

# Indiana Law Review

---

Volume 24

1991

Number 2

---

## ESSAY

### Who's Been Sleeping in My Bed? You and Me, and the State Makes Three

PHYLLIS COLEMAN\*

#### I. INTRODUCTION

Recently a married woman narrowly escaped a trial,<sup>1</sup> the possibility of two years in prison, and a \$10,000 fine for a crime that an estimated sixty percent of the adult American population has committed.<sup>2</sup> Donna E. Carroll, a Wisconsin woman, was charged with having an adulterous affair.

---

\* Professor of Law, Nova University. B.S., 1970; M. Ed., 1975; J.D., 1978, University of Florida.

The author wishes to thank Professors John Sanchez and Bob Jarvis for their helpful comments and criticisms.

1. The 26-year-old Wisconsin woman was spared a trial when she agreed to perform 40 hours of community service and undergo two months of parental counseling. *Chicago Tribune*, May 8, 1990, at 2, col. 3. Her attorney made it clear that the woman agreed to these sanctions not as an admission of guilt, but only to avoid trial. *The Times (London)*, May 9, 1990, *Overseas News*.

This widely reported case "prompted disbelief and hilarity in the liberal northern cities but won approval from many conservative and religious groups." *Id.*

2. "Despite all the hush-hush, the morality, and the vendettas against those involved in them, affairs are extremely common. Almost everyone engages in one in his or her life at some time." L. LINGUIST, *SECRET LOVERS* xi (1989). Dr. Linguist estimates 70% of married men and 50% of married women have affairs. She also calculates that approximately 60% of all single people have had a sexual relationship with a married person. *Id.* Shere Hite and Alfred Kinsey also conclude as many as 70% of spouses have been unfaithful. *Ft. Lauderdale Sun Sentinel*, Sept. 6, 1990, at 9E, col. 1.

Another author estimates that 50% of all married men and women have affairs. M. SANDS, *THE MAKING OF AN AMERICAN MISTRESS* 190 (1981).

The aborted prosecution in this widely publicized case highlights both the ineffective and overly moralistic tenor of present adultery laws and the troublesome possibility of the ease with which this legislation may be abused through selective enforcement. Paradoxically, however, this bizarre case — reminiscent of a very different, more sexually repressive era — could actually spark positive results if judges and legislators respond by reevaluating adultery<sup>3</sup> laws. This Essay proposes repeal of adultery legislation because continued criminalization improperly interjects the State into one of the most private decisions a person makes — choosing a sexual partner.

Unfortunately, in this age of negative political campaigning, when charges of being “liberal” are hurled about as if it were some unspeakable, heinous crime, many legislators are simply too frightened to seek repeal of these statutes. Judges compound the problem by refusing to strike adultery statutes. These jurists seem remarkably undaunted by questionable tactics employed to shore up predetermined conclusions of validity. Judicial maneuvers include manipulated interpretations of precedential Supreme Court cases and rejection of a common sense analysis of the constitutionally based right of privacy.<sup>4</sup>

This Essay uses the Wisconsin case as a backdrop to illustrate unavoidable obstacles in prosecutions for sexual behavior between consenting adults. It contends that the constitutional right of privacy, properly interpreted, sweeps broadly enough to protect adults from such government intervention. It explores problems seemingly inherent in existing adultery statutes, including the bald truths that these laws simply do not achieve their ostensible goals and that they are widely ignored by a majority of Americans. In this extremely sensitive arena of sexual activity between consenting adults, criminal laws are both inappropriate and ineffective attempts to shape public morals. Accordingly, this Essay concludes that adultery statutes are ripe for repeal.

## II. THE STATE INTERESTS

Criminalization of adultery<sup>5</sup> is presumably justified by two state

---

3. Adultery means sexual intercourse between consenting adults during a time when at least one of the partners is married to someone else. Adultery is distinguished from fornication, which is sexual intercourse between unmarried, consenting adults.

4. See *infra* text accompanying notes 19-43.

5. Many states have abolished criminal fornication laws. This Essay advocates the abolition of adultery laws as well, even though public policy could support different treatment of the two crimes. Indeed, that some states have eliminated criminal penalties for fornication but retained criminal penalties for adultery reflects legislative recognition of this distinction. The Supreme Court's conclusion that prohibition of adultery is constitutional, without reference to fornication laws, further supports this distinction. See *infra* text accompanying notes 19-48. Because the two statutory prohibitions impose criminal liability for private sexual activity between consenting adults, both should be repealed.

interests: 1) protecting innocent spouses<sup>6</sup> from potential harm, and 2) protecting public morals.

First, although the State has a legitimate interest in protecting spouses, an extramarital relationship arguably does not pose a sufficient threat to that interest to overcome the fundamental right of privacy granted by the Constitution.<sup>7</sup> Second, purported undermining of public morality fails to support criminalization because of the absence of persuasive evidence of resulting harm.<sup>8</sup> Furthermore, if the issue really is morality, and if the test is refraining from extramarital sex, the battle is long lost. The striking numbers of Americans who are having, or have had, affairs illustrate the futility of continuing this war. Indeed, the stubborn legislative prohibition of this ubiquitous behavior, in the face of continued refusal to prosecute violators, is a shaky foundation on which to build morality. Recently, many public people have forcibly learned this bitter lesson. The public generally refuses to forgive those who blatantly lie about private peccadillos such as sexual liaisons.<sup>9</sup> On

---

6. Children may also be adversely affected by a parent's adultery, but this Essay is limited to the rights of, and obligations to, a marital partner.

7. See *infra* text accompanying notes 19-43.

8. Cf. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1971) (quoting *Baird v. Eisenstadt*, 429 F.2d 1398, 1402 (1st Cir. 1970)) (arguing that without "demonstrated harm" the State lacks the power to declare contraceptives immoral). *Eisenstadt* was not an adultery case. Instead, the issue was the right of single people to buy contraceptives in light of the Supreme Court decision recognizing this right for married persons. *Eisenstadt* is useful, however, as evidence that in privacy cases the Court is willing to require actual proof of harm as a condition to a determination that certain conduct is immoral.

9. Probably the best example is the meteoric rise and fall of politician Gary Hart. A former Colorado senator, Hart announced his candidacy for President by calling for all Americans to "try to hold ourselves to the very highest standards of integrity and ethics, and soundness of judgment . . ." The Miami Herald, May 10, 1987, at 1A, col. 8. Immediately following this announcement, Hart became the acknowledged Democratic front runner. But he was forced to withdraw from the race when the media widely reported he was having an extramarital affair. Hart and his alleged girlfriend adamantly denied an intimate relationship, even as contrary evidence mounted. Hart's brief re-entry into the race, during which he claimed a right to privacy in his personal relationships, was met with resounding indifference.

Voters, initially impressed with Hart's call for integrity and ethics, abandoned him when his hypocrisy was exposed. In fact, many people speculate that it was not the extramarital affair which doomed Hart, but rather his arrogance and hypocrisy in taunting the press to follow him as he consistently denied rumors that he had had an affair.

Allegations of drug abuse provide an analogous situation. For example, outrage among conservatives forced Douglas Ginsburg to withdraw his name from consideration as a Supreme Court Justice nominee following disclosure of his previously secret, past marijuana use. The Miami Herald, Nov. 8, 1987, at 1A, col. 1. However, despite similarities, the initial disclosures about Gary Hart and Douglas Ginsburg produced very different responses from other public people. The Ginsburg disclosure led to an almost religious

the other hand, most of the public continues to respect famous people who confess similar embarrassing incidents, responding honestly<sup>10</sup> to inquiries rather than dissembling.

The message is clear: Americans are fed up with hypocrisy. The time has come to repeal adultery statutes because, even assuming such laws served legitimate goals when adopted, they fail to reflect current reality. To appreciate this argument, it is necessary to understand that early adultery statutes were designed to ensure a wife's fidelity. Fidelity was essential to protect the husband's "property" interest in his wife and to guarantee any child for whom he would be financially responsible was his biological child.<sup>11</sup> Various aspects of modern society and technology have toppled these historical underpinnings: the notion of the wife as a chattel has been rejected; birth control methods have vastly improved; and paternity tests are virtually foolproof. As society and technology evolve, states should jettison outdated laws.

Moreover, if the goal of adultery laws is deterrence, civil causes of action that have been abolished in most jurisdictions,<sup>12</sup> in contrast to the criminal laws, are more likely to achieve the desired result.<sup>13</sup> These abolished tort claims provided the potential additional benefit of financially compensating the "injured" spouse.<sup>14</sup> Nevertheless, these civil ac-

---

zeal to "confess" past drug use. Even Tipper Gore, a self-proclaimed conservative crusader for morality, volunteered that she had tried marijuana. Senator Gore's own admission that he had experimented with marijuana did not appear to adversely affect his presidential aspirations. In contrast, no one rushed forward to admit extramarital relations after the Hart debacle. This distinction may support an argument that admitted but past drug use is more acceptable to the public than are extramarital affairs.

10. Barney Frank, a liberal congressman from Massachusetts, provides an interesting example. Concern that constituents would reject him because of his homosexuality forced him to remain "in the closet" for years. However, his fears proved unfounded as Frank's revelation of his sexual preference failed to diminish his popularity. Real threat to his re-election occurred only after information surfaced of a male prostitution ring operated by one of Frank's lovers from Frank's home. Although Frank terminated the operation as soon as he learned of it, he initially attempted to hide the incident, and serious questions about his future political career were raised. In other words, voters supported Frank's right to privacy and to a personal homosexual lifestyle, which arguably falls outside the mainstream. They only threatened to abandon him upon discovery that he attempted to cover up a potentially embarrassing scandal.

As a result of the attempted coverup, the House ultimately voted to reprimand Frank for bringing discredit to Congress. The majority rejected Republican efforts to impose more severe sanctions. *The Washington Post*, July 27, 1990, at A1.

11. *Oppenheim v. Kridel*, 236 N.Y. 156, 160, 140 N.E. 227, 229 (1923).

12. Case Note, 26 J. FAM. L. 459, 461 (1987-88).

13. *But see* Comment, *Stealing Love in Tennessee: The Thief Goes Free*, 56 TENN. L. REV. 629 (1989) (arguing that the potential for abuse outweighs any positive effects).

14. *See* Note, *The Case for Retention of Causes of Action for Intentional Interference with the Marital Relationship*, 48 NOTRE DAME L. REV. 426, 429 (1972). The

tions were properly repealed. Even the limited involvement of merely providing a judicial forum to decide such extremely private disputes is inappropriate.<sup>15</sup>

### III. THE WISCONSIN CASE

It is really a fairly common situation — a wife's alleged infidelity causes her husband to seek divorce and custody of their child. But then the case took an extraordinary turn. The husband filed a criminal complaint against his wife based on adultery she admitted during a family court hearing. The district attorney claimed he had no choice but to prosecute because adultery is still against the law and "strong evidence" of a violation was presented. Failing to prosecute would be tantamount to "declar[ing] the statute null and void."<sup>16</sup>

The wife raised several defenses. She denied committing adultery. She also reasoned that abolition of adultery as grounds for divorce precluded punishment under the criminal law. Her argument that criminal prosecution is contrary to the goal of preserving marriage was more convincing. Criminal adultery trials, or even the mere threat of prosecution, erode rather than enhance the probability for survival of the marriage. Many spouses decide to overlook or forgive infidelity, choosing to preserve their marriage following termination of an affair.<sup>17</sup> However, reconciliation seems virtually inconceivable after a criminal adultery pros-

---

author argues that "any deterrent function is strictly ancillary to the major purpose of providing a means by which an injured party may be recompensed." *Id.*

15. *Cf. L. Pamela P. v. Frank S.*, 59 N.Y.2d 1, 449 N.E.2d 713, 462 N.Y.S.2d 819 (1983). The court argued that the State should not interfere in cases of contraceptive fraud between two private individuals. Rather, the State may intervene only when the issue concerns government restriction on an individual's right to procreate. "This aspect of the right of privacy has never been extended so far as to regulate the conduct of private actors as between themselves. Indeed . . . *judicial inquiry into so fundamentally private and intimate conduct as is required to determine the validity of the respondent's assertions may itself involve impermissible State interference with the privacy of these individuals.*" *Id.* at 6-7, 449 N.E.2d at 716, 462 N.Y.S.2d at 821-22 (emphasis added).

16. *New York Times (National)*, Apr. 30, 1990, at A1, col. 5. Attempts to dismiss this case as aberrant must fail because similar prosecutions are being reported in other states. In fact, four people recently were charged with adultery in Connecticut. Sachs, *Handing Out Scarlet Letters; Antiquated Sex Laws Turn Into a Bludgeon for Divorcing Spouses*, *TIME*, Oct. 1, 1990, at 98. "In a quirky twist to the contemporary no-fault-divorce saga, venerable adultery laws occasionally are being invoked by quarreling marital partners, sometimes for vindictive purposes and sometimes to gain leverage in lengthy settlement negotiations." *Id.*

17. In fact, thousands, if not millions, of words have been written advising spouses on what to do when faced with a partner's infidelity. Many experts suggest attempts to reconcile, at least "as long as the good outweighs the bad." *See, e.g., J.P. SCHNEIDER, BACK FROM BETRAYAL 171-201 (1988).*

ecution is initiated by a spouse — regardless of whether the filing of charges was motivated by a desire for revenge or merely an understandably bruised ego and hurt feelings.

Finally, Donna Carroll raised the best and most persuasive objection to adultery statutes,<sup>18</sup> the argument firmly grounded in the constitutionally based fundamental right to privacy. Simply stated, the government cannot legitimately claim a right to criminalize private sexual relations between consenting adults.

#### IV. THE RIGHT OF PRIVACY

In a long line of cases beginning with *Griswold v. Connecticut*,<sup>19</sup> the United States Supreme Court has recognized an individual's right to intimate associations without interference from the State. Indeed, a harbinger of this right of privacy may be traced as far back as 1928 when Justice Brandeis argued for "the right to be let alone."<sup>20</sup> The contents of this right remain amorphous despite its long and established history. Indeed, even Supreme Court Justices disagree on whether the right extends to protect all private sexual activity between consenting adults.

A recent case restricting the right of privacy vividly illustrates this fundamental split among the Justices. In *Bowers v. Hardwick*,<sup>21</sup> a sharply divided Court<sup>22</sup> inexplicably rejected the notion that "any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription."<sup>23</sup> This archane analysis exposes *Bowers* as an ill-advised retreat from the Court's movement toward full recognition of individuals' privacy rights.

In *Bowers*, the challenged Georgia law contained no restrictions concerning the status of persons covered, but rather prohibited certain sexual conduct. The Court carefully limited its decision to the specific facts, holding only that homosexuals have no fundamental right to engage in sodomy.<sup>24</sup> Nevertheless, slicing through the majority's rhetoric, this limitation suggests the Court actually decided State approval of sexual conduct can legitimately depend on choice of partner. This conclusion

---

18. The Wisconsin American Civil Liberties Union is expected to push for repeal of the state adultery statute in the next legislative session relying on this argument of a couple's fundamental right to privacy. *Chicago Tribune*, May 8, 1990, at 2, col. 3.

19. 381 U.S. 479 (1965).

20. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

21. 478 U.S. 186 (1986).

22. Two concurring and two dissenting opinions were filed in addition to the opinion of the Court.

23. 478 U.S. at 191.

24. *Id.* at 192.

is inescapable in light of the Georgia Attorney General's concession that the statute would be unconstitutional if applied to a married couple.<sup>25</sup> In other words, disingenuously masquerading as a decision addressing constitutionally unprotected sexual activity, *Bowers* actually endorses prohibition of sexual acts only when the State objects to an individual's choice of partner. In an argument similar to the one used to support adultery statutes, the *Bowers* Court decided that consensual sodomy<sup>26</sup> is not constitutionally protected because it is outside a marriage and within a homosexual relationship.<sup>27</sup>

This conclusion is problematic. The Court in *Eisenstadt v. Baird*<sup>28</sup> established that a statute regulating intimate relationships which is unconstitutional when applied to a married couple is also unconstitutional when applied to a single person. "If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."<sup>29</sup> Moreover, arguments that the Justices intended to limit this right of privacy to contraceptive cases are easily countered by *Eisenstadt's* reliance on first<sup>30</sup> and fourth<sup>31</sup> amendment cases as precedent. These references support the notion that the Supreme Court in *Eisenstadt* was protecting

---

25. *Id.* at 218 n.10 (Stevens, J., dissenting). The Court was able to avoid the issue because the married plaintiffs were denied standing by the lower courts. They "had neither sustained nor were in immediate danger of sustaining any direct injury from the enforcement of the statute." *Id.* at 188 n.2.

26. The Georgia statute includes a broad definition of the crime: "(a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another . . ." *Bowers*, 478 U.S. at 188, n.1 (quoting GA. CODE ANN. § 16-6-2 (1984)).

27. A recent Georgia Supreme Court case arguably casts some doubt on this conclusion. The defendant in *Ray v. State* was convicted and sentenced to ten years in prison for paying a 14-year-old boy to engage in sodomy. 389 S.E.2d 326, 328 (Ga. 1990). The court rejected defendant's argument of selective enforcement against homosexuals, finding insufficient evidence in the record to support his claim. *Id.* at 327-28. The logical inference is that the statute constitutionally could be applied against heterosexuals; otherwise, the discussion concerning the lack of evidence of selective enforcement would be superfluous. Nevertheless, upholding defendant's conviction in *Ray* was appropriate for two other reasons. First, rather than a consenting adult, defendant chose a 14-year-old boy as his sexual partner. Special protection for children, presumably legally incapable of informed consent, is appropriate. *See infra* text accompanying notes 33-34. Second, defendant was actually guilty of prostitution because he paid the child to engage in sodomy. The right of privacy does not apply to prostitution. *Ray*, 389 S.E.2d at 328.

28. 405 U.S. 438 (1972).

29. *Id.* at 453 (emphasis in original).

30. *Id.* at 453 n.10 (citing *Stanley v. Georgia*, 394 U.S. 557 (1969)).

31. *Id.* at 453-54 n.10 (citing *Olmstead v. United States*, 277 U.S. 438 (1928)).

an individual's basic "right to be let alone — the most comprehensive of rights and the right most valued by civilized man."<sup>32</sup>

The conclusion that consenting adults have a constitutionally protected right of privacy to choose sexual partners without State intervention inexorably follows from this analysis. Nevertheless, in a brief opinion, most notable for its paucity of persuasive legal reasoning, the Supreme Court in *Bowers* stubbornly refused to strike the statute, at least as applied.

*Bowers* is troubling for another, related reason. Despite the Court's clear attempt to severely limit its applicability, the case is disturbing because of its implicit assumption that the federally mandated right of privacy does not deny states the power to legislate their own ideas of morality — even to prohibit behavior as fundamental as choice of sexual partner.

Distressing, too, is that the *Bowers* Court fell into a trap, frequently set by proponents of restrictive sexual legislation. Scrambling to buttress the argument that the State can and should regulate private sexual behavior, advocates analogize adultery to incest, which they apparently believe is running amok in bedrooms throughout the country. This highly inflammatory comparison to incest is irrelevant and little more than a dishonest attempt to influence policy by provoking and exploiting strong negative emotions actually unrelated to the issue of adultery. Unfortunately, although the analogy is groundless, it is raised so frequently it cannot be ignored. In fact, the contrast helps highlight and define the appropriate point for State intervention.

Incest and adultery are often linked because both involve sexual behavior usually performed in private. Nevertheless, analysis exposes the absence of similarity beyond this superficial commonality; it also lays the foundation for separate legal treatment of the two. Actually, the differences are far more fundamental and persuasive than any imagined parallels. The principal distinction is that incest typically involves sexual conduct with a child, a person presumed legally incapable of consent. In addition, incestuous sexual contact often occurs through the exploitation of power that results from a family relationship. In other words, the dominant family member abuses his or her power position to "persuade" the dependent child to "consent" to sex. Generally ignored or misunderstood is another important difference: unlike adultery, sexual gratification is rarely the true motivation for incest, but rather satisfaction of other subconscious emotional needs of the abusive adult. The most critical distinction, however, is that incest is never a victimless crime. Even worse, the victim is vulnerable and rarely in a position to help

---

32. *Id.*



himself or herself. Further, and not surprisingly, research shows sexual abuse almost inevitably harms the child.<sup>33</sup>

Under these circumstances, an absolute ban on incestuous behavior easily satisfies strict scrutiny analysis mandated by the fundamental right to privacy. The State's compelling interest in protecting innocent children from abuse is indisputable. On balance, this interest is sufficient to justify infringement on any right to incest an adult may claim. In addition, because of the nature of incest, including its strong, almost universally negative consequences, total prohibition of this conduct is narrowly tailored to effectuate the State's interest, also required under strict scrutiny analysis.<sup>34</sup>

Indeed, protection of children is an interest that often justifies special restrictions of fundamental rights. For example, the Court recently decided the first amendment does not prohibit a State from criminalizing possession of child pornography in a person's home. *Osborne v. Ohio*<sup>35</sup> explicitly distinguished an earlier and arguably precedential case based on substantial differences in the balance of the implicated interests. In the earlier case, *Stanley v. Georgia*,<sup>36</sup> the Court struck down a statute prohibiting private possession of obscene material. The Supreme Court in *Stanley* found the asserted State interest "to control public dissemination of ideas inimical to the public morality"<sup>37</sup> inadequate to justify impinging upon an individual's fundamental first amendment right to receive information privately. Although the Court in *Osborne* assumed a similar first amendment interest in viewing and possessing child pornography, it contrasted the cases based on the underlying State interests. The State's interest in *Stanley* was not substantial, but

a State's interest in "safeguarding the physical and psychological well-being of a minor" is "compelling". . . . The legislative judgment, as well as the judgment found in relevant literature, is that the use of children as subjects of pornographic materials

---

33. See generally Coleman, *Incest: A Proper Definition Reveals the Need for a Different Legal Response*, 49 Mo. L. REV. 251 (1984). See also Coleman, *Sex in Power Dependency Relations: Taking Unfair Advantage of the Fair Sex*, 53 ALB. L. REV. 95, 100-03 (1988) (discussing incest as an abuse of trust arising from the family relationship).

34. "When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests." *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978).

35. 110 S. Ct. 1691, 1696 (1990).

36. 394 U.S. 557 (1969).

37. *Osborne*, 110 S. Ct. at 1696 (quoting *Stanley v. Georgia*, 394 U.S. 557, 566 (1928)).

is harmful to the physiological, emotional, and mental health of the child.<sup>38</sup>

The Court buttressed its holding with the observation that it is "surely reasonable"<sup>39</sup> to conclude child pornography will decrease if possession is criminalized.<sup>40</sup>

It is merely a short and obvious step to analogize the differences in *Stanley* and *Osborne* to distinctions between adultery and incest. Adultery statutes prohibit conduct between consenting adults primarily because that behavior is viewed as "inimical to the public morality."<sup>41</sup> Incest, on the other hand, remains taboo to protect "the physical and psychological well-being of a minor."<sup>42</sup> Furthermore, mindful of the stark reality that many Americans have extramarital affairs, it is "surely [not] reasonable"<sup>43</sup> to pretend that criminalizing adultery has or will inhibit the behavior. Accordingly, it is entirely consistent to seek repeal of adultery statutes and, at the same time, endorse vigorous enforcement of incest laws.

#### V. FAILURE TO ACHIEVE OSTENSIBLE GOALS

Criminal laws serve the important functions of either deterring or punishing harmful misconduct. Adultery statutes should be repealed because they fail to achieve either goal. Moreover, the prohibited behavior simply is not verifiably harmful to the State.

The assumption that adultery is harmful is problematic. Criminal regulation of private, consensual sexual conduct is arguably indefensible absent compelling evidence of harm either to the marriage relationship or other spouse.<sup>44</sup> In other words, when no injury to the marriage or spouse exists, the State presumably has no compelling interest to justify intervention. Absent a compelling state interest, attempts to regulate consensual sexual behavior impermissibly infringe on an individual's constitutional rights. Moreover, even assuming a State interest in protecting innocent spouses from harm which adultery might cause, that interest is neither sufficient to justify the intrusion necessary to discover

---

38. *Id.* (quoting *New York v. Ferber*, 458 U.S. 747, 756-58 (1982)).

39. *Id.*

40. *Id.* Justice Brennan, in dissent, disagreed. He argued the majority was wrong to focus on *Ferber* rather than *Stanley*. "*Ferber* held only that child pornography is 'a category of material the *production* and *distribution* of which is not entitled to First Amendment protection' . . . our decision did not extend to private *possession*." *Id.* at 1712 (emphasis in original) (quoting *Ferber*, 458 U.S. 747, 765 (1982)).

41. *Stanley*, 394 U.S. at 566.

42. *Osborne*, 110 S. Ct. at 1696.

43. *Id.*

44. See *infra* text accompanying notes 57-63.

infidelity, nor to trample fundamental rights of consenting adults. The final argument for repeal is a pragmatic one: although adultery may sometimes cause harm,<sup>45</sup> criminal prohibitions are doomed to fail in deterrence or punishment.

### A. Failure to Deter

Adultery statutes do not deter the prohibited conduct for several reasons. Although the vast majority of people are capable of exercising control over their sexual behavior, the sex drive itself seems virtually irrepressible. Consequently, it is naive to expect that merely criminalizing sexual behavior will suppress this strongest of all biological drives.<sup>46</sup> Indeed, when an estimated sixty percent of American adults have extramarital affairs, it is hardly credible to suggest criminal laws have had any deterrent effect. In fact, the danger associated with forbidden conduct may enhance the sexual experience, paradoxically increasing the likelihood it will occur.

However, the obviously unrealistic nature of the goal of deterrence is not the sole reason that such legislation should be abolished. Another compelling justification for repeal of adultery statutes is the practice of police, prosecutors, and judges who conspire, at least implicitly, to reject these laws by refusing to enforce them. Ironically, judges actually point to non-enforcement to excuse their failure to strike these statutes. Rather than objecting to the abuse inherent in selective prosecution,<sup>47</sup> judges cavalierly dismiss the problem because the "history of nonenforcement suggests the moribund character today of laws criminalizing this type of private, consensual conduct."<sup>48</sup>

---

45. *Id.*

46. It is interesting to note that fundamental to enforcement of fornication laws is the even more absurd expectation that a normal unmarried adult — whether hetero- or homosexual — will be celibate. This also means, of course, that a person who never marries is apparently expected to live a lifetime without sex.

47. *Cf. Potter v. Murray City*, 585 F. Supp. 1126 (D. Utah 1984), in which the court acknowledged without apparent distress that despite the fact that "between 5,000 and 10,000 individual family members of polygamist families" live in the state, no more than 25 had been prosecuted since 1952. *Id.* at 1129. This case is particularly interesting because Utah, like the State of Georgia in *Hardwick*, refused to prosecute for violation of the relevant criminal law. *Id.* at 1133.

Although *Potter* was not an adultery prosecution, the analogy is potentially illuminating. In *Potter*, as might be expected in an adultery prosecution, the court used the long-established tradition of monogamy to uphold state and federal constitutions and laws prohibiting polygamy. *Id.* at 1137. The court affirmed *Potter's* dismissal from the police department because his polygamous marriage was a violation of his oath to uphold these laws. *Id.* at 1143.

48. *Bowers v. Hardwick*, 478 U.S. 186, 198 n.2 (1986) (Powell, J., concurring).

This reasoning is specious for at least two reasons. First, if the statutes are so "moribund," why not just eliminate them? Second, both *Bowers v. Hardwick*<sup>49</sup> and the Wisconsin adultery case undermine any comfort individuals might find in historical failure to prosecute. Although the government refused to prosecute Hardwick "unless further evidence developed,"<sup>50</sup> the continued existence of the Damoclean sword obviously is intended to chill sexual behavior. So long as Georgia criminalizes sodomy, Hardwick and others are faced with the following undesirable options: Break the law and risk prosecution no matter how remote the probability, practice celibacy, or limit sexual gratification.<sup>51</sup> The apparently nonexistent deterrent effect of adultery legislation makes it likely that the vast majority will choose to ignore the law. Such wholesale disregard may result in a disturbing decrease in respect for laws in general. Furthermore, although the Wisconsin case was settled short of a trial, Mrs. Carroll was charged, treated like a criminal, so embarrassed by press coverage she was forced to move to another town, and ultimately compelled to agree to sanctions of community service and parental counseling.<sup>52</sup> It is unlikely Justice Powell could convince either Michael Hardwick or Donna Carroll of "the moribund character" of sodomy and adultery laws.

At the same time, the State's consistent failure to prosecute saps any hope of effective deterrence. Absent fear of enforcement, laws are simply ignored.<sup>53</sup> Although exact data on the prevalence of extramarital affairs is not available because most people are understandably reluctant to admit adultery, little doubt exists that these laws are frequently

---

Although Justice Powell was referring to "prosecution for private homosexual sodomy" rather than adultery, the underlying rationale is the same. *Id.* The last adultery prosecution in New York was in 1944. *New York Times*, *supra* note 16, at A9. This is particularly interesting because adultery was the only grounds for divorce in New York until September 1, 1967. N.Y. DOM. REL. LAW § 170:1 (McKinney 1988) (Practice Commentaries). The point is that divorces were granted based on adultery, but no criminal charges were filed.

49. 478 U.S. 186 (1986).

50. *Id.* at 188. It is unclear to what possible "further" evidence the Court could be referring. The arresting officer walked into the bedroom while Hardwick and a male friend were performing mutual oral sex, an obvious violation of the statute. In fact, the only reason for upholding the statute and discussing "further evidence" apparently would be to chill future sexual behavior by Hardwick and others.

51. Gratification is adversely affected if a homosexual is denied the right to a same-sex sexual partner or any couple is precluded from engaging in non-harmful, consensual sexual activity.

52. See *supra* note 1 and accompanying text.

53. A simple example from everyday life illustrates this point. A majority of drivers ignore the 55 mile per hour speed limit on interstate highways unless they spot a police officer.

violated.<sup>54</sup> In fact, if estimates are to be believed, the unfaithful actually outnumber those who have never strayed!

Perhaps sheer numbers partially explain legal reluctance to prosecute adultery. The impossibility of arresting and possibly even imprisoning all these “criminals” certainly contributes to the failure to enforce. Additionally, the statutes might not be enforced as a tacit recognition that adultery is often not harmful and sometimes even beneficial.<sup>55</sup> Unhappily, many legislators refuse to acknowledge this view.

The primary legal issue implicated by adultery statutes is the constitutionally based right of privacy.<sup>56</sup> This argument, however, necessarily rejects the Supreme Court’s consistent assertions — so far raised only in dicta — that adultery lies outside the penumbras and emanations of privacy.<sup>57</sup> The State’s asserted interest for regulating adultery seems to be an arguably misguided solicitude for the innocent spouse. Underlying this concern is an apparently irrebuttable presumption that adultery destroys, or at least harms, a marriage. Despite superficial appeal, this assumption is frequently incorrect. First, there is the obvious, but often conveniently ignored, threshold question about the stability and marital “bliss” existing in a relationship in which one partner chooses to wander. This logic actually motivated repeal of complementary tort actions. “Human experience is that the affections of persons who are devoted and faithful are not susceptible to larceny - no matter how cunning or stealthful.”<sup>58</sup> Unfortunately, this argument poses the proverbial chicken or egg question, leading to the same inconclusive and nonproductive results. A second important reason to question the irrebuttable presumption of harm is that most affairs end within a relatively short time, after which the straying spouse generally returns home.<sup>59</sup> Third, para-

---

54. Furthermore, although the exact number of sexually active single people is also unknown, it is certainly high. Sex between unmarried consenting adults arguably causes no significant harm to society, and, unlike in adultery, no innocent third persons are involved who may be hurt. Consequently, the State has no compelling interest to protect. Therefore, laws restricting such behavior unconstitutionally infringe on an individual’s right of privacy.

55. See *supra* notes 47-48 and accompanying text.

56. Adultery statutes also arguably abridge the constitutionally protected freedom of association. U.S. CONST. amend. I.

57. See, e.g., *Griswold v. Connecticut*, 381 U.S. 478, 499 (1965) (Goldberg, J., concurring) (quoting *Poe v. Ullman*, 367 U.S. 497, 553 (Harlan, J., dissenting)). Grouped together in this exclusion is homosexuality. *Id.*

58. *Funderman v. Michelson*, 304 N.W.2d 790, 791 (Iowa 1981).

59. When a spouse discovers his or her partner is having an affair, some experts advise doing nothing if the spouse wants the marriage to continue. “Most affairs last three months, and 90 percent of cheating spouses return home.” Brothers, *Why Wives Have Affairs*, *Parade Magazine*, *The Miami Herald*, Feb. 18, 1990, at 4-5.

Most affairs are short term. Only approximately 16% last longer than a year. M. SANDS, *supra* note 2, at 190.

doxically perhaps, many spouses report that having an affair actually strengthened their marriages.<sup>60</sup>

A related argument focuses on the possible "great values in love affairs, that the joys of such a relationship can be unique and unmatched in their intensity, and that for those involved in them they can sometimes be more meaningful even than the fulfillments of monogamous marriage."<sup>61</sup>

Furthermore, the assumption that adultery destroys marriage contains a subtle, but fundamental, fallacy. Inextricably interwoven into the very fabric of this argument is the fervently held, but possibly unjustified, belief that monogamy has inherent value and is thus essential for any successful marriage. In spite of the superficial seductiveness of this idea, reasons to doubt it do exist.

Consider that a majority of married people have affairs. A logical inference might be that monogamy is simply not natural.<sup>62</sup> In some cultures monogamy is not the norm. It may be that these cultures accept multiple sexual partners as a reflection and fulfillment of societal needs different from those that embrace monogamy. Nevertheless, it seems equally possible that the implicit message is that human beings are not naturally monogamous. Assuming the validity of this conclusion, and recognizing that American society imposes monogamy as an element of the marital relationship, spouses may face an unpleasant choice between two intolerable options. First, they can restrict themselves to one sexual partner, acting contrary to nature but consistent with society's artificial constraints. This resolution may cause dissatisfaction with life in general and marriage specifically. Partners become bored and, remaining reluctant to violate marriage vows, seek relief in divorce.

The second scenario, an alternative to divorce, is also undesirable. Faced with a fundamentally non-monogamous nature, many spouses do stray. However, because of societal disapproval, they must lie to spouses and others about their affairs. Although perverse, they may even resent their spouses and marriage for "forcing" them into this uncomfortable predicament. Furthermore, of course, faithful spouses may be injured if they discover their partners' dishonesty.

---

60. One couple wrote a book about their experiences in coping with the husband's infidelity after 11 years of marriage. They contend working through the emotions caused by infidelity helped them build a stronger, more satisfying and honest marriage. At the time their book was published, the couple had been married 25 years and had two children. They are psychologists who work as a husband-wife consulting team. *See generally* J. & P. VAUGHAN, *BEYOND AFFAIRS* (1980).

*See also* L. LINGUIST, *supra* note 2, at 18. "[M]any affairs can be quite beneficial to the individual, his or her marriage, and to those around him or her." *Id.*

61. R. TAYLOR, *HAVING LOVE AFFAIRS* 185 (1982).

62. L. LINGUIST, *supra* note 2, at 197.

Trust and agreement on the essential aspects of the relationship are the foundation of a successful marriage. If parties marry promising monogamy, breach of that promise damages the relationship. But the harm results not from any sexual dalliance; rather, it results from violation of trust and breach of the agreement.<sup>63</sup> Consequently, if a couple chooses sexual freedom,<sup>64</sup> rather than monogamy, as the basis of their relationship, arguably an affair would not adversely affect the marriage. Instead, the relationship would be harmed by either party objecting to an affair because the objection itself would breach their agreement.<sup>65</sup>

Admittedly the current definition of marriage conflicts with this argument. Despite the Supreme Court's consistent reference to marriage as a fundamental right,<sup>66</sup> states regulate who can marry and prescribe terms of the relationship. Consequently, states mandate that marriage requires sexual exclusivity. This results in the incongruous situation that adults may negotiate terms of any other contract but apparently are precluded from defining the parameters of their most important and intimate relationships.<sup>67</sup>

Another reason to abolish adultery laws exists: many laws are simply too vague to withstand constitutional challenge. For example, a Florida statute prohibits "liv[ing] in an open state of adultery."<sup>68</sup> The statute includes neither definitions nor explanations. Is a single sexual encounter with a married person sufficient to violate the statute, or is open and notorious cohabitation required? Such uncertainty is inconsistent with

---

63. J.P. SCHNEIDER, *supra* note 17, at 193-94. "One of the biggest costs of affairs is the loss of trust. . . ." *Id.* at 193.

64. Today a realistic fear in any non-exclusive sexual relationship is the possibility of contracting, and spreading to the "innocent" partner, sexually transmitted diseases. Consistent with the argument advanced throughout this Essay, the appropriate resolution of this problem is discussion, and agreement, between the partners. This legitimate fear does not, however, validate State intervention in private, intimate relationships.

65. F. PITTMAN, M.D., *PRIVATE LIES, INFIDELITY, AND THE BETRAYAL OF INTIMACY* 19-29 (1989). The author contrasts infidelity with adultery. He defines adultery "as a sexual act outside of marriage" and infidelity as "sexual dishonesty within the marriage." *Id.* at 22. Throughout this thought-provoking book, he argues injury to the marriage relationship is a consequence of such infidelity.

66. *See, e.g.,* Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

67. The justification for this seeming paradox is that, although in some ways marriage is more a civil contract, unlike other contracts, the state becomes a party to the marriage. The State thus has an interest, generally thought to flow from its interest in protecting children, to regulate marriage and its dissolution. For an interesting discussion of possible changes, see generally Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy - Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463 (1983).

68. FLA. STAT. § 798.01 (1989).

the ordinary prescription that criminal laws must be well-defined and strictly interpreted.<sup>69</sup>

### B. Failure to Punish

Failure to enforce adultery statutes diminishes their deterrent effect and presents a serious obstacle to the second goal of criminal laws — punishment. Obviously, lawbreakers who are neither arrested nor prosecuted cannot be punished.

Furthermore, government punishment of adultery is arguably violative of the constitutional requirement of separation of church and state.<sup>70</sup> Religion, rather than civil law, is the source of adultery laws. Indeed, adultery is a moral,<sup>71</sup> not a legal, issue. Consequently, churches and synagogues should establish prohibitions and punishments for adultery instead of state criminal laws.

### C. Other Problems

Related problems associated with modifying sexual behavior through criminal law further decrease the likelihood of enforcement. Because the State is not the injured party, it has no direct interest in actively pursuing convictions. Moreover, even if a State interest in protecting an innocent spouse from potential emotional distress exists, the reality of limited resources dictates other prosecutions take precedence. Regardless of the morality of the choice, violent crimes pose a much more serious and urgent risk to society than adultery. Thus, limited law enforcement resources are allocated, and frequently depleted, in fighting more life-threatening criminal activity.

---

69. Furthermore, laws affecting sexual behavior are problematic even when prohibitions and punishment are explicitly described. For example, although the state sodomy statute seems clear, it is unlikely that many Georgia residents are aware that they could be sentenced to 20 years in jail for a single act of oral sex. *See supra* note 26.

Of course, interpretations of apparently unambiguous language may cause confusion. *Bowers* is, once again, illustrative. The Georgia sodomy statute criminalizes certain behavior without regard to the offenders' sex or marital status. *Id.* Nevertheless, the *Bowers* Court refused to decide the constitutionality of this statutory prohibition as applied to sodomy between heterosexuals. *Bowers*, 478 U.S. at 188 n.2.

70. U.S. CONST. amend. I.

71. *Bowers* concluded that supporting the majority's views of morality is a legitimate basis for sodomy legislation. 478 U.S. at 196. Laying aside the question as to the correctness of such a ruling in a country with a political system designed and dedicated to protect minority views, the cases are distinguishable because the Supreme Court in *Bowers* rejected the notion that the Georgia statute implicated a fundamental right. Absent a fundamental right, the law need only satisfy the rational basis test. Without discussion, the Court simply asserted the law meets the test because it is "constantly based on notions of morality." *Id.*



Assuming adultery does cause harm sufficient to warrant some legal remedy, the person injured is the partner of the adulterous spouse. The innocent spouse suffers the emotional trauma generally associated with infidelity. Consequently, he or she is the interested and appropriate party to seek redress through the legal system.

Common law obliged by allowing the innocent spouse to sue in tort.<sup>72</sup> Criminal conversation, the civil counterpart of adultery,<sup>73</sup> approached a strict liability tort. It required little more than proof of sexual intercourse with plaintiff's spouse. The only recognized defenses to criminal conversation were denial of the affair or proof that plaintiff consented.<sup>74</sup> Nevertheless, although an "innocent" spouse may be injured by the sexual involvement of his or her marital partner, tort recovery has been virtually eliminated for a variety of reasons.<sup>75</sup>

## VI. CONCLUSION

Properly interpreted, the established fundamental right to privacy requires repeal of adultery statutes. Attempted criminal regulation of private consensual sexual conduct is impermissible absent proof of harm to the State. Tort actions should also be abolished. Bedrooms are simply not large enough to accommodate sexual partners and the spectre of legislators, police, lawyers, and judges.

---

72. The original source of these actions was a master's quasi-proprietary interest in his servant. At common law, a wife was considered her husband's valuable servant, providing him with a protectible right to consortium. Because a wife had no separate identity, she had no protectible interest in his services and, therefore, initially was denied the right to sue. However, as women's rights grew, courts recognized a wife's concomitant marital rights. Note, *The Suit of Alienation of Affections: Can Its Existence Be Justified Today?*, 56 N.D.L. REV. 239, 242 (1980).

73. See, e.g., *Fadgen v. Lenkner*, 469 Pa. 272, 277, 365 A.2d 147, 149 (1976). Another common law action created to protect the marital relationship was alienation of affections. This tort required proof that defendant's wrongful conduct caused actual loss of affections toward plaintiff. Sexual intercourse was not an essential element of the claim. Although damages were originally awarded for loss of services, the real basis of recovery was loss of consortium. Note, *supra* note 72, at 243-44.

74. *Fadgen*, 469 Pa. at 277, 365 A.2d at 149.

75. One of the most compelling arguments for abolishing alienation suits is that "spousal love is not property which is subject to theft." *Fundermann v. Mickelson*, 304 N.W.2d 790, 794 (Iowa 1981).

Other reasons to abolish alienation suits include: 1) the opportunities for blackmail because defendant's reputation may be ruined simply by filing suit; 2) the absence of any reasonably definite standards for assessing damages; 3) the availability of punitive damages makes excessive verdicts likely; and 4) the seemingly forced sale of spouse's affections based upon psychological assumptions contrary to fact. H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES*, § 10.2, at 267 (1968). It is interesting that this section has been eliminated in the recent edition of this text, which focuses instead

The innocent spouse injured by adultery has not been abandoned by the legal system. The appropriate remedy is divorce, where the State grants the means to "put asunder" those whom it has previously joined together.

---

on loss of consortium actions in the parent-child relationship. H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES*, § 11.2, at 388-90 (2d ed. 1988). Professor Clark includes a section on actions for loss of spouse's consortium based on negligent interference with the marital relationship *Id.* § 11.3, at 390-98.

An action for alienation of affections "diminishes human dignity. It inflicts pain and humiliation upon the innocent, monetary damages are either inadequate or punitive, and the action does not prevent human misconduct itself." *Wyman v. Wallace*, 549 P.2d 71, 74 (Wash. Ct. App. 1976), *rev'd*, 91 Wash. 2d 317, 588 P.2d 1133 (1979), *vacated*, 94 Wash. 2d 99, 615 P.2d 452 (1980). Furthermore, many critics believe both actions should be abolished because they conflict with the change in status achieved by women in the last century. Note, *Hunt v. Hunt: The Status of "Heartbalm" Torts in South Dakota*, 27 S.D.L. REV. 160, 163-64 (1982).