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SEX, LAW, AND THE SACRED PRECINCTS OF THE MARITAL BEDROOM: ON STATE AND FEDERAL RIGHT TO PRIVACY JURISPRUDENCE

MARK STRASSER*

INTRODUCTION

The right to privacy includes the right to make important decisions regarding marriage, family, and children. However, there is some controversy regarding the degree to which substantive due process rights protect gays and lesbians. Taking their cue from the United States Supreme Court's decision in Bowers v. Hardwick,¹ many jurists and commentators suggest that the right to privacy does not protect the right of same-sex couples to marry, establish families, or have children. Yet, appearances to the contrary notwithstanding, Bowers suggests that the right to privacy may well protect lesbian and gay families and further, that those courts in states with more robust right to privacy protections than are contained within the Federal Constitution might have great difficulty in explaining why their own substantive due process guarantees do not include the right to marry a same-sex partner.

Part I of this Article discusses right to privacy jurisprudence in light of Bowers v. Hardwick and Romer v. Evans,² concluding that the Bowers Court's refusal to strike down Georgia's sodomy statute is best understood in light of the relevant jurisprudence privileging marital over nonmarital and extramarital acts. Part II discusses some state constitutional decisions in which sodomy statutes have been struck down based on state constitutional guarantees protecting the right to privacy, concluding that although courts in those states may be able to offer a plausible analysis of the right to privacy that would not require the invalidation of adultery statutes, the same courts will have far greater difficulty in offering a credible rationale to justify their claims that the state constitution does not protect the right to marry a

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same-sex partner. The Article concludes that both state and federal courts will have great difficulty in offering a plausible explanation of why the national and, especially, certain state constitutions do not include same-sex marriage within their right to privacy protections.

I. INTERPRETING BOWERS

In Bowers, the United States Supreme Court refused to recognize "a fundamental right to engage in homosexual sodomy," instead upholding a Georgia sodomy law criminalizing both same-sex and opposite-sex sodomitical relations. Jurists and commentators have suggested that the Court's unwillingness to recognize a constitutional right to have consensual sodomitical relations strongly suggests that the right to marry a same-sex partner will not be recognized as falling within the substantive due process protections of the Fourteenth Amendment of the United States Constitution. However, it is not clear that such a conclu-

4. See Dean v. District of Columbia, 653 A.2d 307, 363 n.5 (D.C. App. 1995) (Steadman, J., concurring) (suggesting that if "the state could ban the commission of acts presumably to be expected in such a same-sex relationship, it is difficult to understand on what basis the state constitutionally could be forced to extend the recognition of marriage to that relationship"); Patrick J. Borchers, Baker v. General Motors: Implications for Interjurisdictional Recognition of Non-Traditional Marriages, 32 CREIGHTON L. REV. 147, 151 (1998) (given Bowers, same-sex marriage proponents face an impossible uphill climb in making substantive due process arguments under the Federal Constitution); Andrew H. Friedman, Same-Sex Marriage and the Right of Privacy: Abandoning Scriptural, Canonical and Natural Law Based Definitions of Marriage, 35 HOW. L.J. 173, 214 (1992) (Bowers "deals a serious, if not fatal, blow to any arguments that state prohibitions against same-sex marriages are unconstitutional"); Lisa M. Farabee, Note, Marriage, Equal Protection, and New Judicial Federalism: A View From the States, 14 YALE L. & POL'Y REV. 237, 246 (1996) ("Because the Bowers court explicitly refused to recognize a right for homosexuals to engage in consensual sexual relationships, a federal doctrine offers little promise for same-sex marriage litigation."); Kevin H. Lewis, Note, Equal Protection After Romer v. Evans: Implications for the Defense of Marriage Act and Other Laws, 49 HASTINGS L.J. 175, 184 (1997) ("The argument for same-sex marriage based on the general right to privacy or the Due Process Clause has probably been foreclosed by Bowers v. Hardwick."); Richard Ante, Same-Sex Marriage and the Construction of Family: An Historical Perspective, 15 B.C. THIRD WORLD L.J. 421, 424 (1995) (book review) (Given Bowers, "the case law seems to signal a defeat for proponents of same-sex unions") cf. Watkins v. United States Army, 837 F.2d 1428, 1452 (9th Cir. 1988) (Reinhardt, J., dissenting), superseded by 847 F.2d 1329 (9th Cir. 1988), different results reached on en banc rehearing at 875 F.2d 699 (9th Cir. 1989) (suggesting that Bowers stands for the proposition that substantive due process protections apply to heterosexuals but not gays and lesbians); but see Storrs v. Holcomb, 645 N.Y.S.2d 286, 287 (1996) (distinguishing between sodomy and the exchange of personal commitments involved in marriage).
sion is warranted, at least in part, because the Court was not sufficiently explicit about why the right to privacy did not include consensual sodomy.

A. The Implications of Bowers for the Right to Marry a Same-Sex Partner

It may seem strange to suggest that the Bowers Court was not sufficiently explicit about why sodomy was not protected by the right to privacy, since the Court offered several justifications for its holding, any one of which would seem to have sufficed. For example, the Court suggested that "to claim a right to engage in such conduct [sodomy] is 'deeply rooted in this Nation's history and tradition' or 'implicitly in the concept of ordered liberty' is, at best facetious," implying that unless a practice or activity could plausibly be described in those terms it would not be included within the right to privacy. The difficulty with this justification was not that the Court was wrong to conclude that the protection of sodomy was not deeply rooted in this Nation's history and tradition, but merely that the Court might have made the same point about contraception, abortion, and interracial marriage, and each of those is nonetheless protected by the right to privacy. Thus, although the Court was no doubt correct that sodomy has been criminalized historically, it is not at all clear that the point establishes that sodomitical relations are not protected by the Constitution.

The Bowers Court rejected the idea that the Georgia sodomy statute was invalid as a majoritarian attempt to impose particular

6. See Dean, 653 A.2d at 343 (Ferren, J., concurring & dissenting) (suggesting that both homosexual and heterosexual sodomy have not been protected historically).
8. See Roe v. Wade, 410 U.S. 113, 116 (1973) ("The Texas statutes under attack here are typical of those that have been in effect in many states for approximately a century.").
9. See Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 847-48 (1992) (noting that "interracial marriage was illegal in most states in the 19th century").
10. See Mark Strasser, Domestic Relations Jurisprudence and the Great, Slumbering Baehr: On Definitional Preclusion, Equal Protection, and Fundamental Interests, 64 Fordham L. Rev. 921, 971-72 (1995) (suggesting that these are protected notwithstanding their having been criminalized historically).
moral values on a disfavored minority, suggesting that the law "is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the Courts will be very busy indeed." Yet, the claim was not that any statute promoting morality must be struck down—statutes prohibiting murder serve legitimate nonmoral ends and thus are permissible—but merely that statutes which promote no legitimate nonmoral ends and, perhaps, which are designed to punish a disfavored minority, should be struck down.

The Bowers Court accepted that consensual sodomy was a victimless crime but then suggested that, after all, other "victimless" crimes are permissibly criminalized. However, the Court's argument was unpersuasive, since its examples—the possession of drugs, guns, and stolen property—were hardly victimless crimes. The Court further undermined its own persuasiveness when suggesting that it could not distinguish between adultery and sodomy, as if the promise-breaking and breach of trust likely involved in the former but not the latter provide no relevant basis for differentiation.

As a separate point, were the Court serious when implying that the right of privacy would not protect practices that society viewed as immoral, the Court would have some difficulty in explaining why abortion, contraception, and interracial marriage were all protected by the right to privacy, notwithstanding their being or having been viewed as immoral. Thus, while numerous reasons were offered to reject that sodomy was protected by

12. But cf. Commonwealth v. Wasson, 842 S.W.2d 487, 497 (Ky. 1992) ("We view the United States Supreme Court decision in Bowers v. Hardwick . . . as a misdirected application of the theory of original intent. To illustrate: as a theory of majoritarian morality, miscegenation was an offense with ancient roots.").


14. See Romer v. Evans, 517 U.S. 620, 644 (Scalia, J., dissenting). Equal protection issues were not raised in Bowers. See Bowers, 478 U.S. at 196 n.8.

15. See Commonwealth v. Bonadio, 415 A.2d 47, 50 (Penn. 1980) ("With respect to regulation of morals, the police power should properly be exercised to protect each individual's right to be free from interference in defining and pursuing his own morality but not to enforce a majority morality on persons whose conduct does not harm others.").


17. See id. at 209 (Blackmun, J., dissenting).

18. See id. at 195-96.

19. See id. at 209 n.4 (Blackmun, J., dissenting) ("[A] State might conclude that adultery is likely to injure third persons, in particular, spouses and children of persons who engage in extramarital affairs.").

20. Cf. supra notes 7-10 and accompanying text.
the right to privacy, many of those reasons were specious and, further, would not account for why those practices already recognized as protected by the right to privacy are in fact protected.

The Bowers Court suggested that the right to privacy did not include consensual sodomy because there was no evidence of any connection between that activity on the one hand and family, marriage, or procreation on the other.\(^2\) If that is the reason,\(^2\) however, then Bowers does not preclude the Court's recognizing that the right to privacy protects the right to marry a same-sex partner. While the Court might plausibly deny a connection between a one-night stand (which happened to involve sodomitical relations)\(^2\) on the one hand and marriage and family on the other,\(^2\) the Court could not plausibly deny a connection between same-sex unions on the one hand and marriage and family on the other.\(^2\) Exactly what is at issue in the same-sex marriage debate is whether same-sex couples will be able to form a legally recognized marriage or family, and thus this Bowers line of argument supports rather than undermines that the right to privacy protects same-sex marriage.

A separate question is whether connection to marriage and family in fact is the relevant criterion.\(^2\) If, instead, the relevant question is whether the activity or status at issue is fundamental

\(^21\). See Bowers, 478 U.S. at 191.

\(^22\). See Jeffrie G. Murphy, Moral Reasons and the Limitation of Liberty, 40 WM. & MARY L. REv. 947, 950 (1999) (In the majority opinion in Bowers, Justice White "interpreted the previous privacy cases as concerned essentially with marriage, family life and reproductive autonomy and argued that, because homosexual sodomy engages none of these values, it should not be conceptualized as a fundamental privacy right and thus that strict scrutiny was not required").

\(^23\). It is contested whether what was at issue in Bowers involved a one-night stand or, instead, consensual sexual relations between lovers. Compare Mary Ann Case, Couples and Coupling in the Public Sphere: A Comment on the Legal History of Litigating for Lesbian and Gay Rights, 79 VA. L. REv. 1643, 1652 (1993) (Hardwick's sexual partner that day "was a schoolteacher from North Carolina, a married man, and a one-night stand"), with Leslye M. Huff, Deconstructing Sodomy, 5 AM. U. J. GENDER & L. 553, 561-62 (1997) (describing Hardwick's sexual partner as his lover).

\(^24\). Of course, one-night stands sometimes turn into more lasting relationships, although that is a separate point.

\(^25\). But see John G. Culhane, Uprooting the Arguments Against Same-Sex Marriage, 20 CARDOZO L. REv. 1119, 1148-49 (1999): [I]t would be a mistake to think it inevitable that courts will discover this link between the elements of family life and same-sex marriage. Explicit recognition of the latter would . . . [challenge] the rigidity of gender roles and identity that conspires with political will to deny the creative possibility and richness in all lives of committed intimate relation.

\(^26\). See infra notes 190-97 and accompanying text.
to concepts of personhood, then both same-sex marriages and adult, consensual, nonmarital sexual activity should be recognized as protected by the right to privacy. Arguably, the latter is the appropriate criterion and, thus, the claim here is neither that Bowers was rightly decided nor that Bowers should not have been litigated, but merely that the jurisprudence articulated in Bowers does not undermine the claim that the Federal Constitution protects the right to marry a same-sex partner.

B. Different Understandings of Bowers

Notwithstanding that the right to marry a same-sex partner might be protected by the right to privacy even if the right to commit sodomy is not, a variety of commentators have suggested that Bowers is incompatible with a federally recognized right to same-sex marriage. The arguments that Bowers precludes such a recognition might helpfully be separated into three different categories. The first concerns itself with the language of the opinion, suggesting that same-sex marriage does not meet the relevant test for determining whether the activity at issue is protected by the right to privacy. The second concerns itself with the substance of the decision, suggesting that same-sex marriage does not meet the relevant test for determining whether the activity at issue is protected by the right to privacy. The second concerns itself with the substance of the decision, suggesting that because sodomy is

27. See Bowers, 478 U.S. at 205 (Blackmun, J., dissenting): The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there may be many "right" ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom an individual has to choose the form and nature of these intensely personal bonds.

28. See infra notes 182-91 and accompanying text (contrasting nonmarital versus extramarital activity).

29. See Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 851 (1992) (suggesting that "matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment"); but see Washington v. Glucksberg, 521 U.S. 702, 727 (1997) ("That many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected.").

30. Cf. Mary C. Dunlap, Gay Men and Lesbians Down by Law in the 1990’s USA: The Continuing Toll of Bowers v. Hardwick, 24 Golden Gate U. L. Rev. 1, 4-5 (1994) (suggesting that it is wrong to assert that Bowers involved bad facts and should not have been litigated).

31. See John H. Garvey, What Are Freedoms For? 26-31 (1996) (suggesting that Bowers was an easy case but that a strong argument can be made for the state’s having to recognize same-sex marriages). While Dean Garvey is wrong about Bowers, he is correct that Bowers does not preclude an argument for same-sex marriage.

32. See supra note 4.
illegal and because same-sex couples would presumably be having sodomitical relations if permitted to marry, the right to privacy obviously cannot include the right to marry a same-sex partner. The third concerns itself with the tone rather than the language or substance of the opinion, suggesting that even if Bowers does not substantively preclude same-sex marriage, the attitude manifested by the Court in that opinion indicates the Court's understanding that the Constitution permits the imposition of burdens on lesbians, bisexuals, and gays that could not be imposed on other groups.33

Some commentators examining the language of Bowers suggest that same-sex marriage cannot be included within the right to privacy because such unions are not deeply rooted in the history and traditions of the country.34 Yet, this test would not have yielded protection for much that is protected by the right to privacy,35 and thus is simply an inappropriate test for making the relevant determination.

Ironically, some theorists when explicating the history and traditions test seem not to appreciate the implications of their own positions. For example, those commentators who suggest that the history and traditions test protects interracial marriage,36 because marriage and family are deeply embedded in the country's history and traditions even if interracial marriages in particular are not,37 seem not to appreciate the force of the analogous argument that might be made about same-sex marriages—even if same-sex marriages are not deeply rooted in this nation's history and tradition, marriage and family are and thus same-sex unions might nonetheless be protected.

The Kentucky Supreme Court has pointed out that "miscegenation was an offense with ancient roots."38 Since interracial

33. But see Romer v. Evans, 517 U.S. 620, 632 (1996) (striking down state constitutional amendment disadvantaging lesbians, bisexuals, and gays because it seemed "inexplicable by anything but animus toward the class it affect[ed]"").


35. See supra notes 7-10 and accompanying text.


37. See Michael R. Engleman, Bowers v. Hardwick: The Role of Privacy—Only Within the Traditional Family?, 26 J. Fam. L. 373, 390 (1987-88) ("In Loving v. Virginia, the Court upheld an individual's decision to define his identity through marriage to someone of a race different from his, even though such interracial marriages were, at the time of the decision, illegal in sixteen states and counter to theological teachings.").

marriage was itself criminalized until 1967, one would expect the theorists arguing that same-sex marriage does not meet the history and traditions test to make the same point about interracial unions. By taking the opposite tack, these theorists offer an understanding of that test that might also be applicable here. Just as the history and traditions test might be thought to protect interracial unions, historical practices notwithstanding, that test might also be thought to protect same-sex unions, historical practices notwithstanding. Indeed, an Alaska trial court has already recognized that the historic place in our hierarchy of values occupied by marriage and family may well entail that same-sex unions are constitutionally protected.

Other commentators consider the substance of Bowers and suggest that because sodomy is permissibly criminalized, same-sex marriage is obviously not constitutionally protected. Yet, this argument is unpersuasive for a few different reasons. First, as a practical matter, most states do not criminalize sodomy, so it is unclear why any of those states would nonetheless be permitted to claim, for example, that permitting sodomitical relations so strongly offends public policy that same-sex unions cannot be legally recognized. Second, even those states that have sodomy laws have created exceptions for married couples either through their legislatures or their courts. Indeed, since Griswold v. Conn-


40. See Brause v. Bureau of Vital Statistics, No. 3AN-95-6562 CI, 1998 WL 88743, at *4 (Alaska Super. Ct. Feb. 27, 1998) (“[T]he relevant question is not whether same-sex marriage is so rooted in our traditions that it is a fundamental right, but whether the freedom to choose one's own life partner is so rooted in our traditions.”).

41. See supra note 4.

42. There are 14 states which criminalize both same-sex and opposite-sex sodomitical relations and five states which criminalize only same-sex sodomitical relations. See ACLU, Status of U.S. Sodomy Laws (visited Apr. 8, 2000) <http://www.aclu.org/issues/gay/sodomy.html> [hereinafter ACLU].

43. Cf Steven K. Homer, Note, Against Marriage, 29 HARv. C.R.-C.L. L. Rev. 505, 530 (1994) (“After Bowers v. Hardwick, every state that has a same-sex sodomy law can plausibly argue that it need not recognize a Hawaii same-sex marriage because it has a constitutionally sound public policy against sodomy, an act likely to be committed in a same-sex marriage.”) (emphasis added).

44. See, e.g., Towler v. Peyton, 303 F. Supp. 581, 582-83 (W.D. Va. 1969) (recognizing exception for marrieds but holding that the exception is inapplicable where force has been used); Williams v. State, 494 So. 2d 819 (Ala. Crim. App. 1986) (recognizing exception for marrieds but holding that the exception is inapplicable where force has been used); State v. Dubish, 675 P.2d 877, 886 (Kan. 1994) (striking down conviction for aggravated sodomy because defendant and victim were married); State v. Santos, 413 A.2d 58 (R.I. 1980) (recognizing exception for married couples).
necticut, where the Court explained that the Constitution bars states from searching for contraceptives in "the sacred precincts of marital bedrooms," it has not been at all clear that the Constitution permits states to criminalize consensual, marital, sodomitical relations. Thus, even in states with sodomy statutes, same-sex, married couples would presumably fall within an existing explicit or implicit exception to those statutes rather than be likely violators of those statutes.

Commentators who claim that the permissibility of sodomy statutes established the permissibility of same-sex marriage prohibitions seem to forget recent constitutional history. In McLaughlin v. Florida, the State of Florida argued that its punishing interracial coupling more severely than intraracial coupling was reasonably related to its goal of preventing interracial marriage. The Supreme Court rejected that argument, suggesting that each statute had to be examined on its own merits and that "the State's policy against interracial marriage [can] ... be as adequately served by the general, neutral, and existing ban on illicit behavior as by a provision ... which singles out the promiscuous interracial couple for special statutory treatment." The Court struck down the Florida statute at issue without expressing an opinion about whether Florida's interracial marriage ban was itself constitutional. By doing so, the Court emphasized that statutes regulating marriage and statutes regulating nonmarital sexual relations implicate different issues and thus their constitutionality may hinge on different factors.

The McLaughlin Court did not even hint that a statute regulating nonmarital relations would be unconstitutional, "dealing

45. 381 U.S. 479 (1965).
46. Id. at 485.
47. See Bowers v. Hardwick, 478 U.S. 187, 218 (1986) (Stevens, J., dissenting) ("Our prior cases thus establish that a State may not prohibit sodomy within 'the sacred precincts of marital bedrooms.'").
49. 379 U.S. 184 (1964) (striking down Florida's statute punishing interracial cohabitation more severely than intraracial cohabitation).
50. See id. at 195.
51. See id. ("For even if we posit the constitutionality of the ban against the marriage of a Negro and a white, it does not follow that the cohabitation law is not to be subjected to independent examination under the Fourteenth Amendment.").
52. Id. at 196.
53. See id. ("We accordingly invalidate § 798.05 without expressing any views about the State's prohibition of interracial marriage, and reverse these convictions.").
as it does with illicit extramarital and premarital promiscuity." \(^5^4\) Rather, the Court established that special penalties could not be imposed on unmarried, interracial couples having sexual relations, conveniently ignoring the fact that because interracial couples could not marry in Florida they could only have "nonmarital" relations if they were to have sexual relations at all. The Court did not strike down interracial marriage bans until three years later, \(^5^5\) although the opportunity to do so had been presented in the mid-1950s. \(^5^6\)

It is perhaps underappreciated that miscegenation might refer to interracial coupling or to interracial marriage. \(^5^7\) Former laws prohibiting interracial coupling are analogous to current laws prohibiting same-sex sodomy, \(^5^8\) since in each case special penalties were or are being imposed as a way of burdening disfavored groups. Because such laws target specific groups, they may be constitutionally offensive even if the general behavior that they seek to regulate is permissibly proscribed. \(^5^9\)

Former laws prohibiting interracial marriage are analogous to current laws prohibiting same-sex marriage, since in each case individuals are being prevented from marrying their would-be spouses, notwithstanding the clear public policy reasons supporting the recognition of such unions. \(^6^0\) Indeed, many of the specious arguments currently offered in an attempt to justify same-sex marriage bans echo the specious reasons formerly offered in attempts to justify interracial marriage bans.

Here, the issue is whether a state with a sodomy statute could thereby justify its same-sex marriage ban. As suggested both by the \textit{McLaughlin} Court's requirement that Florida's interracial fornication and marriage statutes be examined separately, 

\(^5^4\) \textit{Id.} at 193.

\(^5^5\) See \textit{Loving v. Virginia}, 388 U.S. 1 (1967) (striking down Virginia's statutory scheme barring interracial marriages as violative of the Fourteenth Amendment).


\(^5^8\) See, e.g., \textit{TEX. PENAL CODE ANN. § 21.06(a)} (West 1994) ("A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex.").

\(^5^9\) The sodomy laws at issue in \textit{Bowers} were not challenged on equal protection grounds. See \textit{Bowers v. Hardwick}, 478 U.S. 187, 196 n.8 (1986).

\(^6^0\) See Strasser, \textit{supra} note 10, at 979-80 (describing some of those public policy considerations supporting the recognition of same-sex marriage).
each needing to be justified on its own merits, and by the Griswold Court’s recognition of marital privacy, the permissibility of a sodomy statute hardly establishes that same-sex marriage is not protected by the right to privacy.

Were the issue presented before the Court today, the current Supreme Court would presumably say that while interracial marriage bans are unconstitutional, statutes banning nonmarital, intraracial and interracial coupling are not so protected, although the state is of course precluded from punishing the latter more severely than the former. So, too, the Court might say, even if statutes banning same-sex marriage are unconstitutional, statutes prohibiting sodomy (especially if not distinguishing between same-sex and opposite-sex couples) might nonetheless be upheld. The historical treatment of interracial coupling and marriage and the current treatment of same-sex coupling and marriage are much more analogous than some commentators seem willing to admit.

Still other commentators address the tone of the Bowers opinion, suggesting that even if the substance of the opinion has no implications for same-sex unions, the tone of the opinion indicates that lesbians, gays, and bisexuals are not protected by the Federal Constitution. That kind of analysis is more difficult to critically evaluate, since at least two issues would have to be addressed: (1) whether, in fact, lesbians, bisexuals, and gays are not entitled to all of the protections taken for granted by many people; and (2) if, in fact, not all protections are applicable, which are not or, perhaps, under what conditions are those protections inapplicable. Using the tone analysis, one simply cannot even know which kinds of arguments could be successfully marshaled to show that the rights of bisexuals, lesbians, and gays had

61. In Burns v. State, 48 Ala. 195 (1872), overruled by Green v. State, 58 Ala. 190 (1877), the Alabama Supreme Court found that the state’s intraracial marriage statute violated equal protection guarantees. However, in Ford v. State, 53 Ala. 150 (1875), the Alabama Supreme Court upheld punishing interracial adultery more severely than intraracial adultery without overruling Burns, which was not overruled until two years later. While McLaughlin and Loving establish that differentiation on the basis of race is impermissible whether the statute involves marital or nonmarital coupling, the point here is merely that a fornication statute which did not differentiate on the basis of race could be upheld even if an interracial marriage ban would be found unconstitutional.

62. But see infra notes 191-98 and accompanying text (describing reasoning offered by state courts to establish that sodomy statutes violate their own state constitutional guarantees). The reasoning offered by the courts would also seem applicable to federal constitutional protections, Supreme Court protestations to the contrary notwithstanding.

been violated in a particular case, especially when issue two is not explicitly addressed and the suggestion instead is that a different standard is applicable to lesbians, bisexuals, and gays without a specification of what that higher standard is or how it differs from the standards against which others are judged.

Consider Judge Reinhardt's dissenting opinion in Watkins v. United States Army, where he suggested that Bowers must be read either as "about 'sodomy,'" and heterosexual sodomy is as constitutionally unprotected as homosexual sodomy, or it is about 'homosexuality,' and there are some acts which are protected if done by heterosexuals but not if done by homosexuals." He regretfully concluded that it was about the latter, believing that the "anti-homosexual thrust of Hardwick, and the Court's willingness to condone anti-homosexual animus in the actions of the government, are clear."

C. Scalia on Bowers

It is not difficult to understand how someone might infer that Bowers relegated lesbians and gays to second-class citizen status, since at least some members of the current Court seem to interpret Bowers that way. For example, in his dissent in Romer, Justice Scalia suggested that the issue in Romer—whether the electorate could constitutionally preclude lesbians and gays from receiving the kinds of protections that other groups in the state

64. See Dunlap, supra note 30, at 31 ("There can be little doubt that there is a higher standard in this system, approaching a double one, for gay men, lesbians, and bisexual and transgendered persons who publicly identify our sexualities."); Stephen Macedo, Homosexuality and the Conservative Mind, 84 Geo. L.J. 261, 277 (1995) (discussing a "double standard of permissiveness toward straights and censoriousness toward gays who engage in acts that are essentially the same").


66. 837 F.2d 1428 (9th Cir. 1988), superseded by 847 F.2d 1329 (9th Cir. 1988), withdrawn on rehearing by 875 F.2d 699 (9th Cir. 1989).

67. Id. at 1452 (Reinhardt, J., dissenting).

68. See id. at 1451-52 (Reinhardt, J., dissenting) ("With great reluctance, I have concluded that I am unable to concur in the majority opinion.").

69. Id. at 1453 (Reinhardt, J., dissenting).

70. But see Romer v. Evans, 517 U.S. 620, 632 (1996) (striking down state constitutional amendment because it seemed "inexplicable by anything but animus toward the class it affect[ed]").

71. The amendment read:

Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation,
were already receiving—was already settled by *Bowers.* However, it was not obvious why *Bowers*—a case involving the constitutionality of Georgia's sodomy statute criminalizing both same-sex and opposite-sex sodomitical relations—would be dispositive of the question at issue in *Romer,* since Colorado had been one of the first states to repeal its own sodomy statute and was not attempting to recriminalize that activity. Thus, were *Bowers* "merely" holding that same-sex sodomitical relations were not protected by the right to privacy, one could not thereby infer that the Constitution therefore permitted "homosexuality . . . [to] be singled out for disfavorable treatment." Nonetheless, Justices Scalia, Thomas, and Rehnquist so construe that decision and the Constitution, notwithstanding that the *Bowers* rationale would apply to any nonmarital, sodomitical relations, regardless of the sexes of the parties involved.

When the *Bowers* Court noted, "Sodomy was a criminal offense at common law and was forbidden by the laws of the original thirteen States when they ratified the Bill of Rights," the Court failed to mention that both heterosexual and homosexual sodomy were proscribed at common law. The test articulated

ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

Id. at 624.

72. Both suspect and nonsuspect groups were protected by Colorado law. See id. at 637 (Scalia, J., dissenting).

73. See id. at 643 (Scalia, J., dissenting) ("[U]nder *Bowers,* Amendment 2 is unquestionably constitutional as applied to those who engage in homosexual conduct.").


75. See *Romer,* 517 U.S. at 645 (Scalia, J., dissenting).

76. Of course, it should not be thought that the deprivation effected by *Bowers* involved nothing important; indeed one of the failings in the decision was to undervalue the importance of the liberty at issue. See *Bowers,* 478 U.S. at 208 (Blackmun, J., dissenting) (discussing the "Court's failure to comprehend the magnitude of the liberty interests at stake").

77. *Romer,* 517 U.S. at 636.

78. Justices Rehnquist and Thomas signed onto Justice Scalia's dissent.


81. See id. at 215 (Stevens, J., dissenting).
by the Bowers Court does not justify selecting lesbians, bisexuals, and gays for special adverse treatment, Justice Scalia's claims to the contrary notwithstanding.

Justice Scalia suggested that the Colorado initiative at issue in Romer was probably motivated by animus, although he denied that the animus was constitutionally impermissible.\(^8^2\) Rather, he suggested that because sodomy was criminalizable and because it was reasonable to assume that gays, lesbians, and bisexuals would have a desire to commit that criminalizable conduct, it was permissible to impose burdens on that group.\(^8^3\)

D. Implications of Scalia's Position

Justice Scalia's position has some surprising implications. Suppose, for example, that one accepts the Bowers rationale that sexual practices whose proscriptions have "ancient roots"\(^8^4\) may be criminalized. This would mean that states could criminalize heterosexual sodomy,\(^8^5\) adultery,\(^8^6\) and fornication,\(^8^7\) as well as interracial marriage\(^8^8\) and marital sodomy.\(^8^9\) Further, because

\(^8^2\) See Romer, 517 U.S. at 644 (Scalia, J., dissenting):
I had thought that one could consider certain conduct reprehensible—murder, for example, or polygamy, or cruelty to animals—and could exhibit even "animus" toward such conduct. Surely that is the only sort of "animus" at issue here: moral disapproval of homosexual conduct, the same sort of moral disapproval that produced the centuries-old criminal laws that we held constitutional in Bowers.

\(^8^3\) See id. at 642 (Scalia, J., dissenting).

\(^8^4\) Bowers, 478 U.S. at 191.

\(^8^5\) See State v. Chiaradio, 660 A.2d 276, 277 (R.I. 1995) (upholding sodomy statute for unmarrieds); but see ACLU, supra note 42 (listing Rhode Island's statute as having been repealed).

\(^8^6\) See City of Sherman v. Henry, 928 S.W.2d 464 (Tex. 1996) (adultery not constitutionally protected). See also Griswold v. Connecticut, 381 U.S. 479, 498 (1965) (Goldberg, J., concurring) ("The state of Connecticut does have statutes, the constitutionality of which is beyond doubt, which prohibit adultery and fornication.").

\(^8^7\) See Dean v. District of Columbia, 653 A.2d 307, 343 (D.C. App. 1995) (suggesting that fornication statutes are constitutional); see also Griswold, 381 U.S. at 498 (Goldberg, J., concurring) (holding fornication statute constitutional).

But the suggestion that constitutionally protected rights and liberties are restricted to those already recognized in our history and tradition should concern us all . . . the right to marry interracially and the right to have an abortion were hard-fought battles precisely because the specific practices given constitutional protection by those cases had long been outlawed.
any of these could be criminalized. Justice Scalia's analysis suggests that the Constitution would permit anyone who would even have a desire to commit any of those to be subject to having unwanted burdens imposed upon him or her.

It would be true but irrelevant to point out that the fact those practices were once criminalized hardly establishes that they are not now constitutionally protected. Such a criticism involves a rejection of the criterion that was implicitly offered for determining the constitutionality of particular practices and might cast doubt on the vitality of Bowers.\(^9^0\) Indeed, such a point might imply that the Court should engage in the kind of reasoned judgment in light of the existing jurisprudence that the plurality endorsed in Planned Parenthood v. Casey,\(^9^1\) but that Justice Scalia rejected.\(^9^2\)

Nonetheless, suppose that one limits one's focus to practices that the Court has not (yet) declared protected by the right to privacy, for example, adultery and fornication. Some estimate that the percentage of the population engaging in such practices is very high, although those estimates are controversial.\(^9^3\) Yet, Justice Scalia's comments suggest that not only those committing

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89. Thus, marital sodomy was also thought criminalizable. See State v. Nelson, 271 N.W. 114, 118 (Minn. 1937) (consensual marital sodomitical relations can be punished).

90. See Compassion in Dying v. Washington, 79 F.3d 790, 813 n.65 (9th Cir. 1996) ("We also note, without surprise, that in the decade since Bowers was handed down the Court has never cited its central holding approvingly."). rev'd, Washington v. Glucksberg, 521 U.S. 702 (1997).


92. See id. at 980 (Scalia, J., concurring in part & dissenting in part) (rejecting the reasoned judgment approach and instead suggesting that a practice is not protected if "(1) the Constitution says absolutely nothing about it, and (2) the longstanding traditions of American society have permitted it to be legally proscribed").

adultery and fornication but also those who have a "tendency or desire to do so"94 may permissibly have burdens imposed upon them—the potentially burdened group would include, for example, those who had lusted in their hearts for someone to whom they were not married, even if the lusting individuals had never in fact acted on those inclinations.95 Thus, according to this theory, anyone who desired to have premarital or extramarital sexual relations would be tempted to commit a criminalizable (even if not criminalized) act and would be subject to disadvantageous treatment should the state deem the imposition of such treatment appropriate.96

Some who might be subject to having these burdens imposed upon them might claim never to have even been tempted to have premarital or extramarital sex.97 Justice Scalia would presumably suggest that those individuals "might successfully bring an as-applied challenge" to the statute envisioned here.98 In response to the claim that individuals should not be disadvantaged on the mere presumption that they would engage in these criminalizable if not criminalized activities, Justice Scalia might suggest that because no criminal penalty was at issue, sexual desires would be "an acceptable stand-in for . . . conduct."99

In his Romer dissent, Justice Scalia made clear his belief that it is permissible for a state to pass an amendment which "with-

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96. Justice Scalia did not claim that gays, lesbians or bisexuals were subject to more uncontrollable urges than others and thus, for example, would be more likely to give in to such urges. Claims that unpopular groups are subject to uncontrollable urges are not uncommon. See Constance Backhouse, The White Women's Labor Laws: Anti-Chinese Racism in Early Twentieth Century Canada, 14 Law & Hist. Rev. 315, 335 (1996) (discussing racist claims that black men had uncontrollable sexual desires for white women); John M. Kang, Deconstructing the Ideology of White Aesthetics, 2 Mich. J. Race & L. 283, 341 (1997) (discussing stereotype of black men as subject to uncontrollable sexual urges); David P. Tedhams, The Reincarnation of "Jim Crow": A Thirteenth Amendment Analysis of Colorado's Amendment 2, 4 Temp. Pol. & Civ. Rts. L. Rev. 133, 153 (1994) (suggesting that members of stigmatized groups are often characterized as hypersexual); cf. Alan L. Keyes, How Should Society Handle Injustice?, 19 Harv. J.L. & Pub. Pol'y 645, 647-48 (1996) (conflating the claim that sexual orientation cannot be controlled with the claim that one's sexual urges cannot be controlled).
97. The credibility of the claim that the person had never even been tempted would be up to the trier of fact to assess.
98. Romer 517 U.S. at 642 (Scalia, J., dissenting).
99. Id.
draws from homosexuals, but no others, specific legal protections from the injuries caused by discrimination, and [which] ... forbids reinstatement of these laws and policies," because the state could (even if, in fact, it did not) have a law criminalizing sodomy. Yet, the fact that the state did not have such a law presumably indicates that it did not believe the conduct at issue sufficiently worrisome to merit criminal sanctions. Were the state in fact to have criminalized the activity, one might expect Justice Scalia to have been willing to give the state even more leeway to impose burdens on people who had a desire to commit the activity in question.

While Colorado does not have a law criminalizing sodomy, it does have a law prohibiting adultery. One wonders what civil penalties against possible adulterers Justice Scalia would be willing to countenance and what kinds of showings of propensities or desires he would constitutionally require before such penalties could be imposed. After all, it might be argued, sexual desires for the object of one's lust can be strong and, even if that person is a nonspouse, might well be irrepressible. Since no criminal penalties would be at issue, Justice Scalia would presumably suggest that the state would not need to wait until the individual had in fact acted on his or her adulterous desires for these burdens to be imposed.

E. Marital Versus Nonmarital Acts

Were the Court to have adopted Justice Scalia's position on Colorado's Amendment 2, one might have accepted Judge Reinhardt's analysis of Bowers in which he suggested that the Court believes lesbians, bisexuals, and gays are not entitled to the same protections that others receive. However, the Court rejected Justice Scalia's analysis in Romer and, indeed, did not even men-

100. Id. at 627.
101. See id. at 645 (Scalia, J., dissenting).
102. See COLO. REV. STAT. ANN. § 18-6-501 (West 1999) (“Any sexual intercourse by a married person other than with that person’s spouse is adultery, which is prohibited.”).
103. See Coleman, supra note 93, at 408 (1991) (“Although the vast majority of people are capable of exercising control over their sexual behavior, the sex drive itself seems virtually irrepressible.”); cf. Julie Lefler, Shining the Spotlight on Johns: Moving Toward Equal Treatment of Male Customers and FemaleProstitutes, 10 HASTINGS WOMEN'S L.J. 11, 14-15 (1999) (suggesting that the “Victorian myth that men could not control their sex drives” resulted in men not being “faulted for acting upon their irrepressible desires”).
104. See supra notes 66-69 and accompanying text.
tion *Bowers* in that opinion. This could be because the Court was overruling *Bowers sub silentio* or because the Court did not believe *Bowers* to be on point, perhaps reading (or limiting) the decision to be only about what it purported to be about, namely, whether the right to privacy guaranteed in the Federal Constitution includes the right to commit sodomy.

Even before *Bowers*, several courts had suggested that the right to privacy protects marital but not nonmarital sodomy. Bracketing whether distinguishing between marrieds and unmarrieds this way is rationally supportable or, instead, a violation of equal protection guarantees, this way of interpreting *Bowers*

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105. See Romer v. Evans, 517 U.S. 620, 640 (Scalia, J., dissenting) (*Bowers* "is not even mentioned in the Court's opinion").


108. See Commonwealth v. Bonadio, 415 A.2d 47, 51-52 (Penn. 1980): [T]o suggest that deviate acts are heinous if performed by unmarried persons but acceptable when done by married persons lacks even a rational basis, for requiring less moral behavior of married persons than is expected of unmarried persons is without basis in logic. If the statute regulated sexual acts so affecting others that proscription by law would be justified, then they should be proscribed for all people, not just the unmarried.

See also People v. Onofre, 415 N.E.2d 936, 944 (N.Y. 1980) (New York Court of Appeals Judge Jasen rejected the idea that sodomy was protected by the right to privacy, but concurred in the judgment striking down the sodomy statute because he could "discern no rational basis upon which the Legislature could have decided to freely allow the conduct in issue among married people and to make identical conduct criminal among those for whom that estate is undesirable or unattainable"); State v. Lopes, No. P1/90-3789, 1994 WL 930907, at *6 (R.I. Super. Ct. Mar. 14, 1994) (striking down statute criminalizing nonmarital sexual relations on equal protection grounds), order quashed, 660 A.2d 707 (R.I. 1995); cf. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."); but see State v. Chiaradio, 660 A.2d 276, 277 (R.I. 1995) (upholding sodomy statute as not violating equal protection guarantees).
and the right to privacy jurisprudence would less readily support the claim that it is permissible to impose burdens on lesbians, bisexuals, and gays just because the electorate desires "to make them unequal to everyone else." While the reading of Bowers suggested here neither makes the decision a well-reasoned opinion nor even a respectable one, it would nonetheless remove some of the taint from one of the Court's more embarrassing recent decisions.

F. The Fundamental Interest in Marriage

The Court has declared that the "right to marry is of fundamental importance for all individuals" and has "routinely categorized the decision to marry as among the personal decisions protected by the right to privacy." While the Court has recognized that "reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed," the Court has also warned that "[w]hen a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests." Entirely precluding same-sex couples from marrying does more than significantly interfere with their marital decisionmaking.

Justice Powell recognized that the Court's right-to-marry jurisprudence might force society to modify some of its existing

109. Arguably, the refusal to allow same-sex marriage itself imposes a badge of inferiority which makes such laws suspect. The Court has warned that "clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character," may well violate the Constitution. Bell's Gap R.R. Co. v. Pennsylvania, 134 U.S. 232, 237 (1890).
110. Romer, 517 U.S. at 635.
I can only hope that here, too, the Court soon will reconsider its analysis and conclude that depriving individuals of the right to choose for themselves how to conduct their intimate relationships poses a far greater threat to the values most deeply rooted in our Nation's history than tolerance of nonconformity could ever do.
112. See Cass Sunstein, Foreword: Leaving Things Undecided, 110 HARV. L. REV. 4, 68 (1996) (describing Bowers as "one of the most vilified decisions since World War II").
114. Id.
115. Id. at 386 (emphasis added).
116. Id. at 388.
practices. In his concurrence in *Zablocki v. Redhail*, he suggested that the Court’s willingness to “subject all state regulation which ‘directly and substantially’ interferes with the decision to marry in a traditional family setting to ‘critical examination’ or ‘compelling state interest’ analysis” might well have implications for how the state may regulate same-sex relations. Further, it simply is not credible to say that gay, lesbian, and bisexual individuals have the right to marry as long as they marry someone of the opposite sex. (One can imagine the response were heterosexuals told that they had a fundamental right to marry—they just had to marry someone of the same sex.) The fallacy of saying that individuals of all races have the right to marry as long as they marry someone of the same race has already been recognized, and the fallacy of making an analogous claim on the basis of sex should also be recognized.

The Court almost glows when it discusses marriage. In *Loving v. Virginia*, the Court described the right to marry as “one of the vital personal rights essential to the orderly pursuit of happiness by free men [and women].” In *Griswold*, the Court described marriage as “a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred,” and as an “association for as noble a purpose as any involved in any of [the Court’s] prior decisions.” The Court has clearly and expressly articulated its “historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment.”

The *Zablocki* Court suggested that it “would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society.”

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118. Id. at 396 (Powell, J., concurring).
119. See id. at 399 (Powell, J., concurring).
120. For such a claim, see Lynne Marie Kohm, *A Reply to “Principles and Prejudice”: Marriage and the Realization that Principles Win Over Political Will*, 22 J. CONTEMP. L. 293, 302 (1996).
121. See *Loving v. Virginia*, 388 U.S. 1, 11 n.11 (1967) (“[W]e find the racial classifications in these statutes repugnant to the Fourteenth Amendment, even assuming an even-handed state purpose to protect the ‘integrity’ of all races.”).
122. Id. at 12.
124. Id.
However, that suggestion has been misinterpreted by some of the lower courts. For example, in *Baehr v. Lewin*, a plurality of the Hawaii Supreme Court said: “Implicit in the *Zablocki* Court’s link between the right to marry, on the one hand, and the fundamental rights of procreation, childbirth, abortion, and child rearing, on the other, is the assumption that the one is simply the logical predicate of the others.” The plurality believed that its *Zablocki* analysis “demonstrates that the federal construct of the fundamental right to marry—subsumed within the right to privacy implicitly protected by the United States Constitution—presently contemplates unions between men and women.” Yet, this analysis of the case notwithstanding, *Zablocki* would seem to establish that the right of same-sex couples to marry must be recognized, since marriage is allegedly the logical predicate of having and raising children and same-sex couples are having and raising them.

As a separate point, the *Baehr* plurality misunderstood the import of *Zablocki*. The Court in *Zablocki* and elsewhere is suggesting that the right to marry is as fundamental as the right to have and raise children. Marriage is not merely important because it instrumentally provides a setting in which children might be raised but is of fundamental importance in its own right. Families may, but need not, include children. Thus, even individuals who definitely will not or cannot have children nonetheless have a fundamental right to marry. As the *Zablocki* Court made clear, the “right to marry is of fundamental importance for all individuals,” not just for those who are able and willing to procreate.

The *Bowers* rationale does not undermine the right to marry a same-sex partner as long as the test articulated—promotion of marriage and family—is the relevant test. If the test is whether the activity or practice is implicit within the concept of ordered liberty or whether it is deeply rooted in this Nation’s history and

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128. *Id.* at 56.
129. *Id.*
131. So, too, sexual relations are not only for procreation. *Cf.* *Campbell v. Sundquist*, 926 S.W.2d 250, 263 (Tenn. App. 1996) (“The first asserted interest, that the statute discourages activity which cannot lead to procreation, is neither a compelling nor even a constitutionally valid justification for the Act.”).
132. See *Strasser*, *supra* note 10, at 962.
tradition or is such that its nonprotection would violate the collective conscience of the people, then many of those practices already recognized as falling within the right to privacy are nonetheless at risk. Even the right of marrieds to use contraception was thought by some not to meet those tests. Thus, insofar as the test for whether something is included within the right to privacy actually accounts for those practices recognized as protected by that right and does not merely account for those practices not so recognized, the right to privacy might well protect the right to marry a same-sex partner, Bowers notwithstanding.

II. SEXUAL ACTIVITY OUTSIDE OF MARRIAGE

When discussing which sexual activities are constitutionally protected and which are not, members of the Court have suggested that neither fornication nor adultery is constitutionally protected. However, merely because both of those are currently viewed as outside of the realm of privacy rights protected by the United States Constitution does not establish that no constitutionally relevant distinctions can be made between the two. The Court has suggested that there is an implicit ordering that privileges marital over nonmarital acts, but also that might protect certain nonmarital acts before others. Thus, because fornication might plausibly be viewed as less destructive to marriage than adultery, fornication might be protected by the right to privacy even if adultery is not, at least according to one understanding of the principle underlying right to privacy jurispru-

134. See Griswold v. Connecticut, 381 U.S. 479, 518 (1965) (Black, J., dissenting) (casting doubt on the claim that the law prohibiting contraception violated the traditions rooted in the collective conscience of the people); id. at 522-23 (Black, J., dissenting) (suggesting that the Court was engaging in Lochnerism by striking down the law); id. at 527 (Stewart, J., dissenting) (suggesting that the law was unwise and asinine but not unconstitutional).

135. See Lewis v. United States, 523 U.S. 155, 164 (1998) (discussing federal laws prohibiting fornication and adultery without a hint of their being constitutionally suspect, although because neither was at issue in the case before the Court, the Court might have seen no reason to raise concerns about their constitutionality); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 69 n.15 (1973) (stating that few today would even suggest that adultery or fornication statutes violate constitutional guarantees); Griswold, 381 U.S. at 498 (Goldberg, J., concurring) (neither statute constitutionally offensive).


137. But see Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.").

138. See infra notes 181-88 and accompanying text.
dence. A separate question is whether the "expanded" right to privacy would include the right to marry a same-sex partner—needless to say, however, many of the arguments in favor of including fornication would apply equally, if not more strongly, in the case of same-sex marriage, assuming for the sake of argument that the right to marry a same-sex partner is not already protected by the right to privacy.

A. Harlan's Poe Dissent

In his dissent in Poe v. Ullman, Justice Harlan outlined a way of understanding right to privacy jurisprudence which many on the Court seemed to have adopted. He suggested:

The laws regarding marriage which provide both when the sexual powers may be used and the legal and societal context in which children are born and brought up, as well as laws forbidding adultery, fornication and homosexual practices which express the negative of the proposition, confining sexuality to lawful marriage, form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis.

It might at first seem misguided to quote from Justice Harlan's dissent in an article suggesting that same-sex marriage is protected by the right to privacy, since he groups adultery, fornication, and homosexual practices and then suggests that they are the "negative" of the legal and social context in which children are born and raised. His concern was "family life," the integrity of which "is something so fundamental that it has been found to draw to its protection the principles of more than one

141. Poe, 367 U.S. at 545 (Harlan, J., dissenting).
142. As a separate point, Justice Harlan's point about where children are born and raised may not be accurate empirically. See Strasser, supra note 10, at 953 (discussing illegitimacy rates).
143. Poe, 367 U.S. at 551 (Harlan, J., dissenting).
explicitly granted Constitutional right.” He envisioned same-sex and nonmarital relations as outside of the family and hence the opposite of that which he believed so foundational. However, his doing so may have involved a mistake of fact—he simply may not have imagined that same-sex relationships involve any more than sex and thus may not have envisioned same-sex individuals as composing families.

At least two distinct points must be made about Justice Harlan’s analysis. The first point is that his right-to-privacy jurisprudence is based upon the family without a specification of how family should be defined. Regardless of whether Justice Harlan’s perspective was less broad than it might have been or, perhaps, whether social practices have changed over the past forty years or so, the issue at hand involves the legal recognition of existing families. The concept of family has evolved over the past several decades to include additional groups of individuals who function as families. While there may be disagreements about what the outer contours of this concept should be, same-sex partners (perhaps with children whom they are raising) are close enough to the core definition of family that there should be no question that they should be included. Unless the Court is going to “close [its] . . . eyes to the basic reasons why certain rights associated

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144. Id. at 551-52.
145. Justice Harlan also discussed the state’s ability to define who may marry whom:

It is one thing when the State exerts its power either to forbid extramarital sexuality altogether, or to say who may marry, but it is quite another when, having acknowledged a marriage and the intimacies inherent in it, it undertakes to regulate by means of the criminal law the details of that intimacy.

Id. at 553. It is difficult to tell which marital restrictions he had in mind, for example, interracial or incestuous. However, given that he signed onto Loving and, when writing for the majority in Boddie v. Connecticut, 401 U.S. 371 (1971), he recognized that “marriage involves interests of basic importance in our society,” id. at 376 (citing Loving), it seems clear that he believed the state’s power to limit who may marry whom was not without limit.


[A] more realistic, and certainly equally valid, view of a family includes two adult lifetime partners whose relationship is long term and characterized by an emotional and financial commitment and interdependence. This view comports both with our society’s traditional concept of “family” and with the expectations of individuals who live in such nuclear units.
with the family have been accorded shelter under the Fourteenth Amendment[...], [the Court cannot] ... avoid applying the force and rationale of these precedents to the family choice involved in this case."\textsuperscript{147} It has already been established that the "Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition,"\textsuperscript{148} and, as an Alaska trial court has suggested, "just as the 'decision to marry and raise a child in a traditional family setting' is constitutionally protected as a fundamental right, so too should the decision to choose one's life partner and have a recognized nontraditional family be constitutionally protected."\textsuperscript{149}

The second point is that Justice Harlan did not suggest that the right to privacy must be limited to family but merely that the doctrine must be built upon that basis. Thus, it would be quite compatible with his articulated view to expand right to privacy protections as long as family matters were at its core. As to how far these protections should be expanded, this is an issue which state courts are attempting to address in light of their own constitutional rights to privacy protections.

\textbf{B. On Fornication and Adultery}

Traditionally, states criminalized both fornication and adultery.\textsuperscript{150} Fornication involves an unmarried person's having sexual relations with someone else, whereas adultery involves a married person's having sexual relations with someone other than his or her spouse.\textsuperscript{151} Thus, two unmarried people having

\textsuperscript{147} Moore v. City of East Cleveland, 431 U.S. 494, 501 (1977) (plurality opinion).

\textsuperscript{148} Id. at 503 (Brennan, J., concurring).


sexual relations might be guilty of fornication,\textsuperscript{152} two married people having sexual relations might be guilty of adultery (assuming that they were not married to each other),\textsuperscript{153} and a married and unmarried individual having sexual relations with each other might be guilty of different crimes.\textsuperscript{154}

The above method of distinguishing between fornication and adultery may seem a little surprising, since its focus is not on whether \textit{either} party to the affair is married but, rather, on whether the individual whose conduct is at issue is married. According to the definition above, an unmarried individual having sexual relations with someone is guilty of fornication whether or not his or her sexual partner is married, and a married individual having sexual relations with someone other than his or her spouse would be guilty of adultery. Thus, a single individual having an affair with a married person might be guilty of fornication while his or her partner would be guilty of adultery.\textsuperscript{155}

A variation of the above method of distinguishing between fornication and adultery involves looking at the marital status of the \textit{woman} involved in the affair.\textsuperscript{156} A single woman and a mar-

\textsuperscript{152} See Hopwood v. State, 45 S.E.2d 715, 716 (1947) ("Since the indictment alleges that both parties were single at the time of the alleged act, the accused is charged with the offense of fornication only.").

\textsuperscript{153} See Purvis v. State, 377 So. 2d 674, 676 n.2 (Fla. 1979):
Whoever lives in an open state of adultery shall be guilty of a misdemeanor of the second degree, punishable as provided in § 775.082 or § 775.083. Where either of the parties living in an open state of adultery is married, both parties so living shall be deemed to be guilty of the offense provided for in this section.

\textsuperscript{154} But see Hopwood, 45 S.E.2d at 716 (emphasis added) (citation omitted):
Under Code § 26-5801, "there are three distinct kinds of indictable sexual intercourse, viz. adultery, fornication, and adultery and fornication, the offense in each case being a joint one. If both parties to the criminal act are married, each is guilty of adultery; if both are single, each is guilty of fornication; if one is married and the other single, each is guilty of adultery and fornication."

\textsuperscript{155} Compare GA. CODE ANN. § 16-6-18 (1999) (an unmarried person commits fornication, a misdemeanor, when he voluntarily has sexual intercourse with another), \textit{with} GA. CODE ANN. § 16-6-19 (1999) (a married person commits adultery, a misdemeanor, when he voluntarily has sexual intercourse with a person other than his spouse); compare UTAH CODE ANN. § 76-7-104 (1995) (an unmarried person who voluntarily engages in sexual intercourse with another is guilty of fornication, a class B misdemeanor), \textit{with} UTAH CODE ANN. § 76-7-103 (1995) (a married person who has sexual intercourse with someone other than his spouse commits adultery, a Class B misdemeanor).

\textsuperscript{156} See MINN. STAT. ANN. § 609.36(1) (West 1987) (adultery involves married woman having sex with a man other than her husband); MINN. STAT. ANN. § 609.34 (West 1987) (fornication involves a single woman having sexual intercourse with any man).
ried man having sexual relations would be guilty of fornication while a married woman and a single man having sexual relations would be guilty of adultery. It is unclear whether this method of differentiating would survive an equal protection challenge.\textsuperscript{157} It is also unclear what crime would have been committed if a married woman had an affair with a single woman—as a general matter, the definitions of fornication and adultery adopted by the states tended to assume that the individuals having the affair were not of the same sex.\textsuperscript{158}

Currently, in several states, when an individual has an affair with someone who is married to a third party, both parties to the affair may be charged with adultery.\textsuperscript{159} That way, one would not have the seemingly anomalous situation in which, for example, Kim is charged with adultery and Dana with fornication when both knew that Kim was married and both nonetheless voluntarily engaged in the affair.

At least two points might be made about this way of defining adultery, which several states have adopted. First, it would have important implications for the person who might now be accused of adultery rather than fornication, since some states punish the former more severely than the latter,\textsuperscript{160} and other states criminalize one without criminalizing the other.\textsuperscript{161} Second, where either party to an affair may be charged with adultery if one of them is married to someone else,\textsuperscript{162} it makes sense to reserve fornication

\textsuperscript{157} See Anne M. Coughlin, Sex and Guilt, 84 VA. L. REV. 1, 43 n.144 (1998) (discussing the double standard involved in such classifications); Carolyn B. Ramsey, Sex and Social Order: The Selective Enforcement of Colonial American Adultery Laws in the English Context, 10 YALE J.L. & HUMAN. 191, 207 (1998) (book review) (stating that the "definition of adultery as intercourse with a married or espoused woman embodied an explicit double standard, for a married man could not commit adultery by sleeping with a single female").


\textsuperscript{159} See IDAHO CODE § 18-6601 (1997); MASS. GEN. LAWS ANN. ch. 272, § 14 (West 1990); MICH. COMP. LAWS ANN. § 750.29 (West 1991); N.H. REV. STAT. ANN. § 645:3 (1996); N.Y. PENAL LAW § 255.17 (McKinney 1989); R.I. GEN. LAWS § 11-6-2 (1994); S.C. CODE ANN. § 16-15-70 (Law Co-op. 1985); Wis. STAT. ANN. § 944.16 (West 1996).

\textsuperscript{160} See infra note 163 (describing penalties for each in Massachusetts and Idaho).

\textsuperscript{161} For example, both New York and Rhode Island have laws criminalizing adultery but not fornication. See N.Y. PENAL LAW § 255.17 (McKinney 1989); R.I. GEN. LAWS § 11-6-2 (1994).

\textsuperscript{162} There may be an explicit proviso suggesting that the unmarried person will not be guilty if he or she reasonably believes that the other party is unmarried. See, e.g., ALA. CODE § 13A-13-2(b) (1994).
for instances in which neither party to the affair is married. That way, should the state believe that sex between unmarrieds is less offensive, if offensive at all, than sex between a married person and a nonspouse, the state would be able to distinguish between the two.\textsuperscript{163} Should the state find adultery and fornication equally offensive, for example, because each involved sexual relations outside of marriage, then the state could impose the same penalty on either "crime."\textsuperscript{164}

Even if fornication is limited to instances in which both parties are unmarried, the term still covers very different types of relationships. For example, it would include two unmarried parties having sexual relations who had lived together for several years, had had children together, and had been monogamous for that entire period.\textsuperscript{165} It might also include two unmarried parties who had had a one-night stand. In the former case, the couple has a marriage-like relation even if in fact the state does not give legal recognition to their relationship.\textsuperscript{166} In the latter, the couple has had intimate relations, even if not a long-lasting relationship. These different relationships might receive different constitutional protections, depending upon which principle determines what is protected by the right to privacy.\textsuperscript{167}

C. Criminal Versus Civil Penalties

The question of immediate concern in this section is whether the right to privacy protects the right to commit fornica-

\textsuperscript{163} See Idaho Code § 18-6601 (1997) (person committing adultery shall have jail sentence not exceeding three years or a fine not exceeding $1,000); Idaho Code § 18-6603 (1997) (person committing fornication shall have jail sentence not exceeding six months or fine not exceeding $300); Mass. Gen. Laws Ann. ch. 272, § 14 (West 1990) (person committing adultery shall be imprisoned for a term not exceeding three years or fined not more than $500); Mass. Gen. Laws Ann. ch. 272, § 18 (West 1990) (person guilty of fornication shall be imprisoned for not more than three months or fined not more than $30).

\textsuperscript{164} See, e.g., S.C. Code Ann. § 16-15-60 (Law. Co-op. 1985) (both adultery and fornication subject to fine of not more than $500 or jail term of not more than a year or both); W.V. Code Ann. § 61-8-3 (1997) (person guilty of fornication or adultery shall be guilty of a misdemeanor and fined not less than $20).

\textsuperscript{165} But see Coleman, supra note 93, at 412.

\textsuperscript{166} The first couple might well not have the option of having a common law marriage, since only a minority of states recognize such unions. See Staudenmayer v. Staudenmayer, 714 A.2d 1016, 1019 n.3 (Penn. 1998) (listing states still recognizing such marriages). Thus these individuals might not be recognized as legally married notwithstanding their having lived together as a family for many years.

\textsuperscript{167} See infra notes 180-87 and accompanying text.
tion or adultery. However, even before that is addressed, a separate issue must be briefly discussed, if only so that different issues will not be conflated. Regardless of how much the constitutional right to privacy includes, the state should neither be criminalizing fornication nor adultery. Even if one rejects the claim that adultery is a violation of private rather than public morality and instead believes adultery a violation of both, there are numerous reasons that it should nonetheless not be criminalized. For example, limited public resources are better spent in enforcing other laws. It is not even clear that society thinks adultery appropriately punished, since such laws are rarely if ever enforced.

It might be argued that, even if adultery laws are not enforced, an important message is communicated about society's views as long as laws prohibiting that conduct remain on the books. However, it is simply unclear what message unenforced laws communicate. Perhaps the message is that society disap-


In all matters concerned directly or indirectly with sexual morality, from homosexuality to abortion, from pornography to adultery, the trend both of social mores and of the law has been towards a greater recognition of the rights of consenting adults to lead their own private lives without interference from the State.

169. See M. Cathleen Kaveny, Cloning and Positive Liberty, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 15, 34 n.37 (1999) (A theorist can "consistently hold both that adultery should not be subject to criminal prohibition and that it is a violation of public morality (e.g., a breach of a publicly made marriage promise whose fulfillment is important to the community at large as well as to the children born from the marriage).".).

170. See Coleman, supra note 93, at 414 ("[L]imited law enforcement resources are allocated, and frequently depleted, in fighting more life-threatening criminal activity."); J. Drew Page, Comment, Cruel and Unusual Punishment and Sodomy Statutes: The Breakdown of the Solem v. Helm Test, 56 U. CHI. L. REV. 367, 391 (1989) (suggesting that "public resources are, and probably should be, used to police more serious crimes involving violence and loss of life" than sodomy or adultery).

171. See Coughlin, supra note 157, at 9 (suggesting that fornication and adultery statutes violate "contemporary moral and political judgments"); Stuart Green, Why It's a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses, 46 EMORY L.J. 1533, 1601 n.227 (1997) (suggesting that criminal penalties for adultery seem out of place); Toni M. Massaro, The Meanings of Shame Implications for Legal Reform, 3 PSYCHOL. PUB. POL'Y & L. 645, 668 (1997) (discussing the sense that "sexual behaviors, such as adultery or premarital sex, have been destigmatized"); but see Eric Rasmussen & Jeffrey Evans Stake, Lifting the Veil of Ignorance: Personalizing the Marriage Contract, 73 IND. L.J. 453, 479 (1998) (pointing out that states could step up their enforcement of these laws).
proves of adultery,\textsuperscript{172} although the failure to prosecute might also suggest that society believes adultery permissible\textsuperscript{173} or, at the very least, not particularly offensive.\textsuperscript{174} Further, yet another message might be communicated—by having laws remain on the books even though those laws are rarely if ever enforced, society may communicate that it does not believe that its own laws must be taken seriously. Thus, by having unenforced laws on the books, society may promote a lack of respect for those laws in particular or for law more generally.\textsuperscript{175}

As a separate matter, if the goal of laws criminalizing adultery is to promote marriage, they may in fact undermine the very goal they seek to attain. Threatened or actual imposition of criminal sanctions would seem unlikely to promote reconciliation.\textsuperscript{176} Further, the threat of such sanctions might also chill honest and open communication, perhaps blocking the only path that might lead to a particular marriage being saved.\textsuperscript{177}

\textsuperscript{172} See Elizabeth S. Scott, \textit{Rehabilitating Liberalism in Modern Divorce Law}, 1994 \textit{Utah} L. Rev. 687, 703 n.58 (suggesting that the law reinforces social norms); \textit{cf.} Traci Shallbetter Stratton, Note, \textit{No More Messing Around: Substantive Due Process Challenges to State Laws Prohibiting Fornication}, 73 Wash. L. Rev. 767, 797 (1998) ("Keeping fornication statutes on the books and informing the public of their existence might not prevent fornication, but it will send a much needed message of social disapproval, driving this immoral conduct underground.").

\textsuperscript{173} See Sunstein, \textit{supra} note 112, at 95 (suggesting that "when an old law is practically unenforced because it does not receive sufficient public approval, ordinary citizens are permitted to violate it"); \textit{but see} Gerard E. Lynch, \textit{Our Administrative System of Criminal Justice}, 66 Fordham L. Rev. 2117, 2144 (1998) ("So long as the formal prohibition remains on the statute books, even if largely unenforced, it has the power to shape conduct: people may not often comply with a fifty-five mile per hour speed limit, but they drive slower than if the limit is removed or raised.").

\textsuperscript{174} See Coleman, \textit{supra} note 93, at 410 ("[T]he State's consistent failure to prosecute saps any hope of effective deterrence."); Paul H. Robinson & John M. Darley, \textit{The Utility of Desert}, 91 Nw. U. L. Rev. 453, 472 n.47 (1997) ("[R]egular non-enforcement or a declination to prosecute or to convict tends to undermine the norm prohibiting the conduct.").

\textsuperscript{175} See Andrew D. Leipold, \textit{Rethinking Jury Nullification}, 82 Va. L. Rev. 253, 300 (1996) ("[T]he presence of many unenforced crimes probably breeds cynicism about the law.").

\textsuperscript{176} See Coleman, \textit{supra} note 93, at 403 ("Criminal adultery trials, or even the mere threat of prosecution, erode rather than enhance the probability for survival of the marriage."); Martin J. Siegel, \textit{For Better or for Worse: Adultery, Crime and the Constitution}, 30 J. Fam. L. 45, 89 (1991-92) ("[I]t is impossible to believe that a criminal penalty imposed on one of the spouses would somehow benefit a marriage instead of representing the final nail in its coffin.").

\textsuperscript{177} \textit{But cf.} N.Y. C.P.L.R. § 4502 (a) (McKinney 1992) ("A husband or wife is not competent to testify against the other in an action founded upon adultery, except to prove the marriage, disprove the adultery, or disprove a
Thus, there seem to be a variety of reasons not to criminalize adultery. Many of these arguments would apply with equal if not greater force to fornication. Thus, regardless of whether the United States Constitution prohibits criminal sanctions for adultery or fornication, adult, consensual fornication, sodomy, and adultery should not be criminalized.

D. A Constitutional Right to Commit Adultery?

The above suggests that a legislature would be wise not to criminalize certain sexual practices. Nonetheless, a separate question is whether any or all of these practices are protected by the right to privacy. Consider the analysis offered by the Supreme Court of Texas when it was asked to consider whether adultery was protected by the right to privacy guaranteed under the Texas Constitution. The court held that adulterous relations were not protected, echoing part of Justice Blackmun's Bowers dissent by pointing out that "adultery often injures third persons, such as spouses and children." Indeed, the court suggested that adulterous conduct "is the very antithesis of marriage and family . . . [since adultery], by its very nature, undermines the marital relationship and often rips apart families."

Arguably, the Texas court was exaggerating its description of adultery, since adultery does not by its very nature undermine marital relationships. Indeed, some claim that adulterous relationships have strengthened their marriages. Thus, perhaps the Texas court should have claimed that adultery sometimes destroys marriages when one of the parties has breached his or

defense after evidence has been introduced tending to prove such defense."); N.Y. C.P.L.R. § 4502(b) (McKinney 1992) ("A husband or wife shall not be required, or, without consent of the other if living, allowed to disclose a confidential communication made by one to the other during marriage.").

178. *But see* Coughlin, *supra* note 157, at 9 ("[I]f we are now prepared to agree that fornication and adultery no longer should be criminalized—whether because these offenses violate contemporary constitutional guarantees or contemporary moral and political judgments (to the extent that such judgments differ from constitutional guarantees) . . . ") (emphasis added).


180. *Id.* at 470.

181. *Id.; see also* Commonwealth v. Stowell, 449 N.E.2d 357, 360 (Mass. 1983) ("We take judicial notice that the act of adultery frequently has a destructive impact on the marital relationship and is a factor in many divorces.").

182. *See* Coleman, *supra* note 93, at 411-12 ("[P]aradoxically perhaps, many spouses report that having an affair actually strengthened their marriages."); *cf.* Siegel, *supra* note 176, at 90 ("[T]here are many marriages in which [adulterous] . . . conduct is either tacitly condoned or enthusiastically participated in together.").
her promise to be faithful.\textsuperscript{183} Still, even if the court's language was too strong, its point remains. It seems reasonable to assume both that adultery sometimes destroys marriages and that adultery and fornication are distinguishable in this very respect, assuming that fornication is limited to relations between individuals who are not married to anyone.\textsuperscript{184}

That fornication would be less likely to destroy existing families and might indeed promote family (especially if a functional definition of family is used)\textsuperscript{185} might be constitutionally significant if in fact the relevant test involves the promotion of family rather than, for example, whether the activity is of intimate personal concern. However, where the latter is the relevant test, a different analysis will be required if, indeed, courts nonetheless are not going to recognize that the right to privacy protects the right to commit adultery.

E. State Constitutions

Over the past several years, various state courts have held that their own state constitutions have broader right to privacy protections than are contained in the Federal Constitution\textsuperscript{186}—several state courts have struck down sodomy statutes on state constitutional grounds.\textsuperscript{187} The question at hand is what implications, if any, these rulings have for the other practices under discussion here.

\textsuperscript{183} See Coleman, supra note 93, at 413.

\textsuperscript{184} Commentators disagree about whether premarital sex promotes or undermines marriage generally, but that is a different debate. Compare Linda J. Lacey, Mimicking the Words, But Missing the Message: The Misuse of Cultural Feminist Themes in Religion and Family Law Jurisprudence, 35 B.C. L. Rev. 1, 30 (1993) ("An alternative view is that people understand that compatibility is necessary for a successful marriage and believe that premarital sex and cohabitation give them an opportunity to decide whether the relationship has a good chance of survival.") with Leon R. Kass, The End of Courtship, 126 Pub. Interest 39, 44 (1997) ("For why would a man court a woman for marriage when she may be sexually enjoyed, and regularly, without it?").


\textsuperscript{186} See, e.g., Women of State of Minnesota v. Gomez, 542 N.W.2d 17, 30-31 (Minn. 1995) (stating that state right to privacy protections are broader than the analogous federal right); In re J.W.T., 872 S.W.2d 189, 197 (Tex. 1994) ("Texas due course of law guarantee has independent vitality separate and distinct from the due process clause of the Fourteenth Amendment to the United States Constitution.") . . .

\textsuperscript{187} See, e.g., Commonwealth v. Wasson, 842 S.W.2d 487 (Ky. 1993); Gryczan v. State, 942 P.2d 112 (Mont. 1997); Campbell v. Sundquist, 926 S.W.2d 250 (Tenn. App. 1996).
In *Campbell v. Sundquist*, a Tennessee appellate court stated that the "right to privacy provided to Tennesseans under our Constitution is in fact more extensive than the corresponding right to privacy provided by the Federal Constitution." The court also said that "an adult's right to engage in consensual and noncommercial sexual activities in the privacy of that adult's home is a matter of intimate personal concern which is at the heart of Tennessee's protection of the right to privacy." In *Powell v. State*, the Georgia Supreme Court reached a similar conclusion on similar grounds. The Georgia court wrote: "We cannot think of any other activity that reasonable people would rank as more private and more deserving of protection from governmental interference than unforced, private, adult sexual activity." The Montana Supreme Court expressed similar sentiments.

Some commentators have worried that the reasoning of these and other courts would imply that adultery is also constitutionally protected, which would seem to prevent the imposition of any penalties, criminal or civil, for such behavior. At least two points should be made about such a claim. First, such a result might not be unwelcome—criminal penalties should not be imposed for such conduct and, at least in certain kinds of situations, civil penalties should not be imposed either. For example, child custody decisions should be made in light of who would be a better parent rather than in light of who committed adultery, assuming that no nexus between the adultery and the parenting can be established.

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188. 926 S.W.2d 250 (Tenn. App. 1996).
189. *Id.* at 261.
190. *Id.* at 262.
191. 510 S.E.2d 18 (Ga. 1998).
192. *Id.* at 24.
193. *See* Gryczan v. State, 942 P.2d 112, 123 (Mont. 1997) ("[I]t is hard to imagine any activity that adults would consider more fundamental, more private and, thus, more deserving of protection from governmental interference than non-commercial, consensual adult sexual activity.").
194. *See* Powell, 510 S.E.2d at 30 (Carey, J., dissenting) ("Presumably, under this new standard, the State can no longer enforce laws against fornication or adultery.").
195. *See* Note, *supra* note 93, at 1678 n.136 (1991) ("Civil restrictions on adultery share the same constitutional infirmities as criminal adultery laws.").
196. *See supra* notes 168-77 and accompanying text.
197. *See* Mark Strasser, *Fit to Be Tied: On Custody, Discretion, and Sexual Orientation*, 46 Am. U. L. Rev. 841, 861-62 (1997) ("The nexus test requires that a connection between parental conduct and harm to the child be established if the parent is to be deprived of custody because of that conduct.").
It is simply unclear whether civil penalties for adultery are inappropriately imposed in other contexts—for example, when determining spousal support. Arguably, penalties are not appropriately imposed in that context either, since it may be difficult to establish which party is "really" at fault when one of the parties commits adultery. Further, allowing such an imposition may operate to systematically disadvantage one group—fault-based models have historically operated to disadvantage women. Yet, arguably, a fault system could be devised which would not disadvantage one group. Further, at least some suggest that adulterers should have civil penalties imposed against them.

Courts recognizing that "unforced, private, adult sexual activity" is protected by the right to privacy might seem to have established that their state constitutions protect adultery and that only a compelling state interest could justify statutes permitting the imposition of civil penalties against adulterers. However, such a conclusion may not be warranted. Even assuming that the right of privacy protects consensual, adult, sexual relations, it does not follow that civil penalties could not be imposed for adulterous behavior, since an individual might be said to have waived his or her right to have unforced, private, adult relations with a nonspouse when he or she took marital vows. Using the

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199. Barbara Bennett Woodhouse looks at how fault-based models affect alimony awards:

Traditional alimony rules, which imposed a fault-based story, punished women and men unequally. They penalized women but not men for sexual misconduct by denying alimony to a woman who left her marriage without cause. Men, as the supporting spouses, lost nothing through their own misconduct, but gained freedom from financial responsibility by proving their wives' misconduct.


200. See id. at 2558 ("Rather than adopting a fault-blind approach to avoid discrimination, I would ask that judges evaluate male, female, heterosexual, and homosexual conduct by a single standard.").

201. See id. ("A person who agrees to an exclusive, monogamous relationship clearly has wronged the partner when he or she secretly has sex with others and exposes the faithful partner to sexually transmitted disease. He or she should be responsible to the mate for the harm inflicted.").


203. Of course, it might be argued that the state has a compelling interest in preventing adultery. Such a claim has even been made about fornication. See Stratton, supra note 172, at 789 ("Even if the Court were to find a fundamental right to engage in sex, fornication statutes would survive strict scrutiny.").

204. See Bowers v. Hardwick, 478 U.S. 186, 209 n.4 (Blackmun, J., dissenting) ("A State might define the contractual commitment necessary to become
waiver analysis, civil penalties might still be imposed on the married individual having the affair.

Ironically, although a waiver theory would account for why the marital partner might be sanctioned for having committed adultery, it is not clear whether such a theory could account for why the unmarried individual would be subject to having penalties imposed for having taken part in an adulterous affair, since that individual would not, for example, have waived the relevant right by taking marital vows. However, it might be argued that an unmarried individual does not have a right to have sexual relations with someone who is married (who, after all, has waived his or her right to have sexual relations with a nonspouse), since the latter might be viewed as legally incapable of consenting to such relations. Consensual relations with a minor are not protected by the right to privacy, at least in part, because minors are legally incapable of consenting, and an analogous argument might be of use to establish why the Constitution does not protect adulterous relations between adults.

As a general matter, society has grown more willing to allow unmarried individuals to have consensual, adult sexual relations without fear of criminal penalty—the trend in current law is not to have statutes prohibiting fornication205 and not to enforce those statutes that are on the books.206 Nonetheless, it is also true that some states have repealed their fornication statutes while retaining their adultery laws207 and, further, that those adultery statutes also target the unmarried individual who takes part in the affair.208 Thus, it may well be that society views adul-

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205. See A. Mechele Dickerson, Family Values and the Bankruptcy Code: A Proposal to Eliminate Bankruptcy Benefits Awarded on the Basis of Marital Status, 67 FORHAM L. REV. 69, 103 n.174 (1998) (listing the relatively few states that still have fornication laws); see also Coughlin, supra note 157, at 22 n.79 (suggesting that some statutes only prohibit open fornication while others would apply to any sexual activity by single individuals).

206. Even adultery statutes tend not to be enforced. See supra note 171 and accompanying text.

207. See, e.g., R.I. GEN. LAWS § 11-6-3 (1994) (concerning fornication which was repealed by P.L. 1989, ch. 214 § 1); R.I. GEN. LAWS § 11-6-2 (1994) (Rhode Island adultery statute).

208. See R.I. GEN. LAWS § 11-6-2 (1994) ("[I]licit sexual intercourse between any two (2) persons, where either of them is married, shall be deemed adultery in each.")
tery much more unfavorably than it does fornication and, at least arguably, that the Constitution permits but does not require penalties to be imposed if one engages in the former.

The discussion above is merely intended to suggest that a recognition that the right to privacy protects the right to engage in consensual adult relations would not entail that individuals would have the right to commit adultery. Even if the right to privacy is not premised on a connection to marriage and family but instead on the right to engage in consensual, adult, intimate relations, it would not therefore follow that adultery laws are therefore unconstitutional. A court basing the right to privacy on connection to family or on the intimacy and fundamental nature of voluntary, adult relations could quite consistently hold that consenting sexual relations between unmarried adults are protected by the right to privacy without also holding that the Constitution recognizes a right to commit adultery.

CONCLUSION

The current federal right to privacy jurisprudence has family concerns at its core. This alone has a variety of implications, since those who seek the right to marry a same-sex partner are often seeking legal recognition of their already existing families. Even if Bowers is still good law, same-sex marriage may nonetheless be constitutionally protected by the right to privacy. Indeed, the only nonspecious rationale articulated in Bowers to determine what is protected by the right to privacy supports rather than undermines the theory that laws banning same-sex marriage violate federal constitutional guarantees.

Bowers was a disaster, not only because the wrong conclusion was reached but also because the reasoning was so patently specious that it is difficult to know what the Court was trying to communicate in addition to its disapproval of same-sex relations. Perhaps the Court was suggesting that sexual relations are not protected by the Federal Constitution unless they are within the family context. Arguably, that view is mistaken, although a more plausible claim might be that sexual relations within a relationship are viewed as more fundamental and hence having more constitutional protection than are individual sex acts.

209. See Charles Fried, Philosophy Matters, 111 Harv. L. Rev. 1789, 1745 (1998) ("[L]aws criminalizing homosexual relations between consenting adults violate fundamental principles of morality and, therefore, constitutional protections of fundamental rights.").
outside of a relationship. 210 Even if acts within a relationship are considered more fundamental than acts outside of one, however, that of course does not mean that sexual activity outside of relationships should be criminalized unless they are, for example, nonconsensual, but merely that sexual activity within relationships would be accorded constitutional priority.

If, indeed, adult, consensual relationships are at least as fundamental as adult, consensual relations, 211 then those state constitutions protecting the latter should also protect same-sex relationships. While there are important differences between the two—legal recognition of same-sex relationships involves a public recognition of those unions whereas protecting sexual relations might "merely" mean immunizing them from criminal prosecution—the entire right to privacy jurisprudence would have to be turned on its head for nonmarital relations to be recognized as fundamental without an accompanying recognition of the right of same-sex partners to form legally recognized families. On any plausible reading of the right to privacy jurisprudence, the federal and, especially, certain state constitutional rights to privacy already include the right of same-sex couples to form the sacred personal union which is so fundamental in that jurisprudence. Any other reading would suggest that rights and activities already recognized as protected may not enjoy that status for very long.

210. See Jed Rubenfeld, The Right of Privacy, 102 HARV. L. REV. 737, 755 (1989) ("There is no reason for personhood to assert that every sexual act is fundamental to an individual's identity. Rather the intimacy of a sexual relationship—the bond between two people—might be what is central.").

211. Incestuous relations can presumably be excluded because of the harms that they can cause. Jocelyn Lamm discusses some of the harms caused by incest:

Experts have also noted a strong correlation between incest and long-term damage: severe anxiety and depression, sexual dysfunction, and multiple personality disorder. Additionally, the internalization of the anger and anxiety that the incest victim has not been allowed to express frequently results in a profound self-hatred that causes self-destructive behavior later on: incestuous childhood victimization commonly leads to other abusive relationships, self-mutilation, prostitution, and drug and alcohol addiction.
