# Undead Statutes: The Rise, Fall, and Continuing Uses of Adultery and Fornication Criminal Laws

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*Cohabitation is a reality for a majority of Americans. Non-monogamous relationships are increasing over time, yet having a sexual relationship outside of marriage is illegal in a surprising number of states. Conservative groups or politicians also occasionally champion these laws, ensuring their longevity. This enduring conflict of values between the majority and a vocal minority is part of a cultural trend that has existed for centuries. From colonial times to the present, adultery and fornication laws have gone from being the most prolifically enforced to being virtually ignored by prosecutors and held to be unconstitutional invasions of privacy by judges. This Article traces that progression by looking at how American culture has changed over time, including judicial views on and changing evidentiary standards for the crimes of adultery and fornication, both of which have led to fewer prosecutions. The resulting picture indicates why these laws are no longer regularly enforced and why they still remain part of the criminal codes in several states, regardless of their uncertain constitutional pedigree.*



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## INTRODUCTION

According to a recent survey by the Center for Disease Control, cohabitation, either before marriage or as an alternative to marriage, has become a popular living arrangement, particularly for young people.[1] Nevertheless, a record low of 47% of adult women are married.[2] The increase in cohabitation, combined with the growing number of states that recognize marriage for homosexual couples, has created a new minority group: non-monogamous couples and couples who live together but do not wish to get married. Although there is evidence that public opinion regarding cohabitation has improved over time,[3] the stigma attached to both cohabitating and non-monogamous couples is alive and well in the criminal laws of several states that outlaw adultery, fornication, or cohabitation.

To many, adultery and fornication criminal laws are historical relics

1. Michelle Castillo, *CDC: More Women Choosing Cohabitation Before Marriage*, CBS NEWS (Apr. 4, 2013, 4:59 PM), http://www.cbsnews.com/news/cdc-more-women-choosing-cohabitation-before-marriage/.

2. Special to *The Chicago Tribune*, Leslie Mann, *Nowadays, It's 'Last Comes Marriage'*, CHI. TRIB. (Jan. 1, 2014), http://articles.chicagotribune.com/2014-01-01/news/ct-last-comes-marriage-x-0101-20140101_1_big-wedding-couples-wedding-industry.

3. *See, e.g.*, Cynthia Grant Bowman, *Social Science and Legal Policy: The Case of Heterosexual Cohabitation*, 9 J.L. & FAM. STUD. 1, 7 (2007); *see also* Elizabeth A. Pope, *Cohabitation: What to Do When Couples Cannot or Do Not Marry*, DCBA BRIEF, Dec. 2007, at 22. Discrimination against couples in polyamorous or non-monogamous relationships is apparently still a main concern. *See* Ann E. Tweedy, *Polyamory As A Sexual Orientation*, 79 U. CIN. L. REV. 1461, 1514 (2011).

from this Country's earliest colonies. And yet, these laws have had surprising longevity in many states.[4] Typically unenforced, these laws are sometimes still invoked by politicians or interest groups who seek a "moral" platform to impress or mobilize their conservative constituents. A number of recent examples exist. In 2009, the Minnesota Family Council, in the face of efforts to repeal Minnesota's fornication and adultery laws, called for those laws to be strengthened instead.[5] The repeal efforts ultimately failed.[6] In 2012, Bryan Fischer of the American Family Association called for the re-criminalization of homosexuality and fornication nationwide.[7] Also in 2012, Alaskan Governor Sean Parnell appointed a man to the state's judicial appointments panel who believed that extra-marital sex should be a crime.[8] Finally, as recently as 2013, two states' sodomy laws[9] were used to arrest or convict people.[10]

Although they are probably unconstitutional violations of privacy

4. *See* Richard Green, Griswold*'s Legacy: Fornication and Adultery as Crimes*, 16 OHIO N.U. L. REV. 545, 546 (1989).

5. Jonathan Turley, *The Scarlet Letter Lives On*, USA TODAY, Apr. 26, 2010, at 09A, *available at* http://usatoday30.usatoday.com/news/opinion/forum/2010-04-26-column26_ST_N.htm.

6. *Id.* Several other state legislatures have "proudly" refused to repeal existing sodomy laws, even when the laws are undoubtedly unconstitutional. *See* DALE CARPENTER, FLAGRANT CONDUCT: THE STORY OF *LAWRENCE V. TEXAS* 281–82 (W.W. Norton & Co. 2012).

7. Patricia Nell Warren, *HIV Prevention & the New Puritanism*, BILERICO PROJ. (Sept. 9, 2012, 12:00 PM), http://www.bilerico.com/2012/09/hiv_prevention_the_new_puritanism.php.

8. *Id.*

9. Although this Article does not focus on criminal sodomy laws, this Article will occasionally use those laws to supplement evidence of changing values regarding consensual sex between adults.

10. *See* Laura Vozzella, *Cuccinelli Seeks to Preserve Va. Sodomy Law*, WASH. POST (June 25, 2013), http://www.washingtonpost.com/local/va-politics/cuccinelli-seeks-to-preserve-va-sodomy-law/2013/06/25/e410762a-ddd5-11e2-b197-f248b21f94c4_story.html (discussing Virginia Attorney General Ken Cuccinelli II's appeal to the U.S. Supreme Court aimed at preserving Virginia's anti-sodomy law); *see also* Ali Vitali, *Sodomy Laws May Be Illegal, but That's Not Stopping Baton Rouge*, MSNBC (July 28, 2013, 5:41 PM), http://www.msnbc.com/melissa-harris-perry/sodomy-laws-may-be-illegal-thats-not (noting that Baton Rouge Sheriff's Department charged gay men with "crimes against nature" in sting operation for attempting to have consensual sexual relationships with undercover police officers). The persistence of these laws has also caused the United States to be criticized for its own condemnation of other countries' treatment of homosexuals. *See* Max Seddon, *Putin Says He Has Gay Friends but Equates Gay People to Pedophiles*, BUZZFEED (Jan. 19, 2014, 11:24 AM), http://www.buzzfeed.com/maxseddon/putin-says-he-has-gay-friends-but-equates-gay-people-to-pedo (Putin argued that, because fourteen states have anti-sodomy laws, Russia has a more liberal stance towards homosexuality than the United States does).

under *Lawrence v. Texas*,[11] adultery and fornication laws persist. Almost twenty states currently have statutes criminalizing adultery, fornication, or both.[12] Most of those statutes were enacted in the 1800s and were vigorously enforced. In fact, enforcement of adultery and fornication statutes appears to have been commonplace until the 1940s and 1950s, when it abruptly tapered off.[13] Since then, adultery has become a civil, rather than a criminal, matter in most jurisdictions; as such, criminal prosecutions for adultery have been largely replaced by divorce proceedings.[14] Fornication laws have not found a civil counterpart, and consensual premarital sex between adults has all but disappeared from the legal landscape.

A few states have recently repealed their adultery or fornication statutes.[15] On the other hand, several state legislatures have considered and then refused to repeal their existing adultery or fornication statutes,

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11. 539 U.S. 558 (2003). Since *Lawrence*, two courts have heard challenges to existing sodomy and fornication laws, and both courts struck those laws (or the relevant portions thereof) down pursuant to *Lawrence v. Texas*. La. Electorate of Gays & Lesbians, Inc. v. Connick, 902 So. 2d 1090, 1096 (La. Ct. App. 2005) (upholding trial court's decision to strike portion of Louisiana criminal law that criminalized sodomy between consenting adults under *Lawrence*); Martin v. Ziherl, 607 S.E.2d 367, 371 (Va. 2005) (striking down Virginia's fornication statute under *Lawrence*). *But see* Seegmiller v. LaVerkin City, 528 F.3d 762, 772 (10th Cir. 2008) (upholding police department's reprimand of officer for off-duty sexual encounter with another officer under rational basis test articulated in *Lawrence*); *In re* R.L.C., 643 S.E.2d 920, 925 (N.C. 2007) (refusing to extend *Lawrence* to sodomy case involving two minors).

12. Adultery statutes: ALA. CODE § 13A-13-2 (LexisNexis 2005); ARIZ. REV. STAT. ANN. § 13-1408 (2010); FLA. STAT. ANN. § 798.01 (West 2007 & Supp. 2014); GA. CODE ANN. § 16-6-19 (West 1981); IDAHO CODE ANN. § 18-6601 (1972); 720 ILL. COMP. STAT. ANN. 5/11-35 (West Supp. 2014) (previously 720 ILL. COMP. STAT. ANN. 5/11-7 (West 1993)); KAN. STAT. ANN. § 21-5511 (Supp. 2013) (previously KAN. STAT. ANN. § 21-3507 (2007)); MASS. ANN. LAWS ch. 272, § 14 (LexisNexis 2010 & Supp. 2014); MICH. COMP. LAWS ANN. §§ 750.29–.30 (West 2004); MINN. STAT. ANN. § 609.36 (West 2009 & Supp. 2014); MISS. CODE ANN. § 97-29-1 (2006); N.Y. PENAL LAW § 255.17 (McKinney 2008 & Supp. 2014); N.D. CENT. CODE § 12.1-20-09 (2012); OKLA. STAT. tit. 21, §§ 871–872 (2002 & Supp. 2014); S.C. CODE ANN. § 16-15-60 (2003 & Supp. 2013); UTAH CODE ANN. § 76-7-103 (LexisNexis 2012); VA. CODE ANN. § 18.2-365 (2009 & Supp. 2013); WIS. STAT. ANN. § 944.16 (West 2005).Fornication statutes: IDAHO CODE ANN. § 18-6603 (1947 & 1949); 720 ILL. COMP. STAT. 5/11-40 (West Supp. 2014) (previously 720 ILL. COMP. STAT. ANN. 5/11-8 (West 1993))); MASS. ANN. LAWS. ch. 272, § 18 (LexisNexis 2010 & Supp. 2014); MISS. CODE ANN. § 97-29-1; N.D. CENT. CODE § 12.1-20-08 (2012); S.C. CODE ANN. § 16-15-60; UTAH CODE ANN. § 76-7-104 (LexisNexis 2012).

13. Because trial court level prosecutions are not available for this Article, appellate level cases will be used as a proxy for how often these prosecutions were brought.

14. *See* HEATHER BROOK, CONJUGAL RITES: MARRIAGE AND MARRIAGE-LIKE RELATIONSHIPS BEFORE THE LAW 81 (2007).

15. For example, Colorado repealed its adultery statute and New Hampshire looks to follow suit this year. *See* Jolie Lee, *New Hampshire Senate Votes to Repeal Anti-Adultery Law*, USA TODAY (Apr. 17, 2014, 4:39 PM), http://www.usatoday.com/story/news/nation-now/2014/04/17/anti-adultery-laws-new-hampshire/7780563/.

indicating that the public may support criminalization of these acts.[16] Despite these conflicting results, it is clear that even if states are unwilling to repeal these statutes, public opinion has changed.[17] Lack of public interest in adultery and fornication prosecutions has led to fewer prosecutions, as the police and prosecutors have turned their attention to crimes that are considered to be more important.[18] Changing policies have also caused adultery and fornication laws to come into conflict with constitutional rights, such as the right to privacy,[19] as the public has come to see consensual sexual behavior between adults as beyond the remit of the State.

The history of adultery and fornication laws can show us why these laws were enacted and why they are no longer enforced. Adultery and fornication laws were originally cornerstones of a legal system that emphasized religious morality,[20] so the decreasing enforcement of these laws indicates a fundamental shift in society's values and culture. The change in culture can be observed in multiple ways: directly through increasing liberalism in the United States over time, and indirectly through the ways courts apply adultery and fornication laws. Court cases indicate that evidentiary issues, less zealous courts and juries, and, most recently, privacy issues have contributed to lower rates of adultery and fornication prosecutions.

To fully investigate the interplay of culture and adultery and fornication criminal statutes, in Part I, this Article examines the genesis of these laws, why they were created, and how they were used. In Part II, this Article looks at the change in culture, enforcement, and constitutionality of these laws over time. In Part III, this Article analyzes the evolution of evidentiary requirements surrounding these laws and how these changes further evidence a change in American culture and values. Finally, in Part IV, this Article examines why these criminal laws persist in some states, and how they can still be used to prosecute people.

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16. *See* CARPENTER, *supra* note 6; *see also* Gabrielle Viator, *The Validity of Criminal Adultery Prohibitions After* Lawrence v. Texas, 39 SUFFOLK U. L. REV. 837, 842–43 (2006).

17. *See* Martin J. Siegel, *For Better or for Worse: Adultery, Crime & the Constitution*, 30 J. FAM. L. 45, 55 (1991) (discussing the prevalence of marital infidelity, finding that most people surveyed believed it should not be criminalized).

18. *See, e.g.*, Vitali, *supra* note 10 (criticizing Baton Rouge police, who allocated nine sheriffs to an anti-sodomy sting operation despite high levels of violent crime in Baton Rouge).

19. *See* Martin v. Ziherl, 607 S.E.2d 367, 371 (Va. 2005) (striking down Virginia's fornication statute under right to privacy grounds).

20. *See* Douglas Greenberg, *Crime, Law Enforcement, and Social Control in Colonial America*, 26 AM. J. LEGAL HIST. 293, 297 (1982).

## I. THE HISTORY OF ADULTERY AND FORNICATION LAWS

Adultery and fornication criminal laws had an uneasy transition to the Colonies from the United Kingdom. In the United Kingdom, adultery and fornication were ecclesiastical crimes that were punishable only by the Church and were therefore not part of the common law.[21] Only "open and notorious" fornication was considered a secular crime, because it was a public nuisance.[22] After the Restoration, most sexual laws were repealed in England but remained in the Colonies.[23]

The Colonies disapproved of ecclesiastical courts and decided to use secular laws and courts to enforce morals.[24] More specifically, in order to be legally prosecuted for adultery and fornication in what was to become the United States, these crimes had to be criminalized pursuant to statutes.[25] Statutory enactments varied widely, and some did not even define the act of fornication or adultery.[26] The fact that those statutes often did not define the crimes was of no moment to courts, which were more than willing to use extraneous sources to supply those definitions.[27] Some early courts also did not hew to traditional jurisprudence models at trial; judges in these courts were more inquisitorial and used the bible as their only legal source.[28] New Haven was particularly harsh, where judges would sometimes terrorize the accused into confessing his or her sexual transgressions.[29]

In the Colonies, particularly New England, colonists equated crime

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21. *See* State *ex rel.* Van Nice v. Whealey, 59 N.W. 211, 212 (S.D. 1894) ("It was regarded as an offense so essentially wicked, so subversive of private and public morality, and so opposed to the precepts and practice of religion, that its punishment was left to the ecclesiastical courts . . . ."); *see also* Carotti v. State, 42 Miss. 334, 346 (Miss. Ct. Err. & App. 1868); Morris Ploscowe, *Sex Offenses: The American Legal Context*, 25 LAW & CONTEMP. PROBS. 217, 218 (1960); Siegel, *supra* note 17, at 47.

22. *See* Richard Green, *Fornication: Common Law Legacy and American Sexual Privacy*, 17 ANGLO-AM. L. REV. 226, 227 (1988); Siegel, *supra* note 17, at 47.

23. *See* RICHARD A. POSNER, SEX AND REASON 61 (Harvard Univ. Press 1992).

24. *See* David H. Flaherty, *Law and Enforcement of Morals in Early America*, *in* AMERICAN LAW AND THE CONSTITUTIONAL ORDER: HISTORICAL PERSPECTIVES 58 (Lawrence M. Friedman & Harry N. Scheiber eds., 1988); Ploscowe, *supra* note 21, at 218.

25. *See Carotti*, 42 Miss. at 346; Traci Shallbetter Stratton, Comment, *No More Messing Around: Substantive Due Process Challenges to State Laws Prohibiting Fornication*, 73 WASH. L. REV. 767, 769 (1998).

26. *See* State v. Pierpont, 52 P. 992, 993 (Utah 1898); *see also* State v. Armstrong, 4 Minn. 335, 340 (1860).

27. *Armstrong*, 4 Minn. at 340 (using secondary sources to define "adultery"); State v. Byrum, 83 N.W. 207, 208 (Neb. 1900) (using divorce case law to define adultery); *Pierpont*, 52 P. at 993 (noting that the meaning of fornication "is well understood and settled in legal parlance").

28. Greenberg, *supra* note 20, at 298.

29. *Id.*

with sin, and courts were seen as guardians of Biblical precepts.[30] Colonial criminal codes even cited relevant Bible passages.[31] To that end, early fornication laws were concerned with curbing immorality,[32] and colonial leaders encouraged cooperation between courts and churches to monitor sexual offenses.[33] Colonial judges saw themselves as arbiters of religion and morality, not just the law.[34] They often urged those convicted to seek redemption and mend their ways.[35] Those who failed to show due humility and repentance were often punished more severely than those who showed contrition.[36] In addition, the judge's own morality was frequently on display in adultery and fornication cases: "What act can be more grossly lewd or lascivious than for a man and woman, not married to each other, to be publicly living together, and cohabiting with each other?"[37]

Indeed, judges in colonial times often created a public shaming aspect to their legal punishments, which was intended to stimulate remorse so the transgressors could then return to the church.[38]

This public shaming was also intended to deter others.[39] For this reason, those convicted of sexual offenses could experience a kind of "double jeopardy": criminal punishment in the courts and "spiritual sanctions" in the church.[40] Moreover, secular convictions carried severe penalties, such as substantial fines or public whippings.[41] Branding and imprisonment were also common.[42] Relying on scripture,

30. Flaherty, *supra* note 24, at 53; Greenberg, *supra* note 20, at 297.

31. DOCUMENTING INTIMATE MATTERS: PRIMARY SOURCES FOR A HISTORY OF SEXUALITY IN AMERICA 7 (Thomas A. Foster ed., 2013) (citing the Ten Commandments in adultery statute).

32. Green, *supra* note 22, at 227.

33. KATHLEEN M. BROWN, GOOD WIVES, NASTY WENCHES AND ANXIOUS PATRIARCHS: GENDER, RACE, AND POWER IN COLONIAL VIRGINIA 91–92 (Univ. North Carolina Press 1996).

34. RICHARD GODBEER, SEXUAL REVOLUTION IN EARLY AMERICA 86 (Johns Hopkins Univ. Press 2002).

35. *Id.* at 99.

36. *Id.*

37. *See* State v. Bess, 20 Mo. 419, 421 (1855); *see also* State v. Hazen, 39 Iowa 648, 650 (1874) ("The evidence shows that the defendant kept up a long continued adulterous intercourse with his wife's twin sisters, sixteen years of age. The writer hereof cannot suppress the feeling that the punishment inflicted is much too light, and can only regret that the provisions of the statute did not enable the court to punish the offense in a manner proportioned to its magnitude.").

38. *See generally* GODBEER, *supra* note 34. Members of the community also took to shaming those who engaged in illicit sex, particularly adulterers. *Id.* at 245.

39. *Id.* at 35.

40. BROWN, *supra* note 33, at 189; Greenberg, *supra* note 20, at 297.

41. GODBEER, *supra* note 34, at 101; KIRSTEN FISCHER, SUSPECT RELATIONS: SEX, RACE, AND RESISTANCE IN COLONIAL NORTH CAROLINA 112 (Cornell Univ. Press 2002); CLAUDIA DURST JOHNSON, DAILY LIFE IN COLONIAL NEW ENGLAND 116–17 (2002).

42. BERNARD I. MURSTEIN, LOVE, SEX, AND MARRIAGE THROUGH THE AGES 318 (1974).

some sex crimes, such as rape and adultery, could carry the death penalty.[43]

Despite the threat of harsh criminal sanctions, colonial premarital and extramarital sex seems to have been fairly common.[44] In fact, fornication charges were the most frequent charges brought against women in New England in the 1600s.[45] Historical records show that in New Haven,[46] Plymouth,[47] and Massachusetts,[48] sexual offenses outnumbered all other categories of criminal practices in the county court.[49] In fact, "more than 150 couples living in Essex County were convicted of premarital sex between 1640 and 1685."[50] These couples were prosecuted even if they later married.[51]

Colonies outside of puritanical New England also had high rates of morality prosecutions. For example, sexual offenses were the most common criminal charges in Virginia.[52] There is also evidence that fornication and adultery charges became more common throughout the Colonies as the seventeenth century progressed.[53] Even in North Carolina in the 1700s, which reportedly had a more lax judicial system, one in ten crimes concerned immoral behavior, with adultery and fornication as the most common offenses.[54]

Because both churches and magistrates took it upon themselves to watch over the community, illicit sexual liaisons were much more likely to be discovered, which in turn caused higher rates of prosecutions.[55] Public confessions of illicit sexual behavior as late as the 1760s and 1770s were quite common in some parts of New England.[56] In

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43. GODBEER, *supra* note 34, at 35.

44. Flaherty, *supra* note 24, at 59–60.

45. Else L. Hambleton, *The Regulation of Sex in Seventeenth-Century Massachusetts: The Quarterly Court of Essex County vs. Priscilla Willson and Mr. Samuel Appleton*, *in* SEX AND SEXUALITY IN EARLY AMERICA 89, 97 (Merril D. Smith ed., 1998).

46. GODBEER, *supra* note 34, at 20–21.

47. Greenberg, *supra* note 20, at 299–300.

48. *Id.* at 297.

49. The Dutch colony of New Netherland (and later the English colony of New York) was likewise concerned with sexual misconduct, but the legal institutions there lacked the necessary authority over its more heterogeneous population to reach the prosecution levels of other New England colonies. Greenberg, *supra* note 20, at 300–01. In contrast, the colonies of Pennsylvania and West Jersey did not appear to focus on crimes of sexual misconduct. *Id.*

50. GODBEER, *supra* note 34, at 34.

51. *Id.*

52. FISCHER, *supra* note 41, at 113.

53. FISCHER, *supra* note 41, at 113; Hambleton, *supra* note 45, at 98.

54. FISCHER, *supra* note 41, at 112–13.

55. GODBEER, *supra* note 34, at 20–21; FISCHER, *supra* note 41, at 50.

56. MURSTEIN, *supra* note 42, at 319.

addition, during colonial times, fornication or adultery charges may have been the only ones available in cases of rape where the woman became pregnant, because it was believed at the time that a woman could conceive only if she consented to the sexual intercourse.[57] Fornication and adultery charges therefore may have been used more often in order to prosecute much graver offenses. There is also evidence that in colonies with more property or violent crimes, morality offenses were seldom prosecuted, which indicates that sex-based prosecutions were a luxury that only communities with little other crime could afford.[58] Indeed, as violent and property crimes increased in the 1700s, some colonies' prosecutions of all sexual misconduct decreased sharply.[59]

Early on, for those who engaged in fornication, going to "confess" before a magistrate instead of the entire church congregation was an attractive option.[60] Over time, however, the public nature of church inquiries into illicit sex lessened—churches became more willing to allow their members to confess privately and avoid scandal.[61] Accordingly, after the 1740s, prosecutions for simple premarital sex became more rare, and were dealt with as religious matters more often.[62] Even in Massachusetts, criminal prosecutions for illicit sex decreased.[63]

As a result of the Social Purity Movement, there were some revivals of sex laws in the 1800s, particularly regarding prostitution,[64] the age of consent,[65] pornography,[66] and birth control.[67] In fact, in the 1880s, according to the leaders of the Social Purity Movement, "the loss of

57. Hambleton, *supra* note 45, at 96–97.

58. Greenberg, *supra* note 20, at 302, 304, 308, 315.

59. *Id.*

60. GODBEER, *supra* note 34, at 236.

61. *Id.*

62. *Id.* People who engaged in illicit sex were still subject to questioning, sometimes in front of the congregation. *Id.*

63. Greenberg, *supra* note 20, at 305.

64. POSNER, *supra* note 23, at 261–62; Gayle S. Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, *in* 2 SEXUALITIES: CRITICAL CONCEPTS IN SOCIOLOGY 188, 189 (Ken Plummer ed., 2002). The demand for prostitution apparently increased during the Victorian era as a result of Victorian notions of the purity of the wife (including other men's wives) and the ready market of prostitutes due to poor working conditions for women. MURSTEIN, *supra* note 42, at 273.

65. Kay L. Levine, *The External Evolution of Criminal Law*, 45 AM. CRIM. L. REV. 1039, 1060 (2008).

66. Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 201 (1988).

67. *Id.*

sexual purity was the worst thing that could happen to an unmarried woman . . . ."[68] Despite these aberrations, prosecutions of illicit sexual activities generally continued to decrease following the Civil War, and particularly after World War I, as attitudes towards sex changed.[69]

## II. HOW CHANGES IN CULTURE LED TO CHANGES IN ADULTERY AND FORNICATION PROSECUTIONS

A significant reason for the decrease in prosecutions for adultery and fornication is that American society's values and culture became more liberal and sexually permissive over time. The reasons for prosecuting perceived victims of these crimes were also changed, which eventually led to even fewer prosecutions. As shown below, in the Colonies, particularly in New England, strict religion and morality required that all illicit sex be prosecuted. Over time, however, what constituted illicit sex became more restricted in many states, and the reasons for prosecuting changed. Finally, modern views on sexual relationships have led to widespread disapproval of criminalizing pre- and extra-marital sex.

### *A. Colonial Communities and Religion*

Illicit sex was a major concern to the Colonies. Colonial leaders were worried that adultery, and illegitimate children in particular, would create social disorder in their communities.[70] Indeed, Colonies wanted their inhabitants to marry and have children, particularly because indigenous natives outnumbered colonial populations.[71] Those who failed to marry were viewed with suspicion by their communities and could even be subjected to increased taxes.[72]

Although increasing the population was important to the Colonies, they still wanted sexual relationships to be based on community-sanctioned marriages. Some Colonies attempted to place stricter restrictions on obtaining marriage licenses, such as by requiring couples to obtain a license from a government official.[73] However, practical

68. Levine, *supra* note 65, at 1060.

69. MURSTEIN, *supra* note 42, at 320, 419, 429, 435; MARY P. RYAN, WOMANHOOD IN AMERICA: FROM COLONIAL TIMES TO THE PRESENT 233, 306, 330 (3d ed. 1983).

70. *See* FISCHER, *supra* note 41, at 113 (adultery); BROWN, *supra* note 33, at 28 (illegitimate children).

71. MURSTEIN, *supra* note 42, at 299.

72. *Id.* There may also have been an economic motive to encouraging men to marry—having a family made them less likely to travel or return to England once they had earned enough wages. BROWN, *supra* note 33, at 80.

73. GODBEER, *supra* note 34, at 40.

difficulties in obtaining official marriage licenses in the relatively unpopulated Colonies had a large impact on the sexual and marital practices of their inhabitants. For example, colonists frequently had casual relationships because of a lack of ministers in the Colonies.[74] These colonists would cohabitate, part, and seek new partners elsewhere.[75] Bigamy was also easier to practice because of the ease of travel and delays in communication between colonies.[76]

Other colonial practices show variations from traditional marriage. For example, in the 1700s, to accommodate young peoples' desire to get to know each other before getting married, elders would allow young people to engage in the practice of "bundling," or sleeping together in the same bed while being physically separated by a plank of wood or special clothing that was sewn shut over intimate body parts.[77] In addition, some couples engaged in "spiritual marriage" whereby they had a "spiritual" relationship with a member of the opposite sex and even lived with them, but did not have a physical marriage.[78] These spiritual marriages were looked upon with skepticism by some, and perhaps rightly so, as some resulted in illegitimate children.[79]

Similarly, as premarital sex increased during the 1700s, the issue of how to deal with illegitimate children and fornication changed in colonial communities.[80] During the 1700s, courts increasingly focused on adultery and fornication, particularly that which resulted in illegitimate children.[81] Premarital sex was often discovered upon the birth of a child—either to an unwed woman or to a woman who was wed too close to the child's birth.[82] More specifically, in late 1600s Massachusetts, people were prosecuted for fornication if they had children out of wedlock or eight months or less after marriage.[83] Later

74. GODBEER, *supra* note 34, at 8; FISCHER, *supra* note 41, at 19.

75. GODBEER, *supra* note 34, at 8.

76. FISCHER, *supra* note 41, at 19. Similarly, records were hard to acquire, particularly between different colonies (later, states or territories) so some courts placed the burden on defendants to prove that they were married to each other. *See, e.g.*, State v. McDuffie, 12 S.E. 83 84–85 (N.C. 1890).

77. MURSTEIN, *supra* note 42, at 317.

78. GODBEER, *supra* note 34, at 243.

79. *Id.*

80. *Id.* at 230.

81. *Id.*; POSNER, supra note 23, at 61; *see also* Martin J. Siegel, *For Better or For Worse: Adultery, Crime & the Constitution*, 30 J. FAM. L. 45, 48 (1991–1992) (noting that in one Massachusetts county 210 of the 370 criminal convictions from 1760 to 1774 were for the crime of fornication).

82. GODBEER, *supra* note 34, at 34.

83. MURSTEIN, *supra* note 42, at 319; Hambleton, *supra* note 45, at 89. In the New England colonies, churches recorded births that took place within eight months of marriage. RYAN, *supra*

on, courts were increasingly concerned with identifying the fathers of illegitimate children to force these men to pay for their offspring so that county taxes would not be used for the child's care.[84] Some colonies had a custom whereby they attempted to coerce women to identify the father of their children while they were in labor, and the confession was considered strong evidence in determining paternity.[85] Moreover, in North Carolina, a 1741 law allowed women to declare in court whom the father of their illegitimate child was, and that man became the legal father with no other evidence required.[86]

Early illicit sex laws in the Colonies and England also show a disparity of treatment between the sexes. In the Colonies, only a married woman could be guilty of adultery—married men who had sex with unmarried women were guilty only of fornication, which carried a lesser penalty.[87] Blackstone likewise defined adultery as intercourse with a married woman, which meant that a married man could commit adultery only with a woman who was married to someone else.[88] Similarly, in colonial times, if a wife wanted a divorce, she had to show that her husband lived in adultery, whereas a husband had to show only that his wife had committed a single act of adultery.[89] In some states, this differential treatment persisted into the 1950s.[90]

These disparate rules were based, at least in part, on concerns of paternity.[91] In England, for example, the monogamy of one's wife was essential to ensure that all offspring that could inherit were legitimate, as well as to maintain the husband's pride and honor.[92] Courts were likewise concerned with preventing the introduction of "spurious heirs into a family, whereby a man may be charged with the maintenance of children not his own, and the legitimate offspring be robbed of their lawful inheritance."[93] This fear of illegitimate offspring was also why

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note 69, at 42.

84. FISCHER, *supra* note 41, at 103; Flaherty, *supra* note 24, at 53, 62.

85. RYAN, *supra* note 69, at 43.

86. FISCHER, *supra* note 41, at 103. Connecticut had a different solution to illegitimate children: in 1650, fornicators were required to marry each other. MURSTEIN, *supra* note 42, at 320.

87. DURST, supra note 41, at 117; Flaherty, *supra* note 24, at 53, 55. This disparity is also present in earlier Hebraic laws. Daniel E. Murray, *Ancient Laws on Adultery: A Synopsis*, 1 J. FAM. L. 89, 94 (1961).

88. BROOK, *supra* note 14, at 83 (2007).

89. *Id.*

90. *Id.*

91. *Id.* at 85.

92. FISCHER, *supra* note 41, at 17.

93. State v. Armstrong, 4 Minn. 335, 340–41 (1860); *see also* State v. Keith, 92 P. 893, 894 (Wash. 1907); State v. Roberts, 173 N.W. 310, 311 (Wis. 1919). Compensating a husband for the

some states made only adultery by a married woman a crime: "That an offence which may entail such consequences upon society, is much more aggravated in its nature, than the simple incontinence of a husband, few can doubt; although, in a moral point of view, the sin is equally heinous."[94] For that reason, some states considered fornication to be a lesser offense than adultery[95] due to the greater injuries caused by adultery for families and society.[96]

Early court records also show that women were much more likely to be convicted of fornication, which may have been due to the premium placed on the virtue of chastity for women.[97] For example, women who had a child out of wedlock were punished more severely than their partners, even though both were guilty of fornication.[98] Similarly, an adulterous wife was considered especially wrongful not only because she could potentially create spurious heirs, but also because she brought shame upon her husband, who was then perceived as failing to maintain his natural dominance.[99] Indeed, keeping watch over and controlling the sexual activities of one's wife was a central theme in sermons and advice manuals in England and America.[100]

Despite these general trends, fornication and adultery laws differed from colony to colony (and later, state to state). These variations show different purposes for these crimes and different conceptions of the harms of these crimes to individuals and communities. By looking at these cases, these trends become more pronounced.

### *B. Stricter Laws: Habitual Intercourse, Cohabitation, and "Open and Notorious"*

In contrast to the colonial era, beginning in the mid-1800s, adultery and fornication were not always presumed to be of harm or interest to the entire community. For that reason, although some adultery and

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potential introduction of spurious heirs was also the basis for alienation of affection or "heartbalm" torts. Kyle Graham, *Why Torts Die*, 35 FLA. ST. U. L. REV. 359, 407 (2008); *see also* Doe v. Roe, 20 A. 83, 84 (Me. 1890); Kroessin v. Keller, 62 N.W. 438, 438 (Minn. 1895).

94. *Armstrong*, 4 Minn. at 341; *see also* Commonwealth v. Call, 38 Mass. 509, 511 (1839); *Keith*, 92 P. at 894; *Roberts*, 173 N.W. at 311.

95. Easley v. Commonwealth, 11 A. 220, 221 (Pa. 1887).

96. *Armstrong*, 4 Minn. at 337 (1860).

97. *Id.*; BROWN, *supra* note 33, at 31; *see also* MURSTEIN, *supra* note 42, at 312 (discussing that purity in women was emphasized to the extent that women were advised to guard their purity by not even sitting too close to a man). Indeed, historically, women were portrayed as inherently lusty and unpredictable. BROWN, *supra* note 33, at 19.

98. RYAN, *supra* note 69, at 43.

99. BROWN, *supra* note 33, at 29.

100. FISCHER, *supra* note 41, at 17.

fornication statutes required only a single act of sex, other statutes required habitual intercourse or cohabitation, which was presumed to harm society in general.[101] Habitual intercourse meant repeated acts of sex, not simply living together.[102] For example, "[t]he mere stopping over one night at a house upon a transitory journey, and assuming the marital relationship, for purposes of illicit sexual commerce, however scandalous and disgraceful from a moral standpoint" was not sufficient.[103] Similarly, evidence of sexual intercourse—visiting one another and even fathering an illegitimate child—was not considered habitual intercourse.[104]

Cohabitation, on the other hand, required habitual intercourse in addition to the requirement that "the parties must dwell together, openly and notoriously, upon terms as if the conjugal relation existed between them."[105] In short, the parties had to live together while having repeated sexual intercourse.[106] It was this "open and notorious" quality of cohabitation that offended society at large.[107] Cohabitation indictments included language that the cohabitation was "against the

101. Indeed, some states had multiple versions of fornication—one while living together and one while not. Jones v. State, 16 S.W. 189, 189 (Tex. Ct. App. 1891).

102. Smith v. State, 39 Ala. 554, 555 (1865); State v. Johnson, 69 Ind. 85, 87–88 (1879); *see also* Quartemas v. State, 48 Ala. 269, 271 (1872) ("The parties accused must live together in adultery or fornication, or at least the conduct of the parties must be of such a character as to become, openly, an evil example—an outrage upon decency and morality."); Lawson v. State, 33 So. 2d 388, 389 (Ala. Ct. App. 1948); Wilson v. State, 39 So. 2d 250, 253 (Ala. Ct. App. 1948); Janssen v. People, 131 Ill. App. 73, 75 (1907); Jackson v. State, 19 N.E. 330 (Ind. 1889); State v. Kleiman, 85 S.E.2d 148, 151 (N.C. 1954).

103. Turney v. State, 29 S.W. 893, 894 (Ark. 1895); *see also* People v. King, 146 P. 51, 51 (Cal. Dist. Ct. App. 1914) (concluding that because parties occupied different rooms of the same hotel, there was not enough for a conviction, even though they were caught in compromising position).

104. Ledbetter v. State, 17 S.W. 427, 428 (Tex. Ct. App. 1886); *see, e.g.*, Stewart v. State, 46 So. 2d 245, 246–47 (Ala. Ct. App. 1950); Richey v. State, 87 N.E. 1032, 1033 (Ind. 1909); *Jackson*, 19 N.E. at 330; Commonwealth. v. Calef, 10 Mass. 153, 153 (1813); State v. Gieseke, 147 N.W. 663, 666 (Minn. 1914); State v. Williams, 102 N.W. 722, 722–23 (Minn. 1905); Granberry v. State, 61 Miss. 440, 441 (1884); Gill v. State, 240 P. 1073, 1075 (Okla. Crim. App. 1925); Burnett v. State, 70 S.W. 207, 208 (Tex. Ct. App. 1902) (concluding parties did not cohabitate even though they were often seen in town together or visiting each other's houses, seen working together, and caught once together in a state of partial undress); Bird v. State, 11 S.W. 641, 642 (Tex. Ct. App. 1889).

105. Carotti v. State, 42 Miss. 334, 345 (1868); Harris v. State, 145 P. 759, 760 (Okla. Crim. App. 1915); *see also* People v. Stern, 207 Ill. App. 154 (1917); State v. Robinson, 176 S.E.2d 253, 254 (N.C. Ct. App. 1970); Commonwealth. v. Isaacs, 26 Va. 634, 635 (1826) (explaining, but not directly quoting, that parties must dwell together open and notoriously in order to be considered cohabitating).

106. State v. Chandler, 96 Ind. 591, 593 (1884).

107. *Gill*, 240 P. at 1075.

peace" and an "evil example to others."[108]

Some statutes simply required this cohabitation, without pretension to being lawfully married.[109] So long as the parties lived together while having sexual intercourse, they were unlawfully cohabitating as man and wife.[110] Indeed, in some states, living together for an ostensibly proper purpose while clandestinely engaging in multiple acts of intercourse would be sufficient.[111] For example, the California legislature removed the words "open and notorious" from its cohabitation statute, which expanded the statute to apply "to those persons who, while each was simulating continence in their marital relations, were at the same time maintaining such a course of illicit and adulterous conduct with another of the opposite sex as would constitute a counterfeit of the marriage relation."[112] In contrast, if the parties lived together "apparently chaste, regularly occupying separate apartments, a single instance of illicit intercourse surely would not constitute the crime of living together in an open state of fornication."[113]

In contrast, public knowledge of illicit sex was key in some states. If the parties falsely told others that they were married to each other, their crime was not open and notorious, because the fact that they were committing adultery or fornication was kept secret.[114] In order to be open and notorious, at least one person had to know that the relationship was not a valid marriage.[115] Keeping the true status of their relationship a secret, then, prevented that crime from being "an affront to society."[116]

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108. *Calef*, 10 Mass. at 153. Further, because society was the victim of cohabitating couples, cohabitation charges did not have to be brought by an injured spouse. *Gill*, 240 P. at 1075.

109. One court concluded:

> We think the legislature intended by section 208 and 209 of the Criminal Code to make it unlawful for persons not joined together in wedlock to live in a state of adultery or fornication, either secretly or openly, and whether they profess to live in the marital state or not. If they cohabit,—if they live after the fashion of husband and wife,—they are within the letter of the statute, and likewise, it seems to us, within its spirit.

Sweenie v. State, 80 N.W. 815, 816 (Neb. 1899).

110. Granberry v. State, 61 Miss. 440, 441 (1884).

111. State v. Gieseke, 147 N.W. 663, 666 (Minn. 1914).

112. People v. Scarpa, 163 P. 882, 883 (Cal. Dist. Ct. App. 1916).

113. Searls v. People, 13 Ill. 597, 598 (1852); *see also* State v. Ramage, 84 S.E. 246, 247 (W. Va. 1915).

114. *E.g.* Crouse v. State, 16 Ark. 566, 567–68 (1855); People v. Salmon, 83 P. 42, 42–43 (Cal. 1905); People v. Breeding, 126 P. 179, 180–81 (Cal. Dist. Ct. App. 1912); Richey v. State, 87 N.E. 1032, 1033 (Ind. 1909). *But see Ex parte* Thomas, 37 P. 514 (Cal. 1894) (requiring "notorious" cohabitation).

115. Gill v. State, 240 P. 1073, 1075 (Okla. Crim. App. 1925).

116. *Salmon*, 83 P. at 43.

On the other hand, pretend marriages, according to some courts, created "indecent and evil examples tending to debase and demoralize society."[117] For that reason, once a couple's true relationship status was discovered, their illicit sex became "open and notorious," even if the community previously believed that the couple was married.[118]

According to one court:

> When such a relationship has been made to appear the public scandal and disgrace is just as great and the notoriety is just as prevalent as had it been known during the entire time. The notoriety of such a continuous living together and the thought that good people had been deceived into receiving such parties into their homes and treating them with the respect and consideration due to lawfully married people is humiliating in the extreme.[119]

Consequently, to be convicted of fornication or adultery, the parties did not have to admit that their relationship was illegal; they only had to be discovered.[120]

By the 1940s, the cohabitation requirements became relaxed in some states. These states did not require that the parties actually live together; there simply had to be an agreement that the parties would continue having illicit intercourse.[121] Additionally, the timeframe for cohabitating could be very short—in one case, two weeks was sufficient to make the relationship "habitual."[122] These changes in fornication and adultery laws indicate a willingness to capture habitual illicit sex without any concern for "sham" marriages that offend the community. Accordingly, the focus of fornication and adultery laws in later cases indicates that what was considered offensive to society changed over time.

### *C. Rationale for Adultery Prosecutions*

The question of who is the victim—society or the innocent spouse—is manifested frequently in adultery cases. In colonial times, adultery was considered a crime against society's morals.[123] By the 1800s,

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117. *Richey*, 87 N.E. at 1033; *see also* Janssen v. People, 131 Ill. App. 73, 75 (1907) (noting that open and notorious cohabitation "outrages public decency"); Harris v. State, 145 P. 759, 760 (Okla. Crim. App. 1915) (same).

118. Spencer v. State, 169 P. 270, 272 (Okla. Crim. App. 1917).

119. *Id.*

120. *Id.*

121. Burgett v. State, 70 So. 2d 429, 430 (Ala. Ct. App. 1954); Lawson v. State, 33 So. 2d 388, 389 (Ala. Ct. App. 1948).

122. State v. Kleiman, 85 S.E.2d 148, 151 (N.C. 1954).

123. Jeremy D. Weinstein, *Adultery, Law and the State: A History*, 38 HASTINGS L.J. 195, 225–26 (1986).

however, judges usually considered adultery to be a crime of one spouse against another.[124] These judges considered adultery to be injurious to the innocent spouse, even if that spouse later divorced his or her adulterous partner.[125] The notion that adultery was a crime of one spouse against another also led some states to create an exception to the spousal privilege so that an injured spouse could testify against his or her wrongdoer.[126]

In fact, several states required an injured spouse to bring the action or else there could be no prosecution.[127] The reasoning behind this requirement was to protect spouses who did not want to publicize the infidelity.[128] For example, a Minnesota court held that "if the parties injured choose to acquiesce in the wrong done, no one else ought to be allowed to move in the matter . . . ."[129] A North Dakota court stated the policy even more eloquently:

> Laws of this character are evidently enacted for the purpose of protecting the sanctity of the home, and in recognition of the principle that the crime of adultery is a crime peculiarly infringing upon the rights of the innocent parties to the marriage relation, and that if such innocent parties see fit to condone the offense, and from a desire to avoid scandal and humiliation, and to preserve the integrity of the home, and prevent the disgrace of children and relatives, refuse to prosecute, the public is not sufficiently interested or injured to justify

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124. *See, e.g.*, Lord v. State, 23 N.W. 507, 509 (Neb. 1885) ("The statute makes it an offense for a husband to desert his wife and live and cohabit with another woman. If the husband is prosecuted for the offense, the prosecution certainly would be a criminal proceeding for a crime committed against the wife."); Taylor v. State, 232 P. 963, 963–64 (Okla. Crim. App. 1925) ("A charge of adultery never ceases to be a matter of private concern."); Roland v. State, 9 Tex. App. 277, 277 (1880) ("That it is an offence against the husband for the wife to live in adultery with another man, will hardly admit of question.").

125. State v. Smith, 79 N.W. 115, 116 (Iowa 1899).

126. State v. Vollander, 58 N.W. 878, 878–79 (Minn. 1894); *Lord*, 23 N.W. at 509; Kitchens v. State, 140 P. 619, 622 (Okla. Crim. App. 1914).

127. State v. Oden, 69 N.W. 270, 271 (Iowa 1896); State v. Mahan, 46 N.W. 855, 855–56 (Iowa 1890); People v. Davis, 18 N.W. 362, 363 (Mich. 1884); Bayliss v. People, 9 N.W. 257, 257 (Mich. 1881); State v. Marshall, 168 N.W. 174, 174 (Minn. 1918); *In re* Smith, 37 P. 1099, 1100 (Okla. 1894) (holding divorced spouse cannot bring prosecution); *Ex parte* Cranford, 105 P. 367, 369 (Okla. Crim. App. 1909); State v. Eggleston, 77 P. 738, 739 (Or. 1904). However, despite the requirement that a spouse bring the cause of action, at least one state court held that adultery is not a "crime" of one spouse against the other and involves "no violence to, or abuse of" the innocent spouse. State v. Armstrong, 4 Minn. 335, 338, 343 (1860); *see also* Commonwealth v. McGanghan, 29 Pa. C.C. 361, 362 (Pa. Quar. Sess. 1904) ("The crime of adultery is not a crime by the husband against the wife or vice versa, but a crime against the marital relation.").

128. State v. Andrews, 64 N.W. 404, 405 (Iowa 1895); State v. La Bounty, 116 P. 1073, 1073 (Wash. 1911).

129. State v. Brecht, 42 N.W. 602, 603 (Minn. 1889).

> the institution of criminal proceedings, as in other cases, by any member of the community.[130]

Courts were clearly concerned not only with the injury of the adultery itself, but with the further injury a public criminal prosecution could wreak on the innocent spouse:

> The law does not say that we may depart from the spirit of the law, and hold a forgiving spouse to a prosecution that must, from the very fact of the publishing of the details of the crime in open court, tend most strongly to a final disruption of the home; and most certainly to the shame of innocent children, if there be any children. If the law does not say that a case must be continued, why should we? And to what end must it proceed—that a prosecutor may dangle a scalp at his belt; that the public may feed upon the blood that flows from broken hearts; that an offense that is personal may, by a killing of the spirit of the law, become a written monument to blazon those errors that come of the frailties and weaknesses that our Mother Nature has burdened her children with? If the injured one is willing to forgive and forget, the law—there being no public interest in the crime charged—should not be less merciful. A charge may be forgotten, but the hurts and wounds that follow a public trial are rarely healed.[131]

Because courts were so sensitive to the humiliation attendant to an adultery prosecution, they were concerned that allowing a complaining witness to dismiss a case at his or her pleasure at any point in the proceedings would allow him or her to blackmail the accused.[132] The existence of several cases where adultery and fornication statutes were used to blackmail someone indicates the threat of blackmail was very real.[133] For example, in one case, an adultery prosecution was made in retaliation against a defendant and her two sons for having testified against one of the state's witnesses in a prior prosecution against that witness.[134]

Courts' concern for victims led to evidentiary problems with which states attempted to grapple, usually by relaxing the requirement that the injured spouse bring the complaint or extending the crime to include other injured parties.[135] More specifically, one problem courts dealt

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130. State v. Wesie, 118 N.W. 20, 21 (N.D. 1908).

131. Taylor v. State, 232 P. 963, 964 (Okla. Crim. App. 1925) (internal citations omitted); *see also La Bounty*, 116 P. at 1073 (noting the embarrassment of a public prosecution).

132. Perry v. State, 181 P.2d 280, 286 (Okla. Crim. App. 1947); State v. Astin, 180 P. 394, 394 (Wash. 1919).

133. Weinstein, *supra* note 123, at 226. Related tort causes of action (such as seduction or breach of promise) were also fertile ground for blackmail. ANGUS MCLAREN, SEXUAL BLACKMAIL: A MODERN HISTORY 95–96 (Harvard Univ. Press 2002).

134. Cook v. State, 85 So. 823, 824 (Ala. Ct. App. 1920).

135. *See, e.g.*, State v. Maas, 49 N.W. 1037, 1038 (Iowa 1891); State v. Mahan, 46 N.W. 855,

with was that adultery prosecutions had to be dropped if the injured spouse withdrew his or her complaint after reconciling with the adulterous spouse. One way courts dealt with this situation was to allow a prosecution to continue once an injured spouse had made the complaint even if the injured spouse no longer wished to pursue it.[136] These courts usually downplayed the importance of the spousal complaint requirement as being merely procedural.[137]

Courts also sometimes extended a statute to allow an injured husband to sue the offending spouse or her paramour for adultery.[138] One Pennsylvania court reasoned:

> [I]f the injured husband is denied capacity to criminally prosecute his wife's paramour, the only result is that an obstacle is placed in the way of the punishment of crime without any corresponding public advantage, since, as we have already said, he is free to bring a civil action, in which his wife's shame and guilt, as well as the shame and guilt of her paramour, may be fully exposed, and by reason of which his wife may be laid open to criminal prosecution.[139]

Allowing an injured spouse to sue not only his or her own spouse but also his or her (perhaps unmarried) paramour was also justified by a North Dakota court in terms of injury not only to the innocent spouse, but also to society at large:

> It is certainly a monstrous anomaly that the feelings of society should be outraged, and a whole community injured, by the undisputed commission of this offense continued for months and years, and that,

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855–56 (Iowa 1890); State v. Briggs, 27 N.W. 358, 360 (Iowa 1886); Bayliss v. People, 9 N.W. 257, 257 (Mich. 1881); State v. Brecht, 42 N.W. 602, 603 (Minn. 1889); State v. Hayes, 94 P. 751, 751 (Or. 1908).

136. *Briggs*, 27 N.W. at 359.

137. *Maas*, 49 N.W. at 1038 (citations omitted) ("This provision, forbidding prosecution for the crime except on the complaint of [a spouse], does not prescribe an element of the crime. . . evidence as to the commencement of the prosecution by the husband or wife may be introduced, though no averment of the fact is found in the indictment." (internal quotation marks omitted)); *Briggs*, 27 N.W. at 360 ("The requirement is merely directory, and the endorsement is required to be made to enable the court to tax the costs against the prosecutor, if it should be satisfied that the prosecution was malicious or without probable cause."); *Brecht*, 42 N.W. at 603 ("The statute does not point out how the question shall be raised that the prosecution was not commenced on the complaint of the proper person. The making of the complaint is no part of the offense."); *Hayes*, 94 P. at 751 (finding that an indictment which states that it was found on the complaint of the wife of the defendant was sufficient to show that an indictment for adultery was commenced upon the complaint of a person authorized by statute to commence such a prosecution); *see also* State v. Donovan, 16 N.W. 130, 131 (Iowa 1883) ("While, therefore, the defendant cannot be convicted without proof that the indictment was found on complaint of the wife, we do not think it is incumbent upon the state to establish the fact beyond reasonable doubt.").

138. *Bayliss*, 9 N.W. at 257; *see also Mahan*, 46 N.W. at 855–56 (Iowa 1890) (allowing injured husband to sue wife's paramour).

139. Commonwealth v. Vance, 29 Pa. C.C. 257, 260 (Pa. Quar. Sess. 1903).

> under the law, there is no remedy so long as the husband or wife, either from fear of his own or her own degradation, declines or refuses to apply the remedy. But when we go one step further and say that the wife of a guilty husband cannot complain against the wife of another husband, but can only complain of her husband, and that such other wife must escape punishment if her husband does not complain against her, the outrage, to my mind, is still greater . . . .[140]

By the 1910s, some courts had begun to see adultery as a crime against the marriage relation itself[141] as well as the injured spouse.[142] This was particularly true in situations where the injured spouse made the initial complaint.[143] Moreover, exceptions were also made for "open and notorious" adultery, which was considered to be a crime against society as much as against the spouse.[144] This change in perspective progressed to the point where one court noted that adultery is a "victimless crime."[145] However, the requirement that an adultery proceeding be instituted by the injured spouse has persisted in some states, and, in 1970, this requirement was the basis for one court holding that the statute does not violate the equal protection clause because the statute "at least affords equal protection to all adulterers, and is a safeguard against a zealous prosecutor, acting independently, from instituting a prosecution and thereby destroying a salvageable marriage."[146] Accordingly, due to states' inconsistent approaches to

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140. State v. Wesie, 118 N.W. 20, 21–22 (N.D. 1908).

141. State v. Chafin, 103 P. 143, 144 (Kan. 1909); State v. Brooks, 254 N.W. 374, 375 (Wis. 1934).

142. Kitchens v. State, 140 P. 619, 621 (Okla. Crim. App. 1914).

143. State v. Allison, 220 N.W. 563, 564 (Minn. 1928) ("[T]he statute makes the offense a crime against the state, and . . . if commenced as authorized by the statute, it is thereafter solely within the control of the court. That the offense is a crime against the state and not against the other spouse . . . ."); State v. Beck, 202 N.W. 857, 859 (N.D. 1925) ("The court is not a plaything with which one can play fast and loose, and the reason for the rule ceases when the complaint is made upon which prosecution is commenced."); Lee v. State, 231 P. 324, 325 (Okla. Crim. App. 1924) ("After a prosecution for adultery has been commenced, the offense has become at least a quasi public offense, a prosecution which the aggrieved party may have a special interest in maintaining, but one in which the public is also interested in some degree."); State v. Astin, 180 P. 394, 394 (Wash. 1919) ("The case, after the complaint is filed, is no longer a matter of private concern, but has partaken of all the attributes of a public offense, and the injured spouse should have no more right to control the further disposition of the case than should the complaining witness in any other criminal action."); *see also* State v. Ronek, 176 N.W.2d 153, 155–56 (Iowa 1970).

144. *Kitchens*, 140 P. at 622 (Okla. Crim. App. 1914) ("[A]ny person may make complaint when it is alleged that the defendants 'are living together in open and notorious adultery,' as such adulterous cohabitation and its notoriety necessarily tends to debase and lower the standard of public morals by dishonoring the marital relation."); Heacock v. State, 112 P. 949, 950 (Okla. Crim. App. 1911).

145. State v. Dugan, 277 S.E.2d 842, 844 (N.C. Ct. App. 1981).

146. *Ronek*, 176 N.W.2d at 156.

identifying the victim in adultery cases, the rationale for criminalizing adultery remained uncertain, even in more modern times.

### *D. Rationale for Fornication Prosecutions*

In contrast to adultery, fornication has been consistently seen as an offense against "public decency and morality"[147] and detrimental to the morals of a community.[148] Early cases emphasized that fornication upset the "peace and dignity of the state,"[149] especially when it was habitual.[150] As one court said, fornication laws were intended:

> [T]o prevent evil and indecent examples tending to corrupt the public morals, and to prohibit the public scandal and disgrace of the living together of persons of opposite sexes notoriously in illicit intimacy, which, as it contemns [sic] lawful wedlock and lessens the incentive to marriage, contravenes the public policy, and which outrages public decency, and has a demoralizing and debasing influence upon society.[151]

Criminalizing fornication was not meant only to prohibit the "public scandal and disgrace of such immoral connections, but also to [encourage marriage,] upon which the best interests, and indeed the existence, of society depend."[152] According to at least some courts, fornication was seen as a direct affront to marriage.[153]

As noted above, criminalizing fornication was also an attempt to prevent the creation of illegitimate offspring,[154] particularly because illegitimate children were seen as a financial burden on the state.[155] In fact, in Pennsylvania, part of the criminal punishment for fornication and bastardy was the financial maintenance of the illegitimate child.[156] In colonial North America, there may have been a higher frequency of fornication prosecutions against women because some women used the

147. Boatwright v. State, 60 S.W. 760, 761 (Tex. Crim. App. 1901).

148. State v. Cagle, 21 Tenn. 414, 414 (1841) ("[D]esigning to corrupt the morals of the people of the State . . . ."); State v. Brooks, 254 N.W. 374, 375 (Wis. 1934) ("[T]he law seeks . . . to prevent a course of conduct which in public estimation constitutes an example detrimental to the morals of the community.").

149. State v. Tally, 74 N.C. 322, 322 (1876).

150. Crosgrove v. State, 39 S.W. 367, 367 (Tex. Crim. App. 1897).

151. Carotti v. State, 42 Miss. 334, 345 (Miss. Err. & App. 1868).

152. Sullivan v. State, 32 Ark. 187, 191–92 (1877); *see* GODBEER, *supra* note 34, at 40 (discussing a colonial court that attempted to incentivize marriage).

153. *Tally*, 74 N.C. at 322.

154. Sheay v. State, 21 A. 607, 608 (Md. 1891); State v. Dickinson, 18 N.C. 349, 349 (1835); Val D. Ricks, *Marriage and the Constitutional Right to Free Sex: The State Marriage Amendments as Response*, 7 FLA. COASTAL L. REV. 271, 272 (2005).

155. Commonwealth v. Scott, 7 Pa. Super. 590, 592–93 (1898).

156. *Id.*

fornication proceedings in order to obtain marriage or child support from the child's father.[157] The woman's confession—and subsequent public humiliation—was used to later bring a paternity suit against the woman's paramour.[158] If the man agreed to marry the woman or pay child support, he could settle with her privately and then she could have the paternity or fornication indictment dismissed.[159] Over time, this process was streamlined and paternity became a civil matter and was uncoupled from fornication statutes.[160] This trend partially explains the decrease in fornication prosecutions over time.

### *E. Modern Views of Adultery and Fornication*

Since the Victorian era, the incidence and approval of both premarital and extramarital sex has steadily increased. The greater availability of contraceptives, a more naturalistic view towards sex, greater independence of women, greater economic opportunity, and the growing acceptance of hedonism as a life philosophy all contributed to a post–World War I cultural shift towards an increased emphasis on sex both within and outside marriage.[161] In the twentieth century, premarital sex became more common as more convenient transportation made it easier for young people to meet without being observed.[162] As dating, which included seeing multiple prospective marriage partners at the same time, replaced courtship in the 1930s and 1940s, the incidence of premarital sex increased even further.[163] The result was a steady rise in the rates of premarital sex, as well as more accepting attitudes towards the practice throughout the middle of the twentieth century.[164] Rates and acceptance of adultery likewise increased during this time.[165]

Popular opinion approving of premarital sex increased sharply in the 1960s and continued to increase in the 1970s.[166] Some scholars have

157. GODBEER, *supra* note 34, at 256.

158. *Id.*

159. *Id.*

160. *Id.*

161. Judith Treas, *How Cohorts, Education, and Ideology Shaped a New Sexual Revolution on American Attitudes Toward Nonmarital Sex, 1972–1998*, 45 SOC. PERSP. 267, 268–69 (2002); *see* MURSTEIN, *supra* note 42, at 560–61 (discussing how the perfecting of contraceptives, a more naturalistic view of sex, the growing acceptability of hedonism as a philosophy of life, the rise in women's status, and economic prosperity brought a resurgence of sexual feeling into marriage); RYAN, *supra* note at 69, 233–35.

162. MURSTEIN, *supra* note 42, at 386.

163. *Id.* at 386–87. The risk of ruining one's reputation with premarital sex also decreased during this time. *Id.* at 387.

164. *Id.* at 429.

165. *Id.* at 434, 544.

166. David J. Harding & Christopher Jencks, *Changing Attitudes Toward Premarital Sex:*

attributed this more recent change to increased emphasis on individuality and personal fulfillment.[167] In contrast, people who are more religious are less likely to approve of premarital sex.[168] Organized religion's influence on sexual attitudes has been explained as lessening individuality and "fostering internalized sanctions such as guilt."[169] Those who view adultery more positively also have a more diffuse view of intimacy generally; they approve of sharing personal or private feelings with people other than their spouses[170] and also approve of premarital sex.[171]

By 1960, a majority of states still criminally prohibited fornication and adultery; however, perhaps because of cultural shifts, those laws were seen as largely unobserved by the majority of the population.[172] Legal scholars at this time called for these statutes' repeal, arguing that they were unenforceable due to the private nature of the acts prescribed.[173] Similarly, the Supreme Court has demonstrated a more liberal attitude towards privacy rights and non-marital sex in contraceptive cases such as *Eisenstadt v. Baird*[174] in 1972 and *Carey v. Population Services International*[175] in 1977. The growing awareness of an enforceable right to privacy, as emphasized in *Eisenstadt* and *Carey*, led to (unsuccessful) privacy challenges to adultery and fornication statutes in the 1970s and 1980s.[176]

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*Cohort, Period, and Aging Effects*, 67 PUB. OPINION Q. 211, 225 (2003). *But see* Treas, *supra* note 161, at 269 (indicating a trend of less tolerant attitudes towards premarital sex after the mid-1970s).

167. Treas, *supra* note 161, at 268–69.

168. Jon P. Alston, *Attitudes Toward Extramarital and Homosexual Relations*, 13 J. SCI. STUDY OF RELIGION 479, 479 (1974); Jean Dedman, *The Relationship Between Religious Attitude and Attitude Toward Premarital Sex Relations*, 21 MARRIAGE & FAM. LIVING, 171, 175 (1959); Frank Lindenfeld, *A Note on Social Mobility, Religiosity, and Students' Attitudes Towards Premarital Sexual Relations*, 25 AM. SOC. REV. 81, 82 (1960); B. K. Singh, *Trends in Attitudes Toward Premarital Sexual Relations*, 42 J. MARRIAGE & FAM. 387, 391 (1980).

169. Treas, *supra* note 161, at 268.

170. Janice Miller Saunders & John N. Edwards, *Extramarital Sexuality: A Predictive Model of Permissive Attitudes*, 46 J. MARRIAGE & FAM. 825, 828, 832 (1984). Unsurprisingly, they also are less satisfied with their marriages. *Id.* at 832.

171. Anthony P. Thompson, *Extramarital Sex: A Review of the Research Literature*, 19 J. SEX RES. 1, 18–19 (1983).

172. Ploscowe, *supra* note 21, at 218–19.

173. *Id.* at 221. Others have argued that these laws should be repealed because, despite their infrequent enforcement, they have other stigmatic effects that can still be harmful. POSNER, *supra* note 23, at 80–81.

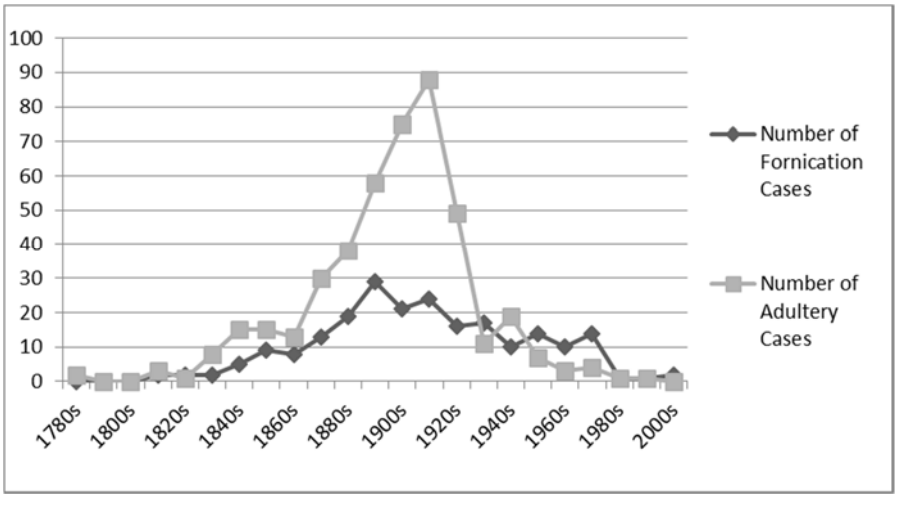
174. 405 U.S. 438 (1972).

175. 431 U.S. 678 (1977); *see* POSNER, *supra* note 23, at 331–32.

176. *E.g.*, Commonwealth v. Stowell, 449 N.E.2d 357 (Mass. 1983) (finding a privacy challenge to an adultery statute unsuccessful); State v. Saunders, 326 A.2d 84 (Essex Cnty. Ct. 1974), *aff'd*, 361 A.2d 111 (N.J. Super. App. Div. 1976), *rev'd*, 381 A.2d 333 (N.J. 1977)

These changing views on sex outside of marriage have also been borne out in the decreasing frequency of prosecutions for fornication and adultery. The following charts aggregate data taken from cases that were gathered using online legal databases. Only appellate cases were available and the resulting data is meant to be illustrative and not dispositive of the number of prosecutions for adultery and fornication, particularly for earlier cases where records are harder to obtain online. Even the limited data gathered, however, shows a wide variety of trends in prosecutions. For example, as shown by Figure 1, both adultery and fornication cases increased until they peaked between the 1890s and 1910s, and then decreased (for adultery, dramatically). By the 1980s, prosecutions for both crimes had all but disappeared.

**Figure 1—Number of Prosecutions over Time**




However, despite decreasing interest in prosecuting adultery and fornication and the relatively low punishment for a conviction, even in the 1950s, police were willing to expend resources to apprehend adulterers and fornicators.[177] Police would even follow suspects and stake out homes where reported adulterers or fornicators were suspected to be engaging in illicit sex.[178] Accordingly, as early as the 1950s, there was a disparity between prosecutors' dwindling interest in these cases

(holding a privacy challenge to fornication statute as unsuccessful); Byrd v. State, 222 N.W.2d 696 (Wis. 1974) (holding that a privacy challenge to fornication statute is to be dismissed for lack of standing).

177. *See, e.g.*, State v. Kleiman, 85 S.E.2d 148, 150 (N.C. 1954).

178. *Id.*; State v. Davenport, 33 S.E.2d 136, 137 (N.C. 1945).

and the remaining willingness of police to arrest and juries to convict for these crimes. This disparity mirrors the existing inconsistency between the general public's acceptance of adultery and fornication and state legislatures' unwillingness to repeal the laws criminalizing these acts.

Gender disparities are also prevalent in fornication and adultery prosecutions. Looking at post-colonial cases in Figures 2 and 3, the person charged with fornication or adultery was overwhelmingly likely to be male, and this trend stayed constant over time. With regard to adultery, only the 1940s had more female defendants. The likelihood of both parties being charged with adultery or fornication also appears to increase over time, peaking in the 1910s for adultery and the 1880s for fornication. However, because it uses solely appeals cases, this case data is limited and may show only that men were more likely to appeal their convictions than were women. Indeed, considering historical property laws,[179] it is entirely plausible that men were more likely to have the resources to appeal their convictions. Actual convictions at the trial level may show different trends.

**Figure 2—Adultery Appeals by Gender of Defendant**[180]

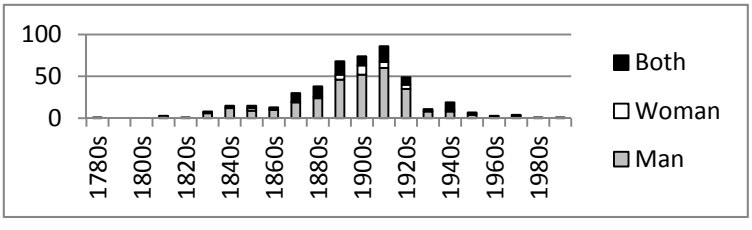
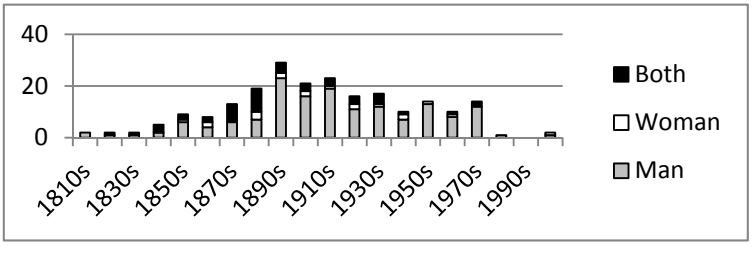



**Figure 3—Fornication Appeals by Gender of Defendant**




179. Carole Shammas, *Re-Assessing the Married Women's Property Acts*, 6 J. WOMEN'S HIST. 9, 9–11 (1994).

180. For Figures 2 and 3, cases where the defendant's gender was unclear have been omitted.

### *F. Trends in Civil Cases*

Along with diminishing adultery and fornication prosecutions, related civil cases show a trend in the changing values placed on privacy and sex. As shown below, judges in civil cases have repeatedly referred to the existence of criminal adultery or fornication statutes when making their decisions in civil cases. One such area of overlap is immigration. For example, a man was denied citizenship in 1935 because of one instance of adultery.[181] In that case, the court assumed that adultery was morally offensive and therefore determined that the applicant did not meet the standards of moral behavior required to become a United States citizen.[182] Similarly, in 1944, a woman was not denied citizenship because, although she had committed fornication, she had believed the man was her lawful husband.[183] In that case, the court emphasized that her mistake meant that she had not "done anything which the community regard as reprehensible."[184] However, by 1963, fornication was not a barrier to naturalization, because it was not a felony and not one of the statue's listed acts, such as illegal gambling or habitual drunkenness "which statutorily prevents a person from being a person of good moral character."[185] The court in that case refused to extend the immigration statute to include other morality offenses not specifically mentioned in the statute.[186]

Housing cases show a similar change in values regarding illicit sex. In New York in 1971, a court held that a landlord could not refuse to rent to unmarried couples under New York's Rent, Eviction, and Rehabilitation Regulations, which allowed landlords to evict tenants for any "immoral or illegal purpose."[187] The judge held that the Regulations did not apply because fornication was not illegal in New York, was not immoral under the "standards of the day," and did not harm anyone.[188] Beginning in the 1980s, challenges under states' anti-discrimination statutes were repeatedly upheld, and landlords were not permitted to refuse to rent apartments to unmarried couples.[189]

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181. Estrin v. United States, 80 F.2d 105, 105 (2d Cir. 1935).
182. *Id.*
183. Petition of R———, 56 F. Supp. 969, 970–71 (D. Mass. 1944).
184. *Id.* at 971.
185. *In re* Sotos, 221 F. Supp. 145, 146 (W.D. Pa. 1963) (citing 8 U.S.C. § 1101(f) (1958)).
186. *Id.*
187. Edwards v. Roe, 327 N.Y.S.2d 307, 308 (N.Y. Civ. Ct. 1971).
188. *Id.*
189. Foreman v. Anchorage Equal Rights Comm'n, 779 P.2d 1199, 1203 (Alaska 1989) ("[T]he Foremans refused to rent the apartment only after they learned that Hohman and Kiefer were not married. This constitutes unlawful discrimination based on marital status."); Hess v. Fair Empl. & Hous. Comm'n, 187 Cal. Rptr. 712, 715 (Cal. Ct. App. 1982) ("As no legitimate

However, this is not a consistent trend; some courts have refused to extend these statutes' protection to unmarried couples seeking to cohabitate.[190] One court refused to do so because it did not want to impliedly repeal an existing criminal cohabitation statute.[191] The addition of arguments regarding the landlord's religious views and the Free Exercise Clause has also caused inconsistent rulings among various states.[192] For example, at least one court has upheld a landlord's decision based in part on the judge's own moral beliefs.[193]

Engaging in criminal fornication or adultery was also used in torts cases to bar recovery for being given a sexually transmitted disease

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business interest exists to justify appellants' practice, respondent properly found that appellants unlawfully discriminated against real parties based on their marital status."); Munroe v. 344 E. 76th Realty Corp., 448 N.Y.S.2d 388, 390 (N.Y. Sup. Ct. 1982) (holding a landlord could not evict tenant based on marital status).

190. Hoy v. Mercado, 698 N.Y.S.2d 384, 385 (N.Y. App. Div. 1999) ("We conclude that the protections of Executive Law § 296(5)(a) do not extend to complainants in these circumstances because the denial of housing to a cohabiting couple does not constitute unlawful discrimination on the basis of "marital status.'"); Cnty. of Dane v. Norman, 497 N.W.2d 714, 717–18 (Wis. 1993) ("Chapter 31 proscribes discrimination based on the state or condition of being married, the state or condition of being single, and the like. Norman refused to rent to the prospective tenants in this case because they intended to live together. Living together is 'conduct' not 'status.'").

191. McCready v. Hoffius, 564 N.W.2d 493, 496 (Mich. Ct. App. 1997), *rev'd*, 586 N.W.2d 723 (Mich. 1998), *vacated in part*, 593 N.W.2d 545 (Mich. 1999) ("The Legislature presumably was aware that the above statute criminalized lewd and lascivious cohabitation. Because the Legislature would not have intended the Civil Rights Act to insulate criminal conduct, unmarried cohabitation is not protected conduct under the act."); *see* Mister v. A.R.K. P'ship, 553 N.E.2d 1152, 1157 (Ill. App. Ct. 1990) (finding the existence of criminal fornication statute supported court's refusal to extend anti-discrimination statute to an unmarried couple who were denied an apartment due to their marital status); State by Cooper v. French, 460 N.W.2d 2, 6 (Minn. 1990) ("[T]he term 'marital status' will not be construed in a manner inconsistent with this state's policy against fornication and in favor of the institution of marriage."); N.D. Fair Hous. Council, Inc. v. Peterson, 625 N.W.2d 551, 561–62 (N.D. 2001) (refusing to extend Human Rights Act because of existing statute criminalizing cohabitation).

192. Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 267, 277 (Alaska 1994) (enforcing these provisions against an Anchorage landlord who refused to rent to unmarried couples on religious grounds did not violate the landlord's right to free exercise of his religion); Smith v. Fair Emp't & Hous. Comm'n, 913 P.2d 909, 912 (Cal. 1996) (holding that landlord is not permitted to discriminate based on marital status despite religious views); Att'y Gen. v. Desilets, 636 N.E.2d 233, 241 (Mass. 1994) (holding state must have compelling interest to preclude landlord from refusing to rent to unmarried couple on religious grounds); *see* State v. French, 460 N.W.2d 2, 11 (Minn. 1990) (holding landlord's religious beliefs outweigh state's interest in allowing cohabitating couples to rent apartments).

193. The *French* Court stated:

> Before abandoning fundamental values and institutions, we must pause and take stock of our present social order: millions of drug abusers; rampant child abuse; a rising underclass without marketable job skills; children roaming the streets; children with only one parent or no parent at all; and children growing up with no one to guide them in developing any set of values.

*French*, 460 N.W.2d at 11 (footnote omitted).

because the fornicating plaintiff had engaged in an illegal act and therefore had "unclean hands."[194] The fact that the crime of fornication was no longer being prosecuted in 1990 did not appear to enter into the court's analysis, and it was not until the fornication statute was declared unconstitutional in 2003 as a result *Lawrence v. Texas* that the unclean hands defense was no longer made available in similar cases.[195]

Perhaps the civil cases most closely related to adultery and fornication criminal cases are those concerning divorce and alimony payments. From the 1910s to the 1950s, a woman who was separated from her husband was not entitled to alimony in the final divorce if she was cohabitating with another man.[196] Courts actually considered her behavior adultery, despite the fact that her marriage was in the process of being dissolved.[197] Many of these early cases draw a distinction between separation and final divorce, so that once the divorce was final, the wife's subsequent sexual behavior would not affect alimony payments.[198]

However, by the mid-1990s, some courts were refusing to terminate alimony payments absent evidence that the cohabitating spouse was receiving financial support from another source.[199] At least one court explicitly rejected any moral arguments to the contrary:

> [Prior cases] clearly reflect a moral judgment that a divorced woman should not engage in sexual relations; the penalty for such activity is forfeiture of her right to support from her ex-husband. A secondary rationale in these cases for termination of alimony is the presumption that the divorced woman's partner/cohabitant is providing financial support, thereby eliminating or reducing her need for support from her ex-husband. We find that only the latter issue-that of support-is

194. Zysk v. Zysk, 404 S.E.2d 721, 721 (Va. 1990).

195. Martin v. Ziherl, 607 S.E.2d 367, 370–71 (Va. 2005).

196. Courson v. Courson, 129 A.2d 917, 920 (Md. 1957); Burton v. Burton, 135 N.Y.S. 248, 248–49 (N.Y. App. Div. 1912); Cariens v. Cariens, 40 S.E. 335, 336–37 (W. Va. 1901).

197. *Courson*, 129 A.2d at 918; *Burton*, 135 N.Y.S. at 248–49.

198. Sheffield v. Sheffield, 310 So. 2d 410, 413 (Fla. Dist. Ct. App. 1975); Cole v. Cole, 35 Ill. App. 544, 544 (1890); Abbott v. Abbott, 282 N.W.2d 561, 565 (Minn. 1979); Sloan v. Cox, 5 Tenn. 75, 75 (Tenn. 1817).

199. DeMaria v. DeMaria, 724 A.2d 1088 (Conn. 1999); Husband B. W. D. v. Wife B. A. D., 436 A.2d 1263 (Del. 1981); Glass v. Glass, 537 A.2d 552 (Del. Fam. Ct. 1987); Maclaren v. Maclaren, 616 So. 2d 104 (Fla. Dist. Ct. App. 1993); *In re* Marriage of Schober, 379 N.W.2d 46 (Iowa Ct. App. 1985); Mitchell v. Mitchell, 418 A.2d 1140 (Me. 1980); Hammonds v. Hammonds, 641 So. 2d 1211 (Miss. 1994); Bisig v. Bisig, 469 A.2d 1348 (N.H. 1983); Moell v. Moell, 649 N.E.2d 880, 883 (Ohio Ct. App. 1994); Perri v. Perri, 608 N.E.2d 790 (Ohio Ct. App. 1992); Miller v. Miller, 508 A.2d 550 (Pa. Super. Ct. 1986); Roberts v. Roberts, 657 P.2d 153 (Okla. 1983); Myhre v. Myhre, 296 N.W.2d 905 (S.D. 1980).

> properly before the court in its consideration of a request for alimony reduction or termination.[200]

However, some states continue to terminate alimony payments for cohabitating ex-spouses, even after their divorce is finalized.[201] Some of these courts' decisions to terminate alimony are the result of state statutes that specifically require alimony to cease if an ex-spouse cohabitates with another person.[202] Others are the direct result of the judge's moral disapproval of an ex-spouse's practice of cohabitation.[203] Similarly, even as late as 1979, an ex-spouse successfully used the other's fornication to gain custody of the couple's child.[204]

Finally, these civil cases also highlight that there is a divide among the states regarding the importance of criminalizing adultery and fornication. As the following two charts show, only a few states currently have adultery or fornication laws. Although adultery laws are much more common, there appears to be no region of the country where such laws predominate.[205] Moreover, all of the states that do have fornication laws also have adultery laws. It is also noteworthy that a couple of states have retained their adultery or fornication laws even though their courts ruled those laws unconstitutional.

In sum, both civil and criminal cases evince a change in attitudes towards pre- and extra-marital sex. Evidence of general attitudes and judicial opinions illustrate that American society has become more accepting of adultery and fornication and less willing to allow the law to intervene in these activities.

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200. *Hammonds*, 641 So. 2d at 1215–16.

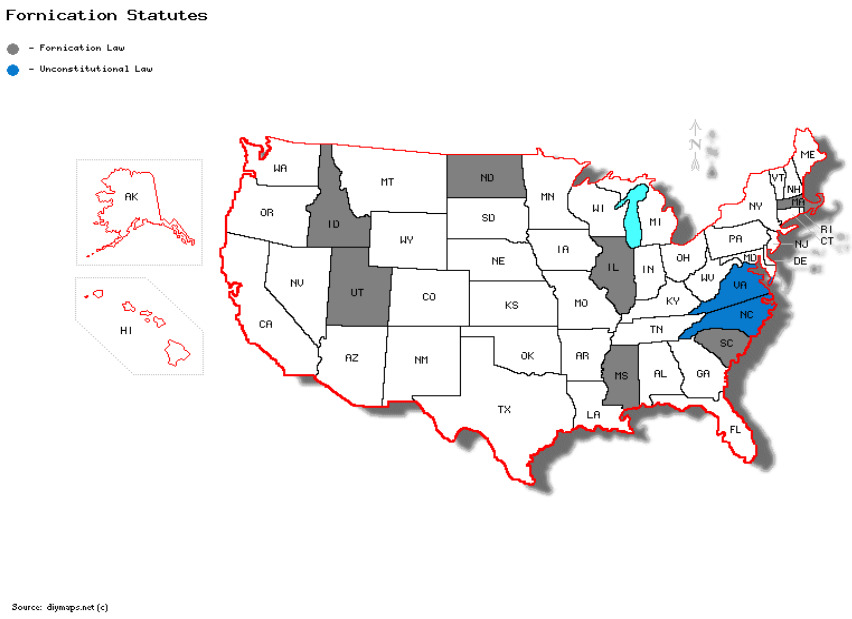
201. *See, e.g.*, Blackwell v. Blackwell, 383 So. 2d 196 (Ala. Civ. App. 1980); Jones v. Jones, 387 So. 2d 217 (Ala. Civ. App. 1980); Paul v. Paul, 60 A.3d 1080, 1082 (Del. 2012); *In re* Marriage of McGowan, 405 N.E.2d 1156 (Ill. App. Ct. 1980); Sigg v. Sigg, 905 P.2d 908, 917 (Utah Ct. App. 1995).

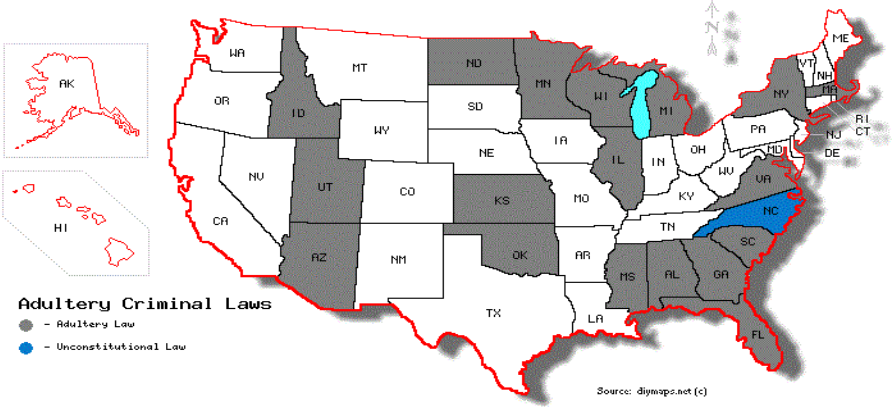
202. Capper v. Capper, 451 So. 2d 359 (Ala. Civ. App. 1984); *Paul*, 60 A.3d at 1082; *In re Marriage of McGowan*, 405 N.E.2d at 1156.

203. McHann v. McHann, 383 So. 2d 823, 826 (Miss. 1980) ("To hold otherwise would be to condone adultery and in effect would penalize a divorcee for marrying but reward her for cohabitation without benefit of marriage."); *see* McRae v. McRae, 381 So. 2d 1052, 1055 (Miss. 1980) (noting "We are of the further view that her abode with the man for more than a year, openly living in adultery, enduring the embarrassment of it, and, in addition by silence, setting that kind of example before her daughters constituted a material change in the circumstances of the parties and that, by her unconscionable conduct, she forfeited her right to future alimony by her repudiation of the right thereto.").

204. Jarrett v. Jarrett, 400 N.E.2d 421 (Ill. 1979).

205. It is noteworthy that the West Coast appears to be the only region where fornication and adultery are legal in every state.




## III. HOW EVIDENTIARY ISSUES LED TO DECREASED PROSECUTIONS

In addition to general cultural changes, evidentiary standards for adultery and fornication prosecutions have also changed over time. More specifically, in early cases, wholly circumstantial evidence was sufficient for a conviction to be upheld.[206] However, over time,

206. As the cases below show, even innocent-seeming activities could be considered evidence

evidentiary standards have become stricter, resulting in more overturned convictions.[207] These changed evidentiary standards show what courts and juries believed was relevant when determining guilt. Moreover, the decreasing availability of circumstantial evidence of adultery or fornication provides insight into the makeup of communities and the importance of these crimes to them. In short, evidentiary standards, combined with cultural evidence, provide a more complete picture of the purpose and utility of adultery and fornication laws over time.

Historically, evidentiary standards have had a significant impact on prosecutions of adultery and fornication. For example, even during the colonial period, some courts were very strict about what evidence was sufficient to convict a person of adultery.[208] Judges were particularly careful that evidence was sufficient for sex crimes that carried the death penalty.[209] Due to evidentiary issues, some states created lesser crimes, such as the crime of a man being found in bed with another man's wife, which had a lesser penalty than the crime of adultery.[210] Likewise, if a court could not convict for adultery or fornication, it could convict for other lascivious actions "tending to adultery."[211] In spite of these limitations, colonial courts generally allowed a wide variety of circumstances to count as evidence of illicit sexual activity. Permissible evidence became more restricted over the years as courts began to impose stricter standards on what kinds of evidence were sufficient to show that the defendant had committed adultery or fornication.

### *A. Historical Evidentiary Standards*

It was more likely in the past that people would be prosecuted and convicted for adultery and fornication than it is today. As seen in Figure 4, until the 1930s it was probable that an adultery conviction would be upheld on appeal; but, beginning in the 1870s, courts became increasingly likely to reverse and remand for a new trial. The likelihood of a pure reversal also increased steadily from the 1830s, peaking in the 1920s. Indictment errors, never a large category, disappeared

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of illicit sex. *See, e.g.*, State v. Crenshaw, 17 S.W.2d 541, 542 (Mo. Ct. App. 1929) (stating that a man and woman going to the theater together was evidence of adultery); Burns v. State, 182 P. 738 (Okla. Crim. App. 1919) (discussing defendants going riding together several times at night as evidence of open and notorious adultery).

207. *E.g.*, Armstead v. State, 71 N.W.2d 317, 320 (Neb. 1955); State v. Eggleston, 77 P. 738, 740 (Or. 1904).

208. GODBEER, *supra* note 34, at 87.

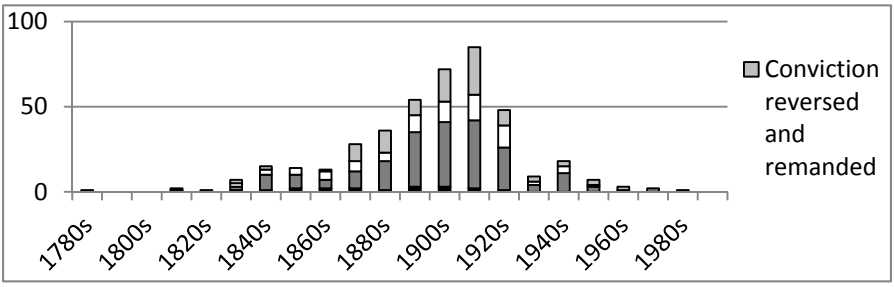
209. *Id.*

210. State v. Green, 1 Kirby 87, 88 (Conn. Super. Ct. 1786); State v. Way, 6 Vt. 311, 313–14 (1834).

211. GODBEER, *supra* note 34, at 103.

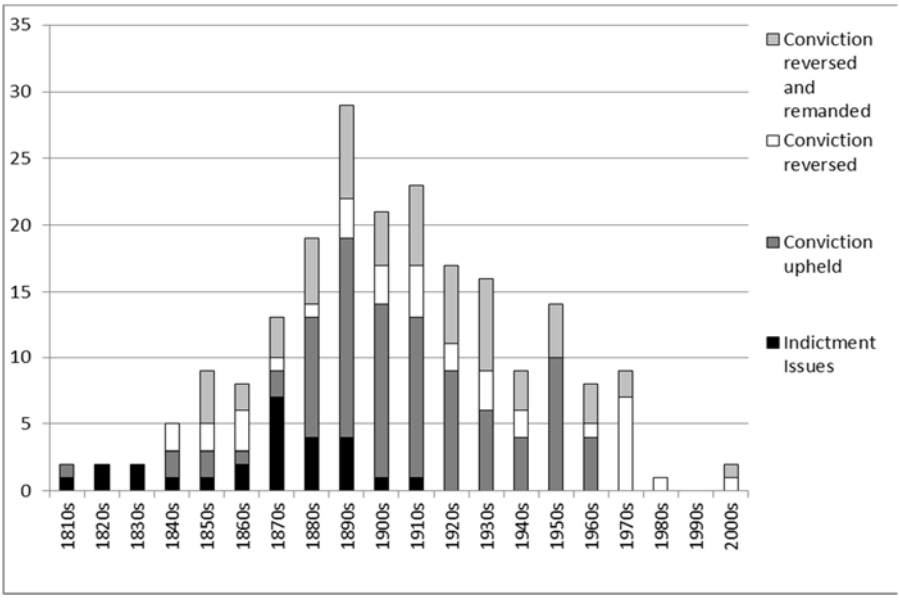
completely by the 1920s, a time period that seems to be a turning point for adultery cases.

**Figure 4—Adultery Grounds for Appeal**[212]




As seen in Figure 5, with regard to fornication cases, indictment issues were originally much more common than evidentiary issues, but disappeared by the 1900s. Upheld convictions for fornication became much more common beginning in the 1880s, and stayed common until the 1970s, when they disappeared completely. Pure reversals and reversals with remands stayed fairly constant from the 1850s to the 1950s. Unlike adultery cases, there were no dramatic changes in appeals trends or numbers in the 1930s—those changes did not begin until the 1980s.

**Figure 5—Fornication Grounds for Appeal**




212. For Figure 4, cases that did not involve indictment issues, or a conviction being upheld, reversed, or reversed and remanded, have been omitted.

The reasons for appeals also changed over time. Figures 6 and 7 show that early adultery and fornication cases often dealt with issues of who could give evidence or the wording of the indictment, and not whether the evidence of illicit sex was sufficient.[213] As shown below, in both adultery and fornication cases, evidentiary issues were more common beginning in the 1920s, with procedural issues all but disappearing until the 1970s. Many of the procedural issues that arose in the 1970s, as noted above, dealt with new privacy challenges.

**Figure 6—Adultery Evidence Issues**[214]

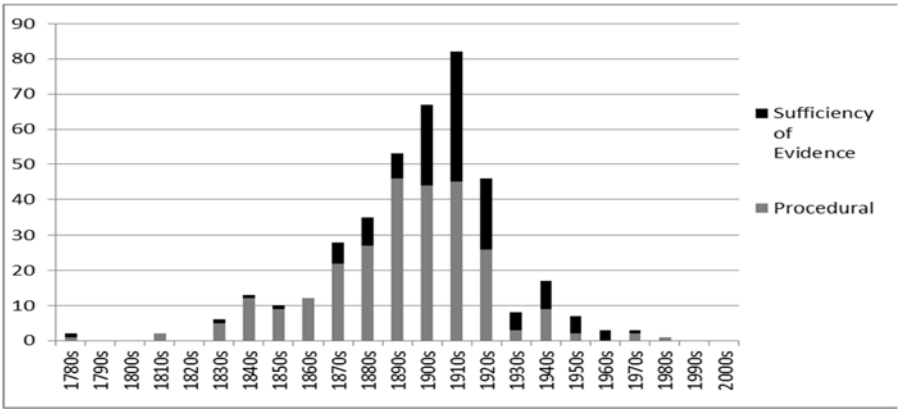
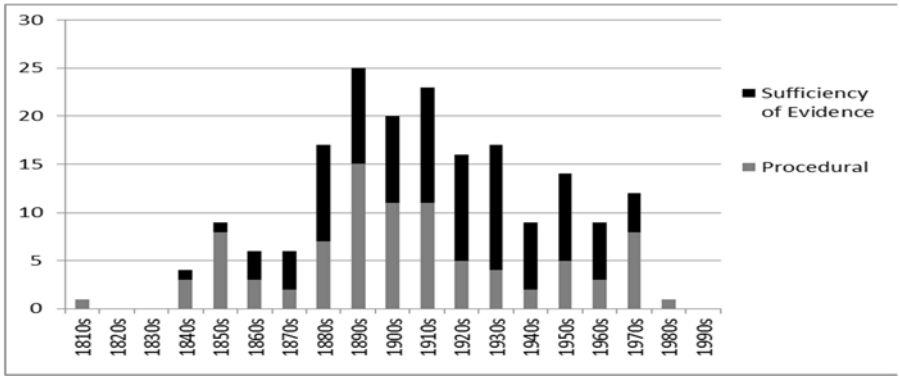



**Figure 7—Fornication Evidence Issues**




213. *See, e.g.*, State v. Dickinson, 18 N.C. 349, 351–52 (1835) (finding that the lower court properly quashed the indictment alleging that the parties were not married to each other); State v. Aldridge, 14 N.C. 331 (1832) (finding the charge insufficient because it did not allege that the parties cohabitated adulterously); State v. Cox, 4 N.C. 597 (1817) (discussing the technical legal issue of whether you can indict one person for fornication or if you have to indict both); Simmons v. Commonwealth, 1 Rawle 142 (Pa. 1829) (discussing how the omission of the sex of the child in the indictment was substantial error); Commonwealth v. Shepherd, 6 Binn. 283 (Pa. 1814) (discussing the question of who can give evidence).

214. For Figures 6 and 7, cases have been omitted where the evidence issues were not clear.

These results are not surprising. Early cases were routinely composed entirely of circumstantial evidence that was used to prove the act of fornication or adultery. Courts emphasized that because of the secrecy involved in illicit sex, it is "ordinarily impossible to prove it, except by circumstantial evidence."[215] As shown below, observations of how parties behaved together in public, illegitimate children, a "disposition" towards adultery, and even reputation could all constituted acceptable evidence of illicit sex.

### 1. Observations of Behavior

Most commonly, how the parties acted together in public was used as evidence that the parties engaged in illicit sexual activity. Being seen in public together could be used as evidence of illicit sexual acts but was usually insufficient to wholly support a verdict,[216] especially if the parties did not engage in visible "improper conduct" or the male defendant's wife was also with the parties at times.[217] Likewise, evidence of the parties riding in a car, buggy, or train together could be insufficient for a verdict, but was admissible evidence, particularly if the rides were at night.[218] Witnesses could also report relatively innocent physical conduct, such as the man putting his arm around the woman's waist, even on only one occasion.[219] Likewise, lesser sexual activities, such as kissing or playful wrestling, could provide evidence that the parties engaged in illicit intercourse, even if not sufficient for a conviction.[220]

What the couple was observed doing in private could provide

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215. Crane v. People, 48 N.E. 54, 56 (Ill. 1897); *see* State v. More, 88 N.W. 322 (Iowa 1901).

216. *See* State v. Chaney, 81 N.W. 454 (Iowa 1900) (discussing how a man and woman went out dancing together in public until late at night); State v. Crenshaw, 17 S.W.2d 541, 542 (Mo. Ct. App. 1929) (discussing how the parties went to the theater together).

217. *See* State v. Gordon, 36 S.E.2d 143 (N.C. 1945).

218. Not guilty of illicit intercourse: Brown v. State, 14 So. 2d 596, 598 (Ala. Ct. App. 1943) (discussing how the parties rode alone in a car together); Grice v. State, 78 So. 984, 985 (Fla. 1918) (discussing how the parties rode in a car together); Hales v. State, 131 S.E. 542, 543 (Ga. Ct. App. 1925). Guilty of illicit intercourse: State v. Austin, 13 S.E. 219 (N.C. 1891) (discussing how a man and woman rode in a buggy together after sunset); Burns v. State, 182 P. 738 (Okla. Crim. App. 1919) (discussing how the defendants went riding together several times at night); State v. Snowden, 65 P. 479, 483 (Utah 1901) (discussing how a man and woman walked together and rode together and she later bore a child).

219. Copeland v. State, 67 So. 623, 623 (Ala. Ct. App. 1915).

220. *See, e.g.*, State v. More, 88 N.W. 322, 323 (Iowa 1901) (stating that a man kissing a woman and laying on top of her on the bed while both were clothed showed "a strong inclination on the part of both to indulge their passions"); State v. Wiltsey, 72 N.W. 415 (Iowa 1897) (finding that hugging and kissing was not sufficient for a conviction); State v. Austin, 13 S.E. 219 (N.C. 1891) (discussing when a man and woman kissed as evidence of adultery). Even public displays of affection between married couples were criticized. MURSTEIN, *supra* note 42, at 301.

powerful evidence of adultery or fornication. Even engaging in normal domestic activities—eating or working in the fields together—was used as evidence of illicit intercourse or cohabitation.[221] Locked doors and a used bed were sometimes sufficient to show that illicit intercourse had taken place.[222] Similarly, being seen in a state of undress, either in or out of a bed, was also evidence that the parties were engaging in illicit intercourse.[223] Indeed, staying the night in the same room where there was only one bed has been held sufficient to show illicit intercourse even if the parties were never observed in bed together.[224] If the parties were in a hotel room together, that would provide stronger evidence of illicit intercourse, especially if they were caught in a state of partial

221. State v. Wade, 84 S.E. 768 (N.C. 1915); State v. Naylor, 136 P. 889, 891 (Or. 1913).

222. *See, e.g.*, Smith v. State, 39 Ala. 554, 555 (1865) (stating that a locked door and a bed with an imprint of two people on it was evidence of criminal intimacy); Commonwealth v. Thrasher, 77 Mass. (11 Gray) 450 (1858) (stating that a man and woman alone in his bedroom with the door fastened, and that once between these times a witness saw [the man] take the defendant [woman] in his arms, carry her into his bedroom, lay her upon his bed, and seat himself on the bed beside her, was evidence of adultery), *overruled by* Thayer v. Thayer, 101 Mass. 111 (1869). *Contra* Davis v. State, 17 S.E. 336 (Ga. 1893) (finding that trial court erred in indicting a woman for fornication based only on the evidence that she was found in man's bed, he was in his bedclothes in the room, the door was shut, there was one bed and no pallet).

223. *See, e.g.*, State v. Green, 1 Kirby 87, 88 (Conn. Super. Ct. 1786) (affirming adultery indictment when defendants found in bed together with the woman undressed); Seats v. State, 50 S.E. 65 (Ga. 1905) (discussing how an unmarried woman was seen in bed in the same room with an unmarried man, who had just got out of bed, and was still in his nightclothes); Cummings v. State, 81 S.E. 366 (Ga. Ct. App. 1914) (finding defendant guilty of adultery when she and a man were both in a state of undress and the bed had an imprint of two people); State v. Schaedler, 90 N.W. 91 (Iowa 1902) (finding defendant guilty of adultery when he and a woman were in a bedroom together and the man was only partially dressed); *Naylor*, 136 P. at 891 (discussing a man found in bed and the woman in the same room in her night clothes, with her corset and clothes hanging on a chair near the bed); State v. Odekirk, 190 P. 777, 778 (Utah 1920) (finding defendant guilty of adultery when he was caught in a woman's room in a partial state of undress, even though his wife and children lived nearby); State v. Way, 6 Vt. 311 (1834) (discussing how a man and woman were found in bed together with their clothes on the floor); *see also* Burger v. State, 6 S.E. 282 (Ga. 1888) (discussing how the defendant was found on the bed, in the night, with the girl with whom the alleged crime was committed, and had been there for 20 minutes); FISCHER, *supra* note 41, at 14 (explaining that the couple "did Ly together upon one bed . . . .").

224. *See, e.g.*, Ramsey v. State, 84 S.E. 984 (Ga. Ct. App. 1915) (finding defendant guilty of adultery when he was found in a state of undress and only one of two beds appeared to have been disturbed); State v. Higgins, 95 N.W. 244, 247 (Iowa 1903) (finding defendant guilty of adultery when the parties boarded together in a room with only one bed); State v. Ean, 58 N.W. 898, 899 (Iowa 1894); Commonwealth v. Clifford, 13 N.E. 345, 346 (Mass. 1887) ("If a married man is found with a woman not his wife, in a room with a bed in it, and stays through the night with her there, that is sufficient to warrant a finding of adultery against him."); State v. Austin, 13 S.E. 219 (N.C. 1891) (finding defendants guilty when the male defendant was seen going to the female defendant's room at night, sometimes stealthily, and remaining there for some hours, leaving with his shoes off); Gill v. State, 240 P. 1073 (Okla. Crim. App. 1925) (discussing how the parties shared a room with one bed). However, some courts required more than seeing the parties asleep in bed together. *See* Cohen v. State, 11 Tex. Ct. App. 337 (1882).

undress or nightclothes.[225] Such evidence was more compelling where the boarding house or hotel had a reputation for lewdness.[226]

Courts seem to split on the issue where there were multiple beds in a single dwelling. In some cases, if there were evidence that the communal house had multiple rooms with beds, it was less likely that the court would find sufficient evidence of illicit intercourse.[227] In other cases, however, simply living in the same house together was held sufficient to show illicit sexual activity, even though the woman had done some paid domestic service at the house and the man's parents both lived in the house.[228] Evidence that a man had said he had visited the defendant at night was also held sufficient to show "that a meretricious connection had taken place between them."[229] Indeed, the kinds of evidence courts considered as relevant to whether the parties engaged in illicit intercourse sometimes seemed frivolous or even racist: the defendant's skin color, former slave status, and hairstyle have been used as evidence of illicit sexual intercourse.[230]

### 2. Illegitimate Children

Another important area of evidence involves illegitimate children. Courts likely began focusing on "bastardy" cases because an illegitimate child was unquestionable evidence of fornication for an unmarried woman.[231] Illegitimate children could also provide evidence of illicit sex against men. For example, incidents of assisting a woman

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225. Warner v. State, 175 N.E. 661, 662 (Ind. 1931) (discussing a man buttoning up trousers when answering the door and a women in bed in nightdress as evidence of cohabitating in a state of fornication).

226. State v. Cushing, 85 A. 770, 770 (Vt. 1913) ("[P]eople do not go to such places to say their paternosters.").

227. *See, e.g.*, Lightner v. State, 55 S.E. 471 (Ga. 1906) (discussing how the parties slept in the same room but both beds were shown to have been used the next morning); State v. Coleman, 141 S.E. 431 (Ga. Ct. App. 1928) (discussing how there were two beds in a room, one "rumpled," and both parties were dressed); Winkles v. State, 61 S.E. 1128 (Ga. Ct. App. 1908) (discussing how a man spent the night in same house as woman, but in a different bedroom); Grice v. State, 78 So. 984, 985 (Fla. 1918) (discussing how parties slept in different beds in the same room); State v. Chaney, 81 N.W. 454 (Iowa 1900) (discussing how defendant and a woman occupied different rooms in a hotel); State v. Waller, 80 N.C. 401, 402 (1879) (finding that a woman in bed, a man up and dressed, and the other bed "not tumbled" was insufficient evidence of illicit intercourse); Smelser v. State, 31 Tex. 95, 96 (1868) (discussing how the parties lived in the same house in separate bedrooms); Ham v. State, 15 S.W. 405 (Tex. Ct. App. 1890) (finding that having two bedrooms in a house and it being unclear where each party slept was insufficient to support a conviction of fornication).

228. Van Dolsen v. State, 27 N.E. 440 (Ind. Ct. App. 1891).

229. Spencer v. State, 31 Tex. 64, 65 (1868).

230. *Smelser*, 31 Tex. at 96 ("There was no other proof to sustain the verdict, except that the woman had been the other defendant's slave, was nearly white, and wore short hair.").

231. Brown, *supra* note 33, at 191.

in her childbirth or paying for a doctor were used as evidence that the man doing so was the father.[232] Evidence that a male defendant showed any paternal inclinations to those children could also be used to show that he engaged in illicit intercourse with their mother.[233] Similarly, children's references to the man as their father have also been used as evidence.[234] However, even if the parties lived in the same house and the woman had illegitimate children, courts have been willing to overturn a fornication conviction if other potential suitors lived nearby and could be the actual father.[235]

### 3. "Disposition" Towards Adultery or Fornication

In addition to observed acts, a person's history could be used against him or her in a conviction. Repeated prior sexual acts were often added together as a "disposition" towards illicit sex. As one court put it:

> Being in bed together but once raises a presumption of guilt, but the guilt might possibly be disproved by a proper explanation of the circumstances; but being in bed together at various and different times cannot be satisfactorily explained consistently with innocence, and tends to satisfy the mind of the guilt of the accused beyond a reasonable doubt.[236]

Similarly, courts were very explicit about what an "adulterous disposition" meant and why it could be used to show later acts of adultery or fornication:

> An adulterous disposition existing in two persons toward each other is commonly of gradual development. It must have some duration, and does not suddenly subside. When once shown to exist, a strong inference arises that it has had and will have continuance, the duration and extent of which may be usually measured by the power which it exercises over the conduct of the parties. It is this character of permanency which justifies the inference of its existence at any particular point of time from facts illustrating the preceding or subsequent relations of the parties.[237]

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232. Alsabrooks v. State, 52 Ala. 24, 26 (1875) (discussing how the defendant paid for a midwife); State v. Snowden, 65 P. 479, 483 (Utah 1901) (discussing how the defendant sent after a doctor when woman was in childbirth).

233. State v. McGlammery, 91 S.E. 371, 372 (N.C. 1917) (discussing how the defendant had pictures of the children made).

234. *Id.*; State v. Wade, 84 S.E. 768 (N.C. 1915).

235. Thompson v. State, 62 S.E. 571, 572 (Ga. App. 1908) (noting that other men who lived nearby who probably knew of the woman's "lewd" reputation); Ham v. State, 15 S.W. 405 (Tex. Ct. App. 1890) (noting that a number of other men lived in the same neighborhood.).

236. Baker v. United States, 1 Pin. 641, 642–43 (Wis. 1846).

237. Crane v. People, 48 N.E. 54, 56 (Ill. 1897); *see* State v. More, 88 N.W. 322, 322 (Iowa 1901) ("[W]hen adulterous disposition is shown to exist between the parties at the time of the

In short, if a couple had previously engaged in illicit sexual acts, a jury could infer that they were "predisposed" to having sex with each other.[238] Once a "disposition" was shown, simply being seen together later was evidence that the couple was again engaging in illicit sex.[239] These prior acts could be used as evidence even though they occurred prior to the relevant date for the statute of limitations.[240] Moreover, an adulterous inclination could be shown by evidence of innocent activities such as riding alone together and going fishing together when the woman's husband was away.[241]

### 4. Reputation, Gossip, and Spying

Reputation has historically been a fertile ground for evidence in adultery and fornication cases. In colonial times, communities were organized so that neighbors could watch each other.[242] Neighbors saw it as their duty to investigate those who lived nearby, including by observing any lascivious behavior.[243] In colonial New England, for example, older women acted as monitors to prevent younger women from acting promiscuously.[244] In order to protect people from their own base natures, some courts ordered all "single persons" to live with relatives or a respectable family in their community so they could be watched.[245] Neighbors were also expected to report transgressions and misbehavior to their church.[246] Even though some women were unwilling to report unwanted advances in order to avoid a court case and give the malefactor the opportunity to mend his ways,[247] community gossip often made that impossible. Keeping the unwanted advances a secret was risky as well; the woman could be accused of failing to be a "moral steward" if she did not report the advances.[248]

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alleged act, then mere opportunity, with comparatively slight circumstances showing guilt, would be sufficient to justify the inference that criminal intercourse has actually taken place."); Monteith v. State, 89 N.W. 828, 829 (Wis. 1902) ("If the adulterous disposition be shown to exist between the parties, and they be shown to have been together in equivocal circumstances, such as would lead the guarded discretion of a reasonable . . . man under the circumstances to the conclusion of guilt beyond a reasonable doubt, it is sufficient.").

238. State v. Dukes, 25 S.E. 786, 786 (N.C. 1896).
239. *Id.*
240. *Id.*
241. People v. Girdler, 31 N.W. 624, 626 (Mich. 1887).
242. GODBEER, *supra* note 34, at 89.
243. *Id.*
244. Hambleton, *supra* note 45, at 106.
245. GODBEER, *supra* note 34, at 100.
246. *Id.* at 97.
247. *Id.* at 95.
248. *Id.*

Indeed, the failure to report a crime could be punishable as "concealment."[249]

The Victorian Era did not curb Americans' tendencies to spy on their neighbors. In the late 1800s and early 1900s, community members continued to be very willing to watch each other to discover immoral acts, in one case even looking through cracks in the walls of another's house.[250] In another case, a little girl saw the parties walk off into the woods together, and because there had been gossip about a prior relationship between the two parties, she told the woman's mother-in-law, who then followed the couple into the woods and saw them sitting together.[251] The mother-in-law's testimony was later used as evidence in the couple's adultery trial.[252]

Police officers were also quite proactive in trying to catch people in the act of illicit sex. In one instance, officers went to the woman's house, heard "something like bed springs making a noise," and immediately attempted to gain entry to investigate.[253] In another case, when a witness told police that the male defendant was going to see the female defendant, three police officers observed the female defendant's home over a three-month period, hoping to catch the male defendant visiting her.[254]

Unconventional relationships also led to gossip and evidence of bad reputation. Witnesses could testify that they heard gossip that a man and woman were living in adultery even though no one ever saw any improper acts between them.[255] Courts have also noted when couples flouted society's conventions by keeping house together or going out in public together even though they were not married.[256] In an early case, an unwed woman was seen being "merry" with an unwed man, and made him sign a statement of intent to marry her in order to stop her neighbors from complaining.[257] Later, when he began to come to her

249. *Id.*

250. Cohen v. State, 11 Tex. Ct. App. 337, 338 (1882); *see* Commonwealth v. Durfee, 100 Mass. 146, 147 (1868) (describing witness reporting several instances of parties "sitting" together on witness's farm).

251. State v. Tracheal, 129 N.W. 736, 737 (Iowa 1911).

252. *Id.*

253. Mathis v. State, 117 S.E. 95, 95 (Ga. Ct. App. 1923).

254. Koger v. State, 165 S.W. 577, 578 (Tex. Crim. App. 1914); *see* People v. McCoy, 147 N.Y.S. 748, 749 (App. Div. 1914) (witnesses watched the building all night).

255. State v. Crenshaw, 17 S.W.2d 541, 542 (Mo. Ct. App. 1929).

256. State v. Naylor, 136 P. 889, 891 (Or. 1913); *see* Musfelt v. State, 90 N.W. 237, 238 (Neb. 1902) ("It is hardly conceivable that the defendant Musfelt, had his intentions toward his codefendant been honorable, and his motives pure, would have subjected her to the scandal and suspicion naturally arising from their conduct as disclosed by the evidence.").

257. GODBEER, *supra* note 34, at 38.

house late at night and demand admittance, she filed a complaint against him.[258] Unfortunately, witnesses described her "merry" behavior with the man and other sailors (including sitting on their laps), and both she and the man were fined for fornication.[259] This propensity to gossip could be used in the defendant's favor, however. In one case, the court found that the defendants did not commit adultery because no witnesses saw the defendants in compromising positions together, including the woman's husband or any neighbors or acquaintances.[260]

Due to the prevalence of spying and gossip, a person could easily gain a bad reputation. Like disposition, a person's bad reputation for chastity with the person with whom they were alleged to commit the offense could be used as evidence that the defendant was more likely to commit adultery.[261] A woman's reputation was also imputed to those who associated with her. In one case, a man who employed a woman of "lewd character" (because she had an illegitimate child) and who kept her employed even though she had another bastard child while living under his roof and in his employ, was convicted of illicit intercourse with her despite there being no evidence of any improper acts between them.[262] On appeal, the court noted that his actions were "ground for suspicion" but overturned his conviction partially due to the argument that, because the man was so poor, he probably could not afford a servant of better moral character.[263] In a similar case, a man was convicted of adultery simply because his purported mistress had previously had a bastard child,[264] and the defendant visited her and repaired her family's house.[265] Indeed, these cases show how a woman with a bastard child could be ostracized and seen as an object of suspicion in the community.[266]

### *B. Modern Evidentiary Trends*

Stricter evidentiary standards began to truly arise in the beginning of the twentieth century when courts began to refuse to rely upon "mere

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258. *Id.*

259. *Id.*

260. State v. Brown, 124 N.W. 899, 901 (Iowa 1910).

261. State v. Neiburg, 85 A. 769, 769 (Vt. 1913).

262. Thompson v. State, 62 S.E. 571, 571–72 (Ga. Ct. App. 1908).

263. *Id.* at 572.

264. There was some evidence that the bastard child might be the defendant's but the court did not address the issue, as it primarily considered evidence within two years of the defendant's conviction. Winkles v. State, 61 S.E. 1128, 1128 (Ga. Ct. App. 1908).

265. *Id.* at 1129.

266. *Id.* ("Some of the witnesses swore that the woman had a general reputation for immorality, and that the women of the neighborhood did not visit her.").

suspicion and conjecture."[267] Instead, courts began to require that the evidence "not only be consistent with the hypothesis that the accused is guilty, but inconsistent with the hypothesis that he is innocent, and inconsistent with every other rational hypothesis except that of his guilt."[268] These courts required additional circumstantial evidence such as being discovered in a bedroom partly undressed, a history of living in the same room with one bed for several months, frequent visits with each other, or being found lying in a bed together.[269]

In other words, courts needed more than circumstances simply consistent with guilt or evidence that showed suspicion of guilt.[270] Indeed, even if the parties were seen in the same room with only one (rumpled) bed and a locked door, that alone would constitute insufficient evidence.[271] In fact, by the 1910s, attempting to commit adultery was not sufficient to convict—if the parties had been interrupted before they could commit the act, neither could be convicted.[272] Disposition and opportunity were also insufficient for some courts as early as the 1880s.[273] For example, the fact that the woman worked as a servant for the man did not show that improper relations took place, only that there was opportunity for them to act improperly; absent any showing of improper conduct between them,

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267. Armstead v. State, 71 N.W.2d 317, 320 (Neb. 1955); *see* State v. Thompson, 111 N.W. 319, 321 (Iowa 1907) ("The mere fact that parties may have been in each other's company, under such circumstances that the act might have occurred, will not alone justify the conclusion that the offense [of adultery] has been committed.").

268. Burgett v. State, 70 So. 2d 429, 430 (Ala. Ct. App. 1954); *see Armstead*, 71 N.W.2d at 320 ("[M]ere disposition and opportunity to commit adultery are not alone sufficient to justify a conviction, but there must be circumstances inconsistent with any other reasonable hypothesis.").

269. *E.g.*, *Burgett*, 70 So. 2d at 430; *Thompson*, 111 N.W. at 321 (citing Blackman v. State, 36 Ala. 295, 295 (1860)); Eldridge v. State, 23 S.E. 832, 832 (Ga. 1895); State v. Schaedler, 90 N.W. 91, 91 (Iowa 1902); Commonwealth v. Clifford, 13 N.E. 345, 346 (Mass. 1887); Richardson v. State, 34 Tex. 142, 143 (1870)).

270. *Thompson*, 111 N.W. at 320 ("If the evidence is as capable of interpretation which makes it consistent with the innocence of the accused as of one consistent with his guilt, the meaning should be ascribed to the evidence which accords with his innocence.").

271. State v. Coleman, 141 S.E. 431, 431 (Ga. Ct. App. 1928).

272. Glover v. State, 82 S.E. 602, 603 (Ga. Ct. App. 1914). This was also the case in some colonial jurisdictions. GODBEER, *supra* note 34, at 102.

273. People v. Girdler, 31 N.W. 624, 626 (Mich. 1887); *see Thompson*, 111 N.W. at 321 ("Whatever the disposition, the mere fact that the parties may have been in each other's company, under such circumstances that the act might have occurred, will not alone justify the conclusion that it actually did. There must be some circumstances, in addition to the disposition and opportunity, tending to rebut the presumption of innocence which continues until overcome by proof."); Commonwealth v. Donald, 161 A.2d 915, 918 (Pa. Super. Ct. 1960) ("If adultery could be inferred from the mere existence of an opportunity to commit the act, it would be unsafe for persons of the opposite sex to meet except in the presence of others.").

there could be no conviction.[274]

Despite courts' increasing evidentiary requirements, some juries were still willing to convict on little evidence. For example, in one case, a jury convicted based on one incident where the man was alone with the woman when he ate an apple in her house, shut the door behind him, and the woman was lying on the lounge because she was ill.[275] His conviction was overturned on appeal, but the fact that it was based on such little evidence speaks volumes of what juries considered improper in the early 1900s.[276] Moreover, as recently as 1945, some courts were still willing to rely upon jury verdicts using scant circumstantial evidence because of the "secret nature" of illicit sex.[277] Even as late as the 1950s, sharing a bed, standing alone, was sufficient evidence of illicit intercourse.[278]

Most appeals courts, however, began to overturn jury convictions based solely on circumstantial evidence. Up to the 1930s, simply being seen together at one of the parties' houses, without any evidence of improper conduct, was enough to convict them of open and notorious cohabitation, but it was not enough to withstand an appeal.[279] Likewise, living in the same house (with other people) and riding in a car together was enough for another conviction of adultery in the 1940s.[280] Again, the Court of Appeals overturned the verdict for lack of evidence.[281] By the 1960s, evidence that the parties twice spent the night at each other's houses was enough to convict, but not to withstand appeal absent any evidence of inclination towards adultery.[282] It is noteworthy that the appeals court indicated that, had the parties stayed in a hotel or been seen in a compromising position, the court would have been willing to find that there was an adulterous inclination.[283]

Today, it appears that law enforcement believes that, without a

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274. Copeland v. State, 67 So. 623, 623–24 (Ala. Ct. App. 1915); *see* Lightner v. State, 55 S.E. 471, 471 (Ga. 1906) (woman was the nurse of the man's small child); State v. Chaney, 81 N.W. 454, 455 (Iowa 1900) (woman worked as a domestic in the hotel where the man was staying).

275. *Thompson*, 111 N.W.at 320.

276. *Id.*

277. State v. Davenport, 33 S.E.2d 136, 138 (N.C. 1945) ("Some sense of natural shame, coupled with a fear of public condemnation or, more likely, the fear of the law, drives offenses of this nature into secret places, and usually causes those who commit them to observe the outward forms of decency.").

278. *See* Lancaster v. State, 64 So. 2d 602, 603 (Ala. Ct. App. 1953).

279. *See* Mathis v. State, 61 P.2d 261, 267 (Okla. Crim. App. 1936).

280. *See* Brown v. State, 14 So. 2d 596, 598 (Ala. Ct. App. 1943).

281. *Id.*

282. Commonwealth v. Donald, 161 A.2d 915, 917–18 (Pa. Super. Ct. 1960).

283. *Id.* at 918.

confession or witness statement, transgressors must actually be caught in the act in order to be charged with fornication, adultery or sodomy.[284] The most recent adultery and fornication cases bear out this requirement: in these cases, most of the defendants were literally caught in the act of illicit sex, or had a witness testify that the sex act actually occurred.[285] In only a few instances, being seen in bed together without being engaged in sexual intercourse was found to be sufficient.[286] Most of these cases involved more than sleeping in a bed—a state of undress was also observed.[287] In these modern cases, other types of evidence were held to be insufficient.[288]

Accordingly, despite increased evidentiary standards, juries have apparently remained willing to convict people of adultery or fornication using the most circumstantial of evidence. Only judges have been willing to strictly enforce evidentiary requirements.[289] Perhaps unsurprisingly, it is judges who have created a substantive right to privacy and enforced it against legislative incursions.[290] In contrast, several states have been willing to forgo protecting marriage in related areas—all fifty states now have no-fault divorce, and only a very few states retain "heartbalm" or alienation of affection torts[291]—but have

284. *See* CARPENTER, *supra* note 6, at 106.

285. *See* Wilson v. State, 39 So. 2d 250, 253 (Ala. Ct. App. 1948) (testimony of female defendant's daughter); Horne v. State, 186 S.E.2d 542, 543 (Ga. Ct. App. 1971) (witness described illicit sex act); Commonwealth v. Stowell, 449 N.E.2d 357, 359 (Mass. 1983) (defendant seen by police having sexual intercourse in the back of a van); Dale v. State, 449 P.2d 921, 924 (Okla. Crim. App. 1969) (paramour testified).

286. *See* Lancaster v. State, 64 So. 2d 602, 603 (Ala. Ct. App. 1953); State v. Stout, 198 S.W.2d 364, 365 (Mo. Ct. App. 1946); State v. Robinson, 176 S.E.2d 253, 254 (N.C. Ct. App. 1970).

287. *See* State v. Kleiman, 85 S.E.2d 148, 150 (N.C. 1954) (female defendant answered door to officers in a thin negligee, and male defendant found hiding in bedroom closet, completely nude). *See generally* Lawson v. State, 33 So. 2d 388 (Ala. Ct. App. 1948) (husband found his wife and the defendant in bed together, asleep and only in their underclothing).

288. *See, e.g.*, Burgett v. State, 70 So. 2d 429, 430 (Ala. Ct. App. 1954) (defendants seen together "about the premises and working in the fields" but no evidence that they occupied the same room or bed); Armstead v. State, 71 N.W.2d 317, 321 (Neb. 1955) (defendants seen together in his trailer, female defendant dressed in housecoat and performed chores); State v. Gordon, 36 S.E. 143, 143–44 (N.C. 1945) (defendant seen with alleged paramour in public, paramour lived in same house with defendant and his wife, paramour seen sleeping in a different bed from defendant); Commonwealth v. Donald, 161 A.2d 915, 917–918 (Pa. Super. Ct. 1960) (defendants frequently seen in each other's company in public, defendants seen kissing, male defendant's car seen outside female defendant's apartment until late in the night, male defendant had key to female defendant's apartment); Gordon v. State, 346 S.W.2d 841, 842 (Tex. Crim. App. 1961) (uncorroborated confession of defendant).

289. *See Burgett*, 70 So. 2d at 430; *Armstead* 71 N.W.2d at 320; *Donald*, 161 A.2d at 915.

290. *See* Jeffrey M. Shaman, *The Right of Privacy in State Constitutional Law*, 37 RUTGERS L.J. 971, 976 (2006).

291. *See* Lance McMillian, *Adultery as Tort*, 90 N.C. L. REV. 1987, 1991 (2012).

kept their criminal adultery and fornication laws. In addition, these remaining statutes can still affect people and appear to be difficult to exorcise from statute books either legislatively or judicially.

## IV. REMAINING EFFECTS AND STANDING ISSUES

Although some believe that adultery and fornication should remain crimes, the fact is that prosecutions under these statutes have all but disappeared in recent decades. For most Americans, a criminal charge for fornication or adultery would be unthinkable and inappropriate. In other words, these statutes have become completely obsolete for most people, which raises the question: should we get rid of them and, if so, how?

The problem of "obsolete" statutes has existed for decades,[292] and there is no consensus regarding how those laws should be treated once revived by a new prosecution. On one hand, courts almost routinely enforce statutes that, to the public, may seem unfair or absurd.[293] On the other hand, criminal statutes that are only sporadically enforced can also raise constitutional challenges of discriminatory enforcement in violation of the Due Process Clause. Changing public policy can lead to other potential constitutional challenges as people begin to see their rights differently, which further weakens the obsolete statute's viability. However, American courts have roundly rejected the doctrine of desuetude, which causes statutes to lapse and become unenforceable by a long habit of non-enforcement.[294] Consequently, any statute, no matter how old or sporadically applied, may still be enforced. [295]

Although the public has shown declining interest in criminalization of adultery and fornication, and even if existing fornication and adultery laws have a questionable constitutional status, they remain in force, often as a symbol of the legislature's disapproval of those acts.[296] Efforts to repeal these laws are uncommon and, when they do occur, are frequently met with resistance, particularly from religious groups.[297]

Moreover, judicial challenges to these laws are extremely difficult

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292. The problem was discussed as far back as 1930. Frederick K. Beutel, *Valuation As a Requirement of Due Process of Law in Rate Cases*, 43 HARV. L. REV. 1249, 1302 (1929); *see* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 2–6 (Harvard Univ. Press. 1982).

293. CALABRESI, *supra* note 292, at 6.

294. Mark Peter Henriques, *Desuetude and Declaratory Judgment: A New Challenge to Obsolete Laws*, 76 VA. L. REV. 1057, 1070–71 (1990).

295. *Id.*

296. CARPENTER, *supra* note 6, at 281–82.

297. *See id.* at 281; Viator, *supra* note 16, at 860.

due to standing issues. In part to protect separation of powers, courts will not hear a case unless it meets the "case or controversy" requirement of Article III of the Constitution.[298] Only a plaintiff who has standing—a real "case or controversy"—can successfully bring a case to court.[299] And to have standing, a plaintiff must show that: (1) he or she has suffered an injury in fact; (2) there is a causal connection between the injury and the conduct complained of; and (3) it is likely that the injury will be redressed by a favorable decision.[300]

With regard to criminal statutes, a plaintiff has standing only if he or she has been prosecuted under the statute or he or she can show a "real and immediate threat" of a future prosecution.[301] Because fornication and adultery statutes are no longer being prosecuted and the evidentiary standards are now so high, putative plaintiffs have been repeatedly prevented from challenging these statutes due to a lack of standing.[302] Plaintiffs cannot show injury in fact, because prosecutors typically argue that they will not prosecute these crimes and, therefore, courts routinely reject plaintiffs' arguments that they "fear" prosecution.[303] Even *Lawrence v. Texas* was an aberration—the fact that it made it to court in the first place was the result of an unusual combination of the personalities of the defendants and the arresting officers, and a series of well-placed homosexual activists.[304]

Though adultery and fornication are not routinely prosecuted, they remain crimes and can still be used to arrest people. Juveniles are particularly vulnerable to convictions for fornication because courts are more willing to overrule their asserted privacy rights and because *Lawrence v. Texas* did not explicitly address sexual acts with and by minors.[305] For example, in 1996, an Idaho district attorney brought fornication cases against pregnant teenage girls and used these convictions to try to deter teenagers from having sex.[306] These crimes

298. Lujan v. Defenders of Wildlife, 504 U.S. 555, 559–60 (1992); O'Shea v. Littleton, 414 U.S. 488, 494 (1974).

299. *See* Thomas Healy, *Stigmatic Harm and Standing*, 92 IOWA L. REV. 417, 441 (2007).

300. Phelps v. Hamilton, 122 F.3d 1309, 1326 (10th Cir. 1997).

301. D.L.S. v. Utah, 374 F.3d 971, 974 (10th Cir. 2004).

302. *See id.* at 976 (sodomy law challenge failed for lack of standing); Doe v. Pryor, 344 F.3d 1282, 1283 (11th Cir. 2003); Doe v. Duling, 782 F.2d 1202, 1206–1207 (4th Cir. 1986).

303. *See D.L.S.*, 374 F.3d at 976 (sodomy law challenge failed for lack of standing); *Pryor*, 344 F.3d at 1283; *Duling*, 782 F.2d at 1206–1207 (cohabitation law challenge).

304. CARPENTER, *supra* note 6, at 54, 81, 117–18, 145.

305. *See In re* N.A., 539 S.E.2d 899, 900 (Ga. Ct. App. 2000). However, this willingness is limited to juveniles under the state's age of consent. *See In re* J.M., 575 S.E.2d 441, 443 (Ga. 2003).

306. James Brooke, *Idaho County Dusts off Fornication Law*, DESERET NEWS (Nov. 15 1996, 12:00 AM), http://www.deseretnews.com/article/524859/IDAHO-COUNTY-DUSTS-OFF-FOR

have also been resurrected periodically against adults. In 2004, a man convicted of adultery was going to challenge the constitutionality of his conviction.[307] However, he later decided to not pursue the challenge and was instead sentenced to community service.[308]

Sodomy law prosecutions appear to be particularly likely to resurface, despite the Supreme Court's holding in *Lawrence v. Texas*. For example, in 2009, El Paso cops told two men in a restaurant to stop kissing because their act violated the state's "homosexual conduct law."[309] Even more recently, in 2013, many gay men were arrested and charged with sodomy in Baton Rouge, even though the police knew that the law was not constitutional.[310] The Baton Rouge district attorney's office refused to prosecute these cases, which meant that those arrested did not have to go through a criminal trial, but also meant that they were unable to challenge Louisiana's sodomy law.[311]

The shame associated with being charged with a consensual illicit sex crime means that people are even less likely to challenge their convictions, particularly if the punishment is something minor, such as a fine.[312] However, even without prosecutions, existing fornication and adultery criminal laws also carry less tangible harms such as the stigma associated with engaging in private acts that are, at least technically, criminal.[313] Courts, including the Supreme Court in *Lawrence v. Texas*, have recognized the stigmatic harm associated with laws criminalizing these consensual sexual acts.[314] The crime of sodomy appears to be

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307. John F. Kelly, *Va. Man Challenges State's Adultery Law*, WASH. POST, Feb. 26, 2004, at B01.

308. Jonathan Turley, *When Lust and the Law Collide*, CINCINNATI POST, Sept. 15, 2004, at A19.

309. CARPENTER, *supra* note 6, at 281.

310. *La. City Police Arrested Men under Sodomy Law*, ASSOCIATED PRESS, July 29, 2013, *available at* http://www.usatoday.com/story/news/nation/2013/07/28/louisiana-sodomy-arrests/2595071/.

311. *Id.* The Sheriff later apologized and said he would try to have the unconstitutional parts of the law repealed, but commentators believe it is unlikely that Louisiana's conservative legislature would be willing to repeal any part of the existing sodomy law. Jim Mustian, *Gautreaux Issues Apology, Begins Push to Have La. Law Erased*, ADVOCATE (July 31, 2013), http://theadvocate.com/home/6641204-125/gautreaux-issues-apology-begins-push. In this case, the commentators' skepticism was well founded: a bill to repeal Louisiana's sodomy law was rejected by the state's House of Representatives. *Louisiana: Anti-Sodomy Law Stands*, ASSOCIATED PRESS, Apr. 15, 2014, *available at* http://www.nytimes.com/2014/04/16/us/louisiana-anti-sodomy-law-stands.html?_r=1.

312. CARPENTER, *supra* note 6, at 108.

313. Healy, *supra* note 299, at 417; s*ee* Lee, *supra* note 15.

314. Healy, *supra* note 299, at 417; *see* State v. Morales 826 S.W.2d 201, 202–03 (Tex. Ct. App. 1992).

particularly stigmatized, with police, legislators and litigants focusing on their disgust with homosexual sex.[315] However, unless a plaintiff can show that he or she was denied equal treatment on the basis of being part of a stigmatized group, he or she will still not have standing to challenge the law that creates the stigma.[316] Courts, therefore, currently do no present a viable path to erasing adultery and fornication statutes from the books.

## CONCLUSION

The longevity of adultery and fornication laws can be explained by looking at why those laws were created in the first place and how their purposes have adapted over time. Although no longer enforced with any regularity, they retain a symbolic presence that can be used by opportunistic groups and individuals, even though they are probably unconstitutional. It is this remaining utility that should be most concerning to legal scholars and the public. Although these laws undoubtedly implicate privacy rights, they likewise implicate shame and embarrassment, which makes it unlikely that those targeted by these laws will be willing to fight for their repeal. Even those brave enough to challenge these laws are routinely blocked by standing issues, making it extremely unlikely that these criminal laws can be challenged in court. Similarly, due to the vocal disapproval of religious and conservative groups, it is unlikely that legislatures will repeal these laws. These laws, therefore, will remain in limbo, unrepealed and unable to be challenged. Perhaps if the culture continues to change, they will finally be relegated to history.

315. CARPENTER, *supra* note 6, at 99–100, 165, 203–06.
316. Healy, *supra* note 299, at 428.