ABSTRACT

A Sexual Revolution in the Court: An Examination of the Constitutionality of Morally Based Sexual Laws

Victoria Jones

Director: Steve Block, Ph.D.

In the United States, the standards of acceptable sexual conduct are continually evolving. Socially, a shift has occurred towards accepting actions that, at other points in time, were considered grievous sexual deviancies. Similarly, the Supreme Court since *McLaughlin v. Florida* has gradually acknowledged not only a definite right to privacy, but a right to choose whether to bear children, whom to marry, and what sexual intimacies to engage in. Through the line of these cases, beginning with *McLaughlin* and including such cases as *Loving v. Virginia, Eisenstadt v. Baird*, and particularly *Lawrence v. Texas*, the Supreme Court undergoes a sexual revolution, setting the stage for the acknowledgement of further sexual rights. In light of these cases, and particularly in light of Lawrence v. Texas, the laws regarding cohabitation, adultery, and fornication can no longer be considered sound legal statutes. These laws are, in light of recent Supreme Court precedent, unconstitutional and when and if they arrive before the Supreme Court, if principles follow they will be declared as such, or else repealed by the states in which they were enacted in favor or more progressive stances towards the changing social environment surrounding sexual relationships and intimacy within the home.

APPROVED BY DIRECTOR OF HONORS THESIS:

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Dr. Steve Block, Political Science

APPROVED BY THE HONORS PROGRAM:

_____

Dr. Andrew Wisely, Director

DATE: _____

A SEXUAL REVOLUTION IN THE COURT: AN EXAMINATION OF THE CONSTITUTIONALITY OF MORALLY BASED SEXUAL LAWS

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Victoria Jones

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DEDICATION

In loving memory of my sister, Vanessa - for the many hours of encouragement and love and for her unfailing confidence in me
And to my family and to Nita, my closest friend, for their support and patience in this, and all, endeavors

CHAPTER ONE

Introduction to Sexual Morality in the United States

Morally-Based Sexual Laws

Introduction

Laws designed to regulate sexual morality, while not commonly enforced, pervade much of the United States. Even in light of *Lawrence v. Texas*, when the Supreme Court struck down the bans on sodomy within the United States, many laws regarding sexual conduct still remain. In addressing this situation, I will address three types of laws aimed at sexual morality: cohabitation, adultery, and fornication. Specifically, I will address cohabitation as an alternative family structure existing in a sexual relationship outside the bounds of legal marriage, adultery as a man or women having sexual intercourse with another person that is not his/her spouse, and fornication as any extramarital sexual relationships.[1] In all of these cases, I will limit the discussions to pertain only to consensual relationships between adults and use the relevant societal norms as well as the legal jurisprudence of the Supreme Court to show that these laws are unconstitutional when viewed in light of the current jurisprudence of the Supreme Court.

I will begin by examining the nature of cohabitation, adultery, and fornication, as well as the current environment surrounding of these types of sexual

[1] For the purpose of this thesis, I will address cohabitation both in terms of monogamous couples and in terms of polyamorous situations.

conduct. Following this, I will provide a brief overview of the relevant societal environment and norms that influence the way society as a whole views these actions in the modern times, paying attention to possible social concerns that might arise were these statutes no longer in place. Lastly, I will address the jurisprudence of the Supreme Court to show the development of a sexual revolution within the Court, leading up to the Court's decision in *Lawrence v. Texas* and culminating in an environment ripe for these laws, if and when addressed, to be declared unconstitutional.

Cohabitation

I will begin this examination of sexual morality laws by first addressing the issue of cohabitation. Cohabitation, as previously mentioned, can refer to a range of activities. For instance, cohabitation can be used to refer to friends or students living as roommates, using this situation for economic advantages in order to pool their financial resources to offset living costs. Typically in this situation, one would expect said pooling of expenses to only concern paying for rent or utilities.

Sexual cohabitation, however, concerns far more than merely a pooling of resources for economic advantage, at least in theory. Nonetheless, sexual cohabitation still may involve a variety of situations. Perhaps most culturally normative in the United States is a type of sexual cohabitation occurring between two adults as a precursor to marriage. In a study conducted from 2006-2010, over 48% of women reported having cohabitated with their partner before marriage.[2]

[2] Grossbard, Shoshana. "Common Law Marriage and Couple Formation." IZA Journal of Labor Economics 3, no. 1 (2014): 2.

With 48% of married women having already engaged in cohabitation, it certainly would seem that, culturally, cohabitation as a precursor to marriage is, at least to some degree, an accepted phenomenon.

Furthermore, many couples may use sexual cohabitation as an alternative to marriage, rejecting the general cultural standard of legal marriage and instead opting to live in a situation that, aside from the legal designation of a married couple, typically carries the same significance as any other typical marriage. In the past, most couples in the United States who wish to form such a relationship and present themselves as husband and wife could seek a common law marriage after living in such a situation for a fixed period of time. As recent as 2014, however, only 11 states currently allow common law marriages, and one of these states recognizes only posthumous common law marriages, purely for the purposes of inheritance.[3] On the contrary, other states criminalize cohabitation by unmarried couples. For example, Michigan Penal Code states,

> "Any man or woman, not being married to each other, who lewdly and lasciviously associates and cohabits together… is guilty of a misdemeanor punishable by imprisonment for not more than 1 year, or a fine of not more than $1,000.00."[4]

This means that currently, in Michigan, a couple that lives together prior to marriage or without seeking a marriage license could potentially be subject to a year of imprisonment. It is this type of law, as well as similar laws regarding adultery and fornication, that this thesis attempts to address.

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[3] Ibid., 3.

[4] Mich. Pen. Code § 750.335

Cohabitation, however, does not refer exclusively to relationships between two individuals. Cohabitation can also be used to refer to polyamory, defined by the Oxford English Dictionary as

> "the fact of having simultaneous close emotional relationships with two or more other individuals, viewed as an alternative to monogamy, esp. in regard to matters of sexual fidelity; the custom or practice of engaging in multiple sexual relationships with the knowledge and consent of all partners concerned."[5]

This practice is colloquially referred to as 'poly' by many of its participants and includes various different forms of relationships, the most culturally apparent of which is polygyny.[6]

Polygyny refers to the subset of polyamory in which one man engages in a relationship with multiple women at one time with the consent of all of the other women to which he is currently in a relationship with.[7] In this type of relationship, the male engages in sexual relationships with each of the females who do not likewise engage in sexual relationships with one another and typically purports to be the husband of each of the wives. This type of relationships is not a new phenomenon and has occurred in many different states throughout history. Likewise, it has in recent times become the subject of much cultural interest in

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[5] "polyamory, n.". OED Online. September 2014. Oxford University Press. http://www.oed.com/view/Entry/252745?redirectedFrom=polyamory (accessed October 6, 2014).

[6] Tweedy, Ann E. "Polyamory as a Sexual Orientation." *University of Cincinnati Law Review* 79, no. 4 (2011): 1479.

[7] "polygyny, n.". OED Online. September 2014. Oxford University Press. http://www.oed.com/view/Entry/147191?redirectedFrom=polygyny (accessed October 6, 2014).

shows like *Sister Wives*. *Sister Wives*, for instance, showcases the relationship of former Utah resident Kody Brown, his four wives, and their children.[8] Sometimes, as in the case of the Brown family, the man and one of his 'wives' may actually seek a marriage certificate, while the rest of the wives perform ceremonies with the man and then proceed to purport themselves as husband and wife.

Alternatively, polyamory may take the form of polyandry- a relationship where one women has multiple male partners with the consent of all of her other partners.[9] This is, however, a much less common form of polyamory and is rarely seen in the United States, though it does occur in some areas, most significantly of which is Tibet.[10] Lastly, polyamory may refer to a group relationship in which all of the participants actively engage in sexual relationships with one another. At this point, it is not necessary to discuss this relationship in depth, but merely to address the fact that they are a possible relationship within polyamory and relationships that does occur in the world today. In speaking about the decriminalization of cohabitation, this would then include any number of consensual adults in a sexual relationship living within the same home without a formal marriage license between all of the people involved.

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[8] *Sister Wives.* TLC. September 2010-Present

[9] "polyandry, n.". OED Online. September 2014. Oxford University Press. http://www.oed.com/view/Entry/147056?redirectedFrom=polyandry (accessed October 6, 2014).

[10] Berreman, Gerald D. *Pahari Polyandry a Comparison*. 1st ed. Vol. 64. Berkeley, Calif.: Institute of International Studies, University of California, 1962. 60.

As of current, of course, state-sanctioned polygamy, in which a person is granted a legal marriage to more than one other person, is not legal in the United States. This question, of the legalization of polygamy, has been addressed by the Supreme Court in *Reynolds v. United States* (1878), and is not the subject of this thesis today.[11] Rather, in terms of cohabitation I will consider only the broader term- the ability of any number of people, whether married or unmarried, to live together in a home of their choosing without government interference.

Sexual cohabitation could then be viewed as the over-arching term for those sexual relationships involving two or more mutually consenting adults within the same home. Some of these relationship groupings actively seek a state-recognized marriage and many others emphatically do not. For the purpose of this thesis, I will merely address the right of these people to continue at the status quo from which they live without legal penalties, not necessarily the right of these people to seek marriage certificates.

Adultery and Fornication

Adultery and fornication, alongside cohabitation, remain criminalized in much of the United States. Adultery is typically understood to be sexual intercourse, whether or not there is a larger relationship at play, between two or more people, at least one of which is currently married to someone else. Although Michigan, mentioned before in terms of its laws regarding cohabitation, does criminalize

[11] Reynolds v. United States, 98 U.S. 145 (1878). http://www.lexisnexis.com/us/lnacademic/

adultery, it does so only when the injured spouse wishes to seek criminal prosecution. In Idaho, however, the penal code says this of adultery:

> "A married man who has sexual intercourse with a woman not his wife, an unmarried man who has sexual intercourse with a married woman, a married woman who has sexual intercourse with a man not her husband, and an unmarried woman who has sexual intercourse with a married man, shall be guilty of adultery, and shall be punished by a fine of not less than $100, or by imprisonment in the county jail for not less than three months, or by imprisonment in the state penitentiary for a period not exceeding three years, or in the county jail for a period not exceeding one year, or by fine not exceeding $1000."[12]

Thus, in Idaho, a person convicted of adultery could face up to three years in a state penitentiary. Although I will not endeavor to argue that adultery is, or should be, culturally acceptable, I will advocate instead for the more common method of rectifying adultery- divorce. Although Michigan, by allowing the injured spouse to choose not to seek prosecution for divorce, does allow for more freedom on the part of the couple to choose how to deal with infidelity, both states seek to punish acts occurring within a very private place. Actual prosecutions for adultery occur very rarely and, by that very nature, are applied unequally within the states. By allowing the couples to seek divorce, counseling, or whatever remedy they see fit, the state would maintain the privacy and individual control of the marital bond that is heavily protected through the line of cases I will discuss in the later chapters.[13]

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[12] Idaho Code § 18-6601

[13] Obviously, adultery is typically going to involve a lack of respect for the sanctity of marriage by one of the spouses. That being said, it is still important for the state to respect the decisions of the couple in terms of how they as a couple choose to privately deal with the infidelity, whether through divorce, counseling, or some other manner.

Fornication, still criminal in many states, I will cover most briefly. A study conducted from 1954-2003 found that by age 20, 75% of respondents had engaged in premarital sex and that by age 44, 95% of respondents had had premarital sex. This study reached this frank conclusion, relevant to the question at hand: "Almost all Americans have sex before marrying."[14] If this were the case, it would seem quite unusual that fornication convictions remain rare in the United States. There are a few possible explanations for this. First, it is difficult to catch someone in the act of fornication and, furthermore, difficult to prove after the actual act has occurred. Secondly, that those in charge of prosecuting these cases no longer see them as legitimate cases and thus no longer wish to attempt to see convictions and have ceased to view these laws as legitimate laws. Most likely, however, it is some combination of these two facts, meaning that these statutes are both difficult to enforce and no longer desired by the majority of the population. If this is the case, then in accordance with the constitutional protections of the home, as well as the equal protection clause that assures that laws are applied fairly, these statutes would seem to be unconstitutional.

Evolving Standards of Sexual Expression

As was discussed previously, actual convictions for cohabitation, adultery, or fornication happen rarely. Nonetheless, these convictions do still occur and in the recent case of the TLC show *Sister Wives,* this issue has made its way into popular

[14] Finer, Lawrence B. "Trends in Premarital Sex in the United States, 1954–2003." Public Health Reports 122, no. 1 (2007): 73.

culture. In an episode of the second season that aired in May of 2011, the Brown family revealed that, under mounting pressure from a police investigation following their television debut, they would be moving to Las Vegas so as to avoid the investigation while continuing to try and legally battle the investigation surrounding their family.[15] Recently, however, a federal judge struck down the ban on polygamous cohabitation within the bigamy law in Utah in favor of the Browns' argument that, following in the tradition of *Lawrence v. Texas* and the striking down Texas' sodomy law, they had a right to privacy within their home. This decision came while still upholding the portion of the statue requiring that no one hold more than one marriage certificate, thereby continuing to strike down legal marriage for polygamous couples while upholding their freedom to the privacy of their homes and the ability to determine their own family structures and relationships.[16]

For the Browns, this was a victory in every sense. They have not sought legal marriages but have engaged in religious, ceremonial marriages that signify their bond to one another. This overturned legislation, however, may very well signal a change in the United States, and a movement towards allowing more freedom in the realm of private, religious or ceremonial marriages to multiple people and keeping this distinguished from a state-recognized marriage license. In fact, despite the laws that criminalize cohabitation, adultery and fornication, polyamory in its many forms

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[15] "The Brown Family Decision." *Sister Wives.* TLC. May 8, 2014.

[16] "Judge finalizes 'Sister Wives' ruling as both sides prepare for appeals." *The Salt Lake Tribune.* August 28, 2014 Thursday . Accessed October 7, 2014. www.lexisnexis.com/hottopics/lnacademic.

continues to be practiced as a deviant sexual behavior within modern culture, as do instances of adultery and fornication that, as in the case of the Brown family, can occur simultaneously alongside polyamory.[17]

Furthermore, the 2000 census showed that less than 25 percent of households in the United States were what would be deemed traditional nuclear families.[18] This signals a currently evolving view as to traditional family life and a need to reexamine current legal and social standards for sexual and familial relationships. It is with this evolution and change in mind that I begin the examination of the social and legal aspects of cohabitation, adultery, and fornication and how these issues might one day find themselves entering into the legal jurisprudence of the United States.

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[17] "Polygamy Law Is Focus of Witte's Library of Congress Appointment." *Center for the Study of Law and Religion*. August 2, 2012. Accessed October 7, 2014. http://cslr.law.emory.edu/news/news-story/headline/polygamy-law-is-focus-of-wittes-library-of-congress-appointment/.

[18] Bowman, Cynthia Grant. "Legal Treatment Of Cohabitation In The United States*." *Law & Policy* 26, no. 1 (2004): 119-51. Accessed October 7, 2014.

CHAPTER TWO

Sexual Morality from a Sociological Perspective

Introduction

In this chapter I will focus primarily on sexual cohabitation in the United States, beginning with a lesser emphasis on adultery and fornication. The primary reason for this choice lies in the nature in which these acts occur- cohabitation and adultery necessarily include fornication, and the widespread prevalence of fornication in the United States has already been discussed.[1] In the case of adultery, this thesis does not purport to argue the merits of adultery, but merely the legal jurisprudence that suggests that adultery cases are better handled through civil litigation.

Adultery and Fornication.

According to Black's Law Dictionary, marriage is defined as,

> "A *contract*, according to the form prescribed by law, by which a man and woman, capable of entering into such contract, mutually engage with each other to live their whole lives together in the state of union which ought to exist between a husband and wife." (emphasis added)[2]

According to this definition, then, marriage is a contract from the very beginning. Accordingly, "Contract Breaches and the Criminal/civil Divide: An Inter-common Law Analysis" in the Georgia State University Law Review said this about contracts:

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[1] See Adultery and Fornication in Chapter 1.

[2] Black's Law Dictionary 1124 (10th ed. 2014).

> "While accidental breaches are possible, it stands to reason that most breaches will be intentional. A breach entitles a person to bring suit for any money damages resulting from the nonperformance of the contract; however, the state does not seek non-monetary sanctions, such as imprisonment, for such breaches."[3]

If this is the case, marriage ought to be treated similar to other contracts, allowing injured parties to seek damages due to the breech of the contract via civil litigation rather than criminalizing these actions. Because there are so few adultery cases actually prosecuted compared to the instances of adultery that actually happen, it would seem most prudent for the laws to reflect this change.

Furthermore, the case of fornication, as it is covered under the rest of the statutes here discussed, particularly concerns extra marital intercourse between two unmarried people. With the large percent of the population that engaged in premarital intercourse, imagining these laws applied as they are written would lead to a disproportionately large percent of the population charged with sexual crimes. It seems to make the most sense, in this case, to suggest that perhaps these laws, finding their justifications only in preventing the moral degradation of society, do not withstand constitutional muster.

Sexual Cohabitation

` In analyzing the role of Cohabitation in modern society, an analysis of the various forms of cohabitation and their sociological and psychological impacts is required. Broadly, cohabitation can be easily divided into two primary forms:

[3] Bedi, Monu. "Contract Breaches and the Criminal/civil Divide: An Inter-common Law Analysis." Georgia State University Law Review 28, no. 3 (2012): 567. HeinOnline Law Journal Library.

sexual cohabitation and non-sexual cohabitation. In this sense, sexual cohabitation refers to any number of consenting adults that share the same living place while engaging in sexual interactions with one another. Non-sexual cohabitation would they refer to some number of adults that share the same living place without engaging in sexual conduct with one another. Sexual cohabitation can then further be broken into two large categories, cohabitation of monogamous relationships and cohabitation of polygamous relationships.

Monogamous Cohabitation

Monogamous cohabitation can be most easily understood as the act of two people living together as if husband and wife without the prior arrangement of a legal marriage.[45] For the purpose of this thesis, there is little need to distinguish whether the people actually purport to be married or simply live in a similar situation, as all types of sexual cohabitation between only two people will be understood to mean monogamous cohabitation. Monogamous Cohabitation refers broadly to either heterosexual or homosexual couples. These couples can be grouped into three temporal categories: couples that live together as a part of an extended courting process, couples who live together as a trial arrangement in

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[4] The Encyclopedia of Marriage, Divorce and The Family, s.v. "cohabitation"

[5] Technically cohabitation could also include married couples living together in one house. Because in current society this is considered the status quo or the default nature of relationships, this is not examined in depth at this point in the thesis. Instead, in order to adequately address the sociological impacts of deviant sexual culture, monogamy within a marriage is considered in contrast to the monogamy here presented without the addition of a marital union.

preparation for a later marriage, and couples that live together long-term as an alternative to seeking a legal marriage certificate.[6] For the purposes of discussion, cohabitation as courtship and cohabitation as trial marriage are grouped into the single category of cohabitation as a precursor to marriage, separate from cohabitation as an alternative to legally binding marriage.

Cohabitation as a precursor to marriage. In discussing the history of courting, E.S. Turner remarks that, particularly in Britain and in America, some couples have long chosen, as a part of the courting process, to set up a house together and discover their compatibility, both in terms of sexual relations and the ability to co-exist peacefully in one home, before seeking a legal marriage.[7]

This arrangement, although clearly somewhat common and not a new solution, comes with a host of particular problems. A study conducted by Pennsylvania State University found that although at that time, in the early 2000's, more than half of all couples in the United States lived together before marriage, that arrangement was still linked to higher rates of "troubled unions, divorce, and separation."[8] Furthermore, because some cohabiters do not pool financial resources, cohabitation could lead to increased instability and financial strain on

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[6] The Encyclopedia of Marriage, Divorce and The Family, s.v. "cohabitation"

[7] Turner, E. S. "'Sex O'Clock'" In *A History of Courting*, 212-213. New York: E.P. Dutton &, 1955.

[8] "Pre-Nup Cohabitation Promotes Divorce." *USA Today Magazine* 132, no. 2707 (April 2004): 5-6. *Academic Search Complete*, EBSCOhost (accessed November 5, 2014).

each of the parties.[9] Because of this ill-defined relationship, the relationship of the couple to any pre-existing children can be extremely vague and has little legal support in society.[10] Overall, these issues seem to suggest that cohabitation is less stable and generally ill advised.

This being said, many of these factors can be mitigated when considering the courting role of this type of cohabitation. Contrary to the study by Pennsylvania State University, another study published in 2010 found that, when other factors were controlled for, research supports the notion of a trial marriage. "Furthermore," the study concluded, "the risks of marital dissolution for those who cohabited prior to marriage were lower than for those who married directly."[11] Specifically, this study found that women who cohabitated prior to marriage had a 31% lower risk of dissolution than women who married directly.[12] This suggests that rather than being the burden previously suggested, cohabitation, when viewed as a precursor to marriage may be beneficial to the couple and more likely to lead to a steady, stable relationship later in life. Sociologists Pepper Schwartz and Philip

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[9] Linda Waite, "Cohabitation". In Encyclopedia of Social Problems. Thousand Oaks: Sage Publications, 2008. http://ezproxy.baylor.edu/login?url=http://literati.credoreference.com.ezproxy.baylor.edu/content/entry/sagesocprob/cohabitation/0 (accessed November 10, 2014.)

[10] Ibid.,

[11] Kulu, Hill and Paul J. Boyle. "Premarital Cohabitation and Divorce: Support for the "Trial Marriage" Theory?" *Demographic Research* 23, (Jul, 2010): 896, http://ezproxy.baylor.edu/login?url=http://search.proquest.com/docview/856212332?accountid=7014 (accessed November 6, 2014).

[12] Ibid., 894.

Blumstein found similar results in surveying more than 6,000 American couples. They concluded that, as advanced courtship rather than a long-term alternative to marriage, cohabitating couples behaved very much like married couples and did not seem to view marriage in any less of a positive, reverent light.[13] This suggests that cohabitation prior to marriage has at best a positive effect on long-term relationship status and, at worse, results in a roughly equivalent relationship. Neither study, however, found negative effects associated with this cohabitation.

If this is the case, this might also serve as a counter to the argument that cohabitation would be worse for pre-existing children. In fact, if the premarital cohabitation didn't increase divorce rates and perhaps instead led to a more stable family structure, it would suggest that the children might also benefit from increased stability and financial support. If these couples were behaving as married couples would, as Schwartz and Blumstein found, their support of their children would likely become more financially stable and would more than likely also have increased emotional support for the child. It is, furthermore, not difficult to imagine that even in the event that this trial marriage dissolved, the dissolution of a relationship not complicated by legal involvement might put the children in a better situation than if they were involved in the additional stresses of the legal system's role in actual divorce proceedings. Short-term premarital cohabitation can then be understood to actually be a benefit to the families involved by encouraging discovery about the other party in the relationship, and a chance to live as a married

[13] The Encyclopedia of Marriage, Divorce and The Family, s.v. "cohabitation"

couple might do without fear of the difficulties of divorce should the situation not work out. If this is the case, this type of cohabitation may actually prove to be a social benefit rather than a hindrance and then rightly ought to be free of government interference and regulation.

Cohabitation as an alternative to marriage. This form of cohabitation, which looks facially very similar to the previous example, carries many of the same problems as well as a number of additional problems stemming from the couple's choice to forgo traditional marriage. Typically, this type of cohabitation faces is stigmatized to a greater extant than cohabitation as courtship or trial marriage and is typically viewed more of the fringe of monogamous cohabitation.

As stated before, some, primarily older, studies argue that premarital cohabitation is detrimental to the long-term success of a relationship. In addition to the rates of relationship dissolution, the previously stated concerns for the wellbeing of children, as well as the financial stability of the couple still exist. Beyond this, the social implications of continuing to live unmarried, particularly if the couple either chooses to or accidently has children together while unmarried to one another generally reflects poorly on the couple in today's society. Such a child, an illegitimate child, often colloquially referred to as a "bastard child," or "love child," is viewed in a light that reflects poorly on both the children and the parents.[14]

[14] Francoeur, Robert T. *A Descriptive Dictionary and Atlas of Sexology*. New York: Greenwood Press, 1991. s.v. "illegitimate child," "bastard (bastardry)"

Despite these social implications, many of these problems can once more be easily re-examined when more studies are consulted. Suggesting that cohabitating might increase the divorce rate means little to a couple that never plans on marrying. Even if the dissolution of these relationships is still compared to a marital divorce, many of these couples may favor this approach because of previous poor experiences with marriage and may prefer the social mobility associated with cohabitation- without a legal marriage there are fewer outside forces holding the couple together if they become incompatible. Furthermore, in the case of children in a cohabitating relationship, multiple studies have found that the presence of children not only increases the likelihood that a couple will decide to marry, but also increases the stability of the cohabitating union altogether.[15] Regardless of whether these children were from previous relationships or were children formed from the cohabitating couple, the children tended to increase the likelihood that the couple would marry and decrease the number of familial disruptions that occurred as a result of living in a single-parent household long term.[16] In addition to this, society has generally moved towards a less stigmatizing view of children of unmarried couples, particularly considering the vast increase in the number of children that live in such a situation. The National Vital Statistics report in 2013 reported that

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[15] Forste, Renata. "Prelude to Marriage or Alternative to Marriage? A Social Demographic Look at Cohabitation in the U.S." *Journal of Law & Family Studies* 4, no. 1 (2002): 94.

[16] Ibid.,

40.6% of all children born were children born out of wedlock.[17] As this type of birth becomes significantly more commonplace, the notion that children would be ostracized as being an illegitimate offspring has become exceedingly unlikely.

In examining all of these social and financial influences, downsides to cohabitation are still apparent. The argument that some might be more financially unstable is still valid, even if others would choose to act as married couples and join bank accounts in a similar manner to those who are married. It is true that they might choose this financial instability and thus put themselves at a disadvantage. Furthermore, children of cohabitating unions are living in a less stable environment than a marriage.[18]

However, those same children tend to show a better overall well being than children of single parent households. According to another author, single-parent homes tend to face many challenges in providing for, disciplining, and otherwise communicating with their children.[19] When comparing this with the other studies, it suggests that some of these problems- the inability to punish children and the way in which children, perhaps detrimental to themselves, assume an equality-based friendship role with parents rather than a hierarchical role, might be somewhat

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[17] Martin, Joyce A., Brady E. Hamilton, Michelle J.K. Osterman, Sally C. Curtin, and T.J. Matthews. "Births: Final Data for 2013." *National Vital Statistics Reports* 64, no. 1 (2015): 7.

[18] Ibid., 94-95

[19] "A Different Kind of Parenting." *In The Psychosocial Interior of the Family*, edited by Gerald Handel, by Robert S. Weiss, 485-514. 3rd ed. Hawthorne, New York: Aldine Pub., 1985.

countered if those parents who would not otherwise choose to marry instead chose to live together in a monogamous cohabitating union, whether or not this union originally was aimed at the goal of marriage.[20]

Polyamorous Cohabitation

Polyamorous cohabitation is a much more discreet and unusual living arrangement than that of a monogamous cohabitation. This sort of cohabitation has many forms and tends to be more likely to be illicit situations. Although in some places monogamous cohabitation is illegal, it is very commonplace to see statutes regulating anything that might be considered to be polyamorous cohabitation, often particularly aimed to regulate those that would engage in polyamorous sexual relationships. Still, polygamy in a cohabitation setting can encompass a variety of living situation and agreements on the part of those involved, but for the purpose of this thesis will be broadly grouped into three categories. First and most well known is that of a committed polygamous union that condemns extra marital sex and follows that image of a spoke and wheel with one central, usually male, member and other sexual partners of that one person. Often times this is a religious sort of union and is referred to by some as a series of celestial marriages, although it can take many forms, religious or not, and be referred to under a variety of different names and situations. It is in this image that the relationships in shows like *Sister Wives*

[20] Although this will be addressed more significantly in the next chapter with *Eisenstadt v. Baird,* it is important to note here than the fact that these studies show that nuclear families are ultimately a somewhat more stable relationships for children does not necessarily mean that it is in the purview of the states to restrict non-nuclear families from living together.

and *Big Love* are formed.[2122] Secondly, polygamous cohabitants may fall into the category of a group union. These groups, like the first category, condemn sexual relationships outside of the core cohabitating relationship but, unlike the first category, do not function on a spoke and wheel model. Rather, these groups function in more of a spider-web formation, where each person may have bonds with any of the other people. Lastly, though not discussed at length in this thesis, is an open relationship where the people are already living in a group larger than two adults and may purport to have a relationship with more than one person. Often times this type of living arrangement is referred to as polyamory, though in some instances all of the participants may live separately in single or dual occupant homes and only come together for social or sexual encounters.[23]

[21] *Sister Wives.* TLC. September 2010-Present

[22] *Big Love.* HBO. March 2006-March 2011.

[23] This can be alternately referred to as adultery or fornication, and as such will be best addressed within those categories rather than under sexual cohabitation statutes.

Polygyny and celestial marriages.[24] The issue of polyamorous cohabitation raises many of the same issues as before, as well as a much larger range of moral and religious objections to the practice. In the most basic sense, polygamy has long been regarded as a perversion of normal sexual behavior. In *Polygamy's Rights and Wrongs: Perspectives on Harm, Family, and Law,* Rebecca Johnson describes the polygamist history of her extended family, and lays out a series of common problems associated with this type of relationship.[25] First, she postulates the problem of multiple sexual partners as essentially prior agreement of adultery on the part of the male in the relationship. Following this line of thinking, it isn't much of a stretch to imagine polygamy in that sense as having the potential for an increased risk of disease for all involved due to an increased number of sexual partners. Johnson continues further to offer the problem of gender inequality, a common frustration with polygamy, as it is normally understood in a polygynous relationship. Allowing one man to have multiple female sexual partners, Johnson

[24] For the purpose of this section, I am focusing on particularly the types of polygamous relationships that involve one man and multiple women. Although polyandry could, in theory, happen in the United States, it is an unusual practice in current society and unlikely to have many case examples from which to provide a clear list of the social harms and benefits. Polygyny has many more historical and biological roots, particularly in the ability of one man to impregnate multiple females during the same period of time, whereas polyandry has little historical scholarship and is less biologically viable. For these reasons, the cohabitation portion will focus solely on those relationships involving one man with multiple wives, where the wives do not engage in sexual contact with one another but rather only with the male head of the household.

[25] Calder, Gillian, and Beaman, Lori G., eds. *Polygamy's Rights and Wrongs : Perspectives on Harm, Family, and Law*. Vancouver, BC, CAN: UBC Press, 2013. Accessed December 1, 2014. ProQuest ebrary.

argues, is a persistent double standard for sexual fidelity among the partners, and by nature unequal.[26] Finally, Johnson argues that another of the chief problems in polygamy is that of young brides[27]. Although the examples provided in the book relate specifically to Canada, it is common in United States for the minimum age of marriage to be 18. Nonetheless, the required age can, and does, vary by state and, furthermore, most states provide exceptions to the law in the case of parental approval. California, for example, proscribes *no minimum age* at which a minor can marry with prior parental approval.[28]

In the first instance, that of habitual adultery on the part of the male in the relationship, the problem in using such as the basis for regulating polyamorous cohabitation becomes readily apparent when examining the likelihood of a person being considered a criminal for engaging in adultery in a typical, generally monogamous, marital union. Although some states do forbid such an action by law, these laws are rarely enforced and thus hold little judicial value.[29] Rather, current pop culture is such that in many cases, such as the popular music industry, the general consensus on the propriety of adultery seems to be at best that of light

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[26] Ibid.,

[27] 'Young bride' here refers to minor children being married to older men. Although these are not typically legal marriages in the United States, the children are expected to live in such a way so as to purport to be married and conduct themselves as though they were married to the other person.

[28] Marriage Laws*. In *World Almanac and Book of Facts*. 290. 2000.

[29] Although this will be discussed further in the next chapter, if these laws are not enforced they cease to have meaning to the society and become ineffective towards their stated ends, at best.

scorn, perhaps even pity towards the involved parties, and at worst seems to glorify the portrayal of men in particular who engage in extramarital sexual relationships.[30] [31] [32] Johnson points out here that if we aren't to condemn those who engage in these extra-marital affairs without consent of their spouse, why would polygamy be forbidden simply because the aforementioned parties have previously agreed to be bound by this sort of relationship.[33] Furthermore, assuming that this polygamous relationship takes place in an exclusive situation, the potential for disease wouldn't be significantly higher than that of two people who engage in exclusive sexual relationships with one another, as polyamorous cohabitation could include as few as one extra sexual partner who would have no other sexual partners from whom to spread potential disease.

In terms of gender inequality, this is a situation that is very clearly readily apparent in polygamist relationships. In fact, this might lead one to assume that women are forced into this relationship and generally rebel against their oppressors, wishing to get out. Contrary to this, Denise Paulme argues, women in these relationships do not see their own actions are undignified or debasing towards themselves, but rather it is the prejudice of those that believe the Western

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[30] Sugarland. *Stay*. Enjoy the Ride, 2007 by Mercury Nashville.

[31] Usher. *Confessions Part II*. Confessions, 2004 by Arista.

[32] Naughty by Nature. *O.P.P.* Naughty by Nature, 1991 by Tommy Boy Records.

[33] Calder, Gillian, and Beaman, Lori G., eds. *Polygamy's Rights and Wrongs : Perspectives on Harm, Family, and Law*. Vancouver, BC, CAN: UBC Press, 2013. Accessed December 1, 2014. ProQuest ebrary.

ideal to be the only dignified position for a woman.[34] Undoubtedly, gender inequality is something still very prevalent in current society, in many social and political forms.[35] That being said, it doesn't seem to follow that the basis for disallowing and stigmatizing polyamorous cohabitation falls solely under the problem of gender inequality, particularly when the women themselves generally don't regard themselves as being treated unequal. Additionally, with other types of polyamory gaining more ground in common society, it seems that perhaps as polyamory becomes more common, these types of gender differences would become less common and less pronounced. A law that disallowed all polyamory on the basis of some forms being viewed as debasing to women seems to be a law of overbredth, which is typically not viewed as a valid law in the United States.

Lastly, and perhaps most significantly is the argument in favor of protecting those who might be forced into marriage young. This is undoubtedly a significant issue that merits concern. Most of society, as Johnson points out, would not condone and, in fact, condemn relationships between forty-year-old men and fourteen year old girls, and often view this as the stereotypical image of polygamy.[36] If this is the case, though, and these laws are aimed at the goal of protecting young women, why would so many states have laws allowing children to marry sometimes

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[34] Hillman, Eugene. "Polygamy in Society." In *Polygamy Reconsidered: African Plural Marriage and the Christian Churches*, 126-127. Maryknoll, N.Y.: Orbis Books, 1975

[35] Stein, Mark. *American Panic: A History of Who Scares Us and Why*. 172-173.

[36] Ibid.,

as young as twelve with the mere consent of a parent?[37] In fact, in California, as previously stated, there is no minimum age. If this is the true concern of society, it is a reasonable one, but the concern then would be better aimed at changing the current statues concerning the age of marriage rather than banning all relationships between consenting adults. The institution of polygamy, when removed from those that break other laws and cultural stigmas by engaging in sexual relationships with children under the age of consent, is then very similar to the institution of a monogamous marriage. In these terms, consensual adults would be engaging in activates that society otherwise would not condemn, but merely chooses to do so whilst living under one room and purporting themselves to all be members of the same family.

Group marriage and other forms of polyamory. Many of the concerns previously discussed apply equally to this section with few exceptions. The primary difference, in fact, is that group marriage and polyamory are rarely connected to a religious movement and rather generally viewed as simply an extension of individual freedoms. In this sense, a few additional problems arise, or are more complicated, by this living arrangement. First, in the instance of children of the relationship, the appropriate familial structure may be difficult to distinguish and may, potentially, cause difficulty for the children. Contrary to this, studies have shown that even when enrolled in public schools with some degree of visibility in terms of the marital status of the parents, children did not face significant problems

[37] Marriage Laws*. In *World Almanac and Book of Facts*. 290. 2000.

despite their family situations.[38] In general, the studies found, the children did not seem to be worse off than their peers were otherwise. Aside from these small differences, group marriages are otherwise generally similar to the other forms of polyamory and can be viewed in light of the same problems and solutions, save perhaps the fact that group marriages have less of a concern of unequal gender relations.

Non-Sexual Cohabitation

Non-Sexual cohabitation is generally viewed with less of a stigma than that of sexual cohabitation. Nonetheless, it does still present some problems from a familial, economic, and neighborly concerns.

Co-ed Roommates or Other Mixed-Gender Housing

In terms of coeducational based dormitory style living, little disagreement occurs about the sociological benefits of such an arrangement. Theoretically, concerns of extramarital sexual relationships, devaluing of property in off-campus residences, and general concerns of groupthink or criminal behavior could occur.

In terms of extramarital sexual relationships, in the majority of co-ed situations, the students are all of legal age. In this sense, while states and society at large may disagree morally with pre-marital sex, it is unlikely to ever actually be prosecuted, particularly following cases such as *Lawrence v. Texas,* as was stated in

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[38] Smith, James R., and Lynn G. Smith. "Emerging Patterns of Innovative Marriage Behavior." In *Beyond Monogamy; Recent Studies of Sexual Alternatives in Marriage*,, 132. Baltimore, Maryland: Johns Hopkins University Press, 1974.

the introduction.[39] Devaluing of property concerns, or other neighborly concerns of this sort, can, to some degree, be considered legitimately within societal and state interest.[40] Nonetheless, society places high value in the ability of a person to choose with whom they live. For some student, for instance, roommates may be necessary to lower cost of housing. In this sense, while the concern of preserving the peace is a legitimate interest of the state, this doesn't seem to be a valid reason for a widespread ban upon cohabitation when a more narrowly tailed law might suffice.

Extended Family Cohabitation

The last area of concern deals almost solely with societal perceptions. Few places attempt to severely restrict the right of family to congregate in one home, though some do.[41] In *Moore v. East Cleveland* (1977) in particular, though, the court struck down the right of the state to make the distinction between the extended family and the nuclear family as an undue protrusion of the state into the family life.[42] This type of arrangement has long had its own share of problems. Finances, for instance, may be a concern for some families struggling to support elderly family members that are no longer able to work, as may concerns of disagreements over

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[39] Lawrence v. Texas, 539 U.S. 558 (2004). http://www.lexisnexis.com/us/lnacademic/

[40] Village of Belle Terre v. Boraas, 416 U.S. 1 (1974). http://www.lexisnexis.com/us/lnacademic/

[41] Moore v. City of East Cleveland, 431 U.S. 494 (1977). http://www.lexisnexis.com/us/lnacademic/

[42] Ibid.,

childrearing and household rules. This being said, the beneficial effects of extended family relationships are well-documented and well known. Some case studies even suggest that extended family as either nearby relatives or cohabitants can serve to mediate conflicts and mitigate differences.[43] This generally faces little opposition from society and, contrary, is often regarded as beneficial to the family unit.

Conclusion

Although sexual cohabitation is perhaps the most nuanced and complicated matter of the three, there remains some societal concerns may arise with adultery and fornication as well. In the case of adultery, in particular, I do not attempt to show that adultery is good or ought to occur, but merely that adultery is best solved, when it becomes necessary for the courts to be involved, via civil courts. Furthermore, although some states do have laws criminalizing fornication, it is hardly condemned in our society. If this is the case, and the enforcement of these statutes remains as infrequent as it is currently, it seems that these laws hardly carry the same weight as laws that are actually enforced.

Most important to note, leading into the following section concerning the legal history of the right to privacy and a variety of sexual and marital rights, is that these laws are based in an attempt to regulate the morals of those who would engage in these actions. I will argue, however, that the lack of enforcement of these statutes, as well as the line of cases culminating in *Lawrence v. Texas* that rejects

[43] "Extended Family Relations of Disturbed and Well Families." *In The Psychosocial Interior of the Family*, edited by Gerald Handel, by Norman W. Bell, 157-173. 3rd ed. Hawthorne, New York: Aldine Pub., 1985.

sexual laws based purely on public morals, means that these laws have no other legitimate state purpose upon which to stand and are thus unconstitutional.

CHAPTER THREE

A Sexual Revolution in the Court

The Declaration of Independence and the Constitution

The Declaration of Independence

To examine the future of morally-based sexual laws in the United States requires more than a mere examination of the social culture of a sexual revolution, even if said culture is ripe for change. In the United States, a nation of laws, this sort of change would best be indicated by a trend in the laws on the society that, in this case, can be traced back to the very founding of the United States. The Declaration of Independence, written in 1776, laid down many of the foundations that would later form the legal structure of the United States, first in the Articles of Confederation and later in the Constitution of the United States. Among these declaration of harms suffered in the United States, comes the famous declaration of unalienable rights, rights which all people are naturally born with and which it become to purpose of the government to protect. "Among these," the text states, indicating other unstated but nonetheless unalienable rights, "are Life, Liberty, and the pursuit of Happiness."[1]

It is this final right, the pursuit of Happiness that relates most directly to cohabitation. According to Arthur M. Schlesinger, in his article for *The William and*

[1] Declaration of Independence, Paragraph 2 (1776).

Mary Quarterly, the traditional view of the term "pursuit of happiness" is that one has a right to a quest for happiness, to literally pursue happiness without any tangible right to actually achieve said happiness.[2] Instead, Schlesinger argues, that rather than this traditional view, this phrase is more rightly understood as a right to happiness as a continued state of being, that is, the right to be happy. In supporting this claim, Schlesinger argues that John Adams, who had, just a few months prior, declared that, "the happiness of society is the end of government", made no changes to the phrasing of the sentence at question, despite that fact that he happily suggested changes to other portions of the Declaration of Independence.[3] With this in mind, Schlesinger postulates, this famous phrase ought to be read with the rest of the sentence in mind, particularly the end that states that, "…it is the Right of the People to … institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness."[4] When read with this in mind, Schlesinger argues, "the pursuit of happiness" should be understood in this more emphatic light, celebrating a person's right to practice happiness. This, of course, presents the difficult question of exactly what happiness entails, a question that Schlesinger doesn't seem to answer, and that many philosophers have pondered over long, long before the United States was ever formed. Nonetheless, this statement, whether interpreted in

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[2] Schlesinger, Arthur. "The Lost Meaning of "The Pursuit of Happiness"" *The William and Mary Quarterly* 21, no. 3 (1964): Pp. 325-327.

[3] Ibid., 327

[4] Declaration of Independence, Paragraph 2 (1776).

the light that Schlesinger argues or interpreted in the more common sense of a right to literally pursue happiness or attempt to be happy, reveals the highly individualistic belief system that the United States government is rooted in.

It is in accordance with this trend, continuing through the legal history of the United States, though the constitution, and such important cases as *Meyer v. Nebraska* (1923)[5], *Griswold v. Connecticut* (1965)[6], *Roe v. Wade* (1973)[7], *Moore v. East Cleveland* (1977)[8], *Lawrence v. Texas* (2003)[9], and most recently, *United States v. Windsor*[10], amongst many others that one can find this idea of a right privacy and freedom within the home, as well as a general notion that the Supreme Court, as well as society at large, has no real idea what happiness entails precisely and that, because of this, the government rightly ought to remain morally neutral, allowing each to decide his or her own morals and terms of happiness. Although there are cases along the way that are contrary to this understanding, *Reynolds v. United*

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[5] Meyer v. Nebraska, 262 U.S. 390 (1923). http://www.lexisnexis.com/us/lnacademic/

[6] Griswold v. Connecticut, 381 U.S. 479 (1965). http://www.lexisnexis.com/us/lnacademic/

[7] Roe v. Wade, 410 U.S. 113 (1973). http://www.lexisnexis.com/us/lnacademic/

[8] Moore v. City of East Cleveland, 431 U.S. 494 (1977). http://www.lexisnexis.com/us/lnacademic/

[9] Lawrence v. Texas, 539 U.S. 558 (2004). http://www.lexisnexis.com/us/lnacademic/

[10] United States v. Windsor, 570 U.S. ___ (2013). http://www.lexisnexis.com/us/lnacademic/

States (1879)[11] and *Bowers v. Hardwick* (1986)[12] for instance, I argue that the general trend of the Supreme Court precedent is towards an environment in which one would expect to reasonably see morally-based sexual laws occurring within the privacy of a home between consensual adults, when the acts are victimless and can be based in none other than moral disapproval, to be effectively unconstitutional. As previously discussed in the introduction, and later expounded upon in this chapter, this moral disapproval in itself, in light of *Lawrence v. Texas*, does not seem to be a compelling enough factor to buck the legal trend of heightened privacy interests within the home.[13] Using this fact combined with the sporadic enforcement of these statutes, I will show the unsustainability of current morally based sexual laws by tracing the legal history of privacy and marital/sexual rights in Supreme Court precedent.

The Bill of Rights and Later Amendments to the Constitution

Introduction. In order to address the constitutionality of current laws regarding cohabitation, adultery, and fornication, it is necessary to consider the Constitution itself. If these laws regulating sexual morality were not constitutionally sound, the basis for such a conclusion would lie somewhere in the Bill of Right, most

[11] Reynolds v. United States, 98 U.S. 145 (1879). http://www.lexisnexis.com/us/lnacademic/

[12] Bowers v. Hardwick, 478 U.S. 186 (1986). http://www.lexisnexis.com/us/lnacademic/

[13] Lawrence v. Texas, 539 U.S. 558 (2004). http://www.lexisnexis.com/us/lnacademic/

likely, or at least somewhere within the Constitution itself. Ultimately, as I will show through the cases the Supreme Court has decided thus far, if we continue to interpret the Constitution as we do in the line of cases that are currently form the Court's jurisprudence, these laws are ultimately unconstitutional.

The first ten amendments to the Constitution, also known as the Bill of Rights, primarily concern themselves with protecting the rights of the people and singling out the most important and notable rights guaranteed to the people of the United States. In the case of statutes criminalizing cohabitation, adultery, and fornication, as this thesis is primarily concerned with, the most notable sections of the Constitution are the amendments concerned with the sanctity of the home, equal protection, and due process. It is worth noting here that, as in the case of *Reynolds v. United States*, the first amendment is often used in support of cohabitation of a religious sort, as is the case with celestial marriages of the Fundamentalist Mormon Church.[14] Traditionally, this has not passed the test of the Supreme Court. For the scope of this thesis, religious cohabitation is considered only as it falls under the heading of cohabitation that ought not to be prosecuted. That is, the court has not suggested that the religious motivations for this type of cohabitation are a basis upon which one can choose to undertake a currently criminal action.[15] Rather, I will attempt to show that, regardless of religious motivations, economic motivations, or any other possible reasons for this conduct, it is important only to

[14] Reynolds v. United States, 98 U.S. 145 (1879). http://www.lexisnexis.com/us/lnacademic/

[15] Employment Division, Department of Human Resources of Oregon vs. Smith, 494 U.S. 872 (1990). http://www.lexisnexis.com/us/lnacademic/

recognize that these statutes are grounded in mere moral disapproval and, combined with the lack of current enforcement, are not constitutionally sound. I will first begin by addressing the third and fourth amendments in terms of the heightened protections regarding the home, then furthermore the fifth and fourteenth amendment principles of due process and equal protection.

Sanctity of Home: 3rd and 4th Amendments. Together, the third and fourth amendments suggest that the idea of the sanctity of the home has long been a part of the legal doctrine of the United States. The third amendment states,

> "No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law."[16]

This amendment, more than regarding only the quartering of soldiers during war or peace time, speaks deeper to the long-standing cultural belief in the United States that the home is particularly removed from intrusion by the government. It is in the home that citizens find their highest level of protection from an invasion of their privacy, even tracing back to the beginning of the United States. Although this amendment is rarely at issue for citizens today, the principles suggesting the particular sanctity of the home will continue through the jurisprudence of the Supreme Court. Following this theme of the protections accorded to the home, the fourth amendment states,

[16] U.S. Const. amend. III

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."[17]

Although in *Katz v. United States*, the court determined that the fourth amendment "protects people, not places," the fourth amendment clearly notes the right of the people to be secure in their homes, and in, Justice Harlan's concurrence in Katz, he points out that, "a man's home is, for most purposes, a place where he expects privacy."[18]

Thus, it is primarily from these two amendments, though often including others as well, that an argument for privacy and the sanctity of the home can be made. If the Declaration of Independence is to be read to advocate a right to happiness, and the third and fourth amendments are then read as enforcing a line of privacy that, at the very least, encompasses the interior of the home, it would follow that the home is a place of heightened scrutiny from governmental protection and thus is more integral to protect. This doesn't say, of course, that any crime when committed within the home cannot be regulated, but merely that this space cannot be invaded without probable cause that a crime is taking place. It is precisely because of this fact that, even in jurisdictions where cohabitation, fornication, or adultery are criminalized, they are so rarely prosecuted.[19] As will ultimately be

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[17] U.S. Const. amend. IV

[18] Katz v. United States, 389 U.S. 347, 351, 361(1967). http://www.lexisnexis.com/us/lnacademic/

[19] Sweeny, JoAnne. "Undead Statutes: The Rise, Fall, and Continuing Uses of Adultery and Fornication Criminal Laws." Loy. U. Chi. LJ 46 (2014): 130.

addressed in the later privacy cases, when these laws are so rarely enforced, and no longer have reasonable backing within the jurisprudence of similar cases in the Court, such as the transition from *Bowers v. Hardwick* (1986)[20] to *Lawrence v. Texas* (2003)[21], these laws cease to be legitimate laws.

Due Process and Equal Protection: 5th and 14th Amendments. In the case of fifth and fourteenth amendments, the due process clauses of each collectively show the right of people to the due process of law, or the right not to be deprived of life, liberty, or property without a legally justifiable reason. According to the particular situation, of course, a legally justifiable reason could mean anything from a 'compelling state interest' to 'legitimate state interest'. The Fifth Amendment states that,

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law;* nor shall private property be taken for public use, without just compensation." (emphasis added)[22]

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[20] Bowers v. Hardwick, 478 U.S. 186 (1986). http://www.lexisnexis.com/us/lnacademic/

[21] Lawrence v. Texas, 539 U.S. 558 (2003). http://www.lexisnexis.com/us/lnacademic/

[22] U.S. Const. amend. V

Particularly, the due process clause is the portion that states that "nor [shall any person] be deprived of life, liberty, or property, without due process of law." Furthermore, the fourteenth amendment, section one states,

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law*; *nor deny to any person within its jurisdiction the equal protection of the laws*." (emphasis added)[23]

This means that without at least a legitimate state interest a state cannot deprive someone of life, liberty, or property. That is, a legitimate state interest must exist in order for an action to be made illegal. This will become important later on in light of *Lawrence v. Texas* and the denial of morality as a legitimate state interest, meaning that laws must have some other legitimate state interest in order to be considered legitimate laws. Furthermore, the fourteenth amendment states that a state cannot "deny a person equal protection of the laws".[24] As said before, laws such as cohabitation, fornication, and adultery, are rarely enforced even in the places where they are still criminalized.[25] Ultimately it is our practices as a nation that define what our law is- a law that is only sporadically and unevenly enforced by that very nature is a violation of the Equal Protection clause of the 14th amendment. The law must apply equally to all citizens, and laws that are enforced only extremely

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[23] U.S. Const. amend. XIV, § 1

[24] Ibid.,

[25] Sweeny, JoAnne. "Undead Statutes: The Rise, Fall, and Continuing Uses of Adultery and Fornication Criminal Laws." Loy. U. Chi. LJ 46 (2014): 130.

sporadically undermine the principle that all citizens will receive the same treatment.[26] This fact, combined with the Supreme Court's denial of purely morals as a legitimate state interest, when no other interests exist, suggests that these laws are then unconstitutional.

As will be shown through the examination of cases in the Supreme Court's jurisprudence throughout the rest of this chapter, these four constitutional provisions collectively add up to the unconstitutionality of criminalizing cohabitation, adultery, and fornication.

Privacy in the Supreme Court

Privacy in Family Medical Concerns

Introduction. In this section I will examine the cases of *Griswold v. Connecticut* (1965) and *Carey v. Population Services International* (1977) to show the beginnings of the development of a right to privacy to be found within the constitution. Specifically, I will examine the use of contraceptives both in a marriage and by minors to show the court's recognition of the important rights encompassed in a person's ability to make meaningful decisions regarding their family and whether or not to beget children.

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[26] Typically, these laws regard victimless crimes that create no tangible harm. These crimes, lacking any harms upon which to found the law, are often based in terms of morality, and, as will be shown in Lawrence v. Texas (2004), the Supreme Court seems to suggest that morally-based laws such as these are not constitutionally sound.

Griswold v. Connecticut (1965). A discussion of a right to privacy in the constitution and in recent Supreme Court precedent most accurately begins with a discussion of *Griswold v. Connecticut*, the case that famously set forward the principle that, lacking a specific guarantee of a right to privacy in the United States Constitution, the amendments, notably the first, third, fourth, fifth, ninth, and fourteenth in particular, create 'penumbras' and 'emanation' from which a right to privacy can be found.[27] Although other, prior cases had discussed a right to privacy in some sense, such as in *Wolf v. Colorado* (1949), Griswold solidifies this into a more definite, if difficult to define, right.[28][29] In Griswold, the question before the court was in regards to a ban on the use of contraceptives within a marriage. This case, Justice Douglas determined, then concerned,

> "a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which… seeks to achieve its goals by means having a maximum destructive impact upon that relationship."[30]

In much the same way, laws criminalizing cohabitation or fornication among consenting adults cross into a field traditionally considered to be in the private

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[27] Griswold v. Connecticut, 381 U.S. 479 (1965). http://www.lexisnexis.com/us/lnacademic/

[28] Wolf v. Colorado, 338 U.S. 25 (1949). http://www.lexisnexis.com/us/lnacademic/

[29] Although Wolf v. Colorado was overturned by Mapp v. Ohio, the Court in Mapp v. Ohio specifically referenced where the Court in Wolf v. Colorado noted this *about* privacy, heralding this decision as correct, but nonetheless reached a conclusion that didn't uphold this right to privacy.

[30] Griswold v. Connecticut, 381 U.S. 479, 485 (1965). http://www.lexisnexis.com/us/lnacademic/

sphere. In this ruling, the Court held that certain particular areas of privacy existed, such as the marital relation.[31] If this is the case, it is easier still to find such an area of heightened privacy in the home- the home itself is mentioned directly in the Constitution within the third and fourth amendments, as earlier mentioned, while marriage is not mentioned directly in the Constitution at all. In fact, the home seems to be the primary area in which the idea of a Constitutional right to privacy can be found. This trend, of rejecting most state and federal intrusion into the home, will continue, but it is in *Griswold v. Connecticut* that the Court stakes down a firm line that assures that, at the very least, zones of privacy can be found in a careful reading of the Constitution and Bill of Rights.

Carey v. Population Services International (1977). Twelve years after the decision was reached in *Griswold v. Connecticut* that a state couldn't ban the use of contraceptives within marriage; the Court reaffirmed this decision, and expanded it, holding that minors were to be afforded the same protections as adults in the case of contraceptives.[32] In this case, the Court solidified the idea presented in Griswold, and further, stated,

> "While the outer limits of this aspect of privacy have not been marked by the Court, it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions relating to marriage…; procreation…; contraception…; family relationships…; and childrearing and education…"[33]

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[31] Ibid., 495.
[32] Carey v. Population Services International, 431 U.S. 678, 684 (1977). http://www.lexisnexis.com/us/lnacademic/

[33] Ibid.,

In terms of cohabitation, this case, particularly in conjunction with *Griswold*, suggests that such fundamental concerns as procreation, child rearing, and family relationships are so integral to the privacy of a family that, barring few exceptions, these areas are devoid of government intrusion. If this is the case, then the arguments that cohabitation, adultery, or extramarital fornication are either non-conducive to procreation/child rearing or are undesirable relationship statuses or family structures seem not to be constitutionally sound arguments, at least not enough to warrant such an intrusion of the people's privacy.

Privacy in the Home

Introduction. Within this section I will examine but a few of the more landmark cases in the history of the right to privacy in the Constitution. Beginning with *Stanley v. Georgia* (1969), and continuing with *Moore v. East Cleveland* (1977), *Kyllo v. United States* (2001), and *Florida v. Jardines* (2013) I will show the progression of the right to privacy within the home as it develops within the Supreme Court jurisprudence. I will show that the Supreme Court has long recognized that, within the home, more than simply being a place which is more difficult for police to enter, there are also particular concerns and rights concerning private actions in the home- all of which, as Justice Kennedy says in *Kyllo,* can be considered "intimate details" of the home.[34] This is important to the situation of morally-based sexual laws because it establishes the sanctity of the home, where

[34] Kyllo v. United States, 533 U.S. 27, 28 (2001). http://www.lexisnexis.com/us/lnacademic/

these actions take place, and establishes the heightened privacy interests that lead to these statutes being sporadically enforced.

Stanley v. Georgia (1969). *Stanley v. Georgia* occurs before the two previously discussed cases, but differs in that it does not address the matters of child bearing, as *Griswold* and *Carey* do. Rather, *Stanley v. Georgia* concerns obscene materials in the home, the seizure of which led to the Supreme Court to declare that, within the privacy of one's home, the State had no legal right to tell a man which books he may read or what he may watch, even if the ideas contained there in are something the state might find morally depraved.[35][36] In *Stanley v. Georgia* Justice Marshall states,

> "This right to receive information and ideas, regardless of their social worth, … is fundamental to our free society… For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy."[37]

In the same way that the State can regulate obscenity, when consumed in public, and yet not have that regulation legally applicable to private consumption in the home, it seems that, perhaps, the State may regulate marriage as a license, but may not, then,

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[35]Stanley v. Georgia, 394 U.S. 557 (1969). http://www.lexisnexis.com/us/lnacademic/

[36] This case specifically applies to pornography created by, and consumed by, adults. That is, this case only applies when the subject matter at issue is not otherwise banned for legitimate state reasons. Banning child pornography, for instance, the Court holds in *Osborne v. Ohio*, 495 U.S. 103 (1990), is distinguishable because in that case, the State isn't seeking to protect the mind of the adult consumer from moral degradation that might occur by consuming the obscene materials, but to diminish a market for exploiting children in such a significant and clearly harmful way.

[37] Stanley v. Georgia, 394 U.S. 557, 564 (1969). http://www.lexisnexis.com/us/lnacademic/

extend this regulation to private acts and living situation that occur removed from the public eye. This brings up the question of the very idea of defining family. *Stanley v. Georgia* suggests that, within someone's home, they have the right to private consensual acts, such as fornication and perhaps even adultery. Committing adultery, much like the consumption of obscene materials at issue in this case, is generally considered to be a morally corrupt action. Nonetheless, when boiled down fundamentally, as mentioned before, adultery is but another instance of extramarital fornication, and is often dealt with in the civil courts via divorce proceedings. Nonetheless, further cases will be used to evaluate the ability of a person to cohabitate free of government intrusion into the home and to define his/her own family structure.

Moore v. East Cleveland (1977) and Belle Terre v. Boraas (1974). *Moore v. East Cleveland*, in particular, fills this gap in terms of defining family structure. *Belle Tere v. Boraas*, however, presents a different picture of cohabitation. *Belle Tere v. Boraas*, when taken alone, seems to hold against the idea of sexual cohabitation and the right to define the family, holding that a city's zoning ordinance that restricted certain homes to only single family dwellings (that is, no more than two people unrelated by blood, adoption, or marriage) was constitutionally valid when used to bar a group of college students from living within the home.[38] This ordinance, the Court held, was closely related to the goal of the city to create a quiet neighborhood, presumably via the concern that college students like the appellants would hold

[38] Village of Belle Terre v. Boraas, 416 U.S. 1 (1974). http://www.lexisnexis.com/us/lnacademic/

parties or otherwise do things that would make the property less desirable by families. Because there was no protected class involved, and the ordinance was aimed at the most likely scenario- that is, college students living together in large groups and, likely, disrupting the neighborhood, the law was constitutionally valid. This ordinance, then, was not intended to be any sort of moral disapproval of the students or their living arrangements. Rather, the ordinance was solely intended to benefit the neighborhoods in the zoning area by reducing the likelihood of rowdy neighbors in a family-centric area and was clearly aimed towards that end.

This is clearly distinguishable from the cohabitation laws currently in effect. These laws do not aim to insure that the neighbors are protected from the loud noises and commotion emanating from the house in question. These laws, rather, aim to single out people in a particular sexual relationship and, as in *Stanley v. Georgia*, regulate this private home conduct because they find it morally deplorable. The people who engage in these relationships, along with society as a whole, may be changing the definition of the family. No longer can the family unit be so easily defined, whether it is in terms of a couple that chooses to live together without a formal marriage, or a collection of adults that chooses to live together to pool their resources and raise their children as a unit.

Later, in *Moore v. East Cleveland*, the Court examines a case similar to this issue where the city housing ordinances restricted those living in a home to only those in a nuclear family unit.[39] In quoting *Cleveland Board of Education v. LaFleur*,

[39] Moore v. City of East Cleveland, 431 U.S. 494 (1977). http://www.lexisnexis.com/us/lnacademic/

the court stated that, "This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."[40]

Although this case has yet to be applied to people who cohabitate for sexual reasons outside of any legally recognized family structures, the wording of this case seems to suggest that such an application would not be erroneous. If society's views are changing such that couples may choose to cohabitate, either with one partner or multiple, and without regard or desire for state sanctioned marriages, then it seems then that it is also time for the laws to reflect this as a legitimate family structure. In cases such as these, people are living as a family unit already, in everything except the formal recognition of this relationship by the state. Even in the case of *Moore v. East Cleveland*, when the court acknowledged that a grandmother in the eyes of the law had no special legal bond to her grandson, the societal acceptance of this family bond led to the legitimatizing of this way of life, and the inability of the state to refuse recognize it or mandate that this relationship was less legitimate than that a nuclear family in terms of housing regulations.[41] *Moore v. East Cleveland* ends with this quote, summarizing the argument for allowing cohabitation quite well, "By the same token, the Constitution prevents East Cleveland from standardizing its

[40] Cleveland Board of Education v. LaFleur, 414 U. S. 632, 639 (1974). http://www.lexisnexis.com/us/lnacademic/

[41] Moore v. City of East Cleveland, 431 U.S. 494 (1977). http://www.lexisnexis.com/us/lnacademic/

children -- and its adults -- by forcing all to live in certain narrowly defined family patterns."[42]

Kyllo v. United States (2001). In *Kyllo v. United States*, returning to the idea of privacy within the home life, the issue at bar concerns the use of a thermal imaging scanner to determine a hotspot location within a triplex, in this case leading to an arrest for growing marijuana.[43] This scanner was only able to show 'amorphous' shapes on the outside of the house and was distinguished from other similar technologies by the government because it relief on 'off-the-wall' scanning rather than technology that would be able to see through the wall. Although the scanner revealed no details of the home aside from the hot spots where the heating lamps for the marijuana plants were located, the Court still held that, within the sanctity of the home, all details are considered intimate.[44] Even if these details could be found through other methods, this did not excuse the use of the technology to reveal details that the homeowner both exhibited an expectation of privacy in and that society was willing to accept as a legitimate exercise of this expectation.[45]

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[42] Ibid., 506.

[43] Kyllo v. United States, 533 U.S. 27 (2001). http://www.lexisnexis.com/us/lnacademic/

[44] Ibid., 37.

[45] The government did attempt to use the defense that, had there been snow on the house, the melting snow would have revealed the same information. The Supreme Court did not accept this defense as valid, holding that the privacy interests were so great within the home, that unless the details could be, and were, observed by human eye, they were intimate details and would require a warrant to intrude upon.

This case reaffirms the necessity for a firm line to be drawn at the door and, according to Justice Scalia, the line at the door can also be considered bright, barring government intrusion into the sanctity of the home.[46] Notably here, the court places an emphasis on the subjective expectation of privacy and society's willingness to accept that expectation of privacy. As shown in the previous chapter, society is moving towards a time in which these alternative family structures are becoming more common and more accepted. Furthermore, when the conduct is within the home and away from the eyes of the public, not only does the person exhibit an expectation of privacy but it becomes clear through the lack of enforcement of these statutes that society is also willing to accept this expectation of privacy and not attempt to more heavily prosecute these cases as are done with other in-home crimes such as child pornography. As such, family living situations might also be considered intimate details of the home; intimate details that the government has no legitimate reason to regulate so long as the acts are occurring between consensual adults.

Florida v. Jardines (2013). In *Florida v. Jardines*, the Court was presented with a similar question to that of *Kyllo v. US*. In this case, a drug dog was allowed to sniff at the front door of a house without a warrant, leading to the police officer determining that illicit drugs were present within the home.[47]

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[46] Ibid., 40.

[47] Florida v. Jardines, 569 U.S. ____ (2013). http://www.lexisnexis.com/us/lnacademic/

Most notably for the case at hand, *Florida v. Jardines* relies on an earlier case to point out the sanctity of the home itself in saying,

> "But when it comes to the Fourth Amendment, the home is first among equals. At the Amendment's 'very core' stands 'the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.' Silverman v. United States…"[48]

Florida v. Jardines is but another link in the long chain of cases, all pointing to one solid fact ingrained in United States Supreme Court history: privacy, wherever it may be found in the constitution, is a right. This right, as with any other right guaranteed by the Constitution is not unqualified, but is nonetheless legally binding and applicable. Furthermore, this right, although prevalent in everyday life, is never more powerful than in one's home. The home, the Supreme Court has said, is not to be intruded upon except in the most significant, the most important of cases, and few rights stand so far removed from government intrusion than those relating to the family. With this in mind, we continue on to examine the true sexual revolution as it happens in the Supreme Court, starting shortly before Griswold v. Connecticut, and following on to present day.[49]

Marriage and Sexual Relations in the Supreme Court

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[48] Silverman v. United States, 365 U. S. 505, 511 (1961). http://www.lexisnexis.com/us/lnacademic/

[49] It should be noted that many of the cases addressed above, particularly *Griswold v. Connecticut, Moore v. East Cleveland* and *Carey v. Population Services International* could belong just as well under marital and sexual relations as they do under privacy cases. All of these cases address both issues, but in the interests of brevity, will only be covered in the privacy section. Nonetheless, there exists considerable overlap between these two concerns, as there does in the case of many sexual laws, and many of the cases that will be addressed in the next section, likewise, could have been addressed in the section concerning privacy.

Introduction. In this section I will continue the analysis of the right to privacy in the Constitution, but I will focus more specifically on marriage and sexual relations within the Supreme Court. I will begin with *McLaughlin v. Florida* (1964), one of the few cases discussing the right to cohabitate, then continue forward chronologically to email *Loving v. Virginia* (1967), *Eisenstadt v. Baird* (1972), *Zablocki v. Redhail* (1978), and finally end this section with an examination of *Lawrence v. Texas* (2003). I will use this progression of cases to show the development of the jurisprudence of the Supreme Court to gradually recognize the importance of having the ability to make certain marital and sexual decisions free from government intrusion. It is primarily from this line of cases, as well as in *Griswold* and *Carey* as discussed before, that the idea of a sexual revolution within the Court is be found.

McLaughlin v. Florida (1964). In 1964, *McLaughlin v. Florida* considered the case of an interracial couple accused of cohabitation.[50] At that time, this referred only to the couple sleeping in the same room during the nighttime, without any need to attempt to prove whether or not the couple had been engaging in sexual relations. In this case, the Court held that a statute forbidding this action violated the Equal Protection Clause of the 14th amendment because, at its core, it created a disparity by enforcing a criminal offense on one group, interracial couples, while not penalizing or penalizing to a lesser degree, another group, same-race couples, for

[50] McLaughlin v. Florida, 379 U.S. 184 (1964). http://www.lexisnexis.com/us/lnacademic/

the same action.[51] Although this case was decided as it was on the basis of equal protection via racial classifications, it nonetheless helped to kick off a period of sexual revolution within the Supreme Court. From this point continuing onward to United States v. Windsor and perhaps even further, to the newest cases that the Supreme Court will see this year regarding same-sex marriages, the Court undertakes a period of gradually recognizing more sexual freedoms, and acknowledging the differences in relationships among people in the United States.[52]

Loving v. Virginia (1967). *Loving v. Virginia* is closely related to *McLaughlin v. Florida* in that both concern interracial associations. *Loving v. Virginia*, however, concerns both a ban on interracial marriages being performed and, more directly in the case, a criminal sanction against being in an interracial marriage, even if the marriage was performed in a jurisdiction where the ceremony was legal.[53] Justice Warren, writing the majority opinion for the Court, states, "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." Once more, the Supreme Court recognizes the importance of the freedom to pursue personal relationships without undue interference by the government. The mere fact that some people of the time found

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[51] Ibid.,

[52] Barnes, Robert. "Supreme Court Agrees to Hear Gay Marriage Issue." The Washington Post, January 16, 2015. http://www.washingtonpost.com/politics/courts_law/supreme-court-agrees-to-hear-gay-marriage-issue/2015/01/16/865149ec-9d96-11e4-a7ee-526210d665b4_story.html.

[53] Loving v. Virginia, 388 U.S. 1, 12 (1967). http://www.lexisnexis.com/us/lnacademic/

interracial marriages either socially or morally distasteful did not override the fundamental personal rights that a person has to pursue those personal relationships that he feels led to pursue. At this point, the court strikes down bans on interracial marriages, expanding significantly the sexual freedoms recognized within the United States.[54] At this point, the Court has begun to acknowledge the particular rights afforded to legally married couples, but has yet to fully expand these rights to couples who have no decided to seek marriage. The next case, however, in pertaining to unmarried couples in particular, marks an important step in the development of the sexual freedoms recognized by the Court.

Eisenstadt v. Baird (1972). Eisenstadt v. Baird marks one of the most significant steps by the Supreme Court in recognize the important of insuring that a person is able to engage in private consensual sexual relationships without government interference.[55] The issue before the Court in *Eisenstadt* is that of a Massachusetts law prohibiting the distribution of contraceptives to unmarried people.[56] Relying heavily on *Griswold v. Connecticut*, the Court acknowledges that,

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[54] Ibid.,

[55] In 1986 *Bowers v. Hardwick* reaches the opposite conclusion, but *Lawrence v. Texas* (2003) cites *Eisenstadt* to reach the conclusion the, in essence, amount to recognizing a right to engage in private sexual relationships without government interference. *Lawrence*, then, relies heavily on this decision and thus makes *Eisentadt v. Baird* a pivotal case even if not immediately used in such a capacity.

[56] Eisenstadt v. Baird, 405 U.S. 438, 453 (1972). http://www.lexisnexis.com/us/lnacademic/

despite the deep historical significance in the joining of two lives via marriage, a marriage nonetheless consists of two separate individuals and as such, states,

> "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."[57]

This quote can be, and is often, taken to reflect the circumstances of the case. That is, that an unmarried person has a right equal to that of a married person to choose not to bear a child. Nonetheless, Justice Brennan also seems to acknowledge in this quote that the inverse of this statement is also true. That is, that an unmarried couple has the right to decide to bear a child. If this is the case, then an unmarried couple can undoubtedly engage in premarital intercourse, meaning that all current fornication statues in the United States have, in effect already been declared unconstitutional by the Supreme Court[58].

If this is taken as true, then it follows that statutes against fornication and cohabitation might also be unconstitutional, as they concern consensual adults in private relationships within a home. Even in the case of adultery, although many Americans, likely even the majority, find adultery to be distasteful, it can

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[57] Ibid.,

[58] Although at the time in Massachusetts fornication was a misdemeanor punishable by up to a $30 fine or 90 days in jail, the court considered this law only as a possible explanation for the law prohibiting contraceptives to unmarried couples. The court did not consider this law on its own merit, as it is typical of the court to only address the cases as they are brought rather than consider other laws that are tangentially related. As such, the law very well might have been unconstitutional at the time, but was not addressed within this case because the specific issue at hand was whether the state had the ability to infringe on the right of unmarried couples to access contraceptives.

nonetheless be boiled down to a simple sexual act occurring between two consenting adults in the privacy of the home. Typically, in fact, rather than enforcing statues that criminalize adultery, adulterers are usually instead subjected to civil divorce proceedings, a perhaps more fitting situation when the act itself can be boiled down to a mere sexual act occurring between adult, even if this act is something that people find distasteful. If this were the case, then laws against adultery, alongside the laws still in existence against fornication, would be essentially unconstitutional in light of this case. Later cases, and *Lawrence v. Texas* in particular, however, expand further on this issue and provide more context for such a claim. In fact, although the next care concerns particularly the right of a couple to get married, it nonetheless reaffirms the importance of all couples, married or not, being able to make fundamental decisions about the strucute of their families.

Zablocki v. Redhail (1978). *Zablocki v. Redhail* concerns a Wisconsin statue that required residents of Wisconsin who were noncustodial parents to be granted a court order before they could marry. Specifically, the parent had to be up to date on their child support payments and the court had to believe that the child would not rely on the state for support.[59] In this case, the Supreme Court recognized, once more, the fundamental right that is marriage. Although the Court doesn't necessarily go as far as to specially condone or hold in high esteem non-traditional

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[59] Zablocki v. Redhail, 434 U.S. 374 (1978). http://www.lexisnexis.com/us/lnacademic/

families, the court does not condemn these relationships. In particular, the majority opinion written by Justice Marshall states,

> "It is not surprising that the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships. As the facts of this case illustrate, 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."[60]

Cohabitation of unmarried couples is, at its core, an exercise of this right. If the Supreme Court holds high the right of a person to marry, as well as to make such fundamental decisions as those regarding procreation and family relationships, it seems then that it is also an important right of a person to engage in a family relationship in which the couple lives together in a home but chooses not to marry. This would then also indicate that a person might choose such a family relationship that more than two people are engaged in a consensual familial relationship and live amongst one another as a family. The Court in *Zablocki* seems to recognize that it is the fundamental right of a person to make this decision, regardless of the moral approval or disapproval of the state simply because this right, to choose one's family relationships, is a fundamental right.

Much like the right of a person to be free of government intrusion in matters of religion, choosing not to marry is clearly an exercise of the right of a person to decide whether or not to marry. As such it is important for the state to insure that statutes that treat unmarried and married people differently do so within the

[60] Ibid., 386

bounds of the Equal Protection Clause of the fourteenth amendment. As previously discussed by the Court in *Eisenstadt v. Baird*,

> "The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute."[61]

According to the fourteenth amendment, then, while it is constitutional for the state to classify people, and to treat them different for some laws, such classifications must be directly related to the purpose of the laws. If this is the case, those laws must be founded in something directly related to the classification of people as married and unmarried, and that foundation must be a legitimate state interest. As will be shown in the next case, these laws are founded purely on morals, something that cannot rightly be regarded as a legitimate state interest, making these laws on the whole unconstitutional.

Lawrence v. Texas (2003) Lawrence v. Texas is the pinnacle of the conclusion that current morally-based sexual law are unconstitutional. The outcome of Lawrence was far reaching and, even still, forms the cornerstone of not only the case at hand, but also the argument for same-sex marriage.

Lawrence v. Texas involves two petitioners, John Lawrence and Tyron Garner. At the time of the case, anti-sodomy laws existed in 13 states, including Texas where the inciting incident occurred.[62] On September 17, 1998 in Houston, Texas, after

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[61] Eisenstadt v. Baird, 405 U.S. 438, 447 (1972). http://www.lexisnexis.com/us/lnacademic/

[62] Carpenter, Dale. "Introduction." In Flagrant Conduct: The Story of Lawrence v. Texas : How a Bedroom Arrest Decriminalized Gay Americans. New York: W.W. Norton, 2012.

receiving a call from Robert Eubanks, the jealous lover of Tyron Garner, claiming that a crazed black male was brandishing a gun in an upstairs apartment, four police officers entered the apartment of John Lawrence. Here, the accounts of what happened differ. The police report claimed that the men were currently engaged in anal sex at the time of the arrival and continuing this action for several moments even when the police officers had entered the room. Inversely, both Lawrence and Garner claim otherwise, claiming instead that they had been preparing for bed when the officers had entered the apartment and had not at any point in the night been engaged in sexual intercourse with one another.[63]

Regardless of which account is factual, the men were charged with violating a Texas statute that criminalized 'deviant sexual intercourse' between two people of the same sex.[64] Their convictions were appealed all the way to the Supreme Court, and the controlling precedent at the time was that of *Bowers v. Hardwick*.

Bowers v. Hardwick involved a somewhat similar case in 1986. Both cases involved a police officer entering the home and witnessing, at least according to the officer's report, two men engaging in private, consensual sexual acts. In deciding *Bowers v. Hardwick*, however, the Court held that the Constitution did not "extend a fundamental right to homosexuals to engage in acts of consensual sodomy."[65]

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[63] Ibid.,

[64] Lawrence v. Texas, 539 U.S. 558 (2003). http://www.lexisnexis.com/us/lnacademic/

[65] Bowers v. Hardwick, 478 U.S. 186 (1986). http://www.lexisnexis.com/us/lnacademic/

Lawrence v. Texas explicitly overturned this case.[66] Justice Kennedy opens the decision in *Lawrence v. Texas* with this powerful statement,

> "Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions."[67]

Even simply this statement sets the grounds for the decision of the court to overturn *Bowers v. Hardwick*. Justice Kennedy explicitly says here that it is a fact of liberty that a person has a degree of freedom in engaging in intimate conduct, that this is, at least to some extent, a right of the people.

Even at this point in the decision, it is easy to find a basis for invalidating the statutes that still remain in the United States outlawing adultery, fornication, and cohabitation, even when cohabitation is extended to include those states that outlaw bigamy when used to define situation of 3 or more people living in an adult, consensual sexual relationship without seeking marriage licenses between the participants.[68] *Lawrence* is yet another case in the long line of cases, many of which

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[66] Lawrence v. Texas, 539 U.S. 558 (2003). http://www.lexisnexis.com/us/lnacademic/

[67] Ibid.,

[68] It is worth noting, at this point, that *Lawrence v. Texas* specifically points out that even if a law is rarely enforced or is only a misdemeanor, the fact that it carries a criminal penalty is enough to create a harm significant enough that the case might be brought before the court because it confers the title of criminal upon the person(s) engaging in the act.

were discussed in the previous section regarding privacy, to single out the home as a particular place in which the right of a person to be free from government intrusion and to maintain privacy is particularly heightened.

Kennedy also takes care to point out that the question of *Bowers v. Hardwick* and even of *Lawrence v. Texas* is not simply in regard to the right of a person to engage in a specific sexual act. This demeans the claims put forth just as much as it would demean a married couple that were told that marriage is simply about the right to have sexual intercourse.[69] Kennedy continues to say,

> "The laws involved in *Bowers* and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals."[70]

Once more, this statement, particularly the last sentence, has far reaching implications for both the same sex marriage debate and the question of cohabitation in a polygamous relationship. Even if these relationships are not, yet, entitled to 'formal recognition in the law', they are clearly personal relationships. In the case of cohabitation between more than two people, as long as the relationships are consensual and occur between adults in a context that, had it only involved two people, would otherwise be legal, it seems according to Justice Kennedy that these

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[69] Lawrence v. Texas, 539 U.S. 558 (2003). http://www.lexisnexis.com/us/lnacademic/

[70] Ibid.,

people would be entitled to conduct these relationships in the privacy of their homes however they wish.

Finally, in quoting *Planned Parenthood of Southeastern Pa. v. Casey*, the Court reiterates, "Our obligation is to define the liberty of all, not to mandate our own moral code."[71] This statement seems that it might be the basis for declaring that mere moral disapproval, in absence of other factors, is no longer a legitimate reason for the state to ban otherwise victimless actions, particularly when the enforcement of such statutes is rare and arbitrary. Justice Kennedy seems to place some weight on the fact that many states, at the time of the decision in *Lawrence*, no longer had laws that criminalized sodomy.

It is this precise question that forms one of the central arguments of Justice Scalia's dissent to *Lawrence v. Texas*:

> "State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of Bowers' validation of laws based on moral choices."[72]

[71] Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 850 (1992). http://www.lexisnexis.com/us/lnacademic/

[72] Lawrence v. Texas, 539 U.S. 558, 590 (2008). http://www.lexisnexis.com/us/lnacademic/

These concerns span a variety of circumstances and situations, many of which seem to have clear answers.[73] To begin, Justice Scalia isn't necessarily faulty in his assumption that getting rid of laws based on moral disapproval would lead to a situation in which bigamy would no longer be criminalized. The entire history of cases presented thus far seems to suggest, in fact, that in speaking about bigamy in terms of cohabitation, the logical solution would be that, as stated before, the state cannot forbid the private consensual conduct between adults within the interior of them home.

As for the issue of a marriage license, both for bigamy and same-sex marriage, there are other concerns, primarily economic concerns on the part of the state, that introduce complicating factors more than simply moral disapproval. Nonetheless, Justice Scalia is correct in his assumption that Lawrence v. Texas would form the cornerstone of the same sex marriage debate, and that this would serve as an important precedent for future cases concerning same-sex marriage.[74]

Adult incest, on the other hand, presents a very different problem. Historically, incest has been linked to a number of genetic factors, not to mention

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[73] To note here, I am not arguing in this thesis whether or not *Lawrence v. Texas*, or any of these Supreme Court cases, was decided correctly. Instead, I am attempting to use the jurisprudence of the Supreme Court to show that based on the current interpretation of the Constitution by the Supreme Court, current laws such as cohabitation, adultery, and fornication that are based solely on regulating morals are no longer constitutional. By addressing Justice Scalia's dissent in *Lawrence*, I attempt to assuage some of the fears that he addresses, without suggesting that the case ought to have been decided differently than it was.

[74] United States v. Windsor, 570 U.S. ___ (2013). http://www.lexisnexis.com/us/lnacademic/

the power dynamic that typically comes into play in the likelihood that said incest includes a relationship where one person is in a role of superiority over the other. In any case, incest is certainly a result of more than simple moral disapproval, and can easily be distinguished from, for instance, the 'deviant sexual intercourse' at question in *Lawrence v. Texas*.

Prostitution, similarly, presents an economic problem as well as that of the moral problem presented by Justice Scalia. Prostitution, more than other forms of sexual conduct, by nature includes an exchange of money for services performed. Additionally, prostitution invariably presents the likelihood that sexually transmitted diseases will be more readily passed through the population. Both the health concern and the economic concern have, in previous Supreme Court cases, been held to be matters that might lead to a legitimate state interest in regulating the activity.[7576]

Justice Scalia's concerns about laws regarding masturbation are, perhaps, the most perplexing of all. Currently no states ban private masturbation in the home, and were such laws to exist, they likely would have been declared unconstitutional, or at least have been unconstitutional in effect, long before the decision in *Lawrence*. Although Alabama does have a ban on the sale of objects intended and used for sexual gratification, there is a clear distinction between the private conduct that is

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[75] Roe v. Wade, 410 U.S. 113 (1973). http://www.lexisnexis.com/us/lnacademic/

[76] United Haulers Assn., Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330 (2007) http://www.lexisnexis.com/us/lnacademic/

masturbation and the commercial sale of said objects, an issue that is not at bar in *Lawrence v. Texas*.[77]

The issues of adultery and fornication have been addressed repeatedly throughout argument and the reasoning remains the same. *Lawrence v. Texas* is, of course, used in this sense to defend the argument that bans on these actions are unconstitutional, because they once more involve private consensual acts within the home, much the same as *Lawrence v. Texas* itself does.

Bestiality, again, addresses something else entirely. To begin with, bestiality involves a significant risk for harm to the animal itself, both in the cases of large and small animals.[78] Furthermore, bestiality, by nature, involves a lack of meaningful consent. None of the cases thus far have questioned the ability of the adults involved to consent to the action, something important to consider in terms of current statues that require a person be of an age to give meaningful consent to sexual conduct. These laws, regarding sexual conduct with people unable to give consent, are heavily enforced and easily differentiated from the sporadically enforced laws regarding cohabitation, adultery, and fornication that are based only in terms of morals and have no basis in health or concerns of the ability of a person to consent to the actions being done in a meaningful way. Thus, the leap from allowing private consensual sexual acts to allowing harmful, nonconsensual

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[77] Waldo, Curtis. "Toys Are Us: Sex Toys, Substantive Due Process, and the American Way." Colum. J. Gender & L. 18 (2008): 807-810.

[78] Beetz, Andrea M. "Bestiality/Zoophilia: A Scarcely Investigated Phenomenon Between Crime, Paraphilia, and Love*." Journal Of Forensic Psychology Practice* 4, no. 2 (April 2004): 8 .

relationships with animals, which by nature do not have the intellectual capacity to provide meaningful consent, is a very unlikely possibility.

Lastly, considering the private consumption of obscenity such as pornography, the Supreme Court has already decided this issue in 1969, as has been previously referenced in this argument.[79] In this case, the Supreme Court has held that the state cannot ban the private consumption of such materials simply on the basis of moral disapproval. Once more, this can be separated quite clearly if the material is child pornography, as the court has previously held in *Osborne v. Ohio* (1990) that there is a legitimate state interest in banning even the private possession and consumption of child pornography so as to diminish the market for material that, by its nature, exploits children.[80]

Justice Scalia does make a few valid points- the decision in *Lawrence v. Texas* might be, and will be in fact, used to try and invalidate many laws based on moral disapproval. Unfortunately, many of the more shocking claims that he makes are, simply that, intended to be shocking. They include far greater implications than mere moral disapproval and, as such, indicate an entirely separate category of a state exercising its policing power. Nonetheless*, Lawrence v. Texas* does indicate that many of the current 'moral disapproval' laws indicated, such as laws

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[79] Stanley v. Georgia, 394 U.S. 557 (1969). http://www.lexisnexis.com/us/lnacademic/

[80] Osborne v. Ohio, 495 U.S. 103 (1990). http://www.lexisnexis.com/us/lnacademic/

criminalizing adultery, cohabitation, and fornication ought to be considered to be unconstitutional.

Conclusion: A Modern Sexual Revolution in the Supreme Court

United States v. Windsor (2013). United States v. Windsor serves as the most recent example of the pattern of sexual revolution within the court. This case concerns the federal recognition of state legalized same sex marriages.[81] In this case, the Supreme Court struck down the provisions of the Defense of Marriage Act (DOMA) that held that the federal government considered marriage to be exclusively between a man and woman because it was in violation of the long-held principle of equal protection by creating an unequal disparity in same sex marriages granted by the states and heterosexual marriages. In the context of the argument presented, Windsor is but the most recent link in a long line of cases indicating a move towards a sort of sexual revolution occurring within the Supreme Court. Windsor additionally considers the changing societal standards of the time, noting that New York's recognition of same sex marriages performed in other jurisdictions "reflects both the community's considered perspective on the historical roots of the institution of marriage and its evolving under- standing of the meaning of equality."[82]

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[81] United States v. Windsor, 570 U.S. ___ (2013). http://www.lexisnexis.com/us/lnacademic/

[82] Ibid., 20.

In doing such, the Court acknowledges the changing culture surrounding sexual conduct and relationships, indicating that this attempt on behalf of New York is a worthwhile cause and ought to be applauded. Similarly, it seems then, it is opening the doors for even further changes in the interpretation of sexual rights in the Supreme Court. It suggests that further cases regarding bigamy, same sex marriage, adultery, and fornication would likely be decided in the same trend that the Supreme Court has thus far been following. *United States v. Windsor* can, and has, opened the way for more cases involving same sex marriage. In fact, in late-spring to early-summer 2015 the Supreme Court will decide a series of cases involving the recognition of same sex marriages performed in other jurisdictions, as well as the ability of a state to refuse to grant same sex marriages recognition of same sex marriages performed in other jurisdictions, as well as the ability of a state to refuse to grant same sex marriages.[83]

Conclusion. Currently, nearly twenty states currently have statutes criminalizing adultery and/or fornication.[84] Rarely are these statutes prosecuted. However, mere lack of frequent prosecution does not mean that the act is no longer

[83] Barnes, Robert. "Supreme Court Agrees to Hear Gay Marriage Issue." The Washington Post, January 16, 2015. http://www.washingtonpost.com/politics/courts_law/supreme-court-agrees-to-hear-gay-marriage-issue/2015/01/16/865149ec-9d96-11e4-a7ee-526210d665b4_story.html.

[84] Sweeny, JoAnne. "Undead Statutes: The Rise, Fall, and Continuing Uses of Adultery and Fornication Criminal Laws." Loy. U. Chi. LJ 46 (2014): 130.

criminal nor that they needn't be either declared unconstitutional or repealed in the states in which they have been enacted.[85]

However rarely the statutes are enforced, so long as the laws remain in effect, they can be enforced at any time.[86] These laws necessarily concern one of the most intimate details of the home, details that, due to the Supreme Court jurisprudence recognizing the heightened privacy interests within the home, are difficult to discover. This clearly contributes to the lack of prosecution. This difficulty, combined with the unwillingness of police and prosecutors to seek convictions in all but a few very rare and very sporadic cases suggests a broad lack of enforcement of these statutes that, at best, can be viewed as a violation of the Equal Protection Clause of the fourteenth amendment.

Furthermore, in considering the social concerns that surround these issues, the fact remains that, much like the sodomy laws that were challenged in *Lawrence v. Texas*, these laws are based solely on the concept of legislating private sexual morality within the home. Thus, that these laws do not show any other legitimate state interest upon which to found their enforcement, contrary to many of the other concerns listed by Justice Scalia in his dissent to *Lawrence v. Texas*.

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[85] Note once more that it is not necessary, for the purpose of this thesis, to establish whether it is good of a person to engage in any of these sexual relationships. Most clearly in the case of adultery, it is not necessary to reaffirm the problems with adultery or the reasons that people should not choose to have affairs. Furthermore, it is not necessary to consider if these cases should have been decided the way that they were, only that they have been decided this way and thus form the jurisprudence of the Supreme Court. This thesis seeks only to analyze the current jurisprudence of the Court and show the unconstitutionality of morally-based sexual laws in light of this jurisprudence.

[86] Ibid, 170.

Thus, it is necessary for the Courts, if and when presented with a legitimate chance to do so, to consider the constitutionality of these laws, all of which seek to legislate the sexual morality of private, victimless, acts occurring in the home between consenting adults. It becomes clear, then, that in light of the changing social standards of the time, as well as the long history of cases that recognize the heightened privacy interests and protections occurring within the home, these laws are constitutionally unsound.

Nonetheless, despite the apparent unpopularity of the laws, sporadic convictions do occur and this gross violation of the Constitution requires action on the part of the state or, if necessary, the Supreme Court. Either the states ought to repeal the laws themselves or, if convictions continue to occur despite the unconstitutionality of the laws, the Supreme Court ought to consider these statutes in light of the long line of privacy and sexual and marital rights cases, particularly Lawrence v. Texas, and declare them to be unconstitutional.

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