difficult to shape and bend for new situations. Though courts may look to legislative history to determine how to interpret or apply a particular statute, many interpretations and applications are difficult to change without legislative action. Until we decide that all legislation should sunset after a specific number of years (a topic for a different article), the only way some statutory prohibitions lose their effect is through prosecutorial discretion about whether to enforce the particular statute by pursuing criminal charges.

B. Restrictions on Legislating Morality

Legislation based solely on concepts of morality is unconstitutional.¹⁷² Recent Supreme Court decisions regarding legislation related to individual personal behaviors have made it clear that the imposition of one idea about morality cannot be the reason for restricting personal decisions for all.¹⁷³

The connection between societal views of morality and the law has long been assumed.¹⁷⁴ Though legislation often reflects society's views of

171. See *Mich. v. Bay Mills Indian Cmty.*, 134 S. Ct 20124, 20136 (2014) (explaining *stare decisis* is foundational to the rule of law); *POM Wonderful, LLC v. Coca Cola, Co.*, 134 S. Ct. 2228, 2236 (2014) (describing the need to use canons of statutory construction).

172. See *Romer v. Evans*, 517 U.S. 620, 633 (1996) (“By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law.”).

173. See *supra* note 50 and discussion in Part II.

174. KENT GREENAWALT, *CONFLICTS OF LAW AND MORALITY* 161 (1987) (describing natural law as “the longstanding position in moral and legal theory that human law is in some sense derived from moral norms that are universally valid and discoverable by reasoning about human nature or true human goods”); William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1487 (1987) (arguing that courts interpret statutes in light of existing social norms rather than societal norms existing at the time of enactment); Stanley Mosk, *The Common Law and the Judicial Decision-Making Process*, 11

morality, the reverse is not true; not all decisions related to appropriate moral behavior or enforcement of morality are appropriate to be incorporated into the law.¹⁷⁵ The distinction is usually based on the differences between enforcement of public morals and enforcement of private morals, where public morals involve actions that have a negative effect on others, and private morals are those that involve actions that are individual in nature, often related to sexual behavior.¹⁷⁶

In his series of lectures at Stanford University, noted legal philosopher H.L.A. Hart distinguished between morality that protects against harm to others and sexual morality, stating that “society could not exist without a morality which mirrored and supplemented the law’s proscriptions of conduct injurious to others. But there is . . . no evidence to support, and much to refute, the theory that those who deviate from conventional sexual morality are in other ways hostile to society.”¹⁷⁷

Morality, both private and public, describes what one ought to do, and is grounded in religious teachings.¹⁷⁸ But there is no bright line. It is possible to have conflicting views about what constitutes proper behavior.¹⁷⁹ In fact, debate continues about what morality requires about all

HARV. J.L. & PUB. POL’Y 35, 36 (1988) (describing the evolution of the common law and its ability to reflect societal changes). This assumption is evident by the assertion of connections between morality and law without the need for citation, even by Justice Scalia. *See generally* *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 310 (2000) (Scalia, J., concurring); *Romer*, 517 U.S. 620, 644–48 (1996) (Scalia, J., dissenting); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 580 (1991) (Scalia, J., concurring).

175. Larry Alexander & Frederick Schauer, *Law’s Limited Domain Confronts Morality’s Universal Empire*, 48 WM. & MARY L. REV. 1579, 1585–86 (2007). *See also* Suzanne B. Goldberg, *Morals-Based Justifications for Lawmaking: Before and After Lawrence v. Texas*, 88 MINN. L. REV. 1233, 1300–04 (2004) (discussing the influence of morality on the law after *Lawrence*’s disavowal of morality as a legitimate basis for legislation); Gregory Kalscheur, *Moral Limits on Morals Legislation: Lessons for U.S. Constitutional Law from the Declaration on Religious Freedom*, 16 S. CAL. INTERDISC. L.J. 1, 30 (2006) (distinguishing public morality from private morality and suggesting that “public good,” rather than morality in general, is the appropriate role of legislation).

176. *See, e.g.*, G. Marcus Cole, *What Is the Government’s Role in Promoting Morals? . . . Seriously?*, 31 HARV. J.L. & PUB. POL’Y 77, 79 (2008) (using the terms morality of aspiration and morality of duty, where morality of duty involves the “basic duty to respect the person and property of others”). *See also generally* Timothy W. Reinig, Comment, *Sin, Stigma & Society: A Critique of Morality and Values in Democratic Law and Policy*, 38 BUFF. L. REV. 859, 880 (1990).

177. H.L.A. HART, *LAW, LIBERTY AND MORALITY* 50–51 (1963).

178. *See* Cole, *supra* note 176, at 78 (describing how morality was a province of the church until King Henry VIII incorporated it into the state).

179. *See* Alexander & Schauer, *supra* note 175, at 1583 (“[I]f people generally agreed about what morality required, there would then not be much reason to substitute law for the

sorts of things, which provides the ultimate rationale for law and the legal system—to settle disputes about what morality requires in specific instances.¹⁸⁰

Additionally, the proper role of the government in promoting or enforcing morals is subject to much debate.¹⁸¹ Generally, there is agreement that moral standards concerning harm to others or others' property are legitimate reasons for the government to get involved in enforcement through legislation.¹⁸² Laws relating to murder, assault, robbery, and trespass fall into this category.¹⁸³

The more difficult questions involve morality that might be described as virtues and whether these are proper subjects for legislation.¹⁸⁴ Until the time of King Henry VIII, who took control of the Church of England in the 16th century,¹⁸⁵ morality related to virtues was the domain of the ecclesiastical courts.¹⁸⁶ Today, in a system that imposes regulations on individuals with vastly different belief systems, continuing to use legislation to impose certain moral imperatives may impinge on others' freedom to hold alternative beliefs about morality.

While regulating public morality to protect people from harm created by others' choices may still be appropriate, regulating private morality—what we each choose to do in private, whether virtuous or not—may be significantly more complicated. In a world where we are expected to respect everyone's right to practice their own religion and where tolerance of those who are different from us is expected in all realms of life, identifying which moral imperative to enforce becomes impossible.¹⁸⁷

direct moral decision making of citizens and officials alike.”).

180. *Id.* at 1583–84.

181. *See* Cole, *supra* note 176, at 77 (discussing two theories of the role of government and morality and how they are in conflict).

182. *Id.* at 79.

183. *Id.* at 77, 79.

184. *Id.* at 79.

185. King Henry VII ruled England from 1509 to 1547. During the 1530s and 1540s he expanded royal authority at the expense of ecclesiastical authority. A.F. Pollard, *Biography of King Henry VIII of England*, 13 *ENCYCLOPEDIA BRITANNICA* 289 (Cambridge Univ. Press 1910), <http://www.luminarium.org/renlit/tudorbio.htm> (last visited Apr. 14, 2016) (on file with the Washington & Lee Journal of Civil Rights and Social Justice).

186. Cole, *supra* note 176, at 81.

187. *See* GREENAWALT, *supra* note 174, at 26 (asserting that “reasons relating exclusively to one’s own welfare do not establish what, morally, one ought to do; people are free morally not to pursue their own welfare”).

C. Public Morality Versus Private Morality

Some restrictions on behaviors addressed by private morals are appropriate because the behaviors being restricted can lead to potentially harmful effects on others.¹⁸⁸ Restrictions on gambling,¹⁸⁹ or the attempt to prohibit the use of alcohol¹⁹⁰ are designed to protect public morals. Each regulates individual behavior which has a basis in both private and public morals.¹⁹¹ The restrictions on individual behavior attempt to discourage behavior that is commonly considered lacking in virtue, but more importantly, the restrictions protect others who may be harmed by this lack of virtuous behavior.¹⁹² For example, legislation to restrict gambling has been justified by the need to protect families from the financial trouble that often accompanies excessive gambling.¹⁹³ Another example, prohibition,

188. See HART, *supra* note 177, at 50–51 (stating under which conditions behavioral restrictions based on private morals are proper).

189. See, e.g. generally, CAL. PENAL CODE § 330 (West 2012). In fact, Title 9 of the California Penal Code is titled specifically, *Of Crimes Against the Person Involving Sexual Assault, and Crimes Against Public Decency and Good Morals*, and addresses things such as sexual offenses crimes against children, spousal abuse, obscenity, and gambling. See also generally KY. REV. STAT. ANN. § 528.010 (West 2006). The commentary to the Kentucky statutes restricting gambling state:

The principal concept of the entire gambling chapter is to punish those who make a business or profession of gambling rather than the player who makes the business possible. Subsection (1), advancing gambling, and subsection (8), profiting from gambling, define the basic proscribed gambling activities. “Advancing gambling activity” refers to the activities of the operator of a gambling enterprise as well as the person who sets up a game, furnishes equipment, provides facilities for gambling or entices others to patronize gambling activities. A “player” as defined in subsection (7), does not advance gambling activity. “Profiting from gambling activity” is intended to reach the entrepreneurs who receive money or other profit, other than as a player, pursuant to an understanding or agreement to that effect.

KY. REV. STAT. ANN. § 528.010 *Kentucky Crime Commission/LRC Commentary 1974* (West 2006).

190. See, e.g., U.S. CONST. amend. XVIII (in effect from Jan. 16, 1919, until ratification of the Twenty First Amendment in 1933).

191. See, e.g. generally, *Ballock v. State*, 20 A. 184, 186 (Md. 1890).

192. Cf. Raymond Ku, *Swingers: Morality Legislation and the Limits of State Police Power*, 12 ST. THOMAS L. REV. 1, 34 (1999) (discussing restriction of harm to others as basis for morality-based legislation in state police power context).

193. See generally *Greater New Orleans Broad. Ass’n v. United States*, 527 U.S. 173, 177 (1999) (acknowledging that in the past, commercial speech surrounding lotteries was not protected by the First Amendment because the “demoralizing influence upon the people” was a legitimate reason to restrict advertising about lotteries). This same case identifies the governments concerns about gambling as “contribut[ing] to corruption and organized crime;

was designed to discourage and eliminate the potentially harmful behavior that can occur when one is intoxicated.¹⁹⁴

1. Morality as a Legitimate Basis for Legislation

In addition, our legal system has considered morality a potentially legitimate reason for legislation in a number of areas of society where it is challenging to determine whether the moral imperative is personal or public.¹⁹⁵ Where courts reviewed regulation based at least in part on morality, the legislation was allowed when it used a public-private morality combination as its justification.¹⁹⁶ Pure morality rationales, involving no other possible reason for the legislation, were successful (for a time) in *Bowers v. Hardwick*,¹⁹⁷ and were attempted but unsuccessful in *Lawrence v. Texas*.¹⁹⁸ In these two cases, concern about the virtuousness of the

underwrit[ing] bribery, narcotics trafficking, and other illegal conduct; impos[[ing] a regressive tax on the poor; and ‘offer[ing] a false but sometimes irresistible hope of financial advancement.’” *Id.* at 185 (quoting Brief of Respondent at 15–16, *Greater New Orleans Broad. Ass’n*, 527 U.S. 173, 1999 WL 161073, at *15–16).

194. See generally Lisa Lucas, Comment, *A New Approach to the Wine Wars: Reconciling the Twenty-First Amendment with the Commerce Clause*, 52 UCLA L. REV. 899, 915 (2005) (discussing movement to curb prevalence of alcohol).

195. See, e.g. generally, *Bowers v. Hardwick*, 478 U.S. 186, 195–96 (1986), *overruled by Lawrence v. Texas*, 593 U.S. 558 (2003).

196. See Goldberg, *supra* note 175, at 1235–36 (discussing the influence of morality on the law after *Lawrence*’s disavowal of morality as a legitimate basis for legislation).

197. *Bowers*, 478 U.S. at 196.

Even if the conduct at issue here is not a fundamental right, respondent asserts that there must be a rational basis for the law and that there is none in this case other than the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable. This is said to be an inadequate rationale to support the law. The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed. Even respondent makes no such claim, but insists that majority sentiments about the morality of homosexuality should be declared inadequate. We do not agree, and are unpersuaded that the sodomy laws of some 25 States should be invalidated on this basis.

198. *Lawrence*, 593 U.S. at 582–83.

This case raises a different issue than *Bowers*: whether, under the Equal Protection Clause, moral disapproval is a legitimate state interest to justify by itself a statute that bans homosexual sodomy, but not heterosexual sodomy. It is not. Moral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause. Indeed, we have never held that moral disapproval, without

behavior was the sole reason provided for legislatively restricting behavior that had no effect beyond the participating individuals.¹⁹⁹ In other cases, morals rationales have been combined with interests related to obvious means of reducing harm or increasing benefits.²⁰⁰ This combination of morality with other reasons has been described as composite morals-based justifications.²⁰¹ Other cases suggest a basis in morality, yet never actually discuss the moral implications.²⁰² These are referred to as using “embedded morals rationale.”²⁰³ Finally, cases that use the inert morals rationale rely on other reasons for the actual decision, but explicitly discuss the moral implications.²⁰⁴

2. Regulation Cannot be Based on Pure Morality

Though many cases have mentioned morals as part of the rationale, morality alone, or pure morality, has almost never been sufficient to allow

any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons.

Moral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause because legal classifications must not be ‘drawn for the purpose of disadvantaging the group burdened by the law.’

(internal citations omitted).

199. See, Goldberg *supra* note 175, at 1244 (discussing the influence of morality on the law after *Lawrence*’s disavowal of morality as a legitimate basis for legislation).

200. *Id.* at 1245.

201. *Id.*

202. See *id.* at 1244 (identifying cases that restrict adult entertainment, obscenity, and foul language).

203. *Id.* One example of “embedded morals rationale” that Goldberg cites is *City of Erie v. Pap’s A.M.*, 529 U.S. 277 (2000). *Pap’s A.M.* relied on the city’s interest in combating the secondary effects of nude dancing to find the regulation content-neutral and therefore subject to the standard applied to restrictions on symbolic speech rather than the higher standard applied to content-based restrictions. 529 U.S. at 295–96. The closest the Court came to mentioning morals as a rationale for the regulation appeared when Justice O’Connor stated that “‘few of us would march our sons and daughters off to war to preserve the citizen’s right to see’ specified anatomical areas exhibited at establishments like [the nude dance club].” 529 U.S. at 294 (quoting Justice Steven’s opinion in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 70 (1976) (plurality opinion)).

204. See Goldberg, *supra* note 175, at 1246 (citing *Penn. Cent. Transp. Co. v. N.Y.C.*, 438 U.S. 104 (1978), as an example). In this case the Court mentioned that land-use regulations are generally upheld when “‘the health, safety, morals, or general welfare’ would be promoted by prohibiting particular contemplated uses of land” yet the decision rested on other reasons. *Penn. Cent. Transp. Co.*, 438 U.S. at 125 (quoting *Nectow v. Cambridge*, 277 U.S. 183, 188 (1928)).

regulation.²⁰⁵ Instead, the Supreme Court has increasingly emphasized “observable societal harms.”²⁰⁶ Vice alone, without damage to others, has not been the subject of legitimate regulation.²⁰⁷

One of the reasons it is so difficult to use morality to enforce virtue—those personal decisions that do not result in societal harm—is that virtue and the associated benefits that spring from a virtuous life require the freedom to choose without coercion.²⁰⁸ Even the Catholic Church, one of the institutions from which moral responsibilities spring, recognizes that religious freedom requires that each person is treated with dignity, which is protected by the Constitution that governs society, regardless of their choices about morality.²⁰⁹ And the associated decision-making that is afforded to those who are entitled to exercise their own judgment requires that “no one is forced to act in a manner contrary to their own beliefs, . . . no one is to be restrained from acting in accordance with their own beliefs” and that “the dignity of the human person in no way depends on whether or not the person’s beliefs or actions are in accord with religious or moral truth.”²¹⁰

Legislation that codifies a commonly accepted duty to others may also be considered regulation of public morality. For instance, statutes that establish compulsory education impose a duty on parents to insure that their children receive at least a minimal level of education.²¹¹ Generally

205. See *Lawrence v. Texas*, 539 U.S. 558, 577 (2003) (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting) (“[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.”)).

206. Goldberg, *supra* note 175, at 1259.

207. See *id.* at 1260 (citing Professor Christopher Tiedeman’s objection to the use of police power solely to “banish vice and sin from the world”).

208. See Cole, *supra* note 176, at 84 (discussing the difficulties of using morality to enforce virtue); see also Kalscheur, *supra* note 175, at 9 (analyzing enforcing virtue).

209. See Kalscheur, *supra* note 175, at 8–9.

210. *Id.* at 9.

211. See, e.g., MICH. COMP. LAWS ANN. § 380.1561 (West Supp. 2012).

Except as otherwise provided in this section, for a child who turned age 11 before December 1, 2009 or who entered grade 6 before 2009, the child’s parent, guardian, or other person in this state having control and charge of the child shall send that child to a public school during the entire school year from the age of 6 to the child’s sixteenth birthday. Except as otherwise provided in this section, for a child who turns age 11 on or after December 1, 2009 or a child who was age 11 before that date and enters grade 6 in 2009 or later, the child’s parent, guardian, or other person in this state having control and charge of the child shall send the child to a public school during the entire school year from the age of 6 to the child’s eighteenth birthday.

considered a moral obligation as part of parenthood, all fifty states and the District of Columbia address compulsory education through legislation, and many include criminal penalties for failure to comply.²¹²

Other parental obligations are also commonly accepted and considered some sort of natural duty as well. Child support legislation requires parents to provide financial support for their children, a parental duty so widely held that federal statutes exist to enforce this obligation.²¹³ Yet these statutorily enforced duties may also be classified as morally imposed obligations on individual behavior.²¹⁴

VII. Consent as the Controlling Factor

Morality is generally based on commonly accepted ideals of appropriate human conduct. Yet the ideas regarding the appropriateness of premarital sex, cohabitation, or extra-marital affairs are no longer consistent with the criminal statutes originally enacted to encourage moral behavior. Permanent monogamy is no longer the expected norm. Approximately forty percent of American marriages end in divorce and seventy percent of those who divorce move on to a second marriage.²¹⁵ Consequently, we end up with serial monogamy.

As described earlier in this Article, a series of cases decided on the basis of individual rights to privacy, have eliminated the right to legislate certain very personal decisions. Most of these decisions have involved

212. See 50 STATE STATUTORY SURVEYS, *Compulsory Education*, 0040 SURVEYS 6 (Westlaw 2007). A Colorado statute also imposes a legal obligation on parents in the following provision:

The general assembly hereby declares that two of the most important factors in ensuring a child's educational development are parental involvement and parental responsibility. The general assembly further declares that it is the obligation of every parent to ensure that every child under such parent's care and supervision receives adequate education and training. Therefore, every parent of a child who has attained the age of six years on or before August 1 of each year and is under the age of seventeen years shall ensure that such child attends the public school in which such child is enrolled in compliance with this section.

COLO. REV. STAT. ANN. § 22-33-104(5)(a) (West 2011).

213. See, e.g., Child Support and Recovery Act of 1992, 18 U.S.C. § 228 (2012) (establishing enforcement mechanism for collecting outstanding child support across state boundaries).

214. See *State Dep't of Revenue v. Hubbard*, 720 P.2d 1177, 1179 (Mont. 1986) ("Child support is a social and moral obligation imposed by law without court action.").

215. Emens, *supra* note 9, at 298.

personal life choices: who or whether to marry, whether to use birth control, who to live with, and what types of sexual behaviors to enjoy. The two most recent cases in this line of privacy rights decisions, *Lawrence* and *Obergefell*, leave no room for quibbling about the fact that the decision about who to be sexually intimate with, and who to marry, are not within the purview of the government to restrict.

As the Supreme Court has started to tell states and the federal government to stay out of our personal, intimate decisions, legislators and lobbyists are waging a related battle. In response to society's acceptance of much more sexual freedom, women, especially young, college-age women, are becoming much more vocal about the way they engage in sexual relations. The sexual revolution of this generation has not condoned, and probably never will condone one party engaging in non-consensual sexual behavior with another. Recent efforts by women's groups, especially on college campuses, have put the idea of consent front and center.

Additionally, legislation prohibiting sexual harassment, sexual assault, domestic violence, dating violence, and stalking has been invigorated. Title IX now requires a much more proactive response by organizations where the potential for these types of behavior is most prevalent. Young adults are learning how important it is to have full consent before engaging in sexual interactions.²¹⁶ The National Center for Sexual Freedom (NCSF), a national advocacy group, has initiated a project called Consent Counts. Its purpose is to "decriminalize consensual BDSM (Bondage, Discipline, Dominance/Submission, Sadoomasochism) in U.S. law by ensuring that consent will be recognized as a defense to criminal charges brought under assault laws and other statutes."²¹⁷

At the same time, the American Law Institute (ALI) is revising sections of the Model Penal Code that relate to sex-based crimes.²¹⁸ Though the ALI has not yet completed the revisions to the sex offenses section of the Model Penal Code, so far, they have not addressed an important part of the criminalization of sexual intimacy.

216. See Jeanne Zaino, *Changing Definitions of Sexual Consent on College Campuses, Inside Higher Ed*, University of Venus Blog, (July 21, 2015), <https://www.insidehighered.com/blogs/university-venus/changing-definitions-sexual-consent-college-campuses> (last visited Apr. 14, 2016) (discussing young people's knowledge of consent as it relates to sexual interactions) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

217. NCSF, *Consent Counts Mission Statement*, <https://ncsfreedom.org/who-we-are/about-ncsf/item/550.html> (last visited Apr. 26, 2016) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

218. See *supra* note 42 and accompanying text for discussion.

The proposed changes to the Model Penal Code are a step in the right direction, but while there is the opportunity to re-evaluate the way we criminalize intimacy, it is time to look at all of the statutes that do so. What the ALI is missing is a discussion of the ways consensual sexual behavior is still restricted. If consent really counts, as it does in sexual assault statutes, then let's make it count for all consensual sexual relations.

VIII. Legislating for Today's World—A Proposal

Regardless of whether relationships involve members of the same sex or opposite sex, and regardless of whether those relationships are formalized by a marriage certificate, a healthy intimate relationship has certain characteristics. Granted, not every intimate relationship demonstrates all of the characteristics, but it is well-recognized that these relationships should be based on mutual respect, effective communication, honesty, and trust. If these attributes are important to sustaining healthy, long-lasting intimate relationships—something our society seems to value—then legislation that encourages such behaviors should be promoted, and legislation that inhibits such behaviors should be eliminated, unless there is a more compelling reason for that restriction.

So, what is it that needs attention? Laws that restrict the way adults engage in consensual sexual behavior should be eliminated. Statutes prohibiting adultery, cohabitation, fornication, sex toy sale and use, and consensual BDSM behaviors should be eliminated.

Modern society's ideas about love, marriage, family and sexuality have changed drastically in the last century. Attitudes about premarital sexual activity, homosexuality, gender roles, parenting, contraception, and divorce have gone through major shifts, and nothing suggests these shifts will cease at any point in the foreseeable future. Though the statistics may be somewhat unreliable because of the stigma and potential harm of revealing marital transgressions, various surveys suggest that the range of married couples that experience some form of adultery is somewhere between twenty and seventy percent.²¹⁹ In fact, one recent statistical report suggests that fifty-seven percent of men, and fifty-four percent of women admit infidelity in a relationship.²²⁰ The numbers are smaller when questions focus on an affair during a marriage rather than infidelity during a

219. Emens, *supra* note 37, at 298.

220. *Infidelity Statistics*, STATISTICS BRAIN (April 8, 2015), <http://www.statisticbrain.com/infidelity-statistics/> (last visited Apr. 16, 2016).

relationship. However, according to this set of statistics, seventy-four percent of men and sixty-eight percent of women admit they would have an affair if there was no chance they would get caught.²²¹ Clearly, attitudes about extra-marital relationships have evolved over time.

A. Toward a More Sex-Positive Approach

One commonality among the changes in attitudes appears to be more emphasis on “sex-positive” attitudes. This is especially pronounced in the growing polyamorous community, but it appears to be part of the reason for shifting attitudes concerning all intimate relationships.

“Sex-positivity” refers to recognizing the value of sexual intimacy and encouraging individuals to embrace their sexuality.²²² The sex-positive point of view embraces all consensual sexual activity between adults as important to our emotional and physical health, recognizing that each individual has unique sexual interests and needs.²²³

One of the hallmarks of a sex-positive attitude is the need to become self-aware, to identify one’s sexual needs, and to be able to communicate those needs openly and honestly. In a traditional monogamous relationship, whether formally recognized as marriage or not, women often respond to the needs of their male partner with little ability to express or satisfy their own needs, especially if these did not correspond well to their partner’s needs. Today, people are choosing relationships that have much more egalitarian characteristics. Women’s sexual needs and interests are just as important as men’s interests and needs.²²⁴

Additionally, couples in traditional monogamous relationships are told that open communication and honesty with their partner build a strong relationship. But, when that open communication and honesty reveal significantly differing sexual needs, marriages and committed intimate relationships run into serious trouble.

221. *Id.*

222. Kaplan, *supra* note 67, at 91.

223. *See id.* (outlining the sex positive point of view).

224. Emens, *supra* note 9, at 325.

B. Balancing Consent, Sex-Positivity, and Marriage

I offer a solution. We have just had the concept of marriage expanded to include two persons of the same sex as a married couple. Another option would provide all couples with the option to enter a marriage that would not require sexual exclusivity, one that I refer to as an “open union.” Similar to the idea of an open marriage, or an open relationship, this open union relationship would be based on the idea of ethical non-monogamy. Still restricted to two adults, the non-monogamous marriage option would allow couples who are emotionally and financially committed to each other the freedom to develop sexually intimate relationships with others.

To avoid one party or the other forcing a reluctant partner to agree to open the relationship, couples would have to make the choice to enter a traditional marriage, or to enter the non-monogamous open union at the time they chose to commit to one another. In order to prevent one party from engaging in emotional blackmail to coerce the other to agree to the open union, changing from monogamous to non-monogamous would have to be significantly more challenging than changing from non-monogamous to monogamous. To address this concern, I propose requiring a couple to make their choice, and, if they choose the traditional monogamous option, be restricted from changing that without going through the typical divorce proceeding to dissolve that relationship and potentially enter the alternative arrangement.

The differences between the two types of marriage would be nearly invisible to the casual observer. However, the open union would include agreements between the parties that are not often present in today’s marriages. Both parties would be able to develop additional intimate relationships as long as there was full disclosure to the married partner and the new satellite partner was aware of the open union as well. Like traditional marriages, open unions would be restricted to two people, and individuals would only be allowed to enter into one of these agreements at a time.

Aside from the lack of sexual exclusivity, another major difference between the proposed open union and traditional marriage is that it would be for a limited duration. Couples could choose to enter these agreements for anywhere between one and five years, with the ability to negotiate some aspects of the agreement. Couples entering the agreement for the first time would be limited to one year. At the end of that year they would be free to end the union, to renegotiate aspects of it, or to reaffirm the agreement. Should the couple choose to end the agreement they would still be able to

enter a traditional marriage if they wished, or they could end their commitment to each other altogether.

Though couples would be free to add terms to the open union agreement, if they chose this option they would have to agree to a minimum standard set of terms. The agreement would expressly allow other relationships, would establish minimum expectations for the way the details of those relationships were handled and the way information was communicated between all of the parties, and would create obligations to engage in safer sex practices to protect everyone involved. Fidelity in this arrangement would not mean sexual exclusivity; instead it would mean honoring the terms of the agreement. Failure to do so would be cause to terminate the agreement and end the relationship.

C. A Potential “Default” Agreement for Open Unions

What follows is a suggested set of standard terms.

Open Union (Non-Monogamous) Relationship Agreement

The following persons, _____ and _____ freely enter into this relationship agreement, which will begin on _____ and extend for a period of one year, terminating on _____. We are defining our relationship as an Open Union. At the end of the term of this agreement, we may choose to reconfirm or renegotiate our agreement. We may also choose not to continue the relationship and to part from each other peacefully, respectfully, and as whole and free persons.

Whereas:

This agreement is understood to apply to a single relationship between two individuals;

This agreement does not prohibit additional unique understandings, agreements, and limitations that may apply to the two individuals in this Open Union throughout the course of the relationship;

This agreement is intended to be an overall agreement and statement of expectations for the ethical and respectful treatment of both individuals in this relationship, and to clarify the relationship as one that is intentionally non-monogamous; and

The basis of this relationship is our mutual agreement that we are each happier being together than not being together;

A. Each of us agrees as follows:

1. We understand that this relationship is non-monogamous, which means there is no expectation of sexual exclusivity between the two of us.

2. We agree that neither of us should be expected to hide our relationship from others, or to hide the nature of the relationship from others.

3. This relationship is a relationship of equals. Each of us is expected to make our own decisions and choices.

4. We each agree to abide by safer sex practices and to take reasonable steps to avoid risk of sexually transmitted infections or diseases.

5. This relationship is founded on honesty, and the truth must be shared, even when it is unpleasant.

6. We agree that each will keep the other informed of important life events, including, but not limited to:

- a. Addition of new partners;
- b. Removal of other partners;
- c. Changes in status of other partners;
- d. Changes in work/employment situation;
- e. Changes in health;
- f. Changes in financial status that may affect the relationship; and
- g. Participation in events or activities that are important or significant with regard to one's time or one's emotional well-being.

B. Because this relationship allows us each to engage in relationships with other partners, we agree as follows:

1. To avoid sudden surprises, stay informed about each other's lives, and assess potential risks, we each agree to keep the other informed about potential new partners and to provide updates as things progress or it becomes clear they will not progress.

2. Before any potential partner becomes an actual intimate partner, we will inform the potential partner that we are in an Open Union.

3. If a relationship with a new partner progresses, we will make an effort to open direct lines of communication between the new partner and

the existing partner, to allow everyone to get to know one another.

4. Both of us in this relationship will have contact information or the other's partner(s) with the ability to communicate freely.

5. Each of us will treat the other's partner(s) with respect and civility.

6. Each of us will willingly share STI test results with each other and any potential partners of the other. We agree that no unprotected sexual relations will take place without full disclosure of all parties' STI test results, including the new partner's results.

7. We agree to immediately inform each other of any suspected health problem from a potential/new partner and to allow that information to be disseminated to all other partners.

8. In the event of a suspected health concern, we agree to be tested immediately.

9. It is acceptable for one of us to prefer to forego relationships with others at any point during this relationship, but we each agree that the choice by one of us to do so will not preclude the other from continuing to be free to develop relationships with other partners.

Signed/witnessed/dated

IX. Conclusion

As we have seen through the legal battles surrounding same-sex marriage, it is important to avoid creating something that is a second cousin to marriage. In order to make this a viable choice that still encourages long-term commitments between individuals, an open union should be considered another form of marriage, with all of the same benefits and responsibilities, except for two.²²⁵ There would be no expectation of sexual exclusivity, and the agreement would need to be renewed every one to five years, depending on whether it was the first agreement (one year) or a later agreement where the couple negotiated a longer term (not to exceed five years).

225. Some might argue that this negotiated arrangement should be called an open marriage. The only reason I have chosen to avoid this term is the fact that open marriages exist already, though they are not legally sanctioned. My goal in choosing a different name was to avoid any of the existing ideas or perceptions of the existing open marriages from being inadvertently attached to this new arrangement.

In order to create an open union option, legislatures would need to be bold enough to stand up to critics who would like to impose their morality on the rest of society. The legislatures would have to ignore critics who would argue that including a time-restricted, individually negotiated, non-monogamous relationship would harm the current forms of marriage. Instead, legislatures should focus on the benefits this option might provide. These benefits include the ability to explore sexual interests and needs different from a spouse. So a person who is a practitioner of BDSM could still engage in these activities, even if that person's spouse had no similar interest. A person who found themselves attracted to someone else would be able to pursue this interest and potentially enrich their life by including a relationship with someone who shared an interest in something not shared by their spouse. And they would do this with the full consent and knowledge of that spouse.

Consent is a critical component of healthy intimate relationships. It's time for our laws to reflect the importance of consent and respect an individual's ability to give consent, without the law interfering.

For all those who enter these arrangements, the ability to commit to a partner, yet not rely on that one individual to meet all of a person's needs, may strengthen the relationship rather than harm it. Granting the freedom to have some physical and emotional and social needs met by someone else relieves the pressure on the partner to whom one is committed, allowing both parties to be more fulfilled individuals, and hopefully more sustainable couples as well. The openness, trust, honesty and focus on clear communication that this type of arrangement requires means it will not be well-suited for all. But for those who value trust, honesty and openness and effective communication in a relationship, this option will prevent the gradual growth of deception and mistrust that often arise in traditional marriages.

To make this happen, criminal statutes about adultery and fornication and cohabitation must be altered or eliminated. If not completely repealed, the adultery statutes must at least include a requirement that the extra-marital relations were done without the explicit consent of the spouse. Because after all, the most important aspect of the open union—the thing that makes it so different—is the informed consent to extra-marital relationships.