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ON LAW AND CHASTITY

Robert E. Rodes, Jr.*

I could never mix in the common murmur of that rising generation against monogamy, because no restriction on sex seemed so odd and unexpected as sex itself.

—G.K. Chesterton

INTRODUCTION

When Dwight Eisenhower was President, and the baby boomers of today were but gleams in the eyes of their monogamous parents, it was well understood that chastity was the prevailing social norm. Whatever their practices, everyone knew what the standard was: married people were to have sex only with their spouses; the unmarried were to abstain. Nor was the standard flouted as often as is commonly supposed. Professor Kinsey and his followers, using samples


1 G.K. CHESTERTON, ORTHODOXY 101 (1909).

2 For purposes of this Article, I shall define chastity as adherence to this standard and unchastity as failure to adhere to it. I realize that there are philosophical and theological problems in reducing a virtue to a standard of behavior. But I do not think they arise in legal analysis, for the law supports virtue mainly by encouraging virtuous acts and discouraging acts opposed to the virtues. See THOMAS AQUINAS, SUMMA THEOLOGICA, pt. I–II, q. 92, art. 1 (Fathers of the Eng. Dominican Province trans., Benzinger Bros., Inc. 1947) (1485); Robert E. Rodes, Jr., On Law and Virtue, in VIRTUE, PUBLIC AND PRIVATE 30, 31–32 (Richard J. Neuhaus ed., 1986). I also realize that many thoughtful people would characterize as chaste the committed and caring sexual relations that exist between some persons of the same sex and some persons of opposite sexes who are not married to each other. My reasons for not being of the same mind are set forth briefly infra in the text accompanying note 462 and at greater length in the works cited in that note.
heavily skewed toward laxity, found that over a third of the population (about half of the women and a quarter of the men) had not violated it even once.

On the whole, the standard was reinforced by the social ambiance. It was not at all difficult for people of relatively chaste mind to go for days, sometimes weeks, without encountering much of anything at which they could justly take offense. In most environments, social discourse was relatively free of explicit sex, and even sexual innuendo was far from pervasive. Films and broadcasting were closely censored, and detailed descriptions of sexual acts were rare in the print media also.

The reticence of the period is in sharp contrast with the pervasive, even compulsive frankness that prevails today. For instance, the article on “Sexual Behaviour” in the fourteenth edition of the Encyclopedia Britannica deals almost exclusively with animals, only mentioning briefly in one or two places that the higher primates sometimes do things that people sometimes do also, whereas the fifteenth edition (1995) devotes twelve pages of very small type to the sexual practices

3 There is by now a considerable literature attacking Kinsey’s methodology and in some cases his integrity. The objection to his samples is lucidly (and non-polemically) explained in Robert T. Michael et al., Sex in America 15–21 (1994).

4 I have not found in Kinsey’s books any figures applicable to a whole sample. But from the tables appearing in Alfred C. Kinsey et al., Sexual Behavior in the Human Male 280, 550 (1948), I calculate that about 70% had had premarital sex and that about 5% had had extramarital but not premarital sex—leaving about 25% who had had neither. As for the women, Kinsey reported that “nearly” 50% of the married women in the sample had had premarital sex—that is, that more than 50% had not. See Alfred C. Kinsey et al., Sexual Behavior in the Human Female 286 (1953). I cannot find a corresponding figure for the single women in the sample, but the percentage of virgins must have been at least as great. Of those who were virgins at marriage, only 164 individuals, 2.8% of the sample, were unfaithful afterward. Id. at 427. It is interesting to compare these figures with the 1992 survey reported in Michael et al., supra note 3, at 15–21, and in Edward D. Laumann et al., The Social Organization of Sexuality 169, 198, 214, 216 (1994). From a table on page 169 of the latter book, it appears that just short of a quarter of the whole sample were either single people who had had no sex with anyone since the age of eighteen or married or formerly married people who had had sex with only one person since that age. These figures are not broken down by gender. But other relevant figures are. From the tables on pages 198 and 214, I calculate that 20.9% of the men, 34.4% of the women, and 28.4% of the whole sample were virgins at marriage. From the table on page 216, I find that 75.5% of the married men and 85% of the married women had been faithful since marriage.

5 See infra notes 106–11 and accompanying text.


7 See id. at 420D–20E.
The 1960 edition of Emily Post's *Etiquette* takes the reader through dating, college, living alone in the city, traveling alone, and working with people of the opposite sex without mentioning any more serious concerns than not giving occasion to the scandal-mongering "Mrs. Grundy" or making sure that a secretary's hotel room is not on the same floor as her employer's, and that one's friends "are of the sort that pass that sharpest of character readers, the house detective." I found only one intimation that something more serious than scandal might be at stake: "A young woman's very acceptance of a man's dinner-for-two invitation [in his apartment] shows her confidence that her host is a gentleman who will not ply her with cocktails for nefarious purposes, and his behavior should certainly justify her confidence." The 1963 edition of Amy Vanderbilt's *New Complete Book of Etiquette* has even less to say on these subjects. By contrast, a work of Judith Martin (Miss Manners), published in 1989, deals with such questions as whether a reader's widowed mother and her live-in boyfriend should be put in the same bedroom in the reader's house, how parents who are not married to each other should word a birth announcement, and how a couple who spent the night together on slight acquaintance should treat each other afterward.

Looking back on the earlier period, I believe that the most important consequence of the prevailing reticence was the absence of any general assumption of unchastity. Steady dating couples could be constantly in each other's company and even have keys to each other's apartments without it being taken for granted that they were sleeping together. People of the same sex could share an apartment and not be involved in dating without it being assumed that they were homosexual lovers. On dates, marks of affection such as were shown in

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10 *Id.* at 155–67.
11 *Id.*
12 *Id.* at 596–97.
13 *Id.* at 546–61.
14 *See id.* at 557–58.
15 *Id.* at 600.
16 *Id.* at 172.
18 *See Judith Martin, Miss Manners' Guide for the Turn-of-the Millennium* 500–01 (1989).
19 *See id.* at 223–24.
20 *See id.* at 550.
movies consistent with the rigors of the Production Code\textsuperscript{21} were freely exchanged, and in some situations conventional. But nothing more was expected in the absence of a clear signal that it would be forthcoming.

The conventions afforded a certain amount of protection against both sexual harassment and date rape. Both may have been more common than was supposed at the time, but I believe they were considerably less common than they are now. In or out of the workplace, a sexual overture that bypassed the dating conventions was commonly regarded as an insult not only by the person addressed but also by everyone who learned of it. And within the conventions, it was not too difficult to avoid the crossed signals that often presage date rape.

The social commitment to chastity was of course not new, but new forces had arisen in its support. These supplemented, and in part superseded, utilitarian concerns with the social function of monogamy and with what we now call family values. The gradual domestication of the conventions of the medieval courtly love tradition had been going on for more than a century, so that those conventions had come to be firmly identified in the popular culture with honorable courtship and ensuing marriage.\textsuperscript{22} At the same time, new developments in philosophy and theology were placing new emphasis on the transcendent significance of the human person, on interpersonal ("I-Thou") relations,\textsuperscript{23} on the metaphysical complementarity of male and female,\textsuperscript{24} and on the unitive power of sex.\textsuperscript{25} New attitudes toward love and complementarity were also fostered by a gradual expansion of the social roles of women that had been going on since the late nineteenth century and by a religious revival that set in after the Second World War. The whole combination led to a general acceptance of the idea that waiting for marriage, marrying for love, and living faith-

\textsuperscript{21} The Production Code was a system of self-censorship adopted by the studios in 1930 and retained into the 1960s. \textit{See} Leonard J. Leff \& Jerold L. Simmons, \textit{The Dame in the Kimono: Hollywood, Censorship, and the Production Code} 270–72, 283 (1990). Anyone who has watched films from the decades in question will know well enough what the Code did and did not permit.

\textsuperscript{22} \textit{See} Denis de Rougemont, \textit{Love in the Western World} 291–315 (Montgomery Belgin trans., rev. ed. 1956). "No other civilization [than the U.S.] has embarked with anything like the same ingenious assurance upon the perilous enterprise of making marriage coincide with [romantic] love." \textit{Id.} at 292. "Marriage [is] the institution in which passion is ‘contained,’ not by morals, but by love." \textit{Id.} at 315. This was first published in French in 1938. \textit{See id.} at 323.


\textsuperscript{24} \textit{See} Dietrich von Hildebrand, \textit{Man and Woman} 15–17 (1966).

\textsuperscript{25} \textit{See id.} at 7–31.
fully thereafter were both normal and normative. That acceptance was both rooted and reflected in the law. Only in a few cases was the law a serious obstacle to anyone who was determined to be unchaste. But as a witness to how society regarded the subject, it was a support and encouragement to people who aspired to chastity and a guide to those who were making up their minds.

What I intend to do in this Article is to survey the common law and statutory provisions that produced that effect and to indicate what has become of them. I will try to show that we should not put up with the marginalization of chastity that has accompanied these changes in the law, and I will offer a legal agenda that those who still think chastity is an important social value can hope to see put in place.

I. The Law in the Fifties

When Judge Ploscowe published *Sex and the Law* in 1951, fornication was a punishable offense in all but ten states, adultery in all but five, and sodomy or something of the kind in all. Discreet violations of these prohibitions were generally not punished, but the possibility of their being punished played a part in keeping them discreet. Some variations were more systematically prosecuted. "Lewd and lascivious cohabitation" was in a number of states a crime in its own right. So was "seduction," intercourse where consent was gained by a false promise of marriage or, under some laws, by other forms of cajolment or deceit. Some acts fell within statutes or ordinances against public indecency, and otherwise dormant laws against fornication and adultery might be invoked if their violation was too notorious or in too public a place. Persons of opposite sexes could generally not get a room together in a decent hotel without falsely registering as husband and wife and so exposing themselves to a charge of false re-

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27 Ploscowe, *supra* note 26, at 145.

28 Id.

29 Id. at 208–09.

30 Id. at 150; see, e.g., Ind. Code § 35-1-82-2 (1971) (repealed 1976).


Acts between persons of the same sex, especially men, were more apt to be punished than acts between men and women.\footnote{See id. at 202-03.} Or perhaps we should say it took more discretion to be sure they would not be punished. Laws against deviant sex acts were applicable also to heterosexual encounters\footnote{See id. at 200.} and were occasionally set in motion in the aftermath of particularly nasty divorces.\footnote{See id. at 202-03.}

Sex by men with underage girls was punishable as "statutory rape,"\footnote{See id.; infra text accompanying notes 348-48.} the theory being that a girl below a certain age should be deemed incapable of legally effective consent. The age in question was as low as sixteen in many states, as high as twenty-one in a few.\footnote{See id. at 200.} The honest belief of the man that the girl was older was generally not a defense.\footnote{See id.; infra text accompanying notes 348-48.} A person who sets out to commit an illicit act—and fornication was considered illicit even in states where it was not punishable—cannot complain that he was not aware of circumstances making the act more serious than he intended it to be. It was like the case of the hemophiliac who bled to death after being punched in a brawl. The man who punched him was guilty of manslaughter even though all he had intended was battery.\footnote{See State v. Frazier, 98 S.W.2d 707, 713 (Mo. 1936); see also White v. State, 185 N.E. 64, 65 (Ohio Ct. App. 1933) (upholding the trial court's finding that a man was guilty of the offense of abandoning his pregnant wife even though he did not know she was pregnant).}

The Mann Act made it a federal crime to transport women or girls in interstate commerce for prostitution, debauchery, or other immoral purposes.\footnote{See Ploscowe, supra note 26, at 201.} Although the Act was originally intended to deal with organized prostitution,\footnote{See Ploscowe, supra note 26, at 184-85.} the famous Caminetti case, decided in 1917, made it applicable to any kind of illicit sex, if the woman was
transported interstate.\textsuperscript{43} It was not rigorously applied to non-commercial relations, but common legend took it fairly seriously:

\begin{quote}
Didn't know I was in Mississippi,
Didn't know I'd crossed that old state line.
The lady with me weren't my sister;
Now I'm in Atlanta doing time.\textsuperscript{44}
\end{quote}

In 1946, it was used against members of a polygamist Mormon splinter group who moved with their plural wives from Utah to Arizona.\textsuperscript{45}

Procedures for the support of illegitimate children tended to be criminal or quasi-criminal in form. Pennsylvania used its law against fornication for this purpose,\textsuperscript{46} and Massachusetts had a statute making it an offense distinct from fornication for anyone not being the husband of a woman to get her with child.\textsuperscript{47} Whether these statutes (commonly referred to as Bastardy Acts)\textsuperscript{48} were criminal or civil, they resulted in orders to provide support for the children in question.

Laws against fornication or adultery were used to provide the prosecutor with a backup position in rape cases.\textsuperscript{49} A prosecutor who was convinced that a rape had occurred, but who could not prove lack of consent beyond a reasonable doubt could have at least the satisfaction of seeing the defendant subjected to the modest penalties for fornication. At the same time, the possibility might put somewhat of a damper on the enthusiasm of sexual opportunists in equivocal circumstances. The woman, of course, could not be convicted of fornication in such a case because, although it could not be established beyond a reasonable doubt that she was raped, neither could it be established beyond a reasonable doubt that she consented.

\textsuperscript{44} This passage comes from a folk song I heard from a colleague. I am not sure of its origin.
\textsuperscript{47} MASS. GEN. LAWS ANN. ch. 273, § 11 (West 1959) (repealed 1977); see also Ploscowe, supra note 26, at 120 (discussing Massachusetts and Pennsylvania law).
\textsuperscript{48} See, e.g., Cruz v. Gardiner, 375 F.2d 453, 455 (7th Cir. 1967) (applying Indiana's Bastardy Act); State v. Hicks, 211 P.2d 473, 476 (Ariz. 1949) (discussing Arizona's bastardy provisions).
Unconsented sexual approaches short of rape could often be punished as assaults or batteries.\textsuperscript{50} Indeed, in some cases the assault would be punished even though intercourse had ensued by consent or without the vigorous resistance required by the unrealistic standards of the time.\textsuperscript{51} Serious sadomasochistic encounters could be punished as batteries, even if they were consented to by both parties. The law was clear that in a prosecution for bruising, battering, burning, or torturing consent was not a defense.\textsuperscript{52}

Rape, of course, was a serious crime then as now, but commentators tended to be more impressed then than they are now with the difficulty of proving it. No one failed to quote Sir Matthew Hale's remark that "it is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, though never so innocent."\textsuperscript{53} But it was not generally noted that the "never so innocent" men in Hale's examples were innocent because they had never had intercourse with their accusers, not because their accusers had consented. In the usual case that made it into the law reports, the issue was consent.\textsuperscript{54} On this issue, many judges and most commentators displayed a skepticism at which the feminist writers of our own day have taken very legitimate offense.\textsuperscript{55}

While the unchastity of the victim has never been a defense to a rape charge, it was generally regarded as admissible evidence on the issue of consent.\textsuperscript{56} The courts seem habitually to have conflated an

\textsuperscript{50} See People v. Lipski, 43 N.W.2d 325, 326 (Mich. 1950). Indecent exposure and indecent solicitation were also crimes in many places. See Goodsay v. District of Columbia, 187 A.2d 486, 487 (D.C. 1963); Ploscowe, supra note 26, at 157–60.

\textsuperscript{51} See, for example, Bye v. Isaacson, 173 N.W. 754 (N.D. 1919), which was a civil case, but the result would have been the same in a criminal case.


\textsuperscript{53} 1 Matthew Hale, Historia Placitorum Coronae *635. The works of Hale (1609–76) were not published until 1736. See id. at i–xiii.

\textsuperscript{54} See id.

\textsuperscript{55} E.g., Vivian Berger, Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom, 77 COLUM. L. REV. 1, 12–49 (1977). The writer cites other feminist critiques. See id. at 1–4.

inference of non-consent from the chastity of the victim with one of consent from her lack of chastity. Actually, the inferences are quite different. An inference that a woman who has never consented to intercourse with anyone, or with anyone but her husband, is unlikely to have consented to intercourse with the defendant on the occasion charged seems plausible enough to be taken into account with the rest of the evidence in a case. But an inference that a woman who was willing to have intercourse with a particular man on a particular occasion—or with different men on different occasions—must have been willing to have intercourse with any man any time is absurd.

The illegality of non-marital sex was reflected in the civil law rather more than in the criminal. It could not be consideration for a contract, and the courts generally construed any contract between illicit lovers in such a way that the sex was part of the consideration and the contract was unenforceable. In addition to voiding meretricious transactions, the principle sometimes got in the way of arrangements to take serious responsibility for long term relationships.

Seduction was a tort as well as a crime. Redress was available to the parents of the victim (for “loss of services”) as well as to the victim herself. (It was always herself: seducing boys was not a tort, although it might be a crime if the boys were young enough.) Adultery was also a tort: it gave rise to an action by the wronged husband for “criminal conversation.” The action was not available to the wronged wife, but there was a gender-neutral action for “alienation of affections” if the paramour (or anyone else for that matter) broke up the marriage. Adultery was also, of course, recognized everywhere as

terence between the parties was a defense at common law.” Clark & Marshall, supra note 31, at 755 n.21. In the medieval (1221) case they cite, the jury used the previous intercourse as evidence of consent on the occasion charged—not as making consent unnecessary to acquittal. See id. Modern juries have tended to do the same. See Harry Kalven, Jr. & Hans Zeisel, The American Jury 249–54 (1966).


58 E.g., Stevens v. Anderson, 256 P.2d 712, 715 (Ariz. 1953) (holding that a woman who cohabited for more than thirty years was not entitled to property promised her); Wellmaker v. Roberts, 101 S.E.2d 712, 713 (Ga. 1958) (holding a contract void when based on the illegal and immoral consideration of living together); Creasman v. Boyle, 196 P.2d 835, 838 (Wash. 1948) (holding that a man had no claim to property in a woman’s name even though they lived together).


60 Prosser, supra note 59, at 906.

61 Id. at 896–97.

62 Id. at 905.
ground for divorce. In some states, notably New York, it was the only ground.63

Sexual overtures could result in several different kinds of tort liability. There was a developing tort of intentional infliction of emotional distress, which was coming to be recognized in various cases of offensive conduct short of traditional assault or battery.64 A mere solicitation was not enough to constitute this tort, "the view," in Judge Magruder's famous dictum, "being, apparently, that there is no harm in asking."65 But if the solicitation was sufficiently persistent or offensive, it would be actionable—as in one case where a man included a nude photograph of himself in a letter.66 Also, it took very little to turn the harmless asking into an assault or a battery. The applicable legal principles were about the same in tort cases as in the criminal cases already discussed. If the solicitation was frightening (as where the man entered the woman's bedroom wearing only a nightshirt) it would be an assault.67 If it included any touching (say the man took the woman's hand), it would be a battery.68

Sexual practices were of concern in a number of situations in which the law took account of "moral character" or what we would now call lifestyle. Federal judges were of two minds about whether fornicators or adulterers had the "good moral character" required by statute for becoming American citizens.69 Doctors and lawyers could

63 See Ploscowe, supra note 26, at 75.
65 Magruder, supra note 64, at 1055.
66 Mitran v. Williamson, 197 N.Y.S.2d 689, 690 (Sup. Ct. 1960). A few states have statutes, evidently adopted to discourage dueling, that give a cause of action for insulting words tending to a breach of the peace. E.g., Va. Code Ann. § 8.01.45 (Michie 1950); see Magruder, supra note 64, at 1054. It has been held that an indecent proposal violates such a statute. See Rolland v. Batchelder, 5 S.E. 695, 697 (Va. 1888).
68 E.g., Erwin v. Milligan, 67 S.W.2d 592, 593 (Ark. 1934); Johnson v. Hahn, 150 N.W. 6, 6 (Iowa 1914). Either an explicitly sexual touching or a non-sexual touching where words or actions bespeak a sexual intent will be actionable, Annotation, Civil Action for Assault Upon Female Person, 6 A.L.R. 985, 993-94, 1013-14 (1920), although in the latter situation a few cases go the other way, see, e.g., Prince v. Ridge, 66 N.Y.S. 454, 454 (Sup. Ct. 1900).
69 E.g., Flumerfelt v. United States, 230 F.2d 870, 871 (9th Cir. 1956) (denying application); Schmidt v. United States, 177 F.2d 450, 452 (2d Cir. 1949) (granting
lose their professional licenses for sexual misconduct, and public employees, especially teachers, could be fired. Only in the most flagrant or most notorious cases was the blow sure to fall; on the other hand, in no case was it sure not to. Case reports and secondary treatment of the subject were both rare in the period. I suspect that sexual irregularities were somewhat less common than they are today; they were certainly more discreet and more circumspectly dealt with.

In divorce proceedings, there was a tendency for courts to regard an unchaste mother as not fit to have custody of her children. Exceptions were sometimes—but not always—made if the unchastity had ceased, as when the mother after the divorce married the paramour who caused the divorce to take place. Generally, there was no reciprocal attention to the unchastity of the father, because the mother would be preferred for custody in any event, unless she was found unfit. Occasionally, both parents were

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It is not logical to assume that a woman can be a good mother and an adulteress at the same time. The primary duty of any mother is to educate her children in basic moral principles. One who does not possess these principles can hardly be expected to teach them to others.

Id.

73 See Wilcox v. Wilcox, 287 S.W.2d 622, 624 (Ky. 1955); cf. Oliver v. Oliver, 140 A.2d 908, 912 (Md. 1958) (finding that unchastity ceased when the paramour left town); C.T. Drexler, Annotation, Award of Custody of Child to Parent Against Whom Divorce is Decreed, 23 A.L.R.3d 6, 42–45, 65–83 (1969).

74 It appears that at common law there was a preference for the father, which was subject to an exception giving preference to the mother if the child was of “tender years.” Clark, supra note 72, at 584–85. In Michigan, until its repeal in 1970, there was a statute, Mich. Comp. Laws § 722.541 (1948) (repealed 1970), embodying these preferences. See Ostergren v. Ostergren, 118 N.W.2d 245, 246 (Mich. 1962).
found unfit, and the court made some other disposition of the children.\footnote{75}

Unchastity was not always safe even in the privacy of one's home. If it was sufficiently flagrant, it could be regarded by one's neighbors as a nuisance,\footnote{76} by one's landlord as a breach of one's lease,\footnote{77} or even by the authorities as making the place a "disorderly house."\footnote{78} An occasional clandestine encounter would not be apt to have these consequences, nor would a regular cohabitation if the fact of not being married was not flaunted.\footnote{79} But even here local law enforcement authorities might take punitive action that would not be undone until it reached an appellate court. In one case, for instance, a man and woman were in bed in his apartment when his wife, two of her male relatives, and a policeman came in from the fire escape to arrest them.\footnote{80} Only after they had been tried and convicted did the highest court of the state finally determine that their conduct was not sufficiently overt to violate the applicable statute.\footnote{81} Hotels and motels ("tourist camps" as they were called then) were often invaded by the police with similar results.\footnote{82} Welfare laws, spearheaded by the federally funded Aid to Families with Dependent Children,\footnote{83} were often limited to the families of widowed or deserted mothers living chastely. The applicable statutes would require a "suitable home," and it would be determined that if the mother was unchaste the home was not suitable.\footnote{84} Restrictions of this kind were coming under attack as punish-

\footnote{76}{ E.g., Spade v. Spade, 163 N.Y.S.2d 146, 149 (Sup. Ct. 1957).}
\footnote{77}{ See PROSSER, supra note 59, at 618.}
\footnote{79}{ E.g., Gill v. State, 240 P. 1073, 1075 (Okla. Crim. App. 1925); FLOSCOWE, supra note 26, at 149–53.}
\footnote{80}{ State v. Brenner, 41 A.2d 532, 532 (N.J. 1945).}
\footnote{81}{ Id. at 534.}
\footnote{82}{ E.g., State v. Parker, 128 S.W.2d 288, 290 (Mo. Ct. App. 1939) (holding a couple not guilty of open lewdness). But cf. Allinder v. City of Homewood, 49 So. 2d 108, 115 (Ala. 1950) (upholding an ordinance specifically directed against illicit sex in a tourist camp).}
\footnote{84}{ See WINIFRED BELL, AID TO DEPENDENT CHILDREN 93–110 (1965).}
ing children for their mothers' sins, but they persisted through the 1960s and early '70s.85

Because chastity was recognized by the law as the norm, the general evidentiary presumption of innocence translated into a presumption of chastity.86 The presumption could sometimes support treating a cohabiting couple as married.87 It could also be used in actions for seducing a woman of previous chaste character88 or taking indecent liberties without consent.89 In criminal cases, however, it had to give way before the presumption that the accused is innocent of the crime charged. The State could not use it in a rape case to escape the necessity of proving lack of consent beyond a reasonable doubt.90

Laws against prostitution and the like were pretty much the same as they are now. Some of the ancillary case law, however, was different. A line of cases, beginning with one under the Mann Act in 1913, held that recruiting women for an establishment in which their morals were apt to be corrupted was tantamount to recruiting them for prostitution.91 A particularly obnoxious dive in Calumet City, Illinois occasioned three prosecutions along these lines, two of them successful.92 The modus operandi involved hiring girls as waitresses, not paying them enough to live on, and suggesting to them how they could supplement their wages.93

The juxtaposition of sex and alcohol came in for particular scrutiny. A licensee who permitted lewdness, immorality, or the sale of contraceptives anywhere on the licensed premises (or, in the case of a hotel, anywhere in the hotel) could have his license revoked or sus-
pended in an administrative hearing without any opportunity to show a reviewing court that what happened was not as bad as the administrator believed it to be. It did not matter if his employees acted without his knowledge or against his instructions. And if the administrator decided that the floor show was indecent, it did not matter if the same acts would be constitutionally protected in a theater.

Throughout the 1950s and into the '60s, serious pornography was excluded from mainstream media, both print and film. The law of obscenity had for some time been governed by the formula adopted in *Regina v. Hicklin* that forbade any publication likely to corrupt the morals of people whose minds were open to such influences. In the famous *Ulysses* case, decided in 1933, a federal court adopted a more flexible test, making a work obscene only if, taken as a whole, it would strike the average person as appealing primarily to a prurient interest. The opinion, affirmed by the prestigious Second Circuit and appended to most editions of the book, *Ulysses*, was taken up by the drafters of the Model Penal Code and, in 1957, by the Supreme Court. But objectionable works were subject to significant sanctions on which mainstream publishers were not willing to take chances. They tended to stay well on the safe side. Even works that were sold under the counter were pretty innocuous compared to what circulates today.

As a general matter, stage presentations had as much and as little constitutional protection as writings. There was less inclination than there is now, however, to think of nudity and contortion as forms of expression. Furthermore, theaters, because of the crowds they attracted, were subject to municipal inspection and licensing. The requisite licenses could often be refused to a person with a history of putting on lewd shows. And the standards of fire safety might be

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95 Mazza, 100 A.2d at 552.


97 3 L.R.-Q.B. 360, 370 (1868).


99 See id. at 184-85.

100 United States v. One Book Entitled "Ulysses," 72 F.2d 705, 709 (2d Cir. 1934).


applied with additional zeal and rigor, if the municipal authorities or their constituents disapproved of the shows.\(^{104}\) All in all, therefore, burlesque houses were vulnerable to harassment, to restriction, and, if the authorities were sufficiently motivated, to outright suppression, although in most places they managed to survive.

Films were still subject to licensing in a number of states.\(^{105}\) Until 1952, it was not clear that they were entitled to any constitutional protection at all.\(^{106}\) Even after the 1952 Burstyn case established that the making and showing of films was a form of free speech,\(^{107}\) the State still had the power to require a viewing by some official before general distribution to exhibitors.\(^{108}\) Whatever official viewed the film had to use the same criteria of obscenity that applied to books and magazines, but, if a film fell within those criteria, the refusal of permission to show it could be upheld even though it was a prior restraint.\(^{109}\) The officials were not all severe, and many states had no licensing requirement at all. But the major studios generally had more to gain by satisfying the strictest officials than by resisting them.

The broadcast media came under special rules. The technology of the time offered a severely limited number of channels, which the government was mandated to assign in accordance with the public interest.\(^{110}\) Objectionable material, even if not obscene, could be evidence that a channel would serve the public better in different hands.\(^{111}\)

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\(^{105}\) See Kingsley Int'l Pictures Corp. v. Regents of the Univ. of N.Y., 151 N.E.2d 197, 201 (N.Y. 1958) (upholding New York's film licensing law).

\(^{106}\) See Mut. Film Corp. v. Indus. Comm'n of Ohio, 236 U.S. 230, 243–44 (1915) (holding that film is mere entertainment, not a form of speech or press). But see United States v. Paramount Pictures, Inc., 334 U.S. 131, 136 (1948) ("We have no doubt that moving pictures ... are included in the press whose freedom is granted by the First Amendment.").


The distribution of contraceptives was forbidden in most states. There was also a federal prohibition. The federal Second Circuit in 1936 had carved out an exception for doctors who thought their patients' health required not becoming pregnant. Most states followed suit, although a few did not. But the law still could and generally did prohibit counter displays in drugstores and vending machines in bars.

Abortion, except for serious health reasons, was forbidden everywhere. The political and intellectual forces that were eventually to produce Roe v. Wade were only beginning to take shape.

Also just beginning to take shape were the legal developments that did away with discriminatory treatment of illegitimate children and their fathers. The notion that a bastard was filius nullius had been pretty well abandoned for some time as regards the mother. But as regards the father, the old learning tended to persist. In some states, his right to be involved in the child's life depended on the prompt execution of somewhat obscure formalities. In others, it depended on securing custody. In still others, it was never better than at sufferance, or never recognized at all. In most states, a bastard did not take by intestacy from the father or the father's relatives and was not included in any reference to "children" in a will.

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113 See United States v. One Package, 86 F.2d 737, 738 (2d Cir. 1936).
114 Id. at 739.
115 See, e.g., State v. Nelson, 11 A.2d 856, 858-59 (Conn. 1940) (refusing to acknowledge an exception to the prohibition on contraceptives).
116 See, e.g., Howell v. Bryant, 130 N.E.2d 837, 841-45 (Ohio Ct. App. 1954) (denying appellant's claim that prohibition on the sale of contraceptives in vending machines was unconstitutional).
119 See Clark, supra note 72, at 158-62, 176-80.
120 See, e.g., Gorden v. Gorden, 119 N.E. 812, 813 (Ill. 1918) ("An illegitimate son can only inherit property from his mother and any maternal ancestor and any person from whom his mother might have inherited if living.").
121 See Pfeifer v. Wright, 41 F.2d 464, 466-68 (10th Cir. 1930) (discussing the various formalities required by the states); Holloway v. McCormick, 136 P. 1111, 1114 (Okla. 1913) (requiring the father to acknowledge paternity in a writing signed in the presence of a competent witness).
123 See Gorden, 119 N.E. at 313.
124 See, e.g., Eaton v. Eaton, 91 A. 191, 194-96 (Conn. 1914) (holding that fathers' testamentary references to children include only legitimate children).
Divorce was still dominated by the concept of fault. Some courts were willing to take the small change of matrimonial disagreement as evidence of "extreme cruelty," if the parties wished to call it by that name. Many courts were receptive to spurious adultery charges like those involved in *The Gay Divorcee*, with Fred Astaire and Ginger Rogers. But no State had yet adopted the no-fault system advocated by various scholars of the subject. It was still possible, therefore, to believe that divorce was not an inevitable misfortune like the winds and the tides—that it happened because of somebody's act or omission, an example from which others could take warning and save their own marriages.

II. Critiques

This state of the law came under criticism from a number of different sources, and the sources multiplied as time went on and attitudes developed. Looking back, we can sort most of the brickbats into four coherent critiques.

The first, exemplified by Ploscowe's book, already mentioned, can be called instrumentalist. It is that the legal dispositions I have been describing, taken as a whole, do more harm than good. In the first place, they are useless as a curb on consensual sex.

The mere prohibition of an offensive act will not discourage it, particularly when it is in response to so basic a drive as sex. Moreover, a prohibited sexual act performed in private by two people who derive satisfaction from it and will not complain is not likely to come to the attention of law-enforcement authorities. Police officers or district attorneys are not clairvoyants. They must receive notice of some kind before they can prosecute or make an arrest.

Because it is impossible to enforce these laws across the board, they are apt to be enforced selectively. The possibility exposes citizens to blackmail and tempts public officials to corruption. The danger of being blackmailed, in turn, exposes people in responsible jobs to a minute investigation of their private lives by employers who would otherwise have no legitimate interest in the subject.

Moreover, the proliferation of useless and unenforceable laws gets in the way of laws that can and should be enforced. Ploscowe shows, for instance, how the system for confining sexual psychopaths had become so cluttered with persistent petty offenders that serious

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125 Clark, supra note 72, at 327–58; Ploscowe, supra note 26, at 58–99.
126 Ploscowe, supra note 26, at 67–71.
127 The Gay Divorcee (RKO 1934); Ploscowe, supra note 26, at 75.
128 Ploscowe, supra note 26, at 281.
pedophiles and sadists were being overlooked. Similarly, the laws against prostitution were often so broad in their coverage that major exploiters of women and carriers of venereal disease got off with minor penalties because other violators did.

The laws affecting the status of illegitimate children came in for particular criticism as punishing children for the sins of their parents. Ploscowe insists that illegitimate children should have the same rights as legitimate ones to the support and attention of living parents and to the estates of dead parents. I have already referred to the attack on laws excluding illegitimate children from welfare benefits. It used arguments similar to Ploscowe's.

The second critique is more theoretical. It is that private sexual acts between consenting adults, even if they are morally objectionable, should not concern the law because they do not hurt anyone. The critique appeals to John Stuart Mill's *On Liberty*: "The only purpose for which power can rightfully be exercised over any member of a civilized community against his will is to prevent harm to others."

A doctrine in pretty much this form was advanced by the framers of the Model Penal Code in 1955 and by the authors of the Wolfenden Report, presented to the British Parliament in 1957. In both cases, the recommendation was that all punishment of sexual acts committed in private by consenting adults should be dropped. Most Anglo-American jurisdictions adopted these recommendations in the next decade or so.

The subject received considerable treatment in the legal literature of the 1960s as a result of the case of *Shaw v. Director of Public Prosecutions* in the House of Lords. Shaw published a directory with the names and addresses of prostitutes who paid to be included. One of the charges on which he was convicted was conspiracy to corrupt public morals, an offense referred to in passing by Lord Mans-
field in 1774, but long dormant until it was brought forward to deal with Shaw. The affirmance of Shaw's conviction evoked a major debate over whether the enforcement of morality in general and sexual morality in particular was a proper function of the law. Sir Patrick Devlin, then a member of the Court of Appeal, later to be raised to the House of Lords, led the authors on the affirmative side; H.L.A. Hart, Professor of Jurisprudence at Oxford, led those on the negative. Hart, with his lucidity and fair-mindedness, his meticulous organization, and his support in the great Millian tradition, is generally regarded in academic circles as having prevailed. I have to agree, despite my belief that Devlin was generally right. Devlin's argument concedes too much to cultural relativism to be fully effective.

Criticism of the laws regarding obscenity and the like has tended lately to merge with the libertarian critique, but it has an independent constitutional and philosophical basis in the traditional protection of free speech. I prefer, therefore, to regard it as a third critique. We can take as its point of origin the vastly erudite concurring opinion of Judge Jerome Frank of the Second Circuit in United States v. Roth. Frank's basic line was that a citizen should have the same right to disseminate sexual attitudes as to disseminate any other attitudes. While he did not feel free to depart from precedent to the extent of abolishing the obscenity laws, he pretty dearly invited the Supreme Court to do so. That Court did not take up the invitation, but it embarked on several decades of agonizing over the subject.

The critique has an admirable simplicity. As Justice Stewart said in one Supreme Court opinion, "The Constitution . . . protects advocacy of the opinion that adultery may sometimes be proper, no less than advocacy of socialism or the single tax. And in the realm of ideas it protects expression which is eloquent no less than that which is unconvincing." The question then becomes whether the advocacy reaches the point of creating a clear and present danger of action that the State has a right to prevent. Proponents of the critique find no

139 See id. at 291. 
140 See id. at 233. 
144 See id. at 801 (Frank, J., concurring). 
sufficient empirical evidence that it does. Their approach disregards the traditional recognition of lust as a sin in its own right—something less than action, to be sure, but still something more than opinion.

The feminist movement, reviving in the late 1960s after some decades of eclipse, provided a fourth critique. It was noted that the protection of women against sexual exploitation generally took the form of restrictions on the women rather than on the potential exploiters. The dangerous juxtaposition of alcohol and sex was made an excuse for forbidding women to tend bar. Punishing prostitutes was much less effective against prostitution than punishing their customers would have been, but the law seldom provided for punishing customers and was seldom enforced when it did. Institutions, especially schools, that professed to place a high value on chastity, were highly punitive when a lapse manifested itself in pregnancy, but often paid little attention otherwise. As a result, the burden of upholding the moral standards of such institutions fell more heavily on women than on men.

The treatment of rape victims came in for a good deal of feminist criticism, much of it bitter. I have already taken up the state of the law that evoked the criticism. The intellectual background probably contributed a good deal to the bitterness. It seems unbelievable at this remove that as late as 1970 the leading treatise on the law of evidence was urging that no one should be convicted of rape until the complaining witness has successfully undergone a psychiatric evaluation.

More or less on the fringes of the feminist critique there has been a more radical attack on legal support for chastity as such. The gist of

149 See id. at 212 (“When Golda Meir was asked if she felt there should be a curfew for women because of the rape problem, she replied that since men did the raping, there should be a curfew for men.”).
150 See Gosaert v. Cleary, 335 U.S. 464, 466 (1948).
151 Decrow, supra note 148, at 204–07 (discussing the National Organization of Women’s 1973 resolution concerning prostitution).
152 See id. at 258–61.
the argument is that, if sex is forbidden outside of marriage, and if
married women are dominated by their husbands, women must either
abstain from sex or submit to being dominated. They should not have
to do either. This criticism could theoretically be met by excluding
domination from the marriage relationship. But hard line critics will
say that the exclusion is impossible. They may add, with appropriate
historical allusions, that if male dominance were to be abolished there
would be no need for the sexually exclusive marriage relation as we
know it; that relation was set up to secure that dominance. Arguments
of this kind have never been in the mainstream of the feminist move-
ment, but they were given currency by Victoria Woodhull in the nine-
teenth century and are at least implicit in the writing of Germaine
Greer in the twentieth. More circumspect arguments along similar
lines have been used to support varying degrees of sexual permissive-
ness in other feminist agendas.

III. Legal Developments

The development of the law in the next few decades responded
in part to these critiques, in part to broader social changes. There was
also at work a general moral relativism that became dominant in
American jurisprudence somewhere in the second quarter of the
twentieth century. This relativism was seldom fully articulated, but it
tended to make judges inhibited in their judgments about sexual mis-
conduct. The inhibition is interestingly shown in the case of Schmidt
v. United States, in which Learned Hand, often regarded (rightly in
my opinion) as the best judge in the United States at the time, ad-
dressed the question whether an unmarried man who admitted to oc-
casional acts of sexual intercourse with unmarried women possessed
the "good moral character" necessary to become a naturalized citizen.
Instead of treating the issue as one of moral discernment, for which
he was as well qualified as anyone else, Hand turned it into one of
sociological discernment, for which he confessed himself totally un-
qualified. He and his colleagues, "[l]eft at large ... without means of
verifying our conclusion, and without authority to substitute our

155 Victoria Woodhull, The Principles of Social Freedom (1871), reprinted in
156 Germaine Greer, The Female Eunuch 317-29 (1971).
157 See the quotations from Emma Goldman in Decrow, supra note 148, at 189.
See also Simone de Beauvoir, The Second Sex 475-540, passim (H.M. Parshley ed. &
trans., 1953).
158 177 F.2d 450 (2d Cir. 1949).
159 Id. at 451-52.
individual beliefs,"\(^{160}\) had to make "some estimate, necessarily based on conjecture, as to what people generally feel."\(^{161}\) Every job has its difficulties and "so far as we can divine anything so tenebrous and impalpable as the common conscience,"\(^{162}\) Hand and his colleagues do so gamely, because it is their job.

I have no quarrel with their decision in Schmidt’s favor;\(^{163}\) I believe it was right. The question raised by the applicable law was not whether Schmidt was perfect but whether he was good enough to be an American citizen. Interpreting the term “good moral character” in the light of its purpose, what the judges have to ask is not whether people generally approve of Schmidt’s behavior, but whether his behavior is on the whole as good as other people’s—whether he is on the same moral level as the general run of those whose fellow-citizen he wishes to become.

Answering the question requires a kind of synthesis of moral and social discernment. It calls for recognizing that Schmidt has been doing something wrong and at the same time that his wrongdoing is not of a kind that sets him apart from a body of citizens and would-be citizens who are none of them perfect. The discernment is not much different from what is required of a judge who has to decide whether to let a shoplifter out on probation.

Here, though, Hand and his colleagues are strictly disclaiming any judgment of the kind. They cannot accept the idea of a statutory authority to use their own consciences in distinguishing right from wrong. A congressional reference to morality must mean something else, even though there is nothing else that the courts are equipped by ability and training to decide. This kind of bewilderment affects the judicial treatment of sex throughout the period we have now to consider.

It is particularly noticeable in the convoluted body of case law involving obscenity. Basically, the subject is fairly simple. The gratuitous and impersonal intrusion of the erotic into people’s consciousness is bad for them both morally and psychologically. If it happens often, it is bad for society. Communications that intrude in this way are not entitled to the same respect and encouragement as other communications by which people try to share thoughts, feelings, or information with their fellows. On the other hand, our minds are not

\(^{160}\) Id. at 451 (quoting Repouille v. United States, 165 F.2d 152, 153 (2d Cir. 1947)).

\(^{161}\) Id. at 450 (quoting United States ex rel. Iorio v. Day, 34 F.2d 920, 921 (2d Cir. 1929)).

\(^{162}\) Id. at 452.

\(^{163}\) See id.
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compartmentalized, and all kinds of communications that carry erotic freight may be valuable for some other reason. So what has to be decided in a particular case is whether a communication is intrusively erotic, and, if so, whether it has other important value as well. The two questions are differently formulated in different cases. Terms like "prurient interest" and "tendency to deprave and corrupt" go with the first one; "redeeming social importance" and "public good" go with the second.¹⁶⁴

However the questions are formulated, answering them requires moral discernment. It is a kind of discernment that judges deploy quite freely in other contexts and are admired for deploying well. Its use in, say, products liability or landlord-tenant cases is well documented and shows the common-law method effectively at work in giving us ever better and clearer principles of law.¹⁶⁵ It is not surprising, therefore, that its abandonment in obscenity cases results in an ever worse and more obfuscated body of law. First, by looking to a moral judgment other than their own, the judges tend toward permissiveness: if evidence on the judgment of the relevant community is not forthcoming, the prosecution has not proved its case, and book, author, and publisher go free. Moreover, if the prosecution does prove its case, it does so by introducing expert witnesses, who will be countered by expert witnesses for the defense.¹⁶⁶ The whole process ends up costing the taxpayers more than a major murder trial. As regards the general run of obscene materials, the tendency has been for the authorities to give up.

An exception has arisen in the case of child pornography, that is, films or videos whose making involves sexual abuse or simulated sexual abuse of children. Here, there has been moral discernment: the

¹⁶⁴ "Prurient interest" and "redeeming social importance" have been the standard American criteria at least since Roth v. United States, 354 U.S. 476, 484, 489 (1957). "Tendency to deprave and corrupt" and "public good" are the British counterparts. See Obscene Publications Act, 1959, 7 Eliz. 2, c. 66, §§ 1, 4 (Eng.); Theatres Act, 1968, c. 54, §§ 2–3 (Eng.).


¹⁶⁶ See GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 1144 (13th ed. 1997). Luke Records, Inc. v. Navarro, 960 F.2d 134, 138 (11th Cir. 1992), indicates that some criteria can be applied by a judge or jury looking at or listening to a work, but the crucial one—artistic merit or seriousness—must be shown by experts. Luke Records involved the sexually explicit rap record of 2 Live Crew. Id. at 135. The defense came well supplied with experts; the prosecution, relying on the record alone, was defeated. See id. at 136–39.
Supreme Court has determined that the product can be forbidden for the sake of preventing the abuse.167

Where the abuse is less flagrant, though, it is often the prevention that gives way. A colorably communicative function can elicit constitutional arguments in support of sexual behavior that would otherwise be clearly against the law. The United States Supreme Court has upheld bans on nude dancing and the like, especially in bars, but subject to elaborate qualifications and agonized dissents that would never be thought necessary if the same things were done on a street corner or even a beach.168 The Arizona Court of Appeals went to considerable trouble to establish that a sexual exhibition for an individual behind a pane of glass was not entitled to the same protection as one for an audience in a theater.169 Sexual acts for the purpose of making films are in a kind of twilight zone, if the actors are adults. According to the Supreme Court of California, hiring actors to be filmed having sex cannot, consistent with the First Amendment, be treated as prostitution.170 But according to the United States Court of Appeals for the Tenth Circuit, transporting them interstate for the same purpose is a violation of the Mann Act.171

The Supreme Court, in a series of cases involving contraception and abortion, beginning with Griswold v. Connecticut in 1965,172 gave constitutional status to a right of privacy in sexual matters.173 This right of privacy, first discerned by Warren and Brandeis in a famous 1890 law review article having nothing to do with sex,174 was conflated

170 People v. Freeman, 758 P.2d 1128, 1132 (Cal. 1988).
171 United States v. Roeder, 526 F.2d 736, 738–39 (10th Cir. 1975). But cf United States v. Prater, 518 F.2d 817, 820–21 (7th Cir. 1975) (holding that it is not a violation to transport a stripper who engages in prostitution on her own).
173 See GUNTHER & SULLIVAN, supra note 166, at 518–84.
174 Samuel D. Warren & Louis D. Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193 (1890). Justice Black, dissenting in Griswold, objected to the prevailing opinion as "exalting a phrase which Warren and Brandeis used in discussing grounds for tort
for the purpose with the search-and-seizure provisions of the Fourth Amendment and the Millian critique of all laws interfering with self-regarding conduct. But the Supreme Court has thus far resisted attempts to extend the conflated right to protect all forms of consensual sex. ¹⁷⁵

Some state courts and lower federal courts have gone farther. Cases have expanded the right of privacy to cover almost anything done in private or even with an unfulfilled expectation of privacy if it was reasonable. Some have added other conceptual ingredients to the mix. "Freedom of association," first articulated by the Supreme Court in *NAACP v. Alabama* (1958),¹⁷⁶ a civil rights case, was recast as "freedom of intimate association" by Professor Kenneth Karst in an able article of that name, published in 1980.¹⁷⁷ A federal court in Michigan extended this freedom to protect the job of a policeman who was living with another man’s wife,¹⁷⁸ and one in Illinois indicated that it would protect most of the activities of a suburban sex club.¹⁷⁹

Measures taken against the unchaste, usually by employers, run afool of laws against gender discrimination if, as is often the case, they bear more heavily on women than on men. Where two employees are having an extramarital affair, the employer can get in trouble by firing the woman but keeping the man on the job, although sometimes he has been able to show that the woman was more expendable or more affected in her work.¹⁸⁰ An employer is particularly vulnerable to gender discrimination charges if he worries about illicit sex among his workers only when one of them shows up pregnant. As a practical matter, such an employer demands chastity of women and not of men.¹⁸¹

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¹⁷⁹ See Kraus v. Barrington Hills, 571 F. Supp. 538, 541–42 (N.D. Ill. 1982). The court refused, however, to interfere with what the club members claimed was harassment through selective enforcement against them of laws unrelated to their sexual activities. Id. at 542–43.


Some long-standing criminal statutes against sexual misconduct have been objected to on account of gender discrimination. They tended to treat illicit intercourse as adultery if the woman was married, fornication if she was single—regardless of the marital status of the man.\(^1\) Also, under most statutes only a woman could be the victim of either forcible or statutory rape or of various kinds of sexual exploitation.\(^2\) Under many statutes, only a woman could be a prostitute.\(^3\) The distinction between fornication and adultery has been found unconstitutional by a court or two,\(^4\) but the other distinctions have generally been upheld.\(^5\) By now, though, most legislatures, including Congress, have overhauled all their statutes on these subjects and recast them in gender-neutral terms, whether or not they passed muster with the courts in their previous form.\(^6\)

Cases invalidating sodomy statutes have gone off on a mixture of privacy and equal protection grounds. To punish for deviate acts with someone of the same sex and not to punish for the same acts with someone of the opposite sex has been seen as a violation of strictures against discrimination on account of sexual orientation.\(^7\) To punish opposite sex couples also unless they are married to each other

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\(^1\) See Ploscowe, supra note 26, at 145–49.


\(^4\) E.g., Purvis v. State, 377 So. 2d 674, 681 (Fla. 1979).


has been seen as an impermissible discrimination against the unmarried.¹⁸⁹

A number of states have statutes forbidding discrimination on the basis of marital status.¹⁹⁰ I believe the original idea was to keep employers from favoring workers who would be more exploitable, because they had no family responsibilities to compete with their jobs.¹⁹¹ There may also have been concern with landlords of rooming houses who took a punitive attitude toward single mothers or who preferred not to have potentially growing families on their hands. Lately, such provisions have been invoked to claim that landlords must rent housing to cohabiting couples on the same terms as if they were married. Several States have rejected this claim, sometimes by close votes;¹⁹² others have accepted it.¹⁹³ In the latter jurisdictions there have been landlords who have sought to trump the statutory provision by claiming that their religion forbids them to facilitate non-marital sex. The courts have then had to determine whether the rights of cohabiting couples afford a compelling state interest to supersede the religious freedom of the landlords. The cases are in some disarray on the point.¹⁹⁴

¹⁹¹ See id. (indicating that airline hiring policy was the main cause of the legislation).
The courts’ discomfort with moral discernment in sexual matters causes a good deal of waffling and obfuscation in cases where someone’s character has to be taken into account. These include cases involving fitness for some job—usually teacher or police officer, occasionally judge—that calls for serving as a role model or upholding the dignity of the state; professional licensing or discipline cases; and cases involving custody or visitation rights of a parent. Some courts deciding such cases seem still to recognize that there are objective standards of sexual morality and that anyone with the responsibilities of a role model, fiduciary, or parent can be required to live up to them at least in public. More, though, seem to treat such standards as vague, subjective, idiosyncratic, or characteristic of only a few of the numerous lifestyles subsisting in our pluralist society. References to them can be given effect only by considering how they are received among those with whom a person works or associates. And even then, applying them may interfere with the constitutional freedom of all citizens—even schoolteachers, doctors, lawyers, and parents—to live as they please.

Against this ambiguous background, we can examine the role model cases, the professional discipline cases, and the child custody cases. The trend, if there is one, seems to be in the direction of gradually increasing permissiveness. More important, school boards, licensing authorities, and even disgruntled ex-spouses if they are not rich are reluctant to embark on proceedings that will probably go through several layers of appellate review with no guarantee of winning in the end. So a certain amount of conduct is probably reluc-


tantly tolerated or prudently ignored that might well be reached under the applicable law if anyone were determined enough to reach it.

The chief role model cases deal with teachers in public grade schools and high schools. The one thing that is quite clear about these teachers is that they will be subject to swift and undeniable dismissal, if they involve their students directly in their sexual adventures. A teacher can also get in trouble for discussing sensitive sexual topics with students, and the trouble will be a good deal more serious if his or her own private life is questionable. On the other hand, in most jurisdictions, private affairs that only accidentally come to the attention of the authorities cannot be made the basis for dismissing a teacher. Courts hold that the right of privacy precludes interfering with conduct that does not affect the ability to teach. The view that every teacher must teach chastity, and cannot teach it without practicing it, is still raised occasionally, but it is pretty much on the way out. What remains debatable is whether general opprobrium in the community can be regarded as impairing the ability to teach, or whether there must be a showing that actual students have lost respect for the teacher on account of the conduct in question or, worse, are in danger of following the teacher's example. Courts go both ways.

Some of the sexual irregularities of police officers involve actual abuse of their position, either by intimidation or by accepting sexual favors as bribes for overlooking unrelated offenses. In other cases,
Police cars are used for assignations, or apartment managers lend out rooms in the hope of favorable treatment on other occasions.\textsuperscript{206} Affairs within a department are often dealt with as disrupting morale,\textsuperscript{207} and, in one case, the very presence of a homosexual was treated as disruptive.\textsuperscript{208}

It is sometimes thought that the responsibility of the police for law enforcement calls for disciplinary action whenever an officer violates a law, even one as seldom enforced as that against adultery.\textsuperscript{209} Sometimes also, it is felt that an officer’s behavior, even if private and not subject to criminal prosecution, will interfere with the orderly operation of the police by undermining public confidence. As the Commonwealth Court of Pennsylvania put it, “[I]t is not difficult to foresee a certain amount of insecurity on the part of absent spouses when they consider that an officer with adulterous tendencies may be summoned in their absence.”\textsuperscript{210}

Even so, the right of privacy has prevailed in some cases. Federal district courts in Pennsylvania and Michigan have held that, in the absence of specific evidence of a bad effect on law enforcement in the community, the sex life of a police officer is of no legitimate interest to the employing agency.\textsuperscript{211} What seems to be a sharp split between the Commonwealth Court of Pennsylvania and the United States District Court for the Eastern District of that state has not yet been resolved.\textsuperscript{212}


\textsuperscript{209} E.g., Oliverson v. West Valley City, 875 F. Supp. 1465, 1483 (D. Utah 1995).


\textsuperscript{212} I have found no citation of \textit{Shuman,} 470 F. Supp. 449, by any Pennsylvania state court and only two citations of \textit{Faust,} 347 A.2d 765, or \textit{Fabio,} 414 A.2d 82, by federal courts, both on points unrelated to the merits.
There is some material suggesting that lawyers can be disciplined for sexual immorality as such, but most cases—indeed, all the cases I have found since the early 1980s—require some kind of impact on professional life. Thus, in 1979 the Supreme Court of Virginia held that a woman could not be excluded from the bar merely because she was cohabiting with a man to whom she was not married. And in 1981, the Supreme Court of Florida held explicitly that private, non-commercial sexual conduct between adults had no bearing on fitness to practice law and should not be inquired into by the bar examiners. Two dissenter argued that some private, noncommercial sexual conduct between adults was criminal and that all of it outside marriage was regarded as immoral by most of the people of the state. Someone who had not only violated applicable legal and moral standards in the past, but who intended to go on doing so was not fit to practice law. A few earlier courts had been persuaded by this reasoning, but no later ones were.

Practice-related conduct sometimes affects the dignity of the profession. There was a strange case in Iowa in 1979 where the prison officers reported a lawyer for heavy petting with a prisoner she had come to see. She was reprimanded, but the court indicated that, if she had not signed into the prison in her capacity as a lawyer, she would not have been subject to discipline.

Most cases involve either abuse of power (a lawyer demands sex from his client as part of his fee) or abuse of trust (the lawyer takes advantage of the emotionally shattered state of a divorce client).


215 In re N.R.S., 403 So. 2d 1315, 1317 (Fla. 1981).

216 See id. at 1317–19 (Boyd, J. and Alderman, J., dissenting).

217 Id. at 1317–19.

218 See Fla. Bar v. Kay, 232 So. 2d 378, 379 (Fla. 1970); In re Hicks, 20 P.2d 896, 897 (Okl. 1933); Moore v. Strickling, 33 S.E. 274, 278 (W. Va. 1899).

219 Comm. on Prof'l Ethics & Conduct v. Durham, 279 N.W.2d 280, 281 (Iowa 1979).

220 See id. at 284.


The rules of professional conduct generally deal with these cases only obliquely.223 Sometimes a lawyer who takes advantage of the emotional condition of the client is found to have violated Model Rule 1.8(b) by using confidential information to the disadvantage of the client.224 If the representation will be materially limited by the lawyer's interest in the sexual relation, it will violate Rule 1.7(b).225 In states where the sexual acts are still illegal, the lawyer may be disciplined for causing the client to violate the law (Rule 1.2(d)226). And in a divorce case where the adultery of a party may affect the outcome, the lawyer obviously violates the duty of diligent representation by encouraging the client to commit it.

It is clear from the cases that these rules, as most courts interpret them, will not do the job. Lawyers have emerged without either professional discipline or malpractice liability from situations where sexual relations left their clients devastated. Accordingly, there has been a good deal of agitation for more specific rules. On the whole, though, the bar has opted for privacy and freedom of association. Only a few states have adopted rules expressly addressing the subject, and some of those rules have so many qualifications and exceptions as to look more like invitations than restrictions.227 The Illinois legislature passed a resolution in 1991 asking the state Supreme Court to


224 MODEL RULES OF PROF'L CONDUCT R. 1.8(b) (1997); see Berg, 955 P.2d at 1256–57 (upholding the disbarment of a divorce attorney who engaged in a sexual relationship with an emotionally-abused client); In re Halverson, 998 P.2d 833, 840 (Wash. 2000) (holding that an attorney's failure to disclose the material implications of his sexual relationship with a client on the client's divorce violated Washington's Rules of Professional Conduct).

225 MODEL RULES OF PROF'L CONDUCT R. 1.7(b) (1997); see Halverson, 998 P.2d at 840.

226 MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (1997).

227 The rules are cited in Heard, 963 P.2d at 825 n.8. MINN. RULES OF PROF'L CONDUCT R. 1.8(k) (1997), OR. CODE OF PROF'L RESPONSIBILITY DR 5-110 (1998), and WIS. SUP. CT. R. 20: 1.8(k)(2) (1998) outlaw all sex with a current client unless the relationship predated the representation. CAL. RULES OF PROF'L CONDUCT R. 3-120 (1998), FLA. RULES OF PROF'L CONDUCT R. 4-8.4(i) (1998), and IOWA CODE OF PROF'L RESPONSIBILITY EC 5-25 (1998) limit the prohibition to cases where the relation is exploited or the power of the attorney is abused. N.Y. CODE OF PROF'L RESPONSIBILITY DR 1-102(A)(7) is limited to domestic relations cases. The Washington Supreme Court refused to adopt a rule like Oregon's. See Heard, 963 P.2d at 825. The Indiana Supreme Court has outlawed all sex with a current client. See In re Hawkins, 695 N.E.2d 109, 109–10 (Ind. 1998). The language of the Colorado Supreme Court in People v. Good, 893 P.2d 101, 109–05 (Colo. 1995), is almost as sweeping. Proposed
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adopt a rule. Instead, the court reopened the case of the woman whose grievance had prompted the legislative action. The lawyer involved had survived a grievance proceeding and a malpractice suit brought by that woman, and a RICO proceeding brought by another of his victims (the Seventh Circuit held that coercion of sex was not a deprivation of property). He was suspended for three years and until further order. The court said that he should have known better than to do what he did, but it made no change in the rules.

The rules governing other professions are, on the whole, less permissive. Consensual sex between a physician and a current patient is condemned by the American Medical Association, by statutes and administrative regulations in a number of states, and by the Hippocratic Oath. Other professions such as dentistry, psychology, and social work are similarly restricted, but we would have to go over the rules, the statutes, and the cases both state by state and profession by profession to get all the details right. Generally, the closer the sexual misconduct is to the professional service the practitioner is supposed to be rendering, the more scope the licensing authorities have for condemning it. It is easy to say that an optometrist who makes his female patients undress to have their eyes examined is acting unprofessionally within the meaning of a statute that punishes doing so. But I have found only one case that permitted treating physician-patient sex as unprofessional without some aggravating circumstance.

In 1991, the American Medical Association amended its ethical rules to make explicit the condemnation of any sexual relation between a physician and a current patient. Some state agencies have

rules and disciplinary opinions under non-specific rules are covered in Davis & Grimaldi, supra note 223, at 82–89.

228 Davis & Grimaldi, supra 223, at 65–68, 85–87.


230 Doe v. Roe, 958 F.2d 763, 768 (7th Cir. 1992).

231 In re Rinella, 677 N.E.2d 909, 916 (Ill. 1997).

232 See id. at 914.

233 See Davis & Grimaldi, supra note 223, at 59–62; Michael R. Flaherty, Annotation, Improper or Immoral Sexually Related Conduct Toward Patient as Ground for Disciplinary Action Against Physician, Dentist, or Other Licensed Healer, 59 A.L.R.4th 1104 (1988).


236 AMA Council on Ethical and Judicial Affairs, Sexual Misconduct in the Practice of Medicine, 266 JAMA 2741, 2745 (1991).
done the same.\textsuperscript{238} The general prohibition has, of course, raised questions of privacy and freedom of association. These questions have troubled some courts,\textsuperscript{239} although a writer in the \textit{Journal of the American Medical Association} has argued that the rule is not about who can be a lover but about who can be a patient.\textsuperscript{240} The typical court looks for some nexus between the professional and the sexual—as in the case of a dentist who developed an elaborate seduction ritual beginning with massages for the treatment of temporomandibular joint pain.\textsuperscript{241}

In the mental health professions, on the other hand, the complete prohibition has been generally accepted.\textsuperscript{242} \textit{Ex hypothesi} the mental health patient is in a state of emotional vulnerability that it would be unprofessional to exploit. The United States Court of Appeals for the Ninth Circuit elaborated upon this point in a Federal Tort Claims Act\textsuperscript{243} suit based on the negligence of a counselor employed by the government for the benefit of certain Indians.\textsuperscript{244} The court pointed to the phenomenon of "transference" by which the patient transfers to the counselor her feelings about her parents or other authority figures.\textsuperscript{245} The transference is apt to take an erotic

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\textsuperscript{238} See Flaherty, \textit{supra} note 234, at 1104.

\textsuperscript{239} Gromis \textit{v.} Med. Bd. of Cal., 10 Cal. Rptr. 2d 452, 456–57 (Ct. App. 1992) (holding that a statute forbidding "any act of sexual abuse, misconduct, or relations" in connection with a profession forbids doctor-patient sex only if it interferes with a professional relation; noting that it would raise a substantial constitutional problem if it went further (quoting C\textit{AL. BUS. \& PROF. CODE} § 726 (West 1990))).


\textsuperscript{241} Green \textit{v.} Bd. of Dental Exam’rs, 55 Cal. Rptr. 2d 140, 142 (Ct. App. 1996).

\textsuperscript{242} See Davis \& Grimaldi, \textit{supra} note 223, at 60; Flaherty, \textit{supra} note 234. \textit{But see} Colo. Bd. of Med. Exam’rs \textit{v.} Weller, 402 P.2d 606, 608–09 (Colo. 1965) (finding for a doctor because the charges against him failed to track the wording of the applicable statute). There is some question of who is a mental health professional for purposes of this principle. It has been held that a clergyman is. \textit{See} Destefano \textit{v.} Grabrian, 763 P.2d 275, 284 (Colo. 1988). But an Employee Assistance Professional has been held not to be. \textit{See} Reich \textit{v.} Price, 429 S.E.2d 373, 375 (N.C. Ct. App. 1993). Liability for this kind of misconduct has been held not to extend to the spouse of the patient. \textit{See} Homer \textit{v.} Long, 599 A.2d 1193, 1198–200 (Md. Ct. Spec. App. 1992); Strock \textit{v.} Pressnell, 527 N.E.2d 1235, 1242–43 (Ohio 1988).

\textsuperscript{243} 28 U.S.C. § 1346(b) (1994).

\textsuperscript{244} Simmons \textit{v.} United States, 805 F.2d 1363, 1371 (9th Cir. 1986).

\textsuperscript{245} Simmons, 805 F.2d at 1364–68; accord Wharton \textit{v.} Sobol, 580 N.Y.S.2d 554, 556 (App. Div. 1992). Transference was invoked unsuccessfully in \textit{Perkins v. Dean}, 570 So. 2d 1217, 1219 (Ala. 1990), where the offending professional was a social worker, and the sexual relation did not begin until the counseling relation was over.
turn, which a competent counselor should be able to deal with appropriately. The failure to do so is malpractice. In some states, it is also a felony. In Minnesota, for instance, sex in a counseling relation, or a former relation if continuing "emotional dependence" can be shown, is punished as criminal sexual conduct in the third degree, along with various forms of what other jurisdictions would call statutory rape.246

The effect of sexual misconduct on the custody and visitation rights of divorced parents remains in some doubt.247 In 1979, the Supreme Court of Illinois, in the famous case of Jarrett v. Jarrett,248 took children away from their mother and gave them to their father for no reason except that the mother was not married to the man she was living with and did not intend to be.249 The court alluded to a statute that made the mother's conduct criminal, but the main concern of the opinion was the danger to the morals of the children from their mother's bad example.250

Jarrett, whether you agree or disagree with the outcome, was a comparatively simple case. There seems to have been no objection to either of the alternative households except that the mother and the man living with her were not married to each other. A more complicated case is presented when both households are problematic. In another 1979 case, this one out of New Jersey, the mother was a lesbian in a stable, open but unobtrusive relation with another woman, and the father was a heterosexual of kinky tastes, married to a woman who left nude photographs of herself around the house.251 Faced with cases like this, the courts have generally held that neither sexual


248 400 N.E.2d 421 (Ill. 1979).

249 Id. at 425-26.

250 Id. at 424-25.

lifestyle nor any other single quality can be dispositive by itself in a child custody or visitation case. The Supreme Court of Illinois reinterpreted Jarrett along these lines only four years after deciding it. While most courts will not make sexual practices a per se disqualification, they will not usually allow either custody or visitation in an environment where those practices are obtrusively manifested to the children. Many courts seem especially concerned when the practices in question are homosexual. But it has been held that a court cannot rely on "the real or imagined social stigma attaching to Mother's status as a lesbian" in determining where to place a child. The opinion refers to Palmore v. Sidoti in which the Supreme Court held it was unconstitutional to base a custody decision on the social stigma attached to an interracial marriage.

The Supreme Court of Virginia has characterized both homosexual and heterosexual cohabitation as "immoral and illicit" and used the characterization as a reason for protecting children from exposure to it. "The father's continuous exposure of the child to his immoral and illicit relationship renders him an unfit and improper custodian as a matter of law." More often, though, the courts have studiously disclaimed any form of moral discernment in their decision-making:

It is not for this court to determine what is moral or immoral in this context. Nor do we do so. We merely recognize that in the mother's view the moral welfare of the children is possibly endangered if the trial judge's restriction is not upheld. We do not decide whether the mother's views are correct or incorrect but she has a rightful interest in the moral welfare of the children which is entitled to respect. Further it must be acknowledged that her views are not contrary to those of a substantial body of the community. We cannot say that her apprehension that the moral welfare of the children is threatened is arbitrary.

253 In re Thompson, 449 N.E.2d 88, 93 (Ill. 1983).
254 See generally sources cited supra note 247.
Or:

Our courts must serve a society comprised of groups that are widely disparate in cultural background and moral and religious outlook. The judges who must ultimately determine disputes over custody have the same disparities of outlook as the society they serve. Obviously the individual judge cannot hold up his own moral and religious views as the standard against which he determines the moral fitness of the proposed custodian, for different judges would make conflicting determinations, and "the judicial branch of government . . . would become a government of men and not of laws."260

In *Kelly v. Kelly*, another case out of New Jersey, the state that produced the first of the above quotations, a trial court provided for a counselor to explain to the children involved in a visitation dispute that their firmly Catholic mother and their cohabiting father, despite their divergent moral standards, were equally worthy of respect.261

Some courts give a constitutional dimension to their custody and visitation decisions.262 While the welfare of the children, if clearly enough shown to be at stake, trumps the associational rights of either parent, such courts require the showing to be strong and case-specific.263 A general disapproval of the lifestyle of one of the parents will not suffice. Lifestyles are constitutionally protected, and a person cannot be deprived of the society of his or her offspring simply for choosing one.264

In the *Kelly* case just referred to, a different constitutional question came up when the Catholic mother invoked religious freedom to keep her children from spending Saturday nights with their father and the woman he was living with.265 As might have been expected, this was a non-starter.266 The objection to calling for a counselor to indoctrinate the children in the equal acceptability of both parents' moral standards might have fared better, but it seems not to have been raised.

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262 See Boswell v. Boswell, 721 A.2d 662, 669 (Md. 1998) ("In accordance with the Supreme Court, Maryland has declared that a parent's interest in raising a child is a fundamental right that cannot be taken away unless clearly justified.").
263 See id. at 671 ("[I]n making its written findings, the court is not allowed to consider one factor, such as a parent's adultery or homosexuality, to the exclusion of all others.").
265 Kelly, 524 A.2d at 1332.
266 Id. at 1335–36.
The reluctance of so many courts to concern themselves with the morality of non-marital sex has had a good deal of impact on the legal significance of being or not being married. I have already referred to the cases on whether it is lawful to refuse to rent housing to unmarried couples.\footnote{267} There is also a batch of cases upholding arrangements made by such couples for the sharing of income or property, departing from the traditional doctrine that any contract is void if illicit sex constitutes any part of the consideration and that it will be presumed to be part of the consideration for any contract between illicit lovers.\footnote{268} Other cases have adopted a variety of conceptual expedients for adjusting the property rights of cohabitants fairly when they have made no contracts on the subject.\footnote{269}

But the courts have not been willing to bring back common-law marriage in the states (all but a few of them) where it has been abolished. Property distribution schemes that resemble divorce too closely have been repudiated by higher courts or by legislatures.\footnote{270} In a case tendentiously labeled \textit{In re Marriage of Cary},\footnote{271} one of the California Courts of Appeal argued that denying marital remedies to long-term cohabitants was punitive and therefore was no longer appropriate with the advent of no-fault divorce.\footnote{272} In the leading case of \textit{Marvin v. Marvin},\footnote{273} the state Supreme Court rejected this approach in favor of a contractual analysis.\footnote{274} When the Supreme Court of Minnesota adopted a flexible standard of fairness for dealing with former cohabitants,\footnote{275} the legislature adopted a statute limiting the courts to the enforcement of written contracts.\footnote{276} Provisions in a projected Quebec Civil Code that would have created a status of de facto marriage failed

\footnotesize{\textsuperscript{267} See supra notes 191–94 and accompanying text.}  
\footnotesize{\textsuperscript{269} E.g., Carlson v. Olson, 256 N.W.2d 249, 254–55 (Minn. 1977); Connell v. Francisco, 898 P.2d 831, 834 (Wash. 1995); see \textsc{Green} \& \textsc{Long}, supra note 57, at 195–210.}  
\footnotesize{\textsuperscript{270} See Minn. Stat. Ann. §§ 573.075–.076 (West 1980); Hewitt v. Hewitt, 394 N.E.2d 1204, 1210 (Ill. 1979).}  
\footnotesize{\textsuperscript{271} 109 Cal. Rptr. 862 (Ct. App. 1973).}  
\footnotesize{\textsuperscript{272} Id. at 865.}  
\footnotesize{\textsuperscript{273} 557 P.2d 106 (Cal. 1976).}  
\footnotesize{\textsuperscript{274} Id. at 116.}  
\footnotesize{\textsuperscript{275} Carlson v. Olson, 256 N.W.2d 249, 255 (Minn. 1977).}  
\footnotesize{\textsuperscript{276} Minn. Stat. Ann. §§ 573.075–.076 (West 1980).}
to get through the legislature. The couple of cases that allowed a cohabitant to recover for loss of consortium have been solidly repudiated by other courts that have considered the question. There are unemployment compensation cases in Massachusetts and California holding that an unmarried woman who leaves her job in order to follow the man with whom she is living when he moves has not necessarily quit "without good cause;" these too have not been generally followed. A justice in the Massachusetts case said that he was not willing to impose his "personal views on the rights of the parties and the development of the law." But the more usual view is that expressed by an Illinois court that consigned non-marital cohabitation to "a vast middle ground, . . . neither prohibited by the state nor protected against private disapprobation." The State, it said, adheres to a "dichotomous public policy on cohabitation, which is to respect 'purely private relationships' without debasing 'public morality.'"

Changing attitudes toward the difference between marital and nonmarital sex have tended to undermine the old rule that a man cannot be guilty of raping his own wife. Many States have now abolished it. If it was a common-law rule, the courts have said they could change it to go with the times. If it was a statutory rule, they have found it unconstitutional on equal protection grounds. Sir Matthew Hale, in the mid-seventeenth century, seriously obfuscated this particular subject by saying in support of the marital exception that the woman's consent, given at the time of the marriage, is irrevocable. This doctrine made it easy for the Supreme Court of New

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280 See MacGregor v. Unemployment Ins. Appeals Bd., 689 P.2d 453, 457–59 (Cal. 1984); Reep v. Comm'r of Dep't of Employment and Training, 593 N.E.2d 1297, 1299 (Cal. 1992). I have found only one citation to either of these cases outside its home state, and that was on a different matter and in a dissenting opinion.

281 Reep, 593 N.E.2d at 1301 (Liao, C.J., concurring).


283 Id.


286 1 HALE, supra note 53, at 629.
Jersey to wipe out the marital exception in 1981 by saying that if consent was irrevocable in Hale's time, it was no longer so since the advent of no-fault divorce. It has also made it easy for some feminist commentators, with a good deal of historical exaggeration, to attribute the exception to a general chattel status under which women labored in patriarchal times.

Hale's doctrine radically mistakes the nature of matrimonial consent—in our time, in his time, or whenever you please. That consent is to a continuing relationship of husband and wife. The right to sexual intercourse is a characteristic—indeed a defining characteristic—of the relationship, but the consent is to the relationship, not to any specific sexual act. The right created by that consent, the debitum conjugale of traditional marriage doctrine, imposes a serious obligation on either party to accede to any reasonable request of the other for intercourse. But the request has to be reasonable. Neither party is obliged to have sex at inopportune times or places or with a spouse who is drunk, unwashed, abusive, or unreasonably demanding.

Furthermore, even if the request is reasonable and the refusal unreasonable, it does not follow that a husband may use force to assert his right. The moralists advisedly refer to the situation as creating a "debt." If a man owes me five dollars and refuses to pay, I am still not allowed to throw him on the ground and shake the money out of his pockets. I will be guilty of assault and battery. So will the husband who forces himself on his wife, even if he cannot be guilty of rape.

To the extent that there is a legitimate basis for the marital exception in the laws against rape, it depends on a qualitative distinction between marital and non-marital intercourse, a distinction that subsists even when the marital intercourse is carried out through a battery upon the wife. Such a distinction seems to be adumbrated in Black-
stone's reference to the victim as "dishonour[ed]" or "debauch[ed]" by the rapist. Coke suggests a similar distinction in one place where he defines rape as unlawful carnal knowledge without consent (though in another place he uses a definition without that word). Perkins and other modern commentators rely on the word "unlawful" as the basis for the marital exception, but Hale's rationale still has a good deal of currency. The Supreme Judicial Court of Massachusetts in 1981 followed Perkins by holding that the legislature abolished the marital exception when it omitted the word "unlawful" from its new statutory definition of rape. The framers of the Model Penal Code retained the exception as based on a qualitative distinction, but they rested their distinction on psychological, rather than moral or legal, grounds. Accordingly, they extended the exception to any ongoing cohabitation, whether or not the parties were legally married. I believe their approach has been pretty well demolished by the judges and commentators who have pointed out that marriage and cohabitation are both relations of trust. Because of the breach of trust involved, carnal knowledge by force is worse, not better, than it would be under other circumstances.

So, if the exception is to stand, it must rest on a fundamental philosophical distinction between marital and non-marital sex. That distinction is real and important, but it does not really support the exception. The cases where the exception is invoked are usually

293 3 Edward Coke, Institutes of the Laws of England *60.
294 1 id. at *123–24.
295 See 1 Ronald A. Anderson, Wharton's Criminal Law and Procedure § 305 (1957); Rollin M. Perkins & Ronald M. Boyce, Criminal Law 202–03 (3d ed. 1982). Only Perkins and Boyce explain the meaning of "unlawful," saying that all non-marital intercourse is unlawful in the sense of disapproval by law, even if it is not criminal. See id. Clark and Marshall cite only Hale, although they do not use his rationale. Clark & Marshall, supra note 31, at 755.
298 Model Penal Code § 213.1 (1974). The commentary calls Hale's rationale "traditional"—which it is not—rejects it, then says that the use of the term "unlawful" begs the question—evidently on the theory that nothing can be unlawful unless a statute forbids it. Id. § 213.1, cmt. n.8(c). On rape of an unmarried cohabitant, see id. § 213.6(2) & cmt. n.3.
299 See Diana Russell, Rape in Marriage 269 (2d ed. 1990).
300 See id. at 191–95.
They can result in heavy sentences for battery, but such sentences often seem inadequate to the indignation the cases inspire. In any event, the erosion of the philosophical distinction has made it easier for both courts and legislatures to abolish the exception.

The distinction between children with parents married to each other and other children (who have been gradually upgraded terminologically from "bastards" to "illegitimate children" to "nonmarital children") was found constitutionally suspect in *Levy v. Louisiana* (1968), although later cases indicated that it was not to be entirely abandoned. *Stanley v. Illinois* (1972) established also that unwed fathers have a constitutional right not to be left entirely out of account. As we have seen, the old concept of *filius nullius* has long been abandoned as regards unwed mothers. The fact that there is no problem identifying the mother certainly played a part in the abandonment. There is now a technology available that can identify the father with almost the same accuracy. Still, the technology has to be invoked. Paternity, unlike maternity, is not immediately obvious to everyone present at the birth of the child. Accordingly, both statutes and cases have tended to make the father's rights depend on some manifestation of intention to become involved in the child's life. Some States require this manifestation to take the form of an official acknowledgment of some kind; others are content with actual participation in the rearing of the child.

According to a highly controversial Supreme Court decision, the rights of an unwed father may still be limited by the common-law presumption that a child conceived during a subsisting marriage is that of the mother's husband. Some States have modified the presumption in one way or another, although they are still free to retain it.

The most troubling of the unwed father cases is the one where the father does not learn of the child, because the mother does not tell him. He comes forward as soon as he finds out and wants to assert

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302 391 U.S. 68, 71 (1968); see also *In re Succession of Thompson*, 367 So. 2d 796, 798-800 (La. 1979) (holding a statute that excluded acknowledged illegitimate children from sharing succession with legitimate children to violate the state constitution).


307 See Weisberg & Appleton, *supra* note 303, at 533-34.
his right to be involved in the child's life. If he comes soon enough, he can often block or even set aside an adoption, with devastating effect on the adoptive parents, who have already bonded with the child. For my part, I think the cases give the father more rights than he deserves. If a man's relation with a sex partner is so tenuous that she can carry a child to term without his finding out, it would seem that his choice of non-involvement has already been made.

A line of cases beginning with King v. Smith (1968) has established that welfare benefits cannot be denied to a child for illegitimacy or to a parent for immorality. On the whole, this continues to be the law, despite recent statutory tightening of eligibility. Congress has adopted financial incentives for the States to reduce the percentage of illegitimate births among their inhabitants; how the States will go about earning the money has yet to be seen.

Prostitution remains illegal everywhere in the United States except for a few counties in Nevada. In 1972, two resourceful Georgetown Law School students persuaded a District of Columbia trial judge that the whole line of anti-prostitution laws was unconstitutional—the act protected by privacy, the solicitation by free speech. The decision was solidly reversed.
But the Mann Act has been a good deal attenuated. The old idea that one could violate the Act by introducing a woman into a morally subversive environment seems to have gotten no further play after the Calumet City cases referred to earlier.\(^{315}\) By the 1980s, the *Caminetti* rule that non-commercial illicit sex could be an "other immoral purpose" within the meaning of the Act was being treated as obsolete.\(^{316}\) In 1986, Congress amended the Act to put it into gender-inclusive form.\(^{317}\) It now prohibits transporting anybody interstate "to engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense."\(^{318}\) It would seem that as worded it now applies to transporting customers as well as to transporting prostitutes. I suppose its application to transportation for non-commercial sex in a state where fornication or adultery are still offenses will depend on the words "can be charged." Do they refer to the wording of the statute book or to the practice of police and prosecutors? As the federal authorities are not apt to take such a case to court, we will probably never find out. Note that prostitution is separately enumerated: recruiting outside Nevada for the legalized brothels of that state is still a violation.\(^{319}\)

The law concerning rape has developed ambiguously with a shift of emphasis from the chastity of the victim to her autonomy. Obviously, rape is an affront to the autonomy of the victim, her power to choose when, where, and with whom she will be intimate. Strictly speaking, it does not affect her chastity, because that is a moral virtue and can be affected only by something she does on purpose. But we can call rape an "affront" to chastity in that what it imposes by force would be unchaste if it were voluntarily accepted. It is, I believe, this understanding of the affront to chastity that is responsible for the marital exception, which I discussed earlier, and it is the increased focus on the affront to autonomy that has led to the abandonment of that exception.

Other consequences of the shift are more subtle and also more important. The most familiar one concerns the treatment of the victim’s sexual history in a rape trial. As I have already pointed out, the unchastity of the victim has never been a defense to a charge of rape.

\(^{315}\) *See supra* notes 92–93 and accompanying text.


\(^{319}\) *Id. ;* United States v. Pelton, 578 F.2d 701, 710–11 (8th Cir. 1978).
Bracton, Hale, and Blackstone are unanimous on the point.\textsuperscript{320} Judges and commentators were concerned not so much with a woman's right to pick her occasions for being unchaste as with her right, even at the last minute, to reform. In one case from North Carolina, decided in 1885, the victim had offered to accommodate the perpetrator for ten cents.\textsuperscript{321} The court, in convicting him for trying to have his way without paying, said "the law allows a 'locus penitentiae'."\textsuperscript{322}

On the other hand, the law was not quick to assume that the woman who needed a \textit{locus penitentiae} had in fact taken advantage of it. As an 1838 New York case (by no means the best reasoned, but for obvious reasons the most widely quoted) put it, "[W]ill you not more readily infer assent in the practised Messalina, in loose attire, than in the reserved and virtuous Lucretia?"\textsuperscript{323}

The court goes on to cite cases in which evidence had been received that the alleged victim was either a common prostitute or the mistress of the accused; by analogy, it justifies receiving evidence of other unchaste acts.

[T]here is not so much probability that a common prostitute or the prisoner's concubine would withhold her assent, as one less depraved; and may I not ask, does not the same probable distinction arise between one who has already submitted herself to the lewd embraces of another, and the coy and modest female, severely chaste and instinctively shuddering at the thought of impurity? Shall I be answered that both are under the protection of the law? That I admit, and so are the common prostitute and equally the concubine. If either have in truth been feloniously ravished, the punishment is the same, but the proof is quite different. It requires that stronger evidence be added to the oath of the prosecutrix, in one case than in the other. Shall I be answered that an isolated instance of criminal connection does not make a common prostitute? I answer, yes: it only makes a prostitute, and I admit introduces a circumstance into the case of less moment; but the question is not whether it be of more or less \textit{persuasive} force, it is one of \textit{competency}; in other words, whether it be of any force at all.\textsuperscript{324}

These sentiments seem to have been regarded as good law well into the 1970s. When the Federal Rules of Evidence were adopted in

\textsuperscript{320} 4 BLACKSTONE, supra note 292, at *213; 2 HENRY BRACTON, \textit{ON THE LAWS AND CUSTOMS OF ENGLAND} 415 (George E. Woodbine ed., Samuel E. Thorne trans., 1963);
1 HALE, supra note 53, at *633–34 n.10.
\textsuperscript{321} State v. Long, 93 N.C. 510, 511–12 (1885).
\textsuperscript{322} \textit{Id.} at 512.
\textsuperscript{323} People v. Abbot, 19 Wend. 192, 195 (N.Y. Sup. Ct. 1838).
\textsuperscript{324} \textit{Id.} at 196.
1975, they furnished an illustration for the provision of Rule 404(a)(2), admitting “[e]vidence of a pertinent trait of character of the victim of a crime offered by the accused or by the prosecution to rebut the same.”

With this kind of evidence available, a zealous and resourceful defense attorney could often turn a rape trial into a trial of the victim, and most thought it their duty to do so if they could. Here was an obvious grievance for the revived feminist movement of the 1970s to take in hand. By the end of the decade, “rape shield” laws restricting the use of the victim’s sexual history in a rape trial were in place almost everywhere. Rule 412 of the Federal Rules of Evidence, precluding the application to rape cases of the quoted language of Rule 404, was adopted a scant three years after that language was adopted with rape cases in mind.

The main rationale for the now discredited use of the victim’s unchastity as evidence of consent seems to have been a worry—almost paranoid in Wigmore’s case—about the danger of false accusations. Such accusations were evidently felt to be so prevalent and so hard to refute that no possibly exculpatory inference, however tenuous, should be ruled out. This reasoning gains some support from the old saw that it is better for ten thousand guilty men to go free than for one innocent man to be convicted. I am not sure that this principle can be accepted without qualification, nor am I sure that the typical man who avoids a rape charge by showing consent is quite what is envisaged by the term “innocent.” But the principle was conventional

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325 Fed. R. Evid. 404(a)(2).
326 See Berger, supra note 55, at 12.
328 The volume of U.S.C.A. containing these rules has the Advisory Committee’s reference to “consent in case of rape” in its Notes on Rule 404(a)(2) and an excerpt from the Congressional Record in its Note on Rule 412. See Fed. R. Evid. 404(a)(2), Advisory Committee Note; Fed. R. Evid. 412, Historical Note.
329 See 3A Wigmore, supra note 154, at 736.

The unchaste . . . mentality finds incidental but direct expression in the narration of imaginary sex incidents of which the narrator is the heroine or the victim. . . . The real victim, however, too often in such cases is the innocent man; for the respect and sympathy naturally felt by any tribunal for a wronged female helps to give easy credit to such a plausible tale. Id. For further examples of Wigmore’s view, see 1 id. at 1312–34, 1602–05, 1860; 3A id. at 736–47. Tillers is judicious in his explanation of Wigmore’s attitude. See John Henry Wigmore, Evidence in Trials at Common Law 1259–332 (Peter Tillers ed., 1985). Ploscowe is almost as worried as Wigmore about false accusations. See Ploscowe, supra note 26, at 187–94.
wisdom until the 1970s, and except in rape cases it is conventional wisdom still.

But there is another attitude, one less often articulated, behind this probing of the victim's morals. It is based on the severity of the punishment for rape. If you believe that the purpose of the law against rape is to protect the chastity of the victim, you may object to imposing twice the sentence that would be imposed for two black eyes and a broken arm when the victim seems not to value her chastity that high. Ploscowe puts it this way, referring to a date that turned into a rape, "Even if sufficient resistance to indicate lack of consent were present here, the enormity of sentencing this man to twenty-five years of imprisonment when the woman practically invited the incident by drinking with him in a lonely tourist cabin becomes clearly apparent."\[330\]

It is less apparent if your primary concern is with autonomy rather than chastity. Sexual autonomy has a profound place in a person's humanity, even if she fails to use it well. If Messalina chooses to be profligate, she is still entitled to choose with whom she will be profligate. She no more invites rape by drinking with a man in a tourist cabin than she invites theft by leaving her purse on the table while she drinks.

The emphasis on autonomy has also caused a shift in doctrine regarding the amount of resistance a woman has to put up in order to claim that what occurred was against her will. Despite nineteenth century romances and melodramas, a woman has never been expected to defend her honor at serious risk to her life. But courts generally looked for such resistance as the relative strength of the parties permitted, as well as prompt resort to any chance of escape that presented itself.\[331\] In the more recent cases, courts have tended to be content with any kind of objective manifestation that the woman did not wish this particular sexual encounter to take place.\[332\] The shift in attitude has often been taken up by legislatures redefining the crime of rape and sometimes renaming it (for example, "sexual battery")\[333\] as well. In one case it was held that the statutory crime would be committed whenever there was sexual penetration without some affirmative manifestation of consent.\[334\]

\[330\] Ploscowe, supra note 26, at 174.
\[331\] See id. at 169–74.
This development has been supported by a perception that rape is a crime like any other and that the conduct of the perpetrator, not that of the victim, should be the focus of inquiry. The woman's willingness to bestow her sexual favors should have neither more nor less significance in a rape case than the owner's willingness to give away the property would have in a larceny case. And the same kind of proof should be used in the one case as in the other. A woman does not have to fight tooth and nail against a purse snatcher to avoid the inference that he took her purse with her permission.

Shifting attention from the victim to the perpetrator has had one unfortunate consequence. It has led to the doctrine that an honest belief that the woman consents will absolve the man even if in fact she does not. This doctrine has been a substantial boon to men who believe either that they are irresistible to women or that only strumpets are out and about after midnight. Judging from the law reports, there are more such men than one might have supposed.

I have not been able to trace this doctrine any farther back than People v. Maybery (California, 1975)335 and Regina v. Morgan (England, 1976).336 Mayberry grabbed a woman walking by on the street—a complete stranger to him—dragged her to his apartment and had sex with her, beating her whenever she showed signs of resistance.337 The only evidence of consent on her part was that on the way to the apartment she let pass a couple of occasions when, if she had kept her wits about her, she might have escaped or been rescued.338 Mayberry asked for an instruction that the jury was to acquit him if he had a reasonable and genuine belief that she had consented.339 Because the trial court refused this instruction, his conviction was reversed.340 The House of Lords in Morgan held that the perpetrator's belief in the victim's consent need not even be reasonable to acquit him.341

The farthest I found any earlier cases going was to say that consent could be implied as well as express and that a woman might by her actions lead a reasonable man to think she was consenting even if she was not.342 But if a woman put up the quantum of resistance that the courts until recently required to establish rape, it would be very

335 542 P.2d 1337 (Cal. 1975).
337 Mayberry, 542 P.2d at 1340–41.
338 Id. at 1340–42.
339 Id. at 1344.
340 Id. at 1340, 1349.
342 Taylor v. State, 30 So. 2d 256, 260 (Ala. 1947); cf. Stringer v. State, 5 S.W.2d 526, 528 (Tex. Crim. App. 1928) (refusing to pass, on facts as favorable to the defen-
unlikely for anyone to suppose she was consenting. It was the re-
shaping of the requirement of resistance that made it possible for a
sufficiently egotistical male to mistake genuine nonconsent for mere
covyness or feigned reluctance.

The cases before Maybery and Morgan that passed on the effect of
real mistakes were those involving "statutory rape"—intercourse with a
girl too young to give a legally effective consent. It was almost uni-
versally held that a good faith belief that the girl was old enough would
not be a defense.343 Cases on the point begin with Regina v. Prince
(England, 1875)344 and include two California cases, People v. Ratz
(1896)345 and People v. Griffin (1897).346 The problem in such cases
was whether the accused had the requisite mens rea (guilty mind) to go
with the actus reus (criminal act). The defense view in mens rea cases is
that the accused will not be guilty unless the bad intent embraces
every element of the crime; hence, if he does not know that one of the
elements obtains, he cannot have the bad intent. But the courts in
these cases held that a person who does one bad thing intentionally
cannot complain if it turns out to be even worse than he supposed.347
Accordingly, the intention to commit fornication or adultery supplies
the necessary mens rea to convict a man of statutory rape. "He who
engages in such enterprises is committing a moral wrong, for which
there can be neither palliation nor excuse. The illegal motive is pre-
sent, and that illegal motive becomes a criminal intent when the facts,
at whose peril he acts, are shown to exist."348

In People v. Hernandez (1964),349 the Supreme Court of California
overruled Ratz and Griffin and held that a good faith belief that the
girl was old enough would be a defense in a statutory rape case be-
cause it showed absence of mens rea. "If he participates in a mutual act
of sexual intercourse, believing his partner to be beyond the age of
consent, with reasonable grounds for such belief, where is his criminal
intent?"350 The doctrine of the earlier cases, that the intent to com-
mmit fornication or adultery constitutes the mens rea, is not even
mentioned.

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343 See Ploscowe, supra note 26, at 184–85.
344 2 L.R.-C.C.R. 154 (Eng. 1875).
345 46 P. 915 (Cal. 1896).
346 49 P. 711 (Cal. 1897).
347 See, e.g., id. at 712.
348 Id.
350 Id. at 676.
Mayberry, in turn, is supported by Hernandez. In both cases, if the accused does not intend some other criminal or at least immoral act, he must intend every element of the crime for which he is on trial. If a growth in permissiveness has taken consensual sex out of the realm of legally recognized immorality, then the forcible rapist must intend to disregard his victim's lack of consent just as the statutory rapist must intend to disregard her lack of full age. One of the Law Lords in Morgan makes the point explicitly:

No doubt a rapist, who mistakenly believes that the woman is consenting to intercourse, must be behaving immorally, by committing fornication or adultery. But those forms of immoral conduct are not intended to be struck at by the law against rape; indeed, they are not now considered appropriate to be visited with penalties of the criminal law at all. There seems therefore to be no reason why they should affect the consequences of the mistaken belief.351

The Morgan defendants got no benefit from their trip to the House of Lords. The Lords decided that on the facts of the case a reasonable jury could not have acquitted the defendants even on the instruction that ought to have been given.352 But Mayberry's conviction was reversed, and he was not retried.353 The case is a severe miscarriage of justice. Courts have since mitigated its effect by holding that the "Mayberry instruction" need not be given unless there is some evidence of equivocal conduct by the victim.354 If she says he beat her up, and he says she was an eager participant, there is no place for an inference that he had an honest but mistaken belief that she consented. But there are still cases where the Mayberry doctrine lets people off who should be punished,355 and more where it complicates prosecutions that should be simple.356

352 Id. at 235.
353 See People v. Mayberry, 542 P.2d 1337, 1349 (Cal. 1975). I am indebted to William Baldwin of the Alameda County District Attorney's office for assembling this information for me. He adds that Mayberry was sentenced to from two to twelve years on the conviction of consensual oral sex that stood after the rape conviction was reversed. He was released in 1976. In the same year, CAL. PENAL CODE § 288a (West 1976), covering oral sex, was amended to eliminate punishment for acts between consenting adults. 1975 Cal. Stat. 134 (codified as amended in CAL. PENAL CODE § 288a (West 1976)).
355 See, e.g., People v. Giardino, 98 Cal. Rptr. 2d 315, 325–28 (Ct. App. 2000) (rape conviction reversed due to defendant's belief that the victim was not too intoxicated to consent).
356 See, e.g., Williams, 841 P.2d at 965–68.
The emphasis on autonomy has had an uncertain effect on women who exercise their autonomy in favor of being chaste. Traditionally, the law of evidence recognized a presumption that people behave both morally and legally.\footnote{357} It was therefore presumed in the absence of evidence to the contrary that a woman was chaste. So, in a rape case, unless the defendant introduced the issue of consent either in his own testimony or in his cross-examination of the victim, there was no need for the prosecution to present evidence of her chastity, and such evidence would generally be excluded as gratuitously provocative.\footnote{358} On the other hand, if the defendant claimed that the victim had consented to the encounter, it was open to the prosecution to refute the claim by showing that she was chaste.\footnote{359} The defendant, of course, could then rebut the refutation by showing that she was not.

The exact relation between presumptions and burden of proof in a criminal case is difficult to explain (or, indeed, to understand), but the general principle is that the presumption that the defendant is innocent trumps all others. Thus, when a trial judge, relying on the presumption of chastity, told the jury that a man accused of rape had to prove by a preponderance of the evidence that the complaining witness consented, he was reversed.\footnote{360} If a defendant wishes to show consent, the presumption of chastity may require him to bring forward evidence on the point, but once he does bring it forward, the prosecution must refute it beyond a reasonable doubt. To do so, they may bring forth evidence of chastity to strengthen the presumption, but they still have to prove this element of their case—lack of consent—like all the others, beyond a reasonable doubt.

The courts are in serious disagreement over the effect of the rape shield laws on an offer of evidence that the victim is chaste. These laws are generally worded to preclude evidence of past sexual conduct. One or two courts have pointed out that they say nothing about evidence of the lack of such conduct;\footnote{361} others regard this distinction as pettifogging.\footnote{362} Some courts find that neither past profligacy nor

\footnote{357} See, e.g., People v. Nieglos, 137 N.E. 400, 401 (Ill. 1922); People v. Stephens, 310 N.E.2d 824, 831 (Ill. App. Ct. 1974).
\footnote{358} See Nieglos, 137 N.E. at 402; Stephens, 310 N.E. 2d at 831–32.
\footnote{360} People v. O'Brien, 62 P. 297, 299–300 (Cal. 1900).
past continence is relevant to behavior on a particular occasion; on this rationale, they forbid evidence either way. Others find the evidence relevant but too inflammatory to be introduced; they are more apt to let chastity in while keeping unchastity out.

No one has made much of the difference in verbal nuances between one set of rules and another. A 1994 amendment to Rule 412 of the Federal Rules of Evidence added "sexual predisposition" to "sexual behavior" in its category of excluded evidence. If chastity is not a form of sexual behavior, is it a form of sexual predisposition? No one has yet raised the question in a reported case. Rule 404 precludes evidence of a trait of character "for the purpose of proving action in conformity therewith" subject to certain exceptions, one of which is "evidence of a pertinent trait of character of the victim of a crime, offered by the accused, or by the prosecution to rebut the same." This would seem to preclude evidence of the chastity of the victim unless the defense has already offered evidence of unchastity, which under Rule 412 it cannot generally do. Or is chastity a habit rather than a trait of character? If it is, it can be introduced under Rule 406.

Evidence that the victim was a virgin at the time of the encounter generally finds its way in by one route or another, although two courts have held it definitely inadmissible. Courts that let it in sometimes say that it involves a present condition, physical, psychological, or both, rather than a pattern of past conduct. In some cases also, the evidence comes in obliquely, through medical testimony regarding a recent rupture of the hymen or in reports of what the victim said in remonstrating with the defendant.

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363 See Jacobs, 634 F. Supp. at 937.
364 See Johnson, 671 P.2d at 1020; Stephens, 310 N.E.2d at 830–31; State v. Forrester, 440 N.E.2d 475, 479 (Ind. 1982).
365 Fed. R. Evid. 412.
366 Fed. R. Evid. 404.
367 Id.
It has been argued that there will not be a level playing field if the prosecution can introduce evidence that the victim is chaste, while the defense is barred by the rape shield law from introducing evidence that she is not. The defense in Michael Tyson's celebrated case filed a pretrial motion "to allow reference to D.W.'s alleged prior sexual conduct if the State referred to D.W.'s adherence to Christian principles, her lack of sexual experience, or her lack of receptiveness to sexual relations." This motion was denied. On appeal, Tyson claimed

that the State's examination of D.W., as well as its opening and closing arguments, left the jury with the impression that D.W. was a "sexual innocent whose religious beliefs prohibited any premarital sex and who was far too naive to understand the implications of going to Tyson's hotel room in the middle of the night"... and he should have been able to challenge this impression by cross-examining her about her sexual history.

The court was not persuaded.

Assuming the testimony has some probative value in aid of the theory that D.W. was not as sexually innocent as Tyson argues the State suggested, "the legislature has made the determination that evidence of prior sexual history, though arguably relevant... is not admissible except for three strictly limited purposes."

I believe it does stand to reason that the rape shield laws should not be interpreted symmetrically. The fact that certain kinds of behavior, whatever they are, are morally, psychologically, or even esthetically repugnant to a person would seem to be some evidence that she did not willingly engage in any of those kinds of behavior on a particular occasion. But the fact that she does not find a certain kind of behavior repugnant is no evidence at all that she did engage in it. So the rationale of the rape shield laws would seem not to preclude evidence that a complaining witness is chaste, is faithful to one lover, or

373 Johnson v. State, 246 S.E.2d 363, 365 (Ga. Ct. App. 1978), uses this reasoning to exclude evidence of the victim's chastity. Other cases or statutes create an exception to the rape shield law to allow the defense to refute evidence of chastity raised by the prosecution. See, e.g., Nev. Rev. Stat. Ann. 50.090 (Michie 1997); State v. Williams, 477 N.E.2d 221, 228 (Ohio Ct. App. 1984) (permitting testimony to refute the victim's testimony that she would not have consented to the male defendant because she was exclusively homosexual).


375 Id.

376 Id.

377 Id. at 290 n.15 (quoting Kelly v. State, 586 N.E.2d 927, 929 (Ind. Ct. App. 1992)).
believes in waiting until the third date. On the other hand, I have some trouble answering the argument made on Tyson's behalf that any evidence that can be legitimately introduced can be legitimately refuted. Perhaps the solution is to leave it up to the prosecution with the concurrence of the victim to decide whether or not to bring her sexual standards into evidence and, if the decision is in favor of bringing them in, to suspend the operation of the rape shield laws to the extent necessary to admit a fair refutation if there is one.

The growth of gender integration in the workplace has given rise to an almost entirely new field of legal concern—"sexual harassment." A computer search indicates that this term made its first appearance in the law reports in 1976. It applies to two different kinds of mistreatment. One, "quid pro quo" harassment, involves making promotion, other favorable working conditions, or even continued employment conditional on sexual favors. "Hostile environment" harassment occurs when either the treatment of the person complaining or the general level of social discourse is so obscenely, vulgarly, or obsessively sexual as to be a source of discomfort or justifiable offense. Both forms are now recognized as violating state and federal laws against gender discrimination. They can also give rise to tort actions for intentional infliction of emotional distress and, if the facts include an offensive touching, battery. In some but not all states, if quid pro quo harassment is carried to the point of firing the victim for noncompliance, there may also be a tort of wrongful discharge. If the victim is injured or made sick by the treatment, there may also be a workers' compensation claim. In some states, either that or the discrimination claim is apt to supersede the emotional distress


381 Id. at 40–47.


The tort claims are triable by jury; the others are not.

The nuances of these legal dispositions have given rise to a substantial literature which I have no wish to augment. What I will try to do instead is relate the whole subject to the other legal developments we have been considering. The important question in this regard is whether the problem the law is addressing was just as acute before the law started addressing it, or whether the legal restraints have been adopted to fill a gap left by social restraints that are no longer in place. It is a little hard to arrive at an answer, because the available historical material seems to peter out just at the beginning of the period we have to examine, then to start up again with a vengeance just at the end. Kerry Segrave's *The Sexual Harassment of Women in the Workplace, 1600 to 1993*, which appears to be exhaustive, has numerous instances of women industrial and clerical workers being harassed in the late nineteenth and early twentieth centuries. Also, the handful of women in professional and managerial positions at the time were evidently placed in embarrassing situations on occasion by male colleagues who resented their presence. For instance, a woman M.D., licensed in 1902, thought it was no coincidence that she was assigned to catheterize male patients her first day on the job in a hospital. But Segrave finds no instances of women of that class being subjected either to physical abuse or to demands for sexual favors, as working class women were.

From 1950 to 1970, Segrave comes up with nothing beyond a survey of 107 working women in 1963 in which some of them complained of “fresh men” and “wolves,” both terms too broad to support any particular conclusion. By the early seventies, the pace picks up again, and Segrave has ample evidence of every kind of harassment. By the time Catharine MacKinnon published the first law book on the subject in 1979, most kinds had found their way also into the courts. These cases appear to be continuing almost unabated, even

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386 Id. at 171.

387 Id. at 198.

388 See Segrave, supra note 385, at 198–215.

389 MacKinnon, supra note 378.
though by now they have cost some employers heavy damages and legal fees. They are much less class specific than the earlier examples. Intentional—even effortful, and sometimes ingenious—creation of an offensive environment; demanding sex on penalty of being fired, demoted, or given disagreeable jobs; rubbing, pawing, and indecent exposure are now complained of at every level of the working environment and at every level of the working population.

We cannot take the absence of complaints as evidence that none of this was going on in the fifties or sixties. Even with legal redress available, complaining is often futile and often leads to retaliation. This was even more the case in the earlier period Segrave takes up. So it cannot be inferred from nobody complaining that there was nothing to complain about. Even so, I cannot believe that the kinds of harassment that began appearing in the law reports during the seventies were going on beneath the surface to any great extent during the previous decades. I was out of college and working throughout the period, and I am confident that a man could not with impunity—or, indeed, without being considered out of his mind—have assumed without asking that a woman associate on a business trip would share a hotel room with him or have grabbed the breasts or buttocks of a woman fellow worker merely because she happened to be within reach. And a man who made a habit of firing competent secretaries because they would not go to bed with him would soon have found out how hard it was to succeed in business without a competent secretary.

I believe, therefore, that there has been an evolution. To shed some light on the form it has taken, let us compare the rationalizations, explanations, and excuses that were being offered for the harassment that Segrave found in the nineteenth and early twentieth centuries with the ones that have been current since the 1970s. In 1890 or 1920, women who were propositioned by employers or supervisors and said no were told that if they did not comply their jobs could be given to others who would. Women who complained of being grabbed or groped were disbelieved, were told that they must have provoked the treatment, or were told that keeping males at bay was a woman’s personal problem, of no concern to her employer. In 1980 or 1990, women who were propositioned and said no were

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390 Id. at 33–34, 73–74; cf. Post, supra note 9, at 555–58.
392 Segrave, supra note 385, at 61–66.
393 Id. at 112–13.
accused of prudery or were told that sexual intimacy is an essential component of a close business or professional relation between a man and a woman. Women who complained of being grabbed or groped were told that it was all harmless merriment and that they should lighten up.

My conclusion from this shift of rationales is that in the earlier period sexual harassment was generally supported by economic necessity, whereas more recently it has been supported by the marginalization of chastity. This conclusion would account for the hiatus in the evidence during the fifties and sixties. Economic necessity had been mitigated by legislation, by union activity, and by the general prosperity of the period. A woman who was mistreated in one job could more easily find another or leave the job market and stay home. At the same time, the marginalization of chastity, a product of the so-called sexual revolution of the sixties, had not yet fully penetrated the workplace.

To be sure, the gradual implementation of laws against gender discrimination, beginning with Title VII of the Civil Rights Act of 1964 has brought women into many previously all-male work environments, where their presence has been resented. Could not this resentment explain the growth in hostile environment harassment quite independent of any change in attitudes toward chastity? Perhaps, but I am inclined to think not. The patterns of harassment that appear in the literature and the law reports from the seventies on bear a definite resemblance to kinds of banter and horseplay that men in an earlier period sometimes engaged in among themselves, but were careful to avoid in mixed company. Would the introduction of women into the workplace have led men to abandon their mixed company manners so quickly if there had not been a general loosening of social restraints? And would there have been such a loosening if there had not been a general lessening of regard for chastity? These may be chicken-and-egg questions, and even if they are not, I know of no data that will help answer them. For what it is worth, though, from having lived through the period and watched the changes happening, I would answer no to both questions.

I think my perception of the situation is borne out by some of the same-sex harassment cases that have begun coming down. Some of

394  MacKinnon, supra note 378, at 51, 69–70.
395  Id. at 51–52; Segrave, supra note 385, at 115, 118, 154, 158; cf. Weinsheimer v. Rockwell Int’l Corp., 754 F. Supp. 1559, 1561 (M.D. Fla. 1990) (holding that the plaintiff’s participation in the prevailing vulgarity prevented recovery by showing an atmosphere not unwelcome).
these involve homosexual harassers who treat their own sex as heterosexual harassers treat the opposite sex: these cases are easy enough to deal with. But other cases involve heterosexual men who harass other heterosexual men whom they perceive as effeminate. In these cases, the perception of effeminacy appears to be based, at least in part, on the victim's distaste for the prevailing level of conversation and that distaste, in turn, to be based on at least a residual respect for chastity.

My conclusion, then, is that sexual harassment as we experience it today has gone hand in hand with a marginalization of chastity and that it is probably more an effect of that marginalization than a cause. A byproduct of the marginalization has been the absence from almost all the harassment cases of the traditional distinction between honorable and dishonorable intentions. I find only a couple of cases where the marital status of either the harasser or the victim is mentioned, and in one of those cases it is mentioned only in passing. In several cases where the courts found no actionable harassment, the behavior complained of would have been at least borderline acceptable as an incident of an honorable courtship—though less circumspect than an honorable courtship should be during working hours—but mortally insulting if either of the parties was already married. In one case—again the marital status of the parties was not men-

397 See, e.g., EEOC v. Walden Book Co., 885 F. Supp. 1100, 1103–04 (M.D. Tenn. 1995) (holding that it would be "untenable" to allow reverse discrimination claims but not same-sex harassment cases to proceed under Title VII). There have been some cases, however, going the other way. See Elizabeth Williams, Annotation, Same-sex Sexual Harassment Under Title VII of Civil Rights Act, 135 A.L.R. Fed. 307, 334–40 (1996 & Supp. 1999).


tioned—the behavior complained of was nothing more than a repeated request for dates. The idea of honorable intentions seems to have been totally foreign to the experience of the woman who was asked: "He didn't come out and tell me he wanted sex. You don't have to come out and say you want to have sex with somebody, if you want to take them out this is what it's going to lead to." That, I think, goes too far. The court thought so too.

Most sexual harassment cases are pursued under laws against gender discrimination. But conduct can be highly offensive without involving the express or implied threats required for quid pro quo harassment or the continuity and pervasiveness required for hostile environment harassment. And offensive conduct can occur outside the educational or employment relations to which the anti-discrimination laws apply. The gaps are partly filled in by snippets of criminal law together with two major principles of tort liability. But there are still cases of serious offense that the law does not reach.

The snippets of criminal law include provisions against battery, indecent exposure, and stalking. Details are different from one jurisdiction to the next. At common law, and under some statutes, any offensive touching is a battery, though under the Model Penal Code it is not punishable unless the victim is injured. If the battery is sexually motivated, it will be in most places an offense distinct both from common battery and from rape and its various extensions. But in some places, including my own state, Indiana, there must be force as well as sexual motivation; a person who leaves his hand on another person's body until he is made to remove it has used enough force to be guilty of this offense, but if he removes it immediately, he is guilty only of common battery.

Indecent exposure is an offense under the Model Penal Code if there is anyone present who will be alarmed or affronted; under Indiana law, it must be done in public. The Indiana law carries an exacting mental element: the actor cannot be convicted unless "he

402 Id.
403 See id. at 1055-56.
405 See MODEL PENAL CODE § 211 (1962).
408 See IND. CODE § 35-45-4-1 (1998).
knows his conduct is likely to cause affront or alarm." If he flatters himself, however foolishly, that the victim will relish the attention, he gets off. This requirement, like the mental element introduced into the rape laws by Mayberry and Morgan, gives too much scope to people who find themselves sexually irresistible and too little to people who opt for chastity. It allows a person to believe that everyone he encounters is open to the crudest of sexual advances until it is brought home to him with sledgehammer force that she is not. On the other hand, the law will be of some use against some harassers, for their very purpose is to affront or alarm their victim.

Anti-stalking laws have been enacted throughout the United States in the past decade or so. They are tailored to address a specific serious problem, and ordinary sexual harassment is not that problem. But if harassment is sufficiently repetitive, obsessive, and frightening, these statutes might usefully be invoked against it.

The major tort remedy, intentional infliction of emotional distress, has been developing gradually since it was first discerned by Judge Magruder in 1936. It was introduced into the Restatement of Torts in 1948, and now appears as section 46 of the Second Restatement. The development is probably attributable to overzealous bill collectors more than to sexual predators, with a few union organizers and practical jokers playing a part. It still has a long way to go before it will be fully effective against sexual harassers. It is very limited in the conduct it reaches. The Restatement is so qualified on the point as to be ludicrous: "Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." It appears that, at least in Arkansas, for a man to have a woman he has never met

409 Id.
410 Id. §§ 35-45-10-1 to 35-45-10-5 (1998); Laura Curliss, Note, From Imprudence to Crime: Anti-stalking Laws, 68 NOTRE DAME L. REV. 819, 824–25 (1993). In some cases, stalkers have been subjected to injunction and damages without specific statutory provision. See, e.g., Kramer v. Downey, 680 S.W.2d 524, 525 (Tex. App. 1984).
412 See RESTATEMENT (SECOND) OF TORTS § 46 Note to Institute (Tentative Draft No. 1 1957) ("In its original form, § 46 stated flatly that there was no liability for the intentional infliction of emotional distress . . . . In the 1948 Supplement this position was reversed.").
413 RESTATEMENT (SECOND) OF TORTS § 46 (1965).
414 Id.
come to his hotel room on a business pretext and there expose himself and request oral sex of her does not meet this standard.415 Also, the quantum of emotional distress a plaintiff must experience to establish this tort is set too high. Unless cold, spitting rage is a form of emotional distress, those who respond to sexual harassment as I would wish them to will not recover for this tort.

The other major source of potential tort liability is battery. It is certainly possible to commit sexual harassment without committing a battery, but most of the harassment cases in both the law reports and the literature include some kind of offensive touching. Any offensive touching of another person is a battery, and any sexual touching is considered offensive unless the person touched has given some indication that it will not be.416 Given the prevailing disarray of our social conventions, there may be borderline cases where offense is taken although none is intended. But the cases we read about are not borderline.417 Many involve repeated rubbings, pattings, and pawings where the distaste of the victim was made manifest the first time and increasingly manifest thereafter. Some involve the interruption of a purely professional conversation by a sudden passionate onslaught. Often things are done in public that even an acknowledged lover would be permitted only in private. Often also, the offense is intentional and made explicit in the words accompanying the acts; words and acts together are intended to express resentment of the presence of women in a previously all male environment.418

Since the offensive touch is always a tort and often a crime, without any of the added aggravation required for a sexual harassment

415 See Jones v. Clinton, 990 F. Supp. 657, 678 (E.D. Ark. 1998). But see Erwin v. Milligan, 67 S.W.2d 592, 594 (Ark. 1934) (stating that recovery is available for "indignity, humiliation or injury to the feelings" when "caused by willful or intentional conduct").


case under the civil rights laws, it seems odd that it is not proceeded
against more often. The best explanation I have found is what might
be called a shallow pocket doctrine. The perpetrator, unlike his em-
ployer,\footnote{The battery as such will not make the batterer's employer liable. \textit{See Paul}, 696 So. 2d at 1312; \textit{Brown}, 905 P.2d at 230; \textit{cf.} \textit{Wiper v. Downtown Dev. Corp. of Tucson}, 732 P.2d 200, 201, 203 (Ariz. 1987) (denying punitive damages against an employer whose liability is based on \textit{respondeat superior}).} is generally not good for the kind of money that would com-
pensate a lawyer for suing him on a contingent fee. By the same
token, the victim probably cannot afford to pay a lawyer money that
cannot be recovered by winning the case. On the other hand, the
victim probably earns too much money to be within the guidelines of
a typical legal aid office. There is still the possibility of a criminal pro-
ceeding, but here the case will be competing with murder, rape, rob-
bery, domestic violence, and drug distribution for the limited
resources provided by the taxpayers for prosecuting offenders. So any
lawyer looking for a new field for pro bono work might well consider
this one.

There are also remedies a victim can pursue effectively without
involving a lawyer. Usually, the local prosecutor will have a Complaint
Desk where a person harassed by the criminal behavior of a neighbor
or associate can have the harasser summoned and threatened with
prosecution if he does not desist. Also, every jurisdiction has a simpli-
fied small claims procedure by which a plaintiff with a little assistance
from the clerk of the court can present a tort case without a lawyer
and can recover a judgment for a modest sum covering both actual
and punitive damages. Even if this is not enough to pay for a lawyer's
time, it may be enough to spoil the perpetrator's plans for a vacation
or a new car. More importantly, it may be enough to stop him from
doing what he has been doing.

The evolution toward no-fault divorce, already begun in the ear-
lier period, was virtually complete by the end of the 1970s. In most
American jurisdictions, the traditional grounds were replaced or at
least supplemented by "irretrievable breakdown of the marriage," a
concept introduced by the British Parliament in 1969.\footnote{Divorce Reform Act, 1969, c. 55, § 1 (Eng.). On the different American laws, see \textit{Clark}, supra note 72, at 513–21 (2d ed., student ed. 1988), and \textit{Weisberg & Appleton}, supra note 303, at 564–90.} It was origi-
nally supposed that irretrievable breakdown would not be established
without serious and impartial investigation of the possibility of recon-
ciliation.\footnote{\textit{Clark}, supra note 72, at 513.} But a growing emphasis on autonomy, along with more
and more crowded dockets, has led most courts to infer the requisite
breakdown from the mere desire of either party no longer to be married. At this point, it is pretty well the case throughout the United States that anyone who wants a divorce can have one.

Accompanying this development has been a general movement, nearly complete by now, to abolish the two torts of alienation of affection and criminal conversation, which were supposed to protect marriages against outside interference. In most places, the abolition was by statute; in a few, the courts took the initiative, saying that a rule of the common law can always be changed when it is no longer useful. The rationale in either case was partly that the injuries complained of cannot be compensated with money and partly that a marriage relation that can be effectively destroyed by a third person is not worth preserving. The first point depends in a way on the second. If the relation were worth protecting, money damages for interference with it could be justified as a deterrent even if they were not an effective compensation. What it all comes down to, then, is that fidelity to one’s marriage vows is worthless if it is precarious. To say that is to put

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422 Id. at 411.
423 The first case to abolish the action for alienation of affection without statutory authority for doing so is Wyman v. Wallace, 615 P.2d 452, 453-54 (Wash. 1980). The opinion cites all the cases on the subject that were in force at the time and discusses at length the pros and cons of judicial abolition. On the rationale, see Fundermann v. Mickelson, 304 N.W.2d 790, 794 (Iowa 1981).

We do not abolish the action because defendants in such suits, need or deserve our protection. We certainly do not do so because of any changing views on promiscuous sexual conduct. It is merely and simply because the plaintiffs in such suits do not deserve to recover for loss of or injury to “property” which they do not, and cannot, own.

Id. The pace of abolition is indicated by a comparison of Clark, supra note 72, at 262-69, which devotes several pages to the subject, with the second edition of the same work, Clark, supra note 72 (2d ed., student ed. 1988), where the subject has disappeared virtually without a trace.

The cases are split on whether the abolition bars an injured spouse from recovering for intentional infliction of emotional distress. See DeStefano v. Grabrian, 763 P.2d 275, 282 (Colo. 1988) (not barred); Van Meter v. Van Meter, 328 N.W.2d 497, 498 (Iowa 1983) (same); Homer v. Long, 599 A.2d 1193, 1198-99 (Md. Ct. Spec. App. 1992) (same); Strock v. Pressnell, 527 N.E.2d 1235, 1242-43 (Ohio 1988) (barred); Alexander v. Inman, 825 S.W.2d 102, 105 (Tenn. Ct. App. 1991) (same). It has been held that the unique Alabama rule permitting a spouse to enjoin a third party from interfering with the marriage has survived the abolition of the tort liability of the third party. See Logan v. Davidson, 211 So. 2d 461, 461 (Ala. 1968). Most courts did not grant an injunction even when the tort liability was still in place. See, e.g., Snedaker v. King, 145 N.E. 15, 16 (Ohio 1924).

425 See, e.g., Fundermann, 304 N.W.2d at 791.
that virtue on a very different footing from other virtues such as hon-
esty, sobriety, diligence, and kindness.

IV. Social Developments

It should be apparent that what we have been looking at is some-
ting of a juridical shambles. I believe we have a good deal of a socie-
tal shambles to match. While it is not quite there yet, chastity is well
on the way to becoming a sectarian practice, something comparable
to the wearing of turbans by Sikhs or the refusal of Jehovah's Wit-
nesses to undergo blood transfusions. Most of us can no longer lead a
normal social life, or even a normal family life, without having to take
account of the irregular sexual relations of one or more friends or
relatives. Miss Manners, to whom I have already referred, devotes a
good deal of thought and space to the resulting conundrums. Ignor-
ing such relationships or expecting them to be kept clandestine is
hardly ever an option. They are getting more and more public recog-
nition, with "guests" appearing as an alternative to spouses in wedding
and dinner invitations, with "companions" included among survivors
listed in obituaries, and with single parents listed in birth announce-
ments as routinely as married ones.

Consider also how rarely our popular culture offers us a chaste
doctor, lawyer, business executive, police officer, or amateur sleuth to
identify with. A typical television series or work of paperback fiction
will every little while introduce or at least mention a completely super-
fluous sexual episode, evidently in order to humanize the character.
There are exceptions, but they tend to be secondary characters (Ser-
geant Lewis in the Morse series) or over sixty (Jessica Fletcher).

Many public school systems have been adopting sex education
programs. The ones most commonly in use are full of admonitions to
kid-glove handling of moral questions. Basically, they call on the
teacher to avoid pronouncing any moral judgment on different kinds
of sexual behavior. Parents in various places have litigated over

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426 This view of the social ambiance comes partly from personal observation, partly
from the law reports. Personal observation is necessarily limited and the law reports
are necessarily anecdotal. Neither can take the place of a good numerical survey like
the 1992 one referred to in supra note 4 or even of a bad one like Kinsey's, see supra
notes 3–4 and accompanying text. On the other hand, personal observation may give
a better indication of what is conspicuous in society, and the law reports may give a
better indication of what is contentious. Between them, they may give a better idea
than the numbers will of what it is like to live in this society.

427 See supra notes 18–20 and accompanying text.

428 See Laurent B. Frantz, Annotation, Validity of Sex Education Programs in Public
such plans, accusing them of violating religious convictions by presenting sex in a value-neutral form or violating parental rights by interfering with parents deciding for themselves how they want their children to learn about sex. These objections have generally been met by allowing parents to opt out. A companion objection that the program violates the Establishment Clause by inculcating secularism has not gotten anywhere in court. On the other hand, an abstinence-based program was dismantled by a court on the ground that parts of it were “factually inaccurate” (for example, “[t]eens with a low opinion of themselves are more likely than other teens to get involved in premarital sex”) or put forward “religious beliefs or subjective judgments” (for example, “[h]uman reproduction has a higher meaning than animal reproduction”). The federal Adolescent Family Life Act with its provisions for including religious organizations in its funding of private educational programs was saved by a 5-4 Supreme Court decision from suffering the same fate. Four justices believed, as did the lower court, that it is impossible for a religious organization to separate the furtherance of chastity from the furtherance of religion. The majority held that the separation was theoretically possible and that judicial intervention should wait for a case when it was not effectively done.

These cases tend to reinforce the sectarian image of chastity. If you believe in chastity, you can pull your child out of any program of sex education that offends your belief, but you cannot stop the program from being implemented. But if you believe that sexual standards are a matter of personal choice, you can work for a plan that accords with your belief and block the implementation of any plan that does not. A similar message is conveyed by the distribution of condoms in high schools: unsafe sex is to be strongly discouraged, but

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435 See id. at 625-52 (Blackmun, J., dissenting). Justice Blackmun was joined in dissent by Justices Brennan, Marshall, and Stevens. See id.
436 Id. at 600-01.
the decision between safe sex and no sex at all is up to you. Given the dangers of AIDS and other sexually transmitted diseases, a strong case can be made for the distribution of condoms despite the message, but steps could be taken to counteract the message. Generally, they are not taken. After a controversial decision was made to distribute condoms in the Lexington, Massachusetts high school, a group of parents sought to buy advertising space in the student newspaper and yearbook to advocate abstinence.\textsuperscript{437} Their advertisements were rejected by the student editors as too controversial.\textsuperscript{438}

The early advocates of birth control were generally content with making contraceptives available only to married people,\textsuperscript{439} and the first Supreme Court case establishing a right to contraception, \textit{Griswold v. Connecticut} (1965),\textsuperscript{440} relied on the sanctity of the marriage relation. But the next case on the subject, \textit{Eisenstadt v. Baird} (1972), held that single people have as much right to practice contraception as married people do.\textsuperscript{441} Since then, as far as I am aware, nobody has made any distinction between married and single people in the availability of contraceptives.

With the coming of Viagra, the principle of \textit{Eisenstadt} has been carried considerably beyond its rationale. There has been a great deal of debate about whether this expensive pill for the overcoming of male impotence should be covered under health insurance policies. Some have said yes and some have said no, but no one has yet said that it should be covered for married men and not for single men. The pros and cons are very different from what they were in \textit{Eisenstadt}. The lack of contraceptives interferes with sexual intercourse only by making it more dangerous. Justice Brennan's argument in \textit{Eisenstadt} was that although it is desirable to deter non-marital sex, the deterrent effect of the danger is outweighed by the harm to those who are not deterred. Compulsory pregnancy is not a suitable punishment for fornication.\textsuperscript{442} That is hard to disagree with. But lack of Viagra does not make intercourse more dangerous; it only makes it more difficult to

\textsuperscript{437} Yeo v. Town of Lexington, 131 F.3d 241, 242 (1st Cir. 1997).

\textsuperscript{438} \textit{Id.} at 244. A panel of the court, 2-1, had found a First Amendment violation. \textit{Id.} at 242-43. But the court en banc found no state action. \textit{Id.} at 243. \textit{But cf. AIDS Action Comm. v. Mass. Bay Transp. Auth.,} 42 F.3d 1, 11-12 (1st Cir. 1994) (holding that the transportation authority cannot reject condom advertisements).

\textsuperscript{439} See, for instance, the stated policy of the clinic involved in \textit{Commonwealth v. Gardner}, 15 N.E.2d 222, 223 (Mass. 1938).

\textsuperscript{440} 381 U.S. 479, 485-86 (1965).

\textsuperscript{441} 405 U.S. 438, 443 (1972).

\textsuperscript{442} \textit{Id.} at 448 (Brennan, J.); \textit{see also} Carey v. Population Servs. Int'l, 431 U.S. 678, 712, 716 (1977) (Stevens, J., concurring) ("It is as if the state decided to dramatize its disapproval of motorcycles by forbidding the use of safety helmets.").
accomplish. Brennan’s rationale does not give an unmarried man any ground for complaining about not being able to have sex. Between the contraceptive decisions and the Viagra non-decisions, we have shifted from treating chastity as a value outweighed by other values to treating it as no value at all.

The sectarian character of chastity has been underlined lately by the debate over federal funding for the arts. In 1989, the National Endowment for the Arts precipitated a major scandal with two of the projects it funded, one of them scabrous, the other blasphemous. A wide-ranging debate ensued, with Congress deciding in the end not to adopt specific content restrictions on funding by the Endowment, but merely to call for “taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public.”

A panel of the Ninth Circuit thought this standard was unconstitutional on its face; if the government is going to fund expression, it must do so without regard for content. The Supreme Court reversed, saying that the provision was not unconstitutional on its face, although it might be applied unconstitutionally. It sent the case back so the court could watch for unconstitutional applications.

I will not follow the vicissitudes of art funding any farther. What I want to note is the juxtaposition of decency and diversity in the language adopted by Congress. It is as if decency were one value among the many and diverse values held by different segments of our pluralistic society. And that seems indeed to be the attitude that prevailed in Congress. Dean John Garvey, in an exhaustive study of the legislative history of the language in question, puts it this way: “During the early 1980s moral traditionalists and religious conservatives touted

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443 The tests reported in the article on Viagra, 1999 Physician’s Desk Reference 2424, 2425, indicate that the groups of Viagra users were successful in from 48% to 70% of their attempts at intercourse as compared to 12% to 29% for the control groups.


446 See Finley v. Nat’l Endowment for the Arts, 100 F.3d 671, 681–83 (9th Cir. 1996), rev’d, 524 U.S. 569 (1998). No one seems to have pointed out that the artistic excellence called for by the statute is as much a content limitation as decency and that works lacking that quality have at least as much First Amendment protection as indecent works.


448 Id. at 590.

themselves as the Moral Majority. By 1989 they were willing to settle for recognition as a Moral Minority if that would give them the same political standing enjoyed by other minorities—particularly racial minorities.450 In other words, the sectarian label is not only pinned on the proponents of chastity by their adversaries; they have now come to the point of finding it politically advantageous to pin it on themselves.

The marginalization of chastity has been making over our social conventions and our social ambiance in a number of ways. One is that “solicitation of chastity”—that is, propositioning451—seems on the way to becoming almost respectable. It was only an ecclesiastical offense in the Middle Ages, and it has never been much of a tort. But unless it was unambiguously invited in some way, it used to be regarded in most places as an insult. I have no scientific evidence on the point, but I have a strong impression that this is no longer the case. I find from the law reports, the media, and various fragments of anecdotal evidence that Magruder’s dictum that “there is no harm in asking” has about completed its transformation from a principle of tort law to a principle of social deportment; that barring some aggravating circumstance such as obsessiveness, intimidation, or indecent exposure, the prevailing tendency these days is to treat sexual overtures, however unwelcome, as kindly meant; that chaste people tend to respond to such overtures not with rebukes or resentment, but with the vaguely apologetic air of a vegetarian turning down the offer of a steak.

As marriage ceases to be considered necessary for socially acceptable sexual relations, for open cohabitation, or even for having children, people begin to ask what continuing purpose the institution serves, or why anyone should want to be married. The November 2, 1998 issue of *Newsweek* predicts that by the time children born at the turn of the millennium are ready to start families of their own, marriage will be considered only one of the alternative arrangements available for doing so.452 This tells us more about what the editors of *Newsweek* think now than it does about what their children or grandchildren will think in the 2020s, but it is still interesting.

A common attitude is that marriage manifests a serious commitment, whereas cohabitation does not. As one person put it, living together is something you do and marriage is something you are. But in the long run, the institution will not play this role effectively unless

450 Id. at 198.
451 So called because it is a request to part with the thing solicited. See *State v. Render*, 210 N.W. 911, 911 (Iowa 1926).
the law supports it in doing so. It will be subject to an infirmity I call
Feinberg’s Paradox, because I first encountered it in a lecture by Joel
Feinberg (though he made no claim to have originated it).\footnote{Joel Feinberg, Autonomy, Sovereignty, and Privacy: Moral Ideals in the Constitution?, 58 Notre Dame L. Rev. 445, 464–83 (1983); cf. Chesterton, supra note 1, at 227 (“I could never conceive or tolerate any Utopia which did not leave to me the liberty for which I chiefly care, the liberty to bind myself.”).} It is
that if you are free to revoke an undertaking, you are not free to enter
into it irrevocably. Holding you to it or not holding you to it are both
dimensions of your freedom. In the case of marriage, I think the
freedom to make the commitment is more important than the free-
dom to go back on it, because I think serious love aspires to exchange
a permanent and unconditional gift.

Professor Karst, in an article I have already mentioned, offers an
effective statement of a contrary view that has a good deal of currency.
“[T]he value of commitment is fully realizable only in an atmosphere
of freedom to choose whether a particular association will be fleeting
or enduring.”\footnote{Karst, supra note 177, at 633.}

[T]he act of marrying . . . undoubtedly carries greater weight as an
announcement of commitment when the wife binds herself to a
marriage from which exit will be difficult. But from the wedding
day forward, there is a progressive decline in that act’s significance
for the associational value of commitment. What begins to matter
more for the husband is not that his wife was once ready to bind
herself to him by ties enforceable by the state, but that she remains
committed to him day by day—not because the law commands it
but because she chooses the commitment . . . . [O]nce the act of
marriage recedes into the past, the freedom to leave gives added
meaning to the decision to stay.\footnote{Id. at 637–38. Professor Karst and I, who are old friends, have had an interesting exchange of e-mails regarding my criticism of this passage. He was prepared—with some misgivings, I suspect—to recognize a continuing moral force in the original marital commitment. I found more inconsistency than he did between the freedom to leave and the moral—as opposed to the legal—obligation to stay. Also, I believe I attached more importance than he did to the role of law in firming up one’s adherence to one’s own moral judgments. We are both grateful to our wives that these questions continue to be of merely academic concern to us.}

The more I reflect on this passage, the more profoundly I disa-
gree with it. The husband Karst envisages is presumably kept on his
mettle by the constant possibility of his wife leaving him. He may have
the pleasure of congratulating himself when he gets through a day
without losing her, but I should think he would have to face each
ensuing day with a good deal of trepidation. I would expect him to
end up rather neurotic, like a child who thinks his parents will reject him if he misbehaves. Saint John teaches that love casts out fear. I believe that the converse is also true: fear casts out love. Lovers, like children, develop their character not by struggling to hold onto something that can be taken away at any time, but by struggling to respond worthily to an unconditional gift.

This is not a plea for the abolition of divorce laws. We in the Western world have been there and done that, and the bad consequences on the whole have outweighed the good. If a marriage becomes sufficiently burdensome, it is probably wise for the law of the state to leave it to the consciences of the parties, informed by whatever religion they profess, to decide whether they will continue to be bound by it. At the same time, the prospect of losing my wife if I beat her, space out on drugs, or take up with another woman does not inspire in me the same neurotic fear as would the prospect of losing her if I tell boring jokes, put on too much weight, or hog the remote. In the period with which I began this Article, it was certainly possible to get out of a seriously bad marriage. There was some talk about the laxity of the divorce laws in some states making marriage a less serious commitment than it ought to be. But there was no place where it could be terminated so easily as to be no commitment at all. Today, however, that is the case almost everywhere. Our divorce laws have made marriage practically terminable at will. Those who look to the legal institution to manifest a serious commitment simply ignore or disregard what the institution has in fact become.

A few States have responded to this situation by providing for "covenant marriage," an alternative and less easily terminable form for people who are really serious about it. As long as we have the kind of interstate mobility we do, this device probably will not work. Until there is a substantial change in our divorce laws nationwide, lovers who wish to commit themselves seriously to one another will have to look to religion or conscience to enforce the commitment, without any support from the law.

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456 1 John 4:18.
457 CLARK, supra note 72, at 517 (2d ed., student ed. 1988) ("[I]t is virtually impossible to imagine a case in which, if one spouse wishes a divorce, the divorce would be denied.").
459 See generally Katherine Shaw Spaht & Symeon C. Symeonides, Covenant Marriage and the Law of Conflicts Laws, 32 Creighton L. Rev. 1085, 1100 (1999). The authors seem to me to be overly sanguine as to the recognition of covenant marriage in other states.
Meanwhile, unmarried cohabitants are in the position of having to reinvent the wheel. Questions like whether one of them can buy groceries on the credit of the other, who gets the furniture if one of them dies, whether one can authorize emergency medical treatment for the other, and whether it is socially acceptable to invite one to a party without the other—all questions to which law or custom would supply clear answers if they were married—must be negotiated, or guessed at, or both. Efforts to deal with such questions by contract have been on the whole unsuccessful. If lovers are not yet ready to enter into a marriage, they are probably still less ready to work out a contractual arrangement that will cover the necessary ground and be fair to them both.

If marriage is no more than the acknowledgment of an ongoing sexual relation, and if sexual relations are more or less freely acknowledged whether ongoing or not, it is hard to find a good reason for treating relations between persons of the same sex differently from relations between man and woman. The claim of homosexuals to equal treatment for their long and short term relationships is therefore becoming more and more insistent. It has given rise to a good deal of academic debate, as well as a good deal of demotic resistance. The successful academic arguments on the subject, in my opinion, are those that oppose homosexual practices by relating the goodness of the sex act to its effect of establishing and supporting a personal bond that instantiates the metaphysical complementarity of male and female—a complementarity far more profound and pervasive than the obvious one between alternative forms of plumbing. I believe that the demotic resistance to the homosexual agenda is attributable not to mere bigotry, but to a residual intuition of the same complementarity and the same bond. Viewed in this light, ephemeral heterosexual encounters are wrong because they evade or suppress the bonding effect of the act, and all homosexual encounters are wrong because the requisite complementarity is lacking. To the extent that we countenance the one wrong, I believe we seriously undermine any claim we may have to discountenance the other.

The upbringing and support of children has suffered from the growing flexibility of the arrangements for bringing them into the world. It has always been fairly easy for fathers to run away from their

460 See supra notes 267–69 and accompanying text.
462 See Jean Guitton, Essai sur l’Amour Humain 105–12, 184–85, passim (1966); C.S. Lewis, The Four Loves 145–47 (1960); Hildebrand, supra note 24, at 34–45.
responsibilities, if they are minded to do so. It is therefore useful to discourage men from becoming fathers until they have given some indication of social responsibility. The distribution of condoms in high schools has on the whole not been adequate for the purpose.

There is also of course no lack of irresponsible mothers. There are a number of reasons why young women may wish to have babies even though they are not materially or psychologically prepared for the duties of parenthood. They do not become pregnant simply because they fail to use contraceptives or give birth simply because they fail to have abortions. There are in fact real problems for which pregnancy and childbirth provide a short-term solution.463 The ready availability of sex makes this solution easy to adopt; only later does the realization come that children can create more problems than they solve. In short, although the dismantling of social restraints on premarital, and even adolescent, sex could not by itself have produced a spate of irresponsible parenthood, it has certainly helped.

The effect of abortion on attitudes toward parental responsibility is hard to judge. There have naturally been anti-abortion advocates pointing out in connection with certain high profile cases that a woman who kills her newborn baby does nothing that a doctor with a pair of scissors could not have done with impunity a few moments before—but I have not found the women themselves using that for an excuse. And I should think a beleaguered mother abandoning a wailing two-year-old with diarrhea might wonder why the maxim “every child a wanted child” should become suddenly inoperative when the child is born—but I have found no case of a mother making that point either. On the other hand, fathers do use the availability of abortion as an excuse for not supporting unwanted children. In a number of support cases the father has argued that since the choice of having the child was exclusively the mother’s, she cannot legitimately ask him to pay for it: when he offers to pay for an abortion, he does all that she has any right to require.464 The courts give this argument pretty short shrift, but it keeps coming up.

In many ways, the legal protections against rape are better than they used to be. Most importantly, the rape shield laws have made it much more difficult for defense lawyers to “put the victim on trial.” The improvement is reinforced by a substantial change in attitude on


the part of police, prosecutors, judges, and legal scholars. Women have made their presence felt in all these roles, and many of their male colleagues have paid attention to their concerns. Attitudes like Ploscowe's and Wigmore's, discussed earlier on, would hardly achieve even marginal respectability today.

A couple of developments do tend in the opposite direction, though I believe that on the whole they are outweighed. One is the honest mistake defense introduced in the Mayberry and Morgan cases. The other is the widespread repeal of laws punishing consensual sex. These, as I have pointed out, had a significant role as a backup position for prosecutors in rape cases. Thus, after getting his rape conviction reversed on the honest mistake defense, Mayberry was sentenced to imprisonment for from two to twelve years for an act that ceased to be punishable two years after he started serving his sentence.465 State v. Saunders, the case in which the New Jersey Supreme Court struck down their anti-fornication statute, was a rape prosecution in which the State failed to prove lack of consent beyond a reasonable doubt.466 But for the decision, the defendants would have served six months in jail and would have probably been more circumspect sexually when they got out.

These negative legal developments are accentuated by social developments. The marginalization of chastity, together with the dismantling of the dating conventions, has made it possible to believe that people have consented to sex on the slightest of acquaintances and under the most bizarre of circumstances. This in turn makes it easy for the rapist or quasi-rapist to mistake the intentions of the victim and believe she has consented when she has not. It also encourages the jury to make the same mistake or at least to believe that the rapist did.

The situation is also apt to give rise to ambiguous encounters, where it is clear that the victim was overreached and the perpetrator an evil person, but it cannot be determined beyond a reasonable doubt that she did not, however reluctantly, consent.467 These are the

465 See supra note 353.


cases where it is appropriate to punish for fornication, adultery, or deviate sexual conduct and unfortunate that it is no longer possible to do so. It may be impossible to retain these punishments without placing more reliance than we should on prosecutorial discretion. But we pay a price for getting rid of them, and the lack of a way of reaching behavior closely akin to rape is part of that price.

We have seen that the legal restraints on sexual harassment, although far from complete, are a good deal better than they were in the past. They need to be, because the social restraints on the whole are a good deal worse. It has become possible in many places to say or do things that anyone decent would find offensive and then express—disingenuously perhaps, but still with a straight face—astonishment that offense has in fact been taken. So attenuated have our community standards become that people often have to express their wish to be treated with common decency as if it were a personal idiosyncrasy of their own; otherwise no one will pay serious attention to them, let alone afford them the protection of the law. But the literature is full of reasons why the victims of sexual harassment fail to speak up in this way, even to the perpetrators themselves. Until harassing behavior is condemned by the whole social milieu in which it takes place, there will be no adequate protection against it, no matter how good the laws are.

The response, both social and legal, to sexual harassment is unduly restricted by a perception of it as primarily an abuse of power. In many cases it is certainly that, but I believe it is only the prevailing marginalization of chastity that leads us to leave so many other cases out of account. The same kinds of behavior that can be an abuse of power where there is power to be abused can be in other situations an abuse of friendship, colleagueship, professional service, business, education, politics, or, indeed, any endeavor at all in which both sexes participate.

But I do not think it is either abuse or harassment that provides the core objection to sex between doctor and patient, lawyer and client, teacher and student, or members of the same military unit or space crew. Quite independently of anything that could be called abuse or harassment, relations within an enterprise demanding mutual respect and trust can be poisoned by the prospect of turning sexual. Within such an enterprise, even an honorable courtship must be pursued with more than common sensitivity and tact, if the common purpose is not to be undermined. Martin Buber makes an eloquent plea for the humanity of personal relations in the working world.

468 See MacKinnon, supra note 378, at 48–52; Segrave, supra note 385, at 216–24.
No factory and no office is so abandoned by creation that a creative glance could not fly up from one working-place to another, from desk to desk, a sober and brotherly glance which guarantees the reality of creation which is happening .... And nothing is so valuable a service of dialogue between one person and another as such an unsentimental and unreserved exchange of glances between two people in an alien place.469

Now that we have about made an end of the all male workplace, we need to insure that such an exchange will also be possible between a man and a woman. It will not be possible if it constantly threatens to end up in bed.

Whether the virtual dismantling of our obscenity laws has been good or bad for the arts is a debatable question. But for popular culture it has pretty clearly been bad. It has supported a kind of formulaic voyeurism that keeps appearing in the popular treatment of sex and that keeps being intruded on our attention. There is a modest but growing body of literature complaining about the situation. Feminists, led by Andrea Dworkin and Catharine MacKinnon, point out the tendency of the material to degrade women and to give male dominance an erotic status that strengthens its grip on society.470 A film critic, Michael Medved, has argued persuasively that sex is now being touted in the media as persistently as automobiles or toothpaste and probably more effectively.471 Rochelle Gurstein, in an elegant work of historical research and contemporary argument called The Repeal of Reticence, shows how the relentless public exposure of explicit sex impairs the development of sexual maturity by leaving no private space in which it can occur and by making the whole project mechanical.472

The arts community, supported by civil rights lawyers and other allies, generally responds to complaints of this kind not by defending

469 Buber, supra note 23, at 36–37. I have altered the translation to make it gender inclusive—as the original German “Zwischen Mensch und Mensch” is.


the popular culture, but by arguing that its excesses cannot be avoided without imposing unacceptable restraints on the honest literary and artistic treatment of sex.\textsuperscript{473} I will leave to one side the question of whether the price of such treatment is too high, but I submit that as long as we have judges capable of making distinctions that anyone can make who hopes to pass freshman English it should not have to be paid.\textsuperscript{474}

V. \textbf{THE ABDICATION OF LAW}

Chastity is not a moral virtue that can be safely relegated to the private sphere. The effective working of society depends on it in too many ways. Without it, the erotic is continually intruding into situations where it is destructive of friendship, of respect, of trust, of cooperation, and often of human dignity. Where chastity is marginalized, sex is trivialized. And the trivialization of sex is ultimately the trivialization of humanity.

But in the public sphere, chastity has generally proved to be a delicate virtue. Without strong support from society, it tends to languish—as I believe it does today. Unchastity, on the other hand, never lacks for a robust following prepared to occupy any public space that becomes available. A society, therefore, cannot be effectively neutral on the subject. Unless the practice of chastity is strongly supported, unchastity will come to possess the field.

Granted, legal support is not the only possible form of social support. But its deployment is more susceptible of deliberate control than is that of other supports. Also, we tend in many situations to take moral guidance from the law even when the law has no intention of giving it. As early as 1523, Christopher St. Germain pointed out:

Many unlearned persons believe that it is lawful for them to do with good conscience all things, which if they do them, they shall not be punished therefor by the law, though the law doth not warrant

\textsuperscript{473} \textit{E.g.}, \textsc{Herbert N. Foerstel, Banned in the USA: A Reference Guide to Book Censorship in Schools and Public Libraries} 72–90 (1994); \textsc{Celebrating Censored Books} (Nicholas J. Karolides & Lea Burris eds., 1985). \textsc{Medved, supra} note 471, at 320–22, points out also that obscenity prosecutions can be self-defeating by enhancing the public exposure of the person or work prosecuted.

\textsuperscript{474} \textit{But see} Amy M. Adler, \textit{Note, Post-Modern Art and the Death of Obscenity Law}, 99 \textsc{Yale L.J.} 1359, 1375–78 (1990). Adler argues that with the coming of post-modern critical theory the distinction between good and bad art is no longer viable and that obscenity law, being based on that distinction, must fall with it. \textit{See id.} Obviously, her version of the requirements of freshman English will be different from mine. I am not persuaded that post-modern theory is either as inexorable or as prevalent as she seems to suppose.
them to do that they do, but only, when it is done, doth not for
some reasonable consideration punish them that do it, but leaveth
it only to his conscience.475

There are a good many people—not all, alas, unlearned—who believe
the same today. Consequently, the attenuation of legal support as I
have been describing it has had a good deal to do with the marginal-
ization of chastity as we experience it today.

I think it is imperative, therefore, that we take steps to reverse this
attenuation and restore to chastity some of the legal support it had
until fairly recently. I shall conclude this Article with a tentative
agenda for the purpose. First, though, we need to look at the theoretical
basis for the attenuation. I have pointed to four major critiques of
the law as it stood in the fifties. Each of them was in some measure
legitimate, but I believe each has now been extended beyond its legitimate scope.

The first critique, the instrumentalist, is based on a very impor-
tant but seriously flawed perception that came to dominate American
legal thinking early in the twentieth century—a perception of the le-
gal enterprise as exclusively concerned with deploying the coercive
power of the State. Ploscowe was obviously right when he said that
clandestine sexual encounters between consenting adults would not
be much deterred by any coercive measures that we would tolerate
putting in place.476 Conventional wisdom reinforced the point with
platitudes about not legislating morality and with baneful examples,
especially the noble and failed experiment of Prohibition.

That law is generally meant to be coercively enforced, that the
possibilities of enforcement are not unlimited, and that threatening
enforcement without applying it can bring the law into disrepute are
all valuable insights that were not given a full systematic articulation
until relatively recent times. But they do not tell the whole story of
how law operates in society. Our law embodies the common reflec-
tion of our people on how we are to live together. In Justice Holmes’s
words: “The law is the witness and external deposit of our moral life.
Its history is the history of the moral development of the race.”477
People who are in the process of forming their consciences will not
fail to take it into account. And the unlearned persons to whom St.

475 Christopher St. Germain, Doctor and Student dial. I, c. 19 (Scholar Press
1970) (1531).
476 See Ploscowe, supra note 26, at 140.
477 Oliver Wendell Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 459 (1897); cf.
punishing adultery constitutional as an expression of public policy, even though viola-
tors are rarely prosecuted).
Germain refers will take account of its absence. Even by consenting adults, moral choices are not made in a vacuum. They are made in a welter of pressures and influences. If a carefully thought out set of legal mandates is not among them, there are plenty of others to fill in the gap—forces more powerful, less benevolent, and far less subject to control.

As for not legislating morality, it should be obvious to anyone that the immorality of a practice is neither a necessary nor a sufficient condition for passing a law against it and equally obvious that it is a relevant consideration in deciding whether to pass such a law. The old stricture, therefore, is either trivial or absurd, depending on how you interpret it. In fact, we legislate morality all the time, with a variety of possible effects. Even if we cannot abolish a given immoral practice, we can hinder it in a number of different ways and often do so.

Prohibition did not fail because it was an attempt to legislate morality. It failed because it was an attempt—and one of consummate ineptitude—to legislate a much more sweeping restraint than morality required. Drunkenness does seem to have been a serious problem, and one with a major moral dimension, in the period leading up to the adoption of Prohibition. The Prohibitionists attempted to solve it at the expense not only of those responsible for it, but also of all the people in the country who liked to take a glass or two without overdoing it. And to implement their solution, they never got beyond the crudest application of the criminal law. The example of Prohibition does not tell in any way against the use of law to support moral principles by the judicious deployment of education, incentives, and encouragement. Law is a more subtle instrument than the instrumentalist critique supposes.

The second critique, the libertarian, has been carried to the point of requiring moral neutrality on the part of the State and all its instrumentalities. I have referred to a number of examples from the law reports. This neutrality is very far from the original libertarian doctrine, as set forth in John Stuart Mill's *On Liberty*. While Mill is adamant in his insistence that self-regarding conduct must not be coerced or punished, he is entirely ready to have society take a stand on such conduct and deploy in aid of that stand whatever non-coercive resources it has available.

479 See supra note 132 and accompanying text.
I am the last person to undervalue the self-regarding virtues; they are only second in importance, if even second, to the social. It is equally the business of education to cultivate both. But even education works by conviction and persuasion as well as by compulsion, and it is by the former only that, when the period of education is past, the self-regarding virtues should be inculcated. Human beings owe to each other help to distinguish the better from the worse, and encouragement to choose the former and avoid the latter. They should be for ever stimulating each other to increased exercise of their higher faculties, and increased direction of their feelings and aims towards wise instead of foolish, elevating instead of degrading, objects and contemplations. . . . [I]n each person's own concerns, his individual spontaneity is entitled to free exercise. Considerations to aid his judgment, exhortations to strengthen his will, may be offered to him, even obtruded on him, by others, but he himself is the final judge.480

Hart, taking the libertarian side in his debate with Lord Devlin, qualifies Mill's doctrine further by admitting the possibility of a "paternalistic" use of coercive power—protecting people from themselves.481 Whether there is a difference between that and "enforcement of morality as such"482 raises questions of ethical theory that we need not deal with here.483 What is important to note is that neither of the two most powerful libertarian authors gives any basis for requiring society or the State to be neutral on questions of self-regarding morality or for saying that there is no moral mainstream of which the law can take account.

The third critique, based on freedom of expression, consistently overlooks the uniqueness of the erotic in the lives of individuals and communities. I quoted earlier an opinion by Justice Stewart of the Supreme Court to the effect that advocacy, even persuasive advocacy, of adultery is as fully protected by the First Amendment as advocacy of anything else.484 This is one of many manifestations of the common view that sex should be treated no differently from any of the other things that people may choose to talk about, write about, or present on stage or screen. This view has not yet commanded unqualified acceptance by a majority of the Supreme Court, but it has been gain-

480 Mill, supra note 132, at 76–77.
481 See Hart, supra note 142, at 30–34.
482 Id.
484 See supra text accompanying note 145.
ing ground steadily since Jerome Frank launched it in the Roth case in 1956.\textsuperscript{485}

The view, of course, is nonsense. Sex is unique among human experiences, and the response to material with sexual content is unique among human responses. We are sometimes told that sex is a normal bodily function like eating, but, as C.S. Lewis has pointed out, you cannot fill a theater by coming on stage with a roast in a covered dish and gradually lifting the cover.\textsuperscript{486} Because of its power to engage our attention, the erotic can easily become intrusive. It can undermine rational decision-making. It can displace more profound and more human emotions in those exposed to it. It can distort and trivialize the social ambiance. It constantly threatens to displace more serious concerns from public discourse and to drive more subtle effects and responses from the arts. To be sure, sex can no more be excluded from public discussion or from artistic expression than it can be excluded from life. But it cannot just be turned loose like any other form of discussion or expression to find its own level in society.

The final critique, the feminist, draws its major strength from outrage at the so-called double standard—the view that chastity can be seriously expected only of women. As we have seen, that view was reflected in the law until fairly recently and is probably reflected in its enforcement even today. Feminists—and anyone else who believes in treating women with respect—are quite right to give it no quarter.

Obviously, there are two possible ways to liquidate the double standard: we can set lower standards for women or we can set higher standards for men. A good many feminists seem to have chosen the former alternative. I follow a good moral tradition in choosing the latter.

Even from a purely feminist standpoint, I believe my choice is the right one. I suppose it would be theoretically possible for there to be a society where the trivialization of sex affected both sexes equally, but ours is not that society. I can think of a number of examples, but I will content myself with one. I was having dinner with a group of lawyers when the conversation turned, as many conversations were doing at the time, to President Clinton's troubles. One of the lawyers, an attractive woman in her mid-thirties who had spent the day lecturing to professional colleagues about estate planning, remarked that she was afraid that Monica Lewinsky's antics had seriously impaired the likelihood of women being taken seriously as professionals. I am confident that she was mistaken. But I am equally confident that no male lawyer

\textsuperscript{485} United States v. Roth, 237 F.2d 796, 801 (2d Cir. 1956) (Frank, J., concurring).
\textsuperscript{486} C.S. Lewis, Mere Christianity 89–90 (MacMillan Paperbacks ed. 1960).
would have thought for an instant that his professional standing
would be affected by another man's sexual activities, however
notorious.

In short, the feminist critique of the double standard is well
taken, but when it is extended to a critique of chastity as such, it goes
too far.

VI. A Legal Agenda

It is apparent that a wholesale suppression of sexual irregularities
through strict legislation strictly enforced is not going to happen, and
if it were to happen it would not be a good idea. As long as we see the
function of law in strictly coercive terms, the instrumentalist critique
as I have described it is irresistibly cogent. But we do not have to put
up with the systematic marginalization of an important moral virtue
simply because we cannot enforce it coercively upon the whole popu-
lation. Something we have learned from the Critical Legal Studies
movement (however we may feel about its other tenets) is that the
distinction between rule and exception is unstable both in law and in
society.\footnote{See Robert E. Rodes, Jr., Critical Legal Studies, 39 J.
488 See id. at 141–46.} It can be flipped back and forth by the making and application
of legal dispositions—flipped inadvertently if we do not pay atten-
tion to what we are doing, flipped on purpose if we do.\footnote{See id. at 141–46.} My claim,
based on the preceding pages, is that in the past couple of decades we
have inadvertently flipped over the distinction between chastity and
unchastity. What I want to do now is to flip it back. Not long ago,
chastity was the rule and unchastity the exception. The legal accom-
modations we have provided for the exception—mainly on account of
the four critiques I have described—have now made it the rule. This
is the situation I want to change.

What I propose requires several significant departures from the
jurisprudential commonplaces of the recent past. The first, of course,
is to extend the reach of law beyond that of its crudely coercive effect.
The second is to insist that whatever limits there may be on the coer-
cision of self-regarding conduct (and I believe those limits are generally
overrated), they do not go so far as to require the law to be neutral
concerning such conduct. I have made these two points already in
connection with discussion of the four critiques. Here I will add three
others.

One is that the right of privacy should extend only to things done
in private. This would seem obvious, but the obsessively revelatory at-

attitudes prevailing in many quarters have led a number of people to believe that whatever they may do in the closet they may proclaim on the housetops. The result is in many cases incongruous, in many cases intrusive. Some years ago, the Notre Dame campus was visited by a football team whose nickname is the same as the name of a well-known brand of condom. It is a custom among our students to paint various remarks on bed sheets and hang them out dormitory windows. On this occasion, as might have been expected, the enthusiasm of the students took a scabrous turn, and the Vice President in Charge of Student Affairs decided to use his pass key to enter student rooms and cut down some of the sheets. The student newspaper complained of this action as an invasion of the right of privacy of the students who had hung the bed sheets. Such distortions of the concept of privacy are not rare.

Next, we need to rethink the idea of conduct as speech. Here, as in other areas where the First Amendment is invoked against important legislative goals, the case law is in considerable disarray. My candidate for a simple doctrine that would cover everything involved in this Article is this: Conduct legitimately proscribed when it does not purport to convey a message is not constitutionally protected when it does, whereas conduct innocuous but for the message it conveys cannot be forbidden on account of that message. This would distinguish well enough, say, the nude dancing case from the flag burning case. I believe it has adequate albeit not overwhelming support in the case law.

Finally, we should go back to expecting moral discernment on the part of our judges. Edmond Cahn, in an interesting and lyrical book, *The Moral Decision*, argues persuasively that the faculty of distinguishing right from wrong, although it is a common human faculty, can be exercised well in a difficult case only after careful study and reflection. Good judges put in the necessary study and reflection and accept responsibility for the outcome. We cannot expect ordinary citizens, with no involvement in the case at hand, to do the same. Cahn, therefore, takes strenuous issue with Learned Hand’s doctrine.

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489 Paradoxically, the occasion for invoking the right of privacy to strike down Pennsylvania’s sodomy law was a stage performance. See Commonwealth v. Bonadio, 415 A.2d 47, 50–51 (Pa. 1980).


articulated in a number of cases including *Schmidt*, discussed above,\(^{492}\) that moral discernment when the law calls for it must be replaced by sociological discernment.\(^{493}\) The personal conscience of a wise, careful, and experienced judge will give us better moral decisions than a poll, even if we could take one. My claim, accordingly, is that within the range of discretion entrusted to them courts should encourage chastity not because it is popular or conventional (even if it is), but because it is right.

With these jurisprudential adjustments in place, we can look at particular provisions and proposed provisions of the law. We will begin with the criminal law. Making a particular kind of behavior criminal can have any of several different effects.

1. The prospect of being punished may deter the behavior in question on a simple pain-pleasure calculus. This effect, central to the instrumentalist view of law, is important but not exclusive, as I have tried to show.

2. The prohibition has educational and psychological effects. People may refrain from the behavior because they like to think of themselves as law-abiding citizens. People who refrain for some other reason feel vindicated and supported in doing so.

3. There are civil effects. In most cases, a person injured by a violation of the criminal law can sue the violator for a tort. An act denounced by the criminal law cannot be consideration for a contract. A place to which people resort for criminal behavior can be dealt with as a nuisance.

4. Other behavior, more objectionable and harder to reach, may depend on the forbidden act and be effectively prevented by its suppression. By forbidding the sale of alligator shoes and suitcases in the highly accessible fashion centers of New York, we can prevent the poaching of alligators in the remote and unreachable Everglades.\(^ {494}\)

With this range of purposes in mind, we can hope to point the way to a useful body of criminal legislation. There are only a few forms of sexual misbehavior that we can seriously expect to suppress by the rigor of the law. These include rape, incest, molestation of young children, some particularly gross sadomasochistic encounters, large-scale entrepreneurial prostitution, and some of the more intru-

\(^{492}\) See *supra* text accompanying notes 158–63.

\(^{493}\) *Cahn, supra* note 491, at 303–12.

sive forms of public indecency. Other kinds of behavior—sex with nearly mature adolescents ("statutory rape"), small-scale commercial vice, and the less egregious forms of indecency—can be discouraged, but probably not suppressed, by whatever laws we pass against them. By keeping such laws on the books and punishing violators when they come to our attention, we keep the behavior clandestine and prevent its becoming respectable. In this way, while we can probably not deter many people resolved to do one or another of the forbidden things, we can probably keep a good many other people from forming the same resolution.

For reasons I have already suggested, I would favor revising the standard of proof in rape cases where the defendant claims the victim consented. For one thing, I would not follow Maybeny and Morgan as to belief in consent. If an impartial jury believes beyond a reasonable doubt that a woman did not consent to a sex act, it would seem that there must have been something wrong with the man involved, if he believed otherwise. Also, even if we reject the old rationale that the intent to commit fornication or adultery is a sufficient mens rea to support a rape conviction, the sexual standards of a man who can be mistaken on the subject of consent are still not such as to entitle him to the highest protection of the law. In United States v. Balint, the Supreme Court, holding that a man could be convicted of selling narcotics without proof that he knew what they were, said:

Congress weighed the possible injustice of subjecting an innocent seller to a penalty against the evil of exposing innocent purchasers to danger from the drug, and concluded that the latter was the result preferably to be avoided. Doubtless considerations as to the opportunity of the seller to find out the fact and the difficulty of proof of knowledge contributed to this conclusion.\textsuperscript{495}

So here. A legislature might well weigh the possible injustice of subjecting an innocent lover to a penalty against the evil of exposing innocent women to the danger of being raped and conclude that the latter is the result preferably to be avoided. Doubtless considerations as to the opportunity of the lover to find out the fact and the difficulty of proof of knowledge might contribute to this conclusion.

I would also allow the prosecution, with the concurrence of the alleged victim, to decide whether to put her sexual standards into evidence. I have already discussed this point at some length and have shown why I believe there is no requirement of symmetry between prosecution and defense in this regard.\textsuperscript{496}

\textsuperscript{495} United States v. Balint, 258 U.S. 250, 254 (1922).
\textsuperscript{496} See supra notes 358–77 and accompanying text.
There are a number of sexual encounters described in the literature, and to some extent in the law reports, that might be regarded as "quasi-rape." The kind of force or coercion required for a rape conviction is absent, yet it seems that the victim has been betrayed, imposed upon, or overreached.497 There may be an abuse of power, authority, or trust or there may be a frightening environment or a frightening presence. Or the victim may be too drunk to think clearly, but sober enough to defeat a rape prosecution.498 Sexual predation under circumstances of this kind may be less serious than rape, but it still should not be possible to engage in it with impunity. I think that if I were a legislator I would borrow the concepts of duress and undue influence from the law of contracts for use in defining this intermediate crime.499 It seems reasonable that people should not be bound by consent to sex where they would not be bound by consent to a contract.

If there were such an offense as I have in mind, some forms of sexual harassment would be punishable as attempts to commit it. Other forms, as we have seen, would be punishable as batteries. These forms of criminal liability would both extend and supplement the tort remedies for harassment.

I would extend those remedies to make sexual harassment a tort in its own right and not merely an instance of gender discrimination, battery, stalking, or intentional infliction of emotional distress. Sexual solicitation under circumstances amounting to abuse of business or personal relations, or to duress, should be considered tortious even if unsuccessful, and even if the victim has too much firmness of mind to experience the kind of emotional distress envisaged by the Restatement.

In some of the situations I have in mind, it might be appropriate to cut some slack for honorable though inept advances, as long as they are not obsessive, coercive, or otherwise frightening. If someone

499 See RESTATEMENT (SECOND) OF CONTRACTS §§ 174–177 (1981). I think a contract signed under the circumstances that obtained in Evans, 379 N.Y.S.2d at 918–22, would be voidable under these rules. Similarly, I would like to think that a contract signed under the circumstances of Howard, 465 S.E.2d at 145–46, or Miller, 27 S.E.2d at 57–58, would be voidable under the RESTATEMENT (SECOND) OF CONTRACTS § 16, though that is a more doubtful proposition. Compare Lucy v. Zehmer, 84 S.E.2d 516, 522 (Va. 1954) (noting that despite some drinking by the parties, neither consumed enough to diminish his capacity to enter a contract), with Guidici v. Guidici, 41 P.2d 992, 994–36 (Cal. 1935) (upholding cancellation of a deed due to the drunkenness of the grantor).
thinks he has found a potential marriage partner among his business or professional associates, he should probably be allowed some scope for looking into the possibility. The good of encouraging people with common interests to marry each other will outweigh any harm that may befall whatever common enterprise they have in hand. But when a mere liaison is contemplated, the harm will be greater, and there will be no countervailing good to set against it.

I remain in some doubt as to whether the criminal law should address fully consensual sexual encounters between adults, in private, and involving no abuse of any business, professional, or personal relation. The reasons why it should not do so were set forth by Ploscowe in 1951 and are at least as cogent now as they were then. I have stated them in connection with the instrumentalist and libertarian critiques of the law as it then stood. But the reasons the other way are not negligible. I have alluded to them in my discussion of the overextension of the two critiques and of the different purposes of the criminal law. Generally, by condemning sexual irregularities, the law encourages people who are making up their minds to opt for chastity and makes the advisedly unchaste less in-your-face about it than they would otherwise be. It may also have important civil consequences, say, for the enforcement of contracts or the rental of housing.

Of course, these effects can be achieved well enough without actually punishing anybody for any of the acts in question. I have often thought that it might be advisable for a criminal code to include some acts, not all of them sexual, that would be officially disapproved and would carry the civil consequences of a crime, but that would not as such be subject to punishment. Of course, such a treatment of sexual misbehavior would not serve the purpose of providing the prosecution with a fallback position in rape cases. For that, there would have to be a significant—though not too severe—punishment. In other words, there would have to be a law purporting to punish fornication, adultery, and sodomy in every case, which law would only be invoked when the prosecutor believed that rape had occurred, but could not prove lack of consent beyond a reasonable doubt. The obvious objection to such an approach is that it would give too much discretion to prosecutors. I am skeptical of this objection. As long as

500 See Ploscowe, supra note 26, at 213, 281–82.
501 See supra notes 128–47 and accompanying text.
prosecutors are accountable to the electorate, they are unlikely to engage in a wholesale attack on illicit sex. Ploscowe, writing when these offenses were punishable in most states, said, "Both homosexuals and heterosexuals who observe reasonable discretion in their sexual activities and who leave minors alone have little to fear from the police or from prosecuting authorities."\footnote{Ploscowe, supra note 26, at 209; cf. Doe v. Duling, 782 F.2d 1202, 1205–09 (4th Cir. 1986) (stating that prosecution under a Virginia anti-cohabitation statute is so unlikely that action to have it declared unconstitutional on privacy grounds raises no case or controversy).}

People who fail to observe discretion raise other problems. Many of them could be covered under statutes punishing public indecency or something of the kind. Hart has pointed out that this is a quite different offense from sexual immorality.

Sexual intercourse between husband and wife is not immoral, but if it takes place in public it is an affront to public decency. Homosexual intercourse between consenting adults in private is immoral according to conventional morality, but not an affront to public decency, though it would be both if it took place in public.\footnote{Hart, supra note 142, at 45.}

But Hart's distinction can come unstuck if the parties to a private transaction go public about it, or at least about some of the incidentals. At what level of explicitness does description of sex acts past, present, or to come—with or without illustrations—achieve the offensiveness required by a statute against public indecency? And what is the relation between indecency and obscenity? Does one command the same First Amendment protection as the other? There is something to be said for finessing such questions as these by punishing the underlying act when it comes to public attention, rather than the further act of publicizing it.

I will end this discussion of the punishment of consensual sex with the case of \textit{Lovisi v. Slayton}.\footnote{363 F. Supp. 620 (E.D. Va. 1973), aff'd, 539 F.2d 349 (4th Cir. 1976).} Mr. and Mrs. Lovisi were convicted of sodomy on the basis of acts they had shared with a third person and recorded with an automatic camera.\footnote{See id. at 622.} Mrs. Lovisi's daughters, aged eleven and thirteen, found the photographs and took them to school.\footnote{See id. at 622–23.} But for the photographs, the Lovisis would not have been prosecuted.\footnote{See id. at 626–27.} But what they were prosecuted for was not having the pictures taken but actually doing the things pictured. Someone who had done the same things without pictures would have been just as
guilty but would not have been punished. This is a philosophically messy result, but on the whole, I am content with it.

Turning to the field of domestic relations, I am not persuaded that it is a good idea to adopt the two levels of marriage envisaged in those states that offer “covenant marriage” as an alternative. I have already mentioned the problem of how State A will respond to the two levels of marriage existing in State B. Even more serious to my mind is the problem of the effect the possibility of covenant marriage will have on people who opt for the less binding form. I have tried to imagine the discussion between two people trying to decide which form to adopt for their upcoming wedding, and I have not been able to do so.

I believe that a more promising way of reducing the number of divorces would be to take more seriously the concept of “irretrievable breakdown” that appears in the no-fault statutes. I would require the breakdown to be shown by the testimony of qualified professionals who have tried to effect a reconciliation. How many of the divorces now granted would be blocked by such a requirement I have no way of knowing. It would at least block an especially pathetic type of case in which someone resorts prematurely to the divorce mills and then becomes too deeply embedded in the process to get out.

I think the ambiguous status of unmarried cohabitants needs to be better addressed. Despite the examples we have looked at from the Minnesota legislature and the California Supreme Court, I do not think this is the place to follow Sir Henry Maine in moving the law from status to contract. The parties to an ongoing sexual relationship are not apt to think of making contracts about it, and they are not apt to have equal bargaining power. The one with inadequate bargaining power is of course the one most economically dependent on the relationship and the one with the most emotional investment in it. That one, as the feminists are not slow to point out, is apt to be the woman.

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509 See supra notes 458–59 and accompanying text.
510 Spaht, supra note 458, at 1575–77, indicates that religious bodies in Louisiana have adopted an attitude of benevolent dubiety toward that State’s covenant marriage law. Thus far, it appears that only a small minority of couples have opted for the covenant form where it is available.
511 California’s pioneer no-fault divorce law, adopted in 1969, was drafted with elaborate provisions for court ordered counseling which did not make it through the legislature. CAL. FAM. CODE §§ 2300–2452 (West 1994 & Supp. 2000); see Weisberg & Appleton, supra note 303, at 564–66.
But even if the relation is hard bargained between people with equal power and negotiating skills, there is something repugnant about making sex a part of a negotiated set of rights and duties, *quid pro quo, do ut des*. It is meant to be a sign of an open-ended unity. For those who live together without marrying, it is a flawed sign, but that does not make it into anything else.

So it is a sound instinct that makes us want to recognize the relation of cohabitants as more than merely contractual and more than merely illicit. To assign them no responsibility for one another or none but what they have bargained for seems a kind of jejune moralizing. Whatever the moral status of the original decision to live together, when cohabitants turn to the law, they need help, and help that they have generally not thought to bargain for.

As we have seen, this instinctive judgment is one the law has been slow to put into effect.\(^5\)\(^1\)\(^3\) Some courts have tried to make an equitable adjustment of property rights when a relation breaks up, but one of the courts that did so was overruled by the legislature.\(^5\)\(^1\)\(^4\) In a few jurisdictions, a cohabitant qualifies as a dependant under workers' compensation laws.\(^5\)\(^1\)\(^5\) In a few cases, moving to be with a cohabitant has been considered good cause for leaving work.\(^5\)\(^1\)\(^6\) In some places, a cohabitant who performs "services" other than sexual is entitled to recover for them.\(^5\)\(^1\)\(^7\)

A few courts and a number of writers have found these piecemeal recognitions inadequate and have advocated a broader exercise of equitable powers in adjusting relations between cohabitants or former cohabitants. Most of them have disclaimed any intent to bring back common-law marriage. From time to time, though, someone will suggest that the old institution should be updated and revived. Professor Cynthia Bowman of Northwestern has written what she calls a feminist proposal to that effect.\(^5\)\(^1\)\(^8\) Its genesis was evidently in the experience of a client in Northwestern's legal aid clinic who, after fifteen years of using a man's name, keeping house for him, and bearing him two

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5\(^1\)3  *See supra* notes 268–83 and accompanying text.
5\(^1\)4  *See supra* text accompanying notes 275–76.
5\(^1\)5  5 Larson & Larson, *supra* note 383, at 5. The leading case is still *Kendall v. Housing Authority*, 76 A.2d 767, 770 (Md. 1950).
5\(^1\)8  Cynthia Bowman, *A Feminist Proposal to Bring Back Common Law Marriage*, 75 Or. L. Rev. 709 (1996). In her article, Bowman cites a number of other articles arguing for revival. *See id.* at 712 n.7.
children, was ineligible for the modest remedies available to an abused wife, because she was not a wife.519

Common-law marriage might have solved the problem of Professor Bowman's client, but most cohabitants would not be helped by it. Common-law marriage is a direct descendent of the clandestine marriage of medieval times, which the Church disapproved, but did not invalidate until the Council of Trent.520 Since England had broken with medieval Catholicism before that Council, the clandestine marriage remained valid in England, where it was not abolished by statute until after the foundation of the American colonies with independent legal systems.521 The old doctrines underwent some modification in crossing the Atlantic, but they retained the essential element—an agreement by the parties to be husband and wife. In addition to such an agreement, some American courts required open cohabitation and a reputation of being a married couple, but without the original agreement neither cohabitation nor reputation would do.522 Couples, therefore, who enter (or in the more usual case, drift) into cohabitation without agreeing to be married will not be affected one way or the other by common-law marriage.

The medieval law offered two ways of marrying privately. One involved an exchange of consent "per verba de presenti"; the other, one "per verba de futuro cum copula."523 The first was an agreement to be married there and then; the second an agreement to be married at some future time, which agreement was followed by sexual intercourse between the parties.524 The fairly common case of a cohabiting couple who hold themselves out as "engaged" or as "fiancés" would presumably be covered by the second category. But there is serious debate over whether that category ever became a part of the common law in this country. The great Chancellor Kent said it did, but most of the courts that have passed on the question have disagreed.525

519 See id. at 709–10. The case was governed by Hewitt v. Hewitt, 394 N.E.2d 1204, 1205–08 (Ill. 1979), involving a claim to property rights.
520 T.A. Lacey & R.C. Mortimer, Marriage in Church and State 140 (1947).
521 See Ploscowe, supra note 26, at 17–24.
522 See Bowman, supra note 518, at 712–24.
524 See id.
525 See 2 James Kent, Commentaries on American Law *75–76. Holmes v. Holmes, 12 F. Cas. 405, 410–12 (D. Or. 1870) (No. 6638), discusses the question at some length and then finds that it is not raised by the facts. Chaves v. Chaves, 84 So. 672, 676–77 (Fla. 1920), and Peacock v. Peacock, 26 S.E.2d 608, 614–15 (Ga. 1943), reject the doctrine. Estate of Maher, 68 N.E. 159, 160 (Ill. 1903), accepts the doctrine, but
I think I would prefer the approach taken by the drafters of the proposed Civil Code for the Province of Quebec published in 1977. Their draft recognized a stable union of cohabitants as a de facto marriage and assigned a package of rights and duties to the parties. This approach is more broadly effective than the revival of common-law marriage would be, because most cohabitations do not meet the common-law conditions. It would give official recognition to the status of de facto husbands and wives and would give courts and legislatures the necessary flexibility to deal with them fairly. It would in a way create two levels of marriage, just as would the adoption of covenant marriage as an alternative to marriage with divorce on demand. But I think making the two levels consist of de jure and de facto marriage would be more in accord with prevailing attitudes on the subject than making them consist of covenant and non-covenant (whatever that would mean) marriage.

When the 1977 draft reached the Quebec legislature, the provisions for de facto marriage were taken out—evidently to respect the freedom of people who chose to live together without being married. Most of the memoranda submitted [to the legislature] asked the legislators to respect this will of unmarried couples to distinguish their choice of lifestyle with respect to marriage. So it seemed opportune not to intervene in this freely chosen way of life; accordingly, there is no occasion to institutionalize it or to regulate it.

This consideration does not appear to have been among those brought before the Civil Code Revision Office when the draft was in the works. It is akin to a policy of “supportive neutrality” that Professor David Chambers of the University of Michigan Law School was

qualifies it pretty well out of existence by holding that the copula must be regarded by the parties as a consummation of the projected marriage.


527 See Claire L’Heureux-Dubé, The Quebec Experience: Codification of Family Law, and a Proposal for the Creation of a Family Court System, 44 LA. L. REV. 1575, 1589–90 n.43 (1984) (my translation). The status has nevertheless been institutionalized and regulated in a number of ways. See Gouvernement du Québec, Ministère de Justice, L’Union de Fait (n.d.). But the parties are referred to as “conjoints”—not “époux”—“de fait.” Here and elsewhere, I am grateful to Professor Nicholas Kasirer of the Faculty of Law of McGill University for help in finding and evaluating the Quebec material.
Generally, the idea is that if you impose responsibilities on people that they have not agreed to, you interfere with their freedom to decide what responsibilities, if any, they will have. This is true enough, but it was equally true a century ago when it was brought forward to attack government interference with the employment relation. And it is as perniciously irrelevant now as it was then. Far more than an employment relation, a sexual relation creates bonds that may not be anticipated or chosen, but that the law must take into account or somebody will get hurt.

My theory is that the recognition of de facto marriage will tend to support chastity by assimilating the relationship to a chaste counterpart. It avoids validating the option for unchastity. Evidently the Quebec legislature rejected it, because they wished to validate that option. But it also avoids leaving the often unfortunate consequences of that option to go unchecked in society and in the lives of individuals.

Long term sexual relations between people of the same sex may also have unfortunate consequences. Here, we cannot solve the problem by recognizing a de facto marriage, because there is no de jure marriage to which the relation can be assimilated. I have already expressed briefly my reasons for not accepting same sex marriage. They are metaphysical, and this is not the place for an extended metaphysical discussion, so I will not elaborate on them. They require me to look elsewhere for a way to deal with the problems of homosexual cohabitants.

I suggest that the chaste counterpart in this case is the living together of people whose relation is not sexual. All manner of households and extended families would qualify. There is no lack of legislative, administrative, and judicial material defining such relations for purposes of zoning, insurance, food stamps, and rent control. With this material in hand, it should be easy enough to develop a scheme that would give suitable protection and recognition to people who pool their resources and living arrangements, without taking their sexual practices into account. For instance, the New

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529 See supra text accompanying note 462.
530 See ELLMAN ET AL., supra note 308, at 20–40. The term “household” played an important part in the standard automobile liability policy until fairly recently, when it gave way to “family.” See ROBERT C. KEETON & ALAN L. WIDISS, INSURANCE LAW: A GUIDE TO FUNDAMENTAL PRINCIPLES, LEGAL DOCTRINES, AND COMMERCIAL PRACTICES 1117, 1121 (1988).
531 This approach resolved the dispute between the Catholic Archdiocese of San Francisco and the city government over the requirement of S.F. ADMIN. CODE § 12B.1
York law on public housing has an elaborate set of criteria for determining who is a member of the tenant's family, adding that "in no event [will] evidence of a sexual relationship between such persons be required or considered."\(^{532}\)

The "domestic partnership" ordinances adopted in a number of municipalities do more than adjust the relation between cohabitants; they are more or less explicitly calculated to validate the sexual aspect of such relations. The pioneer ordinance, San Francisco's, is very clear on the point: "The purpose of this ordinance is to create a way to recognize intimate committed relationships, including those of lesbians and gay men who otherwise are denied the right to identify the partners with whom they share their lives."\(^{533}\) Others are less definite; the District of Columbia, for instance, is content with a "caring" relationship.\(^{534}\) But all such laws assimilate the partnership to a marriage by providing that no one can have more than one domestic partner at a time and that no married person can be a domestic partner.\(^{535}\) It is here that I part company with proponents of this kind of legislation,

(2000) that bodies contracting with the city extend the same health insurance benefits to domestic partners of their employees as to spouses. Millions of dollars of funding for the charitable activities of the local church would be jeopardized by noncompliance. An agreement was reached to work toward implementing a provision to allow an employee to "designate a legally domiciled member of the employee's household as being eligible for spousal equivalent benefits." \(^{26}\) \(\text{Ootn's 570 (1997).}\)

The municipal authorities agreed that the proposal "not only meets but also exceeds the requirements of the ordinance," while the archbishop expressed his satisfaction that an agreement in principle was reached with city officials which will allow archdiocesan agencies and other Catholic institutions to expand benefits more broadly in accord with the goals of Catholic social teachings, while at the same time, ensuring that church agencies are not required to compromise our Catholic teachings on the unique importance of marriage and family.

\(^{532}\) \text{N.Y. Pub. Hous. Law § 14(4)(c)(i) (McKinney 2000).}\n\(^{533}\) \text{S.F. Admin. Code § 62.1 (1990).}\n\(^{534}\) \text{See D.C. Code Ann. § 36-1401(1) (1992).}\n\(^{535}\) \text{The Hawaii Reciprocal Beneficiaries Act, Haw. Rev. Stat. § 572C (Supp. 1997), adopted in response to Bahr v. Lewin, 852 P.2d 44 (Haw. 1993), provides many (but not all) of the benefits of marriage to people who register as "reciprocal beneficiaries." To be eligible, they must be single and must be forbidden by law to marry each other. The preamble refers to family members such as brother and sister or mother and son, as well as to people of the same sex. See generally W. Brian Burnette, Note, "Hawaii's Reciprocal Beneficiaries Act: An Effective Step in Resolving the Controversy Surrounding Same-sex Marriage," 37 Brandeis L.J. 81 (1998). The Supreme Court of Vermont, while refusing to impose a constitutional requirement of same sex marriage, required the incidental benefits of marriage to be made available to same sex couples, staying its mandate so the legislature could enact suitable legislation. See}
for it is here that they go beyond protecting the parties to the un-
chaste relationship and seek to validate the relationship itself.536

Besides spouses and cohabitants, we have one additional status
concern: children born out of wedlock. The tendency today, as we
have seen, is to give them about the same rights as their lawfully begot-
ten siblings.537 It is hard to disagree with the arguments for doing so.
Children are obviously not to blame for the immorality of their par-
ents. There is, to be sure, some evidence that allowing fathers to
avoid responsibility for their illegitimate children has a tendency to
deter women from conceiving such children—or did before our pre-
sent welfare laws were in place.538 But to make children bear the bur-
den of preventing the birth of other children seems morally
unacceptable.

But there is no reason why the rights of the child should be sym-
metrical with those of the father. While we should not allow a man to
escape responsibility for begetting a child out of wedlock, it seems
quite in order to say he cannot acquire rights by doing so. I would
make rights depend on actual involvement in the life of the child.
And I think I would make his right to take on such involvement de-


Canada may be moving in the same direction. The Supreme Court of Canada
has held that the Charter of Rights and Freedoms requires extending the same bene-
fits to same sex cohabitants as to unmarried cohabitants of opposite sexesa. Attorney
President of the Law Commission of Canada, has suggested looking into extending
the same benefits to non-sexual relationships as well. See Roderick A. Macdonald, Per-
spectives on Personal Relationships, Address at the Conference on Domestic Part-
nerships at Queen’s University, Law Commission of Canada, at http://www.lcc.gc.ca/en/
pc/speeches/s211099.html (Oct. 21, 1999). But an extensive research paper indi-
cates that such relationships should be protected only in case of actual dependency of
one person on the other. See Martha Bailey, Marriage and Marriage-like Relations-
(last visited Dec. 1, 2000). Meanwhile, Quebec has extended the status of “conjoints
de fait” to same sex couples. The extension was by unanimous vote in the legislature
and was celebrated in GOUVERNEMENT DU QUÉBEC MINISTÈRE DE JUSTICE, LE SÈNE N’A
PLUS D’IMPORTANCE (1999).

536 An editorial entitled Separate But Equal argues that domestic partnership laws
are inadequate for just this reason. Editorial, Separate But Equal, The New Republic,
Jan. 10, 2000, at 9. But Burnette, supra note 535, at 94, is probably right that such an
accommodation is probably the best that homosexuals can hope for given the present
state of public opinion.

537 See supra text accompanying notes 119–24.

538 See, for instance, the attitude of the English Poor Law Commission that re-
ported in 1832. ÉLIE HALÉVY, THE TRIUMPH OF REFORM, 1830–1841 at 122 (E.I.
pend on a more than ephemeral involvement with the mother, or else on an express invitation from her. Here again, there is no place for symmetry. A woman who gives birth to a child has already paid enough dues to deserve some say in the child's future; a man who begets a child and walks off has not.

We have looked at a number of what might be called lifestyle cases—cases involving sexual irregularities on the part of teachers, police officers, and other "role models"; cases of sex within professional relations; child custody cases where the sexual practices of the parents are urged upon the consideration of the court. These cases are complicated, and I am afraid I have no lapidary formula for making them simple. I do think, though, that they would be handled a good deal better if the courts would recognize the need for moral discernment in handling them. The immorality of the sex acts involved in these cases is not a sufficient condition for legislative, administrative, or judicial concern with them. But I believe it is a necessary condition. Courts that fail to recognize it as such lapse quickly into incoherence when they take the cases up. The objection to notorious unchastity on the part of teachers or police officers may be that it impairs their effectiveness at their jobs. But the reason it impairs their effectiveness is that it is immoral and, when notorious, is notoriously immoral. The objection to sex between lawyer and client, doctor and patient, teacher and student may be that it is abusive and unprofessional. But the reason it is abusive and unprofessional is that it is immoral in a situation where there is moral influence to be exerted. The objection to the sexual irregularities of parents may be the possibility of children being exposed to them. But the reason we wish to protect children from being exposed to them is that they are immoral, and we fear that the example will impair the moral standards of the children. In short, there are severe limits on the extent to which sexual morality can or should be enforced against people who advisedly reject it. But we will have no success discerning and applying these limits unless we recognize that it is morality and not something else that we are deciding whether or not to enforce.

Cases involving obscenity and the arts also require moral discernment on the part of the courts. In these cases, esthetic discernment is also required. The question in each case is first whether the erotic

539 See Janet L. Dolgin, Just a Gene: Judicial Assumptions About Parenthood, 40 UCLA L. Rev. 637, 647–72 (1993); cf. Slawek v. Stroh, 215 N.W.2d 9, 17–19 (Wis. 1974) (holding that a mother's ability to provide for her child is a defense to the unwed father's claim to involvement; holding a mother's action for seduction to be a counterclaim in the father's action to assert rights).
content of the material in question is disconcertingly explicit and, second, if so, whether there is a good reason for allowing it to be presented. The first question requires a combination of moral and esthetic discernment; the second requires sometimes one (a medical textbook, for instance), sometimes the other (a nude statue), sometimes both (Ulysses).

This area is one in which time, place, and manner restrictions on free speech rights are particularly appropriate. In regard to chastity, the social ambiance is particularly fragile and particularly in need of protection. And where the protection is needed, it is appropriate for the law and its enforcers to provide it. The unchaste have no right to equal access to the social ambiance, no right to compete on equal terms in the marketplace of ideas. Like racists, communists, single tax advocates, opponents of fluoridation or motorcycle helmets, smokers, choppers-down of old growth forests, and exterminators of whales, they are entitled to free speech, but they have no claim to introduce their speech into a society whose official organs are neutral as between them and their opponents. This of course is also the answer to people who claim that government subsidies cannot be granted to educational programs because they favor abstinence or denied to works of art because they are licentious. There remains the argument that the State has to be neutral about sexual morality because sexual morality is a religious matter and the government has to be neutral about religion. But the argument proves too much. Chastity is neither more nor less a religious principle than racial equality or a number of other things about which the government has never tried to be neutral.

My last point about the arts involves rethinking the distinction between speech and conduct. I have already suggested that behavior that would be innocuous if it conveyed no message should be protected when it does, whereas behavior that would be objectionable if it conveyed no message should not become protected when it does. If I come into court and throw a custard pie at the judge in order to protest one of his opinions, I should be neither better nor worse off than if I throw it just for fun. I believe this principle will cover the whole range of cases involving topless dancing and the like.

I have said that under the law with which I began this study, and in the social order it supported, it was generally accepted that waiting for marriage, marrying for love, and living faithfully thereafter were both normal and normative. My claim in leaving off is that they can and should be accepted as normal and normative still. I believe that
everything I have proposed here for the purpose is appropriate for legislative or judicial action within the context of the law as it now stands and of our people as we now live. We are not yet irrevocably committed to the trivialization of sex, of life, or of law.