LOOSE NOT THE FLOODGATES

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> If one is right from a legal point of view, nothing more is required, nobody may mention that one could still not be entirely right, and urge self-restraint, a willingness to renounce such legal rights, sacrifice and selfless risk: it would sound simply absurd.[1]

I. INTRODUCTION

Justice O'Connor is correct in her assumption that a ban on sodomy is not a ban on the sexual act itself.[2] At common law, sodomy could not occur without a man present[3] and it is only later codes that make the act itself apply to both sexes equally.[4] A gender-neutral concept of sodomy or deviate sexual intercourse is not understood to be in all sodomy statutes without gender-specific language.[5]

Sodomy is most likely protected under the "penumbra" of privacy created in *Griswold v. Connecticut*[6] if practiced by married couples.[7] However,

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[1] Alexander Solzhenitsyn, A World Split Apart, Address at the Harvard Class Day Afternoon Exercises (June 8, 1978) *at* http://www.columbia.edu/cu/augustine/arch/solzhenitsyn/harvard1978.html.

[2] *See* Lawrence v. Texas, 123 S. Ct. 2472, 2485 (2003) (O'Connor, J., concurring).

[3] *See* Thompson v. Aldredge, 200 S.E. 799, 800 (Ga. 1939) (citing to common law when acquitting two women of sodomy) ("Wharton, in his *Criminal Law*, volume 1, 11th Ed., § 754, lays down the rule that 'the crime of sodomy proper can not be accomplished between two women, though the crime of bestiality may be.' We have no reason to believe that our law-makers in defining the crime of sodomy intended to give it any different meaning.").

[4] *See* Brief of Amici Curiae The CATO Institute at 9-11, Lawrence v. Texas, 123 S. Ct. 2472 (2003) (No. 02-102).

[5] *See* Riley v. Garrett, 133 S.E.2d 367, 370 (Ga. 1963) ("Adhering to the rule of strict construction, we adopt the view taken by Judge Bloodworth in the *Comer* case, supra, that sodomy as defined by Code § 26-5901 must be committed by man with woman in the same unnatural manner as it is by man with man, that is, by use of the male sexual organ either per anum or per os. The fact that the unnatural sexual act here involved is fully as loathsome and disgusting as the acts proscribed by the Code does not justify us in reading into the statutory prohibition something which the General Assembly either intentionally or inadvertently omitted.").

[6] 381 U.S. 479, 483-84 (1964).

[7] *See* Whalen v. Roe, 429 U.S. 589, 608 (1977) (Brennan, J., concurring) ("*Griswold v. Connecticut* held that a State cannot constitutionally prohibit a married couple from using

the ability of married couples to do as they will behind closed doors was acknowledged by the Supreme Court four years before *Griswold*,[8] and, if a married couple uses sodomy as a way to avoid pregnancy, it may be constitutionally unassailable.[9] Sodomy statutes focus primarily on the conduct of unmarried couples. As "sexual intercourse" is not always inclusive of sodomy in state laws,[10] a law against sodomy fits into a system of law prohibiting fornication as well. Instead of banning a way of sex, a law against sodomy proscribes certain classes of people from having sex.

Fornication and sodomy together cover all possible pre-marital relationships. Adding in adultery[11] and the prohibition of relationships between guardian and ward[12] and teacher and pupil,[13] a pattern emerges to control most sexual contact outside of marriage. It is clear from the text of *Lawrence* that sodomy laws cannot stand and homosexual relationships must be let alone. However, the Court's decision appears to go further stating that, "attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries [should fail] absent injury to a person or

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contraceptives in the privacy of their home") (citation omitted); Washington v. Glucksburg, 521 U.S. 702, 720 (1997) (holding that Due Process Clause liberties extend to "marital privacy," citing Griswold v. Connecticut, 381 U.S. 479 (1964)).

8 *See* Poe v. Ullman, 367 U.S. 497, 502 n.3 (1960) (considering whether a married couple would have standing to challenge Connecticut's anti-contraception law). "The assumption of prosecution of spouses for use of contraceptives is. . . inherently bizarre, as was admitted by counsel. . . ." *See id.* at 553 (Harlan, J., dissenting). Justice Harlan stated that, "the State exerts its power either to forbid extra-marital sexuality altogether, or to say who may marry, but it is quite another when, having acknowledged a marriage and the intimacies inherent in it, it undertakes to regulate by means of the criminal law the details of that intimacy." *Id.*

9 The right to prevent or terminate a pregnancy is best illustrated by Eisenstadt v. Baird, 405 U.S. 438 (1972) (holding that a state cannot interfere in the distribution of contraceptives) and Roe v. Wade, 410 U.S. 113 (1973) (holding that a state's ability to restrict abortion is limited by the constitution). Together, these cases create the presumption that choosing not to have a child is rarely the government's business.

10 *See* S.C. CODE ANN. § 16-15-80 (Law. Co-op. 2002) (fornication as "carnal intercourse . . . of a man and woman"). *Compare* VA. CODE ANN. § 18.2-344 (Michie 2003) ("Any person, not being married, who voluntarily shall have sexual intercourse with any other person.") *with* VA. CODE ANN. § 18.2-361 (Michie 2003) (entitling "Crimes Against Nature" and stating that "[i]f any person carnally knows in any manner any brute animal, or carnally knows any male or female person by the anus or by or with the mouth . . . ."). *Compare* GA. CODE ANN. § 16-6-18 (2002) ("An unmarried person commits the offense of fornication when he voluntarily has sexual intercourse with another person . . . .") *with* GA. CODE ANN. § 16-6-2 (2002) ("A person commits the offense of sodomy when he or she performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another.").

11 *See, e.g.*, ALA. CODE § 13A-13-2 (2003) (defining adultery as the cohabitation of a married individual with one not his spouse); MASS. GEN. LAWS ANN. ch. 272, § 14 (2003) (putting forth the same elements for adultery as Alabama, but without the defense of mistake); MISS. CODE ANN. § 97-29-1 (2003) (collapsing adultery and fornication into one crime); N.C. GEN. STAT. § 14-184 (2003) (collapsing adultery and fornication into one crime).

12 *See* MISS. CODE. ANN. § 97-29-9 (2003).

13 *See* MISS. CODE ANN. § 97-29-3 (2003). Both sections § 97-29-3 and § 97-29-9 of the Mississippi Code affect only guardians and wards, or teachers and pupils who are not married to each other.

abuse of an institution the law protects."[14] One could infer that this language also negates statutes against fornication and adultery. Courts should resist the temptation to read that far since today, prohibitions against pre-marital and extra-marital involvement have some merit.

II. WHAT THESE ILL-USED LAWS DO

It is often argued that laws against fornication and adultery are rarely enforced.[15] Although there are few prosecutions for these crimes, their existence pervades American society. Laws against fornication and adultery control tax filings[16] and jury selection.[17] In certain states, one may sue over a false accusation of fornication or adultery.[18] Although some states read a requirement of "open and notorious conduct" into fornication and adultery laws, making them almost the same as public indecency laws,[19] other states posit that private adultery or fornication is no less worthy of criminal sanction because it is private.[20]

American courts have routinely rejected the notion that the failure to regularly enforce a law may cause it to lose its ability to be enforced.[21]

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[14] *Lawrence*, 123 S. Ct. at 2478.

[15] *See* Hillary Greene, *Undead Laws: The Use of Historically Unenforced Criminal Statutes in Non-Criminal Litigation*, 16 YALE L. & POL'Y REV. 169, 169 (1997).

[16] *See* William V. Vetter, *I.R.C. 152(b)(5) and Victorian Morality in Contemporary Life*, 13 YALE L. & POL'Y REV. 115, 116 (1995) (illustrating the use of the tax code to coerce social norms):

> Despite its usual nonjudgmental approach, the Internal Revenue Code (I.R.C.) penalizes taxpayers who may not conform to state statutes that criminalize selected sexual activities. Taxpayers living in states where such statutes are still on the books cannot claim a 'dependency exemption' for a cohabitant, while a married couple with exactly the same economic circumstances is not similarly limited. There is no reliable way to estimate the number of taxpayers who have been, and are, adversely affected.

Id.

[17] *See* Greene, *supra* note 15, at 178 ("Federal prosecutors have also argued that violation of an unenforced cohabitation prohibition is relevant to determinations regarding one's fitness to serve on a jury.").

[18] *See, e.g.*, ARK. CODE ANN. § 5-15-102 (Michie 2003) (citing as slander a false charge of adultery); KY. REV. STAT. ANN. § 411.040 (Michie 2002) (making actionable any charge of incest, fornication, or adultery).

[19] *See* Powell v. State, 510 S.E.2d 18 (Ga. 1998) (finding that Georgia's sodomy law is not valid under the Georgia Constitution if it applies within one's home since the law has the presumption of constitutionality, the law does not apply to private conduct).

[20] *See* Everett v. Virginia, 200 S.E.2d 564 (Va. 1973) ("The statutory proscription of open and gross lewdness and lasciviousness was not targeted against adultery or fornication which other statutes make crimes."); *see also* Robert P. George, *The Concept of Public Morality*, 45 AM. J. JURIS. 17, 25 (2000) ("Commercial sex acts will likely take place in 'private,' that is, behind closed doors, and it could be the case that there is no highly visible publicizing of the prostitutes' availability . . . still, public interests are damaged.").

[21] *See* United States v. Elliott, 266 F. Supp. 318, 325-26 (S.D.N.Y. 1967) ("Defendant contends that the apparent absence of any prosecution under the statute since its promulgation in 1917 renders it void because of desuetude. We do not agree . . . . We find little analytical aid in merely applying, or refusing to apply, the rubric of desuetude. The problem must be

Furthermore, a lack of enforcement does not infer that the law should be repealed. Instead, sporadic enforcement may be the "most effective strategy for deterring consensual conduct that violates a widely shared moral norm."[22] Lawrence M. Friedman provides a modern analogy to the creation of fornication, prostitution and adultery laws that were rarely enforced even in their own time:

> Vice laws, then, were a little bit like modern laws against speeding. Everybody breaks these laws, at least sometimes; but the laws are far from pointless. They affect the time, manner, and mode of speeding; the worst and most blatant offenders are caught and punished, while the "ordinary" speeder gets away with his offense. Speeding laws almost certainly cut down on the sheer amount of speeding; as a result, speeding probably stays within roughly acceptable limits. The speeding laws permit and foster a decent degree of control, while not interfering with the God-given right to speed a little, some of the time.[23]

It is untrue that courts generally refuse to interfere in "intimate" relationships. Courts are very willing to intervene when it comes to loss of consortium, or determination of paternity.[24] Perhaps we should think about keeping a speed limit on our "fast" society.

III. WHY KEEP THEM?

One of the rationales for keeping statutes against sex outside marriage is to prevent the spread of sexually transmitted diseases. Some courts reject this reasoning,[25] and post-*Lawrence*, it is hard to argue that a sodomy statute

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approached in terms of that fundamental fairness owed to the particular defendant that is the heart of due process."). *Cf.* District of Columbia v. John R. Thompson Co., 346 U.S. 100, 110-11 (1953) (holding that a law from 1871 is still valid if it is on the books unless it is inconsistent with later acts).

[22] Jonathan M. Barnett, *The Rational Underenforcement of Vice Laws*, 54 RUTGERS L. REV. 423, 426 (2002).

[23] Lawrence M. Friedman, *Name Robbers: Privacy, Blackmail, and Assorted Matters in Legal History*, 30 HOFSTRA L. REV. 1093, 1102 (2002).

[24] For loss of spousal consortium, see Kotsiris v. Ling, 451 S.W.2d 411 (Ky. 1970); Diaz v. Eli Lilly & Co., 302 N.E.2d 555 (Mass. 1973); General Elec. Co. v. Bush, 498 P.2d 366 (Nev. 1972). For paternity cases, see Caldwell v. Miller, 313 S.W.2d 862 (Ky. 1958); James v. Commonwealth, 227 S.W. 562 (Ky. 1921); Pamela P. v. Frank S., 443 N.Y.S.2d 343 (1981). *See also* Diane M. Carlton, *Fraud Between Sexual Partners Regarding the Use of Contraceptives*, 71 KY. L.J. 593, 602 (1983).

[25] *See* People v. Onofre, 415 N.E.2d 936, 942 (1980) ("[N]either the People nor the dissent has cited any authority or evidence for the proposition that the practice of consensual sodomy in private is harmful either to the participants or society in general."). However, in the context of sexual regulation as a whole, there were 16,765 deaths from HIV/AIDS in 1999, whereas there were only forty-two deaths due to illegal use of the drug ecstasy. *See* THE DRUG ENFORCEMENT AGENCY, *Statistics, available at* http://thedea.org/statistics.html (last visited Sept. 14, 2003); CENTERS FOR DISEASE CONTROL AND PREVENTION, *HIV/AIDS Update: A Glance At the*

can be resurrected solely for disease control purposes.[26] The modern trend in prosecutions for the transmission of sexually transmitted diseases includes charging the transmitter with reckless endangerment[27] or prosecuting him under specially tailored statutes.[28] Therefore, disease control is not enough of a compelling state interest to overcome Due Process questions, and the argument must be discarded.

More compelling is the proposition that fornication and adultery statutes exist to protect marriage. Protection of marriage was a valid goal for state legislation in prior courts, for many reasons.[29] The existence of stable coupling in America correlates to America's prosperity and security,[30] especially in the upbringing of intelligent, moral citizens.[31]

AIDS Epidemic, available at http://www.cdc.gov/nchstp/od/news/At-a-Glance.pdf (last visited Sept. 14, 2003). These statistics support the dissent in *Onofre* which argued that if "the freedom to choose one's own form of sensory gratification within the confines of one's own home is a constitutionally protected 'fundamental' right," a law against marijuana is similarly unconstitutional, as some recreational drugs have a lower toll than sexual activity. *See Onofre*, 415 N.E.2d at 944 (Gabrielli, J., dissenting).

[26] *Lawrence* itself does not mention disease control, but given its reliance on *Eisenstadt*, one could assume that the dissenting argument made by Justice Burger in *Eisenstadt*, that Massachusetts's law against unauthorized distribution of contraceptives had a reasonable purpose of protecting the public health – probably remained unconvincing to the majority of the Court. *See Eisenstadt*, 405 U.S. at 465 (Burger, J., dissenting).

[27] *See generally* Discussion, *Criminalization of an Epidemic: HIV-AIDS and Criminal Exposure Laws*, 46 ARK. L. REV. 921, 935-41 (1994).

[28] *See, e.g.*, COLO. REV. STAT. § 25-4-401 (2003) (defining venereal diseases as syphilis, gonorrhea, and any diseases the government deems similar) ("It is unlawful for any person who has knowledge or reasonable grounds to suspect that he is infected with a venereal disease to willfully expose to or infect another with such a disease or to knowingly perform an act which exposes to or infects another person with a venereal disease."); S.C. CODE ANN. § 44-29-60 (2002) ("It is unlawful for anyone infected with these diseases to knowingly expose another to infection.") *Cf.* Mona Markus, *A Treatment for Disease: Criminal HIV Transmission/Exposure Laws*, 23 NOVA L. REV. 847, 859-60 (1999); Rebecca Ruby, *Apprehending the Weapon Within: The Case for Criminalizing the Intentional Transmission of HIV*, 36 AM. CRIM. L. REV. 313, 316 (1999).

[29] *See* McLaughlin v. Florida, 379 U.S. 184, 196 (1964) (holding that although a law against interracial cohabitation violated the Constitution, "[t]hose provisions of chapter 798 which are neutral as to race express a general and strong state policy against promiscuous conduct, whether engaged in by those who are married, those who may marry or those who may not. These provisions, if enforced, would reach illicit relations of any kind and in this way protect the integrity of the marriage laws of the State."); *see also* Bowers v. Hardwick, 478 U.S. 186, 217 (1986) (Stevens, J., dissenting) ("Society . . . may prevent an individual from interfering with, or violating, a legally sanctioned and protected relationship, such as marriage."); *Poe*, 367 U.S. at 553 (Harlan, J., dissenting) (arguing that marriage is "an institution which the State not only must allow, but which always and in every age it has fostered and protected").

[30] *See* Mark Strasser, *Same-Sex Marriages and Civil Unions: On Meaning, Free Exercise, and Constitutional Guarantees*, 33 LOY. U. CHI. L.J. 597, 603-04 (2002) ("Marriage provides a setting in which children might be produced and raised . . . Marriage also provides stability for adults, making them both happier and more productive.") *Cf.* Katherine Shaw Spaht, *Propter Honoris Respectum: For the Sake of the Children: Recapturing the Meaning of Marriage*, 73 NOTRE DAME L. REV. 1547, 1552-53 (1998).

[31] *See* Spaht, *supra* note 30, at 1550 ("[T]he result [of child-rearing by unmarried adults, usually single parents] is not just a bit more suffering for a few more children, but the impoverishment of the society and the none-too-slow erosion of American civilization.").

Still, the above benefits accrue to society, and not necessarily to the individual.[32] Modern society, with the courts in tow, consider marriage in much more personal terms,[33] creating marriages which do not achieve society's goals.[34] Without incentives to marry, couples often choose not to do so. This choice is rewarded with generous domestic partnership benefits and the acceptance of this type of status by society.[35] Regardless of the strong emotional bond proclaimed by a cohabiting couple, cohabitation alone does not provide the benefit of stability that a marriage or civil union does.[36] Sexual intimacy is the core of marriage, without which it cannot exist.[37] Therefore, marriage is deserving of some protection even if it is only a schema of rarely-used laws that pop up to exempt cohabiting couples from laws against discrimination[38] and to make filing their taxes more difficult,[39] while simultaneously gently channeling those who are risk-averse into a relationship that benefits society. There are also laws against cohabitation.[40] To strike them, fornication and adultery from the books, is to take away opprobrium and let people do as they will without guilt.

Marriage is also described, disparagingly, as "the capitalist state's way of making its citizens into obedient workers." David Bowman, *Adultery as an Act of Cultural Rebellion*, SALON (Sept. 3, 2003) *at* http://www.salon.com/sex/feature/2003/09/03/kipnis/.

[32] *See* Katherine Shaw Spaht, *Beyond* Baehr*: Strengthening the Definition of Marriage*, 12 BYU J. PUB. L. 277, 280 (1998).

[33] *See, e.g.*, Turner v. Safley, 482 U.S. 78, 95-96 (1987) (holding that marriage is mostly about free expression). Katherine Shaw Spaht also argues that:

> The attributes described as sufficient to constitute the core of the 'right to marry' include: (1) 'expressions of emotional support and public commitment,' a form of personal dedication; (2) 'an exercise of religious faith,' giving the marriage a spiritual dimension; (3) 'the expectation that marriage will be fully consummated'; and (4) 'the receipt of government benefits.' Obviously, such a conception of marriage, or the marital relationship is predicated on the perspective of the individual person who seeks to achieve personal happiness from marriage.

Spaht, *supra* note 32, at 280-81.

[34] *Id.* at 287 (quoting Lee E. Teitelbaum, *The Last Decade(s) of American Family Law*, 46 J. LEGAL ED. 546, 547-48 (1996) in noting that family stability is key to social welfare).

[35] Clifford Krauss, *Now Free to Marry, Canada's Gays Say, 'Do I?'*, N.Y. TIMES, Aug. 31, 2003, at A14.

[36] *See* Strasser, *supra* note 30, at 626-28 (arguing that the benefit to society in homosexual unions is at its maximum if and only if such unions are equal in status to marriages).

[37] *See* Laurence Drew Borten, *Sex, Procreation, and the State Interest in Marriage*, 102 COLUM. L. REV. 1089, 1093 (2002); *see also* Roger Scruton, *The Moral Birds and Bees*, NAT'L REV., Sept. 15, 2003, at 38 ("Marriage was seen as the institutional expression of desire, rather than a way of restricting or denying it.").

[38] *See* Greene, *supra* note 15, at 181.

[39] *See generally* Vetter, *supra* note 16 (discussing tax penalties for cohabitation instead of marriage).

[40] *See, e.g.*, N.D. CENT. CODE § 12.1-20-10 (2003) ("A person is guilty of a class B misdemeanor if he or she lives openly and notoriously with a person of the opposite sex as a married couple without being married to the other person.").

It is in the realm of moral guilt that sexual conduct laws do most good, as they protect one's ability to choose one's sexual encounters free of external pressure. Currently, there is a great deal of pressure on young people to engage in extramarital sex.[41] Many teenagers and younger children succumbing [42] to the pressure can lead to significant psychological damage.[43] Even into adulthood, Americans live in an environment where casual sex is expected, and it takes strong will to break out of the prevailing current.[44] To take away an excuse to refrain from sexual conduct makes one more vulnerable to peer pressure.[45] This is undesirable, as the psychological damage from premature sexual relations can be much worse than an ill-advised contract, something American society often protects minors from.[46] Each year teenagers are given excuses to say no to drugs and alcohol. Saying, "No. I'll get in trouble" is considered a perfectly valid excuse.[47] Even if, as in Georgia, a teenager's room is her private space,[48] there can be occasional enforcement of fornication statutes against egregious teenage offenders.[49] The Supreme Court held in *Michael M. v. Superior Court*[50] that one possible outcome of fornication – teenage pregnancy – is a legitimate state concern allowing for legislation against sexual behavior,[51] and that such state concern

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41 *See* MARY PIPHER, REVIVING OPHELIA: SAVING THE SELVES OF ADOLESCENT GIRLS 207 (Ballantine Books 1995) ("In the halls of junior highs, girls are pressured to be sexual regardless of the quality of relationships.").

42 Currently, twenty-five percent of women say they began having sex before they wanted to, but gave their consent anyway. *See* Charles A. Phipps, *Misdirected Reform: On Regulating Consensual Sexual Activity Between Teenagers*, 12 CORNELL J.L. & PUB. POL'Y 373, 394-95 (2003). A smaller percentage of young men are similarly coerced. *Id.* at 425-26.

43 *See* Pipher, *supra* note 41, at 208 (arguing that "when [teens] are sexual, they tend to get into trouble quite rapidly").

44 *See* Lillie Wade, *Everyone Belongs to No One: Brave New Campus* (Apr. 10, 2003), *at* http://www.shethinks.org/articles/an00259.cfm ("the dreary hook ups that have become the norm among high school and college students . . . are an almost perfect realization of the loveless world Huxley envisioned in Brave New World").

45 *See* Francis Cardinal George, *Law and Culture*, 1 AVE MARIA L. REV. 1, 13 (2003).

46 Phipps, *supra* note 41, at 385.

47 *See, e.g.*, THE NATIONAL YOUTH ANTI-DRUG MEDIA CAMPAIGN, BEHAVIOR CHANGE EXPERT PANEL, *Help With Peer Pressure*, *at* http://www.theantidrug.com/advice/tips_peer_2.html (last visited Oct. 7, 2003).

48 *See In re* J.M., 575 S.E.2d 441 (Ga. 2003) (finding that Georgia cannot charge an unmarried teenager with delinquency for having sex with another teenager in that teenager's bedroom without parents' permission. The bedroom is a place where one has a "reasonable expectation of privacy" and Georgia's power does not extend there.).

49 *See In re* C.P., 555 S.E.2d 426 (Ga. 2001) (holding that two unmarried teenagers having sex inside a high school restroom stall were not protected by Georgia's liberal privacy law).

50 450 U.S. 464 (1981). The statute involved in *Michael M. v. Superior Court* was a statutory rape law; however, statutory rape laws are generally not applied to teenage couples, leaving only prosecution for fornication. *See* Phipps, *supra* note 42, at 382-85 (demonstrating that older men are those most often prosecuted for impregnating younger women. If there is no large age discrepancy, there is usually no prosecution.).

51 *See Michael M.*, 450 U.S. at 470 ("The justification for the statute offered by the State, and accepted by the Supreme Court of California, is that the legislature sought to prevent

is strong enough to trump equal protection laws in some circumstances.[52] For the mental health of the nation, there should be some delineation of boundaries.[53] If Professor Friedman's analogy to traffic violations[54] is given any credit, maintaining laws against fornication and adultery provide the younger generations with a feeling of greater autonomy over their sex lives than they would have without such laws.[55]

CONCLUSION

"Two hundred or even fifty years ago, it would have seemed quite impossible, in America, that an individual could be granted boundless freedom simply for the satisfaction of his instincts or whims."[56]

Texas had a law against sodomy specifically tailored to prohibit sexual contact within one's own gender,[57] but no similar prohibition against adultery or fornication.[58] Prohibiting sodomy alone is most likely unconstitutional under the Equal Protection Clause.[59] Although the majority in *Lawrence* proclaims that the Due Process Clause proscribes a state's ability

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illegitimate teenage pregnancies. That finding, of course, is entitled to great deference.") (internal citation omitted).

[52] *See id.* at 470-73.

[53] However, a greater amount of enforcement on teens, especially pregnant teens, is undesirable. *See* Juhi Mehta, *Prosecuting Teenage Parents Under Fornication Statutes: A Constitutionally Suspect Legal Solution to the Social Problem of Teen Pregnancy*, 5 CARDOZO WOMEN'S L.J. 121 (1998).

[54] *See* Friedman, *supra* note 24, at 1102.

[55] *Cf.* Pipher, *supra* note 40, at 208 ("My experience is that the more mature and healthy girls avoid sex.").

[56] Solzhenitsyn, *supra* note 1.

[57] *See* TEX. PENAL CODE ANN. § 21.06 (Vernon 2003) ("A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex.").

[58] Justice O'Connor outlined Texas's unusual situation:

> The statute at issue here makes sodomy a crime only if a person 'engages in deviate sexual intercourse with another individual of the same sex.' Sodomy between opposite-sex partners, however, is not a crime in Texas. That is, Texas treats the same conduct differently based solely on the participants. Those harmed by this law are people who have a same-sex sexual orientation and thus are more likely to engage in behavior prohibited by § 21.06. The Texas statute makes homosexuals unequal in the eyes of the law by making particular conduct—and only that conduct—subject to criminal sanction.

Lawrence, 123 S. Ct. 2472 at 2485 (O'Connor, J., concurring) (internal citation omitted). Texas repealed its law against cohabitation in 1983. *See* TEX. PENAL CODE ANN. § 20.12 (Vernon 2003).

[59] *See Lawrence*, 123 S. Ct. at 2487 (O'Connor, J., concurring). Still, it is not entirely clear that a law prohibiting same-sex coupling is necessarily exclusively against people who identify themselves as a homosexual. *See* Liz Szabo, *A Silent Scourge in Hampton Roads: AIDS Rates in Region Among Nation's Worst; Disease Now Spreading Fastest Among Poor and Minorities*, THE VIRGINIAN PILOT, Nov. 10, 2002, at A1 ("[m]en who have had sex with other men behind bars often resume sleeping with women after they are released."); Lara Tabac, *Diary*, SLATE (Sept. 29, 2003), *at* http://www.slate.msn.com/id/2088748/entry/2088987/ ("We use the term MSM [men who have sex with men] instead of homosexual because many of these men are not 'gay-identified'—they don't consider themselves to be gay.").

to regulate sexual conduct,[60] this proscription cannot be absolute.[61] The "abuse of an institution" language in *Lawrence* should be read to include marriage, and the "injury to a person" language should be understood to include the consequences of wanton conduct. Any other interpretation suggests that all sexual regulation is impermissible, and there will be a social cost.

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[60] *Lawrence*, 123 S. Ct. at 2484. The *Lawrence* majority implies most sexual conduct is protected by the right to privacy:

> The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime.

Id. *But see Poe*, 367 U.S. at 552-53 (Harlan, J., dissenting) ("I would not suggest that adultery, homosexuality, fornication and incest are immune from criminal enquiry, however privately practiced. So much has been explicitly recognized in acknowledging the State's rightful concern for its people's moral welfare."). This dissent set the foundation for Justice Harlan's concurrence in *Griswold v. Connecticut*, arguing against the limitation of due process to a penumbra around the Bill of Rights, a position *Lawrence* seems to follow. *See Griswold*, 381 U.S. at 500 (Harlan, J., concurring).

[61] *See* Adam Hickey, *Between Two Spheres: Comparing State and Federal Approaches to the Right to Privacy and Prohibitions Against Sodomy*, 111 YALE L.J. 993, 996 n.11 (2002) ("Few would believe that prostitution should be legalized, even though the arguments against sodomy laws would seem to compel that result."). *Cf.* Traci Shallbetter Stratton, *No More Messing Around: Substantive Due Process Challenges to State Laws Prohibiting Fornication*, 73 WASH L. REV. 767, 785 (1998).