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Journal

UCLA Women's Law Journal, 8(2)

Author

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Publication Date

1998

DOI

10.5070/L382017693

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SODOMY, ADULTERY, AND SAME-SEX MARRIAGE: ON LEGAL ANALYSIS AND FUNDAMENTAL INTERESTS

Mark Strasser*

ABSTRACT

In this Article, Professor Strasser contends that, contrary to the assertions of some critics, recognition of the right to marry a person of the same sex would not expand the right to privacy to such an extent that laws against sodomy and adultery would be threatened. Strasser argues that the right to commit adultery is not protected by the Constitution because adultery undermines marriages and destroys families. Recognition of same-sex marriages, on the other hand, would promote marriage and help to establish families. Strasser asserts that sodomy bans do not prevent recognition of same-sex marriage because most sodomy laws have been held to violate due process. In those states that maintain sodomy prohibitions, married couples are usually exempted. Thus, the recognition of same-sex marriage would not invalidate an existing law and would instead fall within an already existing exception. Strasser concludes by arguing that sodomy and adultery bans are constitutional because those practices do not promote marriage and family, and thus do not implicate the right to privacy. Because same-sex marriage promotes marriage and family, it implicates the right to privacy. Thus, constitutional protection of same-sex marriage would not require constitutional protection of either adultery or sodomy.

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I. INTRODUCTION

This year, the Hawaii Supreme Court is expected to affirm a 1996 lower court ruling¹ that Hawaii's ban on same-sex marriage violates state constitutional guarantees. Such a ruling would have a variety of implications, one of which would be that other states' bans on same-sex marriage would more likely be subjected to constitutional scrutiny on either equal protection or due process grounds.

Some commentators argue that if the Constitution prohibits states from banning same-sex marriages, then the Constitution also prohibits states from banning other practices such as adultery and sodomy.² However, such an argument ignores the basis upon which same-sex marriage bans are constitutionally imper-

1. See *Baehr v. Miike*, No. CIV. 91-1394 1996 WL 694235 (Haw. Cir. Ct., Dec. 3, 1996).

2. See Hadley Arkes, *The Role of Nature, in SAME-SEX MARRIAGE: PRO AND CON A READER* 276, 277 (Andrew Sullivan ed., 1997) [hereinafter *SAME-SEX MARRIAGE*]; William Bennett, *Leave Marriage Alone, in SAME-SEX MARRIAGE*, supra, at 274, 275 (suggesting that if same-sex marriage is permissible then everything is permissible); Andrew H. Friedman, *Same-Sex Marriage and the Right of Privacy: Abandoning Scriptural, Canonical, and Natural Law Based Definitions of Marriage*, 35 *How. L.J.* 173, 214 (1992) (*Bowers* "deals a serious, if not fatal, blow to any arguments that state prohibitions against same-sex marriages are unconstitutional."); Charles Krauthammer, *When John and Jim Say "I Do," in SAME-SEX MARRIAGE* supra, at 282, 284; Mary F. Gardner, Note, *Braschi v. Stahl Assocs. Co.: Much Ado About Nothing?*, 35 *VILL. L. REV.* 361, 363 (1990) (arguing that recognition of right to same-sex marriage would conflict with state sodomy statutes); cf. *Bowers v. Hardwick*, 478 U.S. 186, 195-96 (1986) ("it would be difficult, except by fiat, to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery . . ."); *Poe v. Ullman*, 367 U.S. 497, 553 (1961) (Harlan, J., dissenting) (suggesting that the state may forbid homosexuality and adultery altogether). For the argument that if same-sex marriages are recognized, then people will incorrectly think that adultery is wrong because it involves deception rather than because it is "per se" wrong, see John Finnis, *Law, Morality, and "Sexual Orientation,"* 9 *NOTRE DAME J.L. ETHICS & PUB. POL'Y* 11, 32 (1995).

missible.³ This Article suggests that laws against sodomy are probably unconstitutional and that laws against adultery are probably constitutional, but that the existence of a fundamental right to marry a same-sex partner is quite compatible with bans on both adultery and sodomy being constitutional.

Adultery statutes might be divided up into two types: those that impose fines or prison terms and those that limit adulterers' rights to remarry. The constitutionality of statutes imposing fines or prison terms on adulterers seems relatively clear whether or not same-sex marriages are protected by the right to privacy.⁴ Because statutes prohibiting adultery *promote* marriage and statutes prohibiting same-sex marriage *prevent* marriage, the statutes are dissimilar in an important respect and the unconstitutionality of the latter would not entail the unconstitutionality of the former.

Sodomy laws are probably unconstitutional since they seem to violate the constitutional right to privacy. Even if they are constitutional, however, that would not be a bar to recognizing same-sex marriages, since sodomy statutes are already understood to be constitutional only if they have an exception for married couples.

Part II of this Article discusses some of the penalties that have traditionally been imposed on adulterers. If challenged today, some of those penalties would likely pass constitutional muster while others would not. Same-sex marriage opponents' views notwithstanding, an examination of the permissible and impermissible penalties on adulterers and the rationales underlying that differentiation only bolsters the view that same-sex marriage is constitutionally protected and that adulterous relations probably are not.

3. In *Baehr*, 1996 WL 694235, at *19, the court held that there is no fundamental right to marry a same-sex partner. However, the court also held that the same-sex marriage ban implicated equal protection guarantees. *See id.* Arguably, there is a fundamental right to marry a same-sex partner. *See generally* Mark Strasser, *Domestic Relations, Jurisprudence and the Great, Slumbering Baehr: On Definitional Preclusion, Equal Protection, and Fundamental Interests*, 64 *FORDHAM L. REV.* 921, 951-80 (1995). Even had the court been ruling on due process grounds, it is argued below that the existence of a fundamental right to marry a same-sex partner would neither entail a fundamental right to commit sodomy nor a fundamental right to commit adultery.

4. Of course, particular punishments of adultery might violate the Eighth Amendment. *Cf. Bowers*, 478 U.S. at 197-98 (1986) (Powell, J., concurring) (particular punishments of sodomy might violate the Eighth Amendment).

Part III discusses whether the presumed constitutionality of sodomy prohibitions has any implications for the constitutionality of same-sex marriage bans. Even if sodomy bans are constitutional, same-sex marriages may nonetheless be protected by the right to privacy. Just as statutes punishing opposite-sex sodomitical relations are presumed to have a marital exception in order to withstand constitutional scrutiny, a statute punishing same-sex sodomitical relations would also implicitly or explicitly have such an exception. Thus, even if permitted to enact statutes punishing adultery or sodomy, states may do so precisely because of the important respects in which such statutes and same-sex marriage bans differ.

Part IV concludes that because sodomy and adultery statutes are constitutional only if they do not promote marriage and family and thus do not implicate the right to privacy,⁵ and because same-sex marriage promotes marriage and family and thus implicates that right, the Constitution's protection of the latter would hardly entail the Constitution's protection of the former. Indeed, were the Court to accept the argument that protecting same-sex unions would *require* protecting adulterous relations, serious questions would be raised about the Court's judgment, integrity, and impartiality.

II. ADULTERY

Same-sex marriage opponents suggest that a constitutional right to marry a same-sex partner also implies a constitutional right to do many things, including committing adultery.⁶ But, they continue, since it is absurd to believe that the Constitution protects adulterous relations, it is also absurd to believe that the Constitution protects the right to marry a same-sex partner. Yet, this argument is unpersuasive because it ignores an important difference between adulterous relations and same-sex marriages. The right to commit adultery is not protected by the Constitution because adultery tends to undermine marriages and destroy families. However, the right to marry a same-sex partner would promote marriage and help to establish families. Thus, adulterous relations and same-sex marriages are distinguishable in a crucial

5. Arguably, sodomy statutes are unconstitutional nonetheless. However, that is irrelevant for the point being made here.

6. See *supra* note 2 (listing some commentators making such a claim).

respect and recognition of the latter right would hardly entail recognition of the former.

Some attorneys have argued that the right to privacy includes the right to commit adultery and thus that the imposition of civil or criminal penalties is unconstitutional.⁷ These attorneys may be correct that the right to privacy prohibits the imposition of certain civil penalties against adulterers. However, the reason this is so is not because adultery is protected by the right to privacy. Rather, it is because some of the civil penalties impose excessive burdens on the right to marry. Therefore, it will be important to make distinctions among the different possible punishments.

Historically, civil penalties for adultery varied sometimes involving limitations on the adulterer's right to remarry.⁸ Criminal penalties would also vary. Even today, individuals who have committed adultery might be subjected to a variety of criminal penalties ranging from a \$10 fine⁹ to several years' imprisonment.¹⁰ Some of these penalties arguably violate substantive due process protections, although an examination of which are permissible and which are not cannot take place without a brief discussion of what the right to privacy includes.

A. *The Constitutional Right to Privacy*

The Constitution affords "protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education."¹¹ In *Loving v. Virginia*,¹² the Court explained that the "freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness."¹³ Marriage is a basic civil right which is "fundamental to our very existence and survival."¹⁴ In *Meyer v. Nebraska*,¹⁵ the Court recognized that the Constitution

7. See *infra* note 19 and accompanying text.

8. See *infra* notes 57-58 and accompanying text.

9. See MD. CODE. ANN. ART. 27, § 3 (1957).

10. See OKLA. STAT. ANN. tit. 21, § 872 (West 1983) (punishment for up to five years) (As of July, 1998 the language specifying that imprisonment may be for up to five years has been removed; the crime is classified as a felony without a specification of the maximum prison term).

11. *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992) (plurality opinion) (citing *Carey v. Population Serv. Int'l*, 431 U.S. 678, 685 (1977)).

12. 388 U.S. 1 (1967).

13. *Id.* at 12.

14. *Id.*

15. 262 U.S. 390 (1923).

protects the right of the individual to "marry, establish a home, and bring up children."¹⁶ In *Santosky v. Kramer*,¹⁷ the Court discussed the "historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment."¹⁸

If the "freedom of personal choice in matters of family life" is broadly construed, then it might be argued that the freedom to have an adulterous affair is included within those fundamental liberty interests protected by the Fourteenth Amendment. Indeed, a variety of plaintiffs have argued that the right to privacy includes the right to commit adultery.¹⁹ However, no court has accepted that argument, at least not without being overturned.²⁰ Most courts addressing the matter have concluded that adultery is antithetical to marriage and family and thus cannot plausibly be included within the right to privacy.²¹

Part of the difficulty in deciding whether a particular practice or activity is protected by the right to privacy is that several different tests for making such determinations have been suggested or used by the courts. Thus, as an initial matter, a judge having to determine whether a particular interest is protected by the right to privacy will have to make a decision about which test to employ for making that determination.²²

A judge who believed that the number of fundamental interests should be increased might, all else equal, favor a relatively unrestrictive test, while a judge who believed that the number of fundamental interests should not be increased or, perhaps, should be decreased, might favor a relatively restrictive test. However, the test to determine which rights are fundamental should not simply be based on an individual judge's preferences with respect to whether the number of fundamental rights should be increased, decreased, or remain constant. Such an approach would, at best, be unprincipled. At the very least, the test to be employed should account for those fundamental interests which

16. *Id.* at 399.

17. 455 U.S. 745 (1982).

18. *Id.* at 753.

19. See, e.g., *Oliverson v. West Valley City*, 875 F. Supp. 1465 (D. Utah 1995); *Commonwealth v. Stowell*, 449 N.E.2d 357 (Mass. 1983).

20. See, e.g., *City of Sherman v. Henry*, 910 S.W.2d 542 (Tex. App. 1995) (right to commit adultery constitutionally protected), *rev'd* by 928 S.W.2d 464 (Tex. 1996).

21. See, e.g., *Oliverson*, 875 F. Supp. at 1477 ("The act [of adultery] has for centuries been viewed as totally antithetical to the family.").

22. See *infra* notes 24-54 and accompanying text.

the Supreme Court has already recognized as fundamental and those which the Court has said are not fundamental.²³

1. The Scalia Test

In his concurring and dissenting opinion in *Planned Parenthood v. Casey*,²⁴ Justice Scalia suggested that a particular practice or activity is not protected if: “(1) the Constitution says absolutely nothing about it, and (2) the longstanding traditions of American society have permitted it to be legally proscribed.”²⁵ While Justice Scalia’s approach can explain why particular activities were held not to implicate fundamental interests, his approach cannot account for why a number of activities have in fact been recognized as involving fundamental interests. For example, application of these criteria would suggest that no fundamental interests would be implicated if laws were passed prohibiting contraception, abortion, or interracial marriage, Supreme Court rulings to the contrary notwithstanding.²⁶

The right to use contraception is not mentioned in the Constitution anywhere.²⁷ Further, different states had criminalized the use of contraception before the Supreme Court held that it was protected by the Constitution.²⁸ Thus, contraception would not seem to be a fundamental right using Justice Scalia’s test. The right to have an abortion is nowhere mentioned in the Constitution, and when *Roe v. Wade*²⁹ was decided, antiabortion laws

23. The Court can make a mistake about whether a right is fundamental. However, to explain how to account for the Court’s rare mistakes would require a complex theory of interpretation. See, e.g., RONALD DWORKIN, *LAW’S EMPIRE* 379-99 (1986) (discussing Judge Hercules’s attempt to reconcile conflicting cases). In any event, a test for fundamental rights must account for most of the Court’s decisions.

24. 505 U.S. 833 (1992) (plurality opinion).

25. *Id.* at 980 (Scalia, J., concurring in part and dissenting in part).

26. In *Griswold v. Connecticut*, 381 U.S. 479 (1965) and *Eisenstadt v. Baird*, 405 U.S. 438 (1972), the Court recognized that contraception involves a fundamental interest. In *Loving v. Virginia*, 388 U.S. 1 (1967), the Court recognized that marriage, including interracial marriage, involved a fundamental interest. In *Roe v. Wade*, 410 U.S. 113 (1973), the Court recognized that abortion involves a fundamental interest. For the point that Justice Scalia’s approach does not account for these holdings, see Strasser, *supra* note 3, at 971-72.

27. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 100 (1973) (Marshall, J., dissenting) (suggesting that no explicit text in the Constitution guarantees the right to procreate).

28. See *Eisenstadt*, 405 U.S. at 447 (1972) (Massachusetts had a law criminalizing the distribution of contraceptives since 1879); *Poe v. Ullman*, 367 U.S. 497, 501 (1961) (Connecticut had a law criminalizing the use of contraceptives since 1879).

29. 410 U.S. 113 (1973).

had been in effect for about a century.³⁰ Justice Scalia's test would suggest that abortion does not involve a fundamental right.³¹ The right to marry is mentioned nowhere in the Constitution,³² and there was a long history of prohibiting interracial marriages.³³ Justice Scalia's test would seem to imply that interracial marriage bans are constitutionally permissible.³⁴ Thus, Justice Scalia's test is overly restrictive and cannot be an adequate test for determining fundamental rights.

2. The Traditions and Collective Conscience Test

An alternative approach to determining which rights are fundamental has been discussed and employed by the courts. Under this test, an interest is fundamental if it is "so rooted in the traditions and collective conscience of our people that failure to recognize it would violate the fundamental principles of liberty and justice that lie at the base of all our civil and political institutions."³⁵ Yet, this approach is open to the same kinds of criticisms as is Justice Scalia's test. Indeed, since something which is deeply rooted in the traditions and collective conscience of our people presumably would not be something that the long-standing traditions of American society would permit to be legally proscribed, it seems unlikely that many interests would be recognized as fundamental on the traditions and collective conscience approach that would not also be recognized using Justice Scalia's approach. Certainly, when the Supreme Court struck down laws preventing contraception, abortion, and interracial marriage, the number of states outlawing these practices and the length of time that they had been outlawed would have rendered

30. See *id.* at 116.

31. See *Planned Parenthood v. Casey*, 505 U.S. 833, 980 (1992) (Scalia, J., concurring and dissenting) (liberty to abort is not protected by the Constitution).

32. See *Roe*, 410 U.S. at 168 (Stewart, J., concurring).

33. See Emily Field Van Tassel, *Only the Law Would Rule Between Us: Antimiscegenation, the Economy of Dependency, and the Debate Over Rights After the Civil War*, 70 CHI.-KENT L. REV. 873, 899-900 (1995) ("Before the [Civil] War, all but four slave states had laws forbidding marriages between Whites and people of African descent.").

34. See *Casey*, 505 U.S. at 981.

35. *Baehr v. Lewin*, 852 P.2d 44, 57 (Haw. 1993) (plurality opinion), *reconsideration granted in part*, 875 P.2d 225 (Haw. 1993). In *Rochin v. California*, 342 U.S. 165, 169 (1952) the Court sought to determine whether a particular liberty interest was "so rooted in the traditions and conscience of our people as to be ranked as fundamental" (citing *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)), or whether that interest was "implicit in the concept of ordered liberty" (citing *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

it difficult to argue that these practices were deeply rooted in the traditions and collective conscience of the people.

In *Rochin v. California*,³⁶ the Court sought to determine whether a particular liberty interest was “so rooted in the traditions and conscience of our people as to be ranked as fundamental” or whether that interest was “implicit in the concept of ordered liberty.”³⁷ The Supreme Court, in *Rochin*, viewed the traditions and collective conscience test³⁸ as a kind of compromise between two unacceptable approaches: (a) an approach in which judges would draw on their “merely personal and private notions and disregard the limits that bind judges in their judicial function,”³⁹ and (b) an approach in which judges would think of the “concept of due process of law . . . [as] final and fixed.”⁴⁰ The *Rochin* Court warned against trying to “freez[e] ‘due process of law’ at some fixed stage of time or thought,” since doing so would “suggest that the most important aspect of constitutional adjudication is a function for inanimate machines and not for judges.”⁴¹ However, if one ignores that warning and interprets the traditions and collective conscience test such that it cannot be met unless the Framers would have recognized the interest at issue as protected, the test freezes the concept of due process of law and does exactly what the *Rochin* Court warned must not be done.⁴² Judges will merely be performing as “inanimate machines” designed to detect whether the interest at issue was recognized as protected by the Framers, and the Constitution will be unable to evolve to keep up with changing technologies, conditions, and standards.

In *City of Sherman v. Henry*,⁴³ the Supreme Court of Texas addressed whether the right to privacy protected the right to have adulterous relations. The court suggested that the right to have adulterous relations is neither implicit in the concept of ordered liberty nor deeply rooted in this nation’s history and tradi-

36. 342 U.S.165 (1952).

37. *Id.* at 170.

38. In *Griswold v. Connecticut*, 381 U.S. 479 (1965), the test started to include “collective” before “conscience.” *Id.* at 493 (Goldberg, J., concurring) and *id.* at 519 (Black, J., dissenting).

39. *Rochin*, 342 U.S. at 170.

40. *Id.*

41. *Id.* at 171.

42. *Cf. Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1068 (1992) (Stevens, J., dissenting) (criticizing the majority opinion because the “Court’s holding today effectively freezes the State’s common law”).

43. 928 S.W.2d 464 (Tex. 1996).

tion.⁴⁴ While that claim is true, it is not helpful. Some of the activities and practices protected by the right to privacy also would fail that test.⁴⁵ Thus, an appropriate response to the court's claim that adultery was not rooted in this nation's history and tradition might have been that interracial marriage also was not so rooted and was, nevertheless, recognized by the Supreme Court in *Loving v. Virginia*⁴⁶ as a fundamental interest protected by the right of privacy.

3. Promotion of Marriage and Family

The fact that interracial marriage was not rooted in this country's traditions would not establish that the *City of Sherman* court erred in its judgment that adultery was not protected by the right to privacy if an alternative rationale could be offered to justify the holding. For example, the Supreme Court of Texas pointed out that "adultery often injures third persons, such as spouses and children."⁴⁷ Indeed, the court suggested that adulterous conduct "is the very antithesis of marriage and family, . . . [since adultery], by its very nature, undermines the marital relationship and often rips apart families."⁴⁸

In *Bowers v. Hardwick*,⁴⁹ the Supreme Court suggested that the right to privacy protected only those interests which had

44. See *id.* at 470 ("Moreover, sexual relations with the spouse of another is not a right that is 'implicit in the concept of ordered liberty' or 'deeply rooted in this Nation's history and tradition'."). See also *Oliverson v. West Valley City*, 875 F. Supp. 1465, 1482 (D. Utah 1995) ("The practice of adultery has never been seen as implicit in the concept of ordered liberty. The same is true of any claim that the 'right' is deeply rooted in this nation's history or tradition."); *Commonwealth v. Stowell*, 449 N.E.2d 359, 360 (Mass. 1983) ("Whatever the precise definition of the right of privacy and the scope of its protection of private sexual conduct, there is no fundamental personal privacy right implicit in the concept of ordered liberty barring the prosecution of consenting adults committing adultery in private.").

45. See *supra* text accompanying notes 26-34.

46. 388 U.S. 1 (1967).

47. *City of Sherman*, 928 S.W.2d at 470.

48. *Id.* See also *Oliverson*, 875 F.Supp. at 1477 ("The act [of adultery] has for centuries been viewed as totally antithetical to the family."); *Stowell*, 449 N.E.2d at 360 ("[T]he act of adultery frequently has a destructive impact on the marital relationship and is a factor in many divorces."); *Chlystek v. Kane*, 412 F. Supp. 20, 23 n.7 (W.D.Pa. 1976) ("the Pennsylvania legislation [punishing adultery] assailed in the case at bar does not conflict with such a right [i.e., to marry], but indeed affords it additional protection. The statute is simply a means for protecting the sanctity of marriage, and of deterring disregard for the fundamental obligations of that 'basic' civil status.").

49. 478 U.S. 186 (1986).

some connection to "family, marriage, or procreation."⁵⁰ The Texas court offered that rationale to establish that adultery was not protected.⁵¹ Yet, if the relevant standard is whether the activity promotes marriage and family, adultery and same-sex marriage differ in an important respect. Extending legal recognition and protection to same-sex unions would promote marriage and family, whereas extending legal protection to adulterous unions would tend to have the opposite effect.⁵²

Same-sex marriages, unlike adulterous relationships, are not a threat to opposite-sex marriages. It is reasonable to believe that adulterous relations would tend to undermine feelings of marital love and trust. Thus, it would not be at all surprising for a couple to divorce as a result of one of the member's having had adulterous relations. However, there is no reason to believe that permitting same-sex marriages would undermine feelings of marital love and trust in same-sex relationships. Further, allowing such marriages would be unlikely to undermine other relationships and it would be most surprising, for example, for opposite-sex couples to seek divorces because same-sex couples had been allowed to marry.⁵³

Even if the opposite-sex divorce rate would not go up or marriage rate go down were same-sex marriages recognized, some individuals might feel that their own marriages would somehow be devalued by such marriages and that this should provide sufficient justification for the state to refuse to recognize such unions. But the same argument could have been made about recognizing interracial or interreligious marriages. For example, some might argue that marriage between members of the same race or religion would somehow be devalued if marriages between members of different races or religions were recognized. This allegedly would provide sufficient justification for the state to refuse to accord legal recognition to the latter marriages.⁵⁴

50. *Id.* at 191.

51. *See supra* text accompanying notes 47-48.

52. *See Stowell*, 449 N.E.2d at 360 ("Given this broad concern with the institution of marriage, the State has a legitimate interest in prohibiting conduct which may threaten that institution.").

53. *Cf. Evans v. Romer*, 882 P.2d 1335, 1347 (Colo. 1994) (en banc) (rejecting that protecting on the basis of orientation will somehow undermine marriages and heterosexual families).

54. For a discussion of some of the parallels between same-sex and interracial unions, see generally Mark Strasser, *Family, Definitions, and the Constitution: On the Antimiscegenation Analogy*, 25 SUFFOLK U. L. REV. 981 (1991).

However, presumably, no one would seriously maintain that such a justification would have sufficed to establish the constitutional permissibility of a state's refusing to recognize such marriages. By the same token, those who would argue that same-sex marriages should not be permitted because such unions are immoral seem to ignore that the same claims might have been and sometimes were made about interracial or interreligious marriages.

There is no merit to the claim that constitutional protection of same-sex marriages entails the constitutional protection of adulterous relationships. Same-sex marriages implicate the right to privacy because of their connection to and promotion of marriage and family, whereas adulterous relations arguably do not implicate that right because they undermine marriage and family.

B. *Punishments for Adulterous Behavior*

A more difficult question is posed if the adulterer's punishment itself implicates the right to privacy. Consider a state which punishes those who have committed adultery by limiting their rights to remarry.⁵⁵ Even if punishing adulterers by imposing a prison term or fine would not implicate the right to privacy, punishing adulterers by limiting their right to remarry might indeed implicate that right. The issue, then, is whether these marriage limitations can pass constitutional muster, and if so, which limitations and why.

When discussing the punishments which may be imposed for adulterous behavior, it will be helpful to distinguish between criminal and civil sanctions. Currently, the majority of states that still criminalize adultery make that crime a misdemeanor,⁵⁶

55. See, e.g., MISS. CODE ANN. § 93-5-25 (1994):

[T]he judgment may provide, in the discretion of the court, that a party against who a divorce is granted, because of adultery, shall not be at liberty to marry again; in which case such party shall remain in law as a married person. Provided, however, that after one (1) year, the court may remove the disability and permit the person to marry again, on petition and satisfactory evidence of reformation, or for good cause shown, on the part of the party so barred from remarriage.

56. See ALA. CODE § 13A-13-2(c) (1975) (class B misdemeanor); ARIZ. REV. STAT. ANN. § 13-1408 (West 1989) (class 3 misdemeanor); D.C. CODE ANN. § 22-301 (1997) (fine not exceeding \$500, imprisonment not exceeding 180 days or both); FLA. STAT. ANN. § 798.01 (misdemeanor of second degree); GA. CODE ANN. § 16-6-19 (1996) (misdemeanor); 720 ILL. COMP. STAT. ANN. § 5/11-7(b) (West 1993) (class A misdemeanor); KAN. STAT. ANN. § 21-3507(2) (1995) (class C misdemeanor); MD. ANN. CODE art 27, § 3 (1957) (\$10 fine); MISS. CODE ANN. § 97-29-1 (1994) (fine shall not exceed \$500 and imprisonment not to exceed six months); N.C. GEN. STAT. § 14-184 (1993) (misdemeanor); UTAH CODE ANN. § 76-7-103(2) (1995) (class B

although some states make the commission of adultery a felony.⁵⁷

Historically, states would also impose civil penalties on adulterers. For example, a state might limit the marriage rights of individuals who had committed adultery by preventing them from ever remarrying,⁵⁸ from ever marrying their paramours,⁵⁹ from marrying their paramours while the wronged spouse was still alive,⁶⁰ or from marrying anyone for a specified period after divorce.⁶¹

Numerous rationales were offered for such policies. States reasoned that if individuals were precluded from remarrying as soon as their divorces were final and instead had to wait an additional period of time, they might be dissuaded from seeking a divorce or, perhaps, even from committing adultery in the first place.⁶² Even if the individual was not in fact dissuaded from committing adultery, and even if the individual obtained a divorce, states reasoned that it would add insult to injury to allow the adulterer to marry his or her paramour. Some states would bar an adulterer from marrying his or her paramour during the life of the innocent spouse in order to spare that former spouse the extra hurt feelings which would otherwise result from that remarriage.⁶³

misdemeanor); VA. CODE ANN. § 18.2-365 (Michie 1996) (class 4 misdemeanor); W.VA. CODE § 61-8-3 (1997) (misdemeanor).

57. See, e.g., IDAHO CODE § 18-6601 (1997) (fine of up to \$1000, imprisonment for up to three years); MASS. GEN. LAWS ANN. ch. 272, § 14 (Law Co-op. 1992) (fine of up to \$500 or imprisonment for up to three years); MICH. COMP. LAWS ANN. § 750.30 (West 1991) (felony); OKLA. STAT. ANN. tit. 21, § 872 (West 1983) (Amends July 1998) (fine not exceeding \$500, punishment for up to five years); WISC. STAT. ANN. § 944.16 (West 1996) (class E felony).

58. See *Cropsey v. Ogden*, 11 N.Y. 228, 230 (1854).

59. See *Bennett v. Anderson*, 101 S.W.2d 148, 148 (Tenn. App. 1936) ("Mrs. Lula Bennett obtained a divorce from Bennett on August 25, 1924, one of the grounds for the divorce being that he had committed adultery with Vina Anderson. The divorce judgment perpetually enjoined Bennett from marrying said Vina Anderson.").

60. See *Chlystek v. Califano*, 599 F.2d 1270, 1271 (3d Cir. 1979) (discussing statute preventing adulterer from marrying accomplice during life of ex-spouse).

61. *People v. Prouty*, 104 N.E. 387, 388 (Ill. 1914) (extra year wait for adulterers).

62. See *Simpson v. Simpson*, 175 S.E. 320, 326 (Va. 1934) ("The object which [the General Assembly] manifestly had in view was to remove the temptation to a married man or woman to procure a divorce so that he or she may marry another while his or her spouse is living."). See also *Roddis v. Roddis*, 118 N.W.2d 109, 112 (Wis. 1962) (legislature views rapid acquisition of successive spouses with disfavor).

63. See *In re Estate of Lenherr*, 314 A.2d 255, 258 (Pa. 1974) ("The provision is intended to protect the sensibilities of the injured spouse.").

Some states implied that adulterers were not fit to remarry at all, and thus the prohibition was designed to protect the institution of marriage.⁶⁴ Other states would enact temporary restrictions on remarriage as a prophylactic measure to prevent the difficulties which might result were an individual to marry his or her paramour while the "former" spouse appealed the divorce decree.⁶⁵

1. Practical Problems with Limitations of Remarriage

Adultery statutes' limitations on remarriage caused a variety of difficulties for the individuals involved, including uncertainty of marital status and property rights as well as the potential for harm to innocent third parties. These same difficulties may arise if states refuse to recognize same-sex marriages that are valid in the states of celebration and domicile at the time of the marriage.

Suppose that an individual seeking a divorce had committed adultery. Suppose, further, that the divorce decree was granted. The granting of the decree might be reversed on appeal because the individual seeking the divorce had been guilty of adultery.⁶⁶ In that event, the adulterer who had married his paramour in the meantime might be found guilty of bigamy.

Perhaps this result would not seem problematic for the vast majority of adulterers. As long as the innocent party also wanted a divorce, then the adulterous party might be confident that the granting of the decree would not be appealed. Yet, it should not be thought that the potential charge of bigamy would be avoided as long as the innocent spouse refused to appeal the divorce. On the contrary, the innocent spouse might bring a divorce action, obtain the decree, and the divorced adulterer who had been barred from remarrying might nonetheless be charged with bigamy if he or she violated that prohibition.⁶⁷ To make matters

64. See *Hochman v. Hochman*, 68 N.Y.S.2d 886, 891-92 (Sup. Ct. 1947) (discussing the view that the adulterer is not fit to marry).

65. See *State ex rel. Vance v. State*, 97 So. 230, 230-31 (Ala. App. 1923) (discussing case in which divorced party married too early and then was charged with bigamy).

66. See *Roddis*, 118 N.W.2d at 112 ("a judgment of divorce shall not be granted if it appears to the satisfaction of the court that the complaining party has been guilty of adultery not condoned").

67. See *D'Arcangelo v. D'Arcangelo*, 91 N.Y.S.2d 101, 103 (Sup. Ct. 1949) (had defendant married in the state without permission, she would have been guilty of bigamy). See also *Rhodes v. Miller*, 179 So. 430, 431-32 (La. 1938) (adulterer who marries accomplice in adultery may be prosecuted for bigamy); *Kennedy v. Orem*, 15 Pa. Dist. 329, 331 (1905) ("the former marriage of the defendant was not dis-

even more complicated, the divorced innocent spouse would be able to remarry without being at risk of a charge of bigamy.⁶⁸

Laws that barred the adulterer from remarrying were presumably intended, at least in part, to punish the adulterer. Yet, one aspect of these adultery punishments which is not given sufficient attention is that these laws would sometimes impose hardships on innocent parties, such as the innocent second spouses. For example, suppose that an individual barred from remarrying during the life of his former spouse ignored the law and remarried anyway while his first spouse was still alive. Suppose, further, that he tired of the second marriage. He might simply claim that the marriage to his second wife was *void ab initio* and thus that they had never been legally married. Further, the marriage might be held void and to no legal effect even if the second wife had never even known that he had been forbidden by a court from remarrying during the life of his first former spouse.⁶⁹

Great confusion could result from such a system, not only for the potentially innocent spouse, but for any children that might have been produced during the latter marriage. Inheritance and property rights would be in doubt, as would the right to bring certain actions in tort. To make matters more complicated, the prohibition on the right to remarry was viewed as penal⁷⁰ and hence did not have to be enforced by other states.⁷¹

solved so as to permit her to marry the plaintiff, but as to her marriage with him it obtained just as though a divorce had not been decreed, while as to everybody else it was dissolved and at an end.”); *Commonwealth v. Hunt*, 58 Mass. 49, 51 (1849) (“the guilty party should be debarred from contracting marriage during the lifetime of the innocent party, and . . . if the guilty party should contract such marriage, the same should be void, and such party should be adjudged guilty of polygamy.”).

68. See *D’Arcangelo*, 91 N.Y.S.2d at 102 (“That judgment decreed that, ‘It shall be lawful for the said plaintiff to marry again in the same manner as though the defendant were actually dead, and it shall not be lawful for the said defendant to marry again until the said plaintiff is actually dead.’”); *White v. White*, 105 Mass. 325, 326 (1870) (“in cases of divorce from the bond of matrimony the innocent party may marry again, as if the other party were dead”).

69. See *Rhodes*, 179 So. at 434; *Hamm v. Hamm*, 204 S.W.2d 113, 123 (Tenn. Ct. App. 1947); *Beaudoin v. Beaudoin*, 62 N.Y.S.2d 920, 922 (App. Div. 1946); *Kalmbacher v. Kalmbacher*, 63 Pa. D. & C. 195, 205 (1945).

70. See *Huntington v. Attrill*, 146 U.S. 657, 673 (1892).

And personal disabilities imposed by the law of a state, as an incident or consequence of a judicial sentence or decree, by way of punishment of an offender, and not for the benefit of any other person — such as . . . disqualification of the guilty party to a cause of divorce for adultery to marry again — are doubtless strictly penal, and therefore have no extraterritorial operation.

Id.

Thus, if New York precluded an individual from remarrying during the lifetime of his former spouse without court permission, this would imply that he could not remarry in New York but would say nothing about whether he could remarry in New Jersey.⁷²

When one considers the practical effects of some of these marriage limitations, one sees the great problems that might result, for example, the harms to innocent spouses and children or the difficulties attendant on an uncertain marital status.⁷³ When one further considers the ease and frequency of travel, and that some states might recognize a marriage while others would not, even greater potential harm and confusion would seem possible.⁷⁴ Thus, there are a variety of reasons that states might choose not to impose these disabilities on adulterers; in fact, most states have done away with such laws.⁷⁵

Regrettably, it is likely that the practical lessons which should have been learned from imposing marital limitations on adulterers have not been learned, given some states' reactions to the possibility that Hawaii will recognize same-sex marriages. Some states' laws forbid same-sex marriage for their own domiciliaries and in addition refuse to recognize same-sex marriages even if the parties' domicile recognized the marriage at the time

71. See *Beaudoin* 62 N.Y.S.2d at 922 ("the prohibitory clause against remarriage in a divorce decree is regarded as penal in character, and ineffective beyond the boundaries of the state. If the guilty party remarries in a foreign jurisdiction despite such decree, and the marriage is valid there, it will be accepted here . . .").

72. Indeed, even if he married in a state which itself might impose such a restriction on adulterers, New York might still recognize the marriage of a New York adulterer subject to an in-state marriage prohibition who had gone to the second state to marry. See *In re Donlay's Estate*, 111 N.Y.S.2d 253, 254 (App. Div. 1952) (court refuses to apply New York or Pennsylvania prohibition to New Yorker who divorced in New York and married in Pennsylvania).

73. See *Eaton v. Eaton*, 92 N.W. 995, 997 (Neb. 1902) ("It is . . . of the highest importance . . . that the civil and social condition of every person be at all times fixed and certain.").

74. See *In re Estate of Lenherr*, 314 A.2d 255, 258 (Pa. 1974) ("In an age of widespread travel and ease of mobility, it would create inordinate confusion and defy the reasonable expectations of citizens whose marriage is valid in one state to hold that marriage invalid elsewhere.").

75. *But see* MISS. CODE ANN. § 93-5-25 (1994):

The judgment may provide, in the discretion of the court, that a party against who a divorce is granted, because of adultery, shall not be at liberty to marry again; in which case such party shall remain in law as a married person. Provided, however, that after one (1) year, the court may remove the disability and permit the person to marry again, on petition and satisfactory evidence of reformation, or for good cause shown

of celebration.⁷⁶ Individuals who had been legally married and had lived together for years as a married couple might suddenly have their marriage treated as if it had never existed merely because they had moved from one state to another.

Suppose, for example, that Hawaii comes to recognize same-sex marriages and that Kim and Robin, who are domiciled there, decide to marry. Further suppose that Kim and Robin adopt a child. Should that family wish to move to Atlanta several years later, the state of Georgia would refuse to recognize their family,⁷⁷ although it is not at all clear that the state would have the power not to recognize a marriage which was valid in the states of celebration and domicile at the time of the marriage.⁷⁸

2. Constitutional Considerations

Most states no longer impose limitations on an individual's right to remarry, presumably in part, because of the confusion and potential unfairness to innocent parties which might result. However, a separate question is whether such limitations would pass constitutional muster. The Supreme Court has made clear both that there is a fundamental right to marry and that states are permitted to impose reasonable limitations on marriage.⁷⁹ Whenever any marital regulation is challenged, the Court must decide whether the state has merely imposed a reasonable limitation or, instead, an undue burden on the right to marry.

Historically, statutes would vary widely with respect to how much of a disability would be imposed upon someone who had gotten a divorce. Sometimes it would merely involve several months⁸⁰ or a year.⁸¹ Sometimes, when an individual was

76. For a discussion of the significance of the states of domicile and recognizing a marriage at the time of its celebration, see generally Mark Strasser, *Judicial Good Faith and the Baehr Essentials: On Giving Credit Where It's Due*, 28 RUTGERS L.J. 313 (1997).

77. See GA. CODE ANN. § 19-3-3.1(b) (1997 Supp.) ("Any marriage entered into by persons of the same sex pursuant to a marriage license issued by another state or foreign jurisdiction or otherwise shall be void in this state.").

78. See generally Mark Strasser, *For Whom Bell Tolls: On Subsequent Domiciles' Refusing to Recognize Same-Sex Marriages*, U. CIN. L. REV. (forthcoming 1998).

79. See *Zablocki v. Redhail*, 434 U.S. 374, 379 (1978).

80. See *In re Ott's Estate (Ott v. Chrisman)*, 238 P.2d 269, 270 (Or. 1951) (six months); *Wilson v. State*, 184 P. 603, 604 (Okla. Crim. App. 1919) (six months).

81. See *Hall v. Industrial Comm'n*, 162 N.W. 312, 313 (Wis. 1917) (one year).

thought to be at fault, it would involve a few years⁸² or even several years.⁸³ More severe penalties might preclude marriage during the life of the ex-spouse, either to the paramour specifically⁸⁴ or, perhaps, to anyone at all.⁸⁵

In *Zablocki v. Redhail*,⁸⁶ the United States Supreme Court examined a statute which provided that individuals having support obligations of minor children not in their custody would not be permitted to marry unless they could meet two requirements. They had to demonstrate that they were meeting their support obligations and, further, that their children were not and were not thereafter likely to become public charges.⁸⁷ When evaluating the constitutionality of the statute, the Court accepted that the state had legitimate and substantial interests which were promoted by the statute,⁸⁸ but nonetheless held that the statute could not be sustained.⁸⁹ The Court pointed out that some individuals would be "absolutely prevented from getting married" because of the statute,⁹⁰ whereas others, although "able in theory to satisfy the statute's requirements, [would] be sufficiently burdened by having to do so that they [would] in effect be coerced into foregoing their right to marry."⁹¹ The Court suggested that even the rights of those who could meet the requirements at issue might nonetheless be violated by the statute because the statute allowed serious intrusion into an area involving a fundamental freedom.⁹²

The *Zablocki* Court made clear that the right to privacy does not preclude all marital restrictions since reasonable regulations that do not significantly interfere with decisions to marry

82. See *Atwood v. Atwood*, 8 N.E.2d 916, 917 (Mass. 1937) (two years); *Ex parte Crane*, 136 N.W. 587, 587 (Mich. 1912) (two years).

83. See *Underwood v. Underwood*, 98 S.E. 207, 207 (W. Va. 1919) (up to five years).

84. See *Jennings v. Jennings*, 54 S.W.2d 961, 962 (Tenn. 1932); *Beegle's Estate*, 64 Pa. Super. 180, 189 (1916); *Owen v. Bracket*, 75 Tenn. 448, 448 (1881); *Kennedy v. Orem*, 15 Pa. Dist. 329, 331 (1905); *Newman v. Kimbrough*, 59 S.W. 1061, 1062-63 (Tenn. App. 1900).

85. See *People v. Faber*, 92 N.Y. 146, 147 (1883); *Commonwealth v. Richardson*, 126 Mass. 34, 35 (1878); *Commonwealth v. Hunt*, 58 Mass. 49, 51 (1849); *In re Singer's Estate*, 138 N.Y.S.2d 740, 742 (Surr. Ct. 1955).

86. 434 U.S. 374 (1978).

87. See *id.* at 375.

88. See *id.* at 388.

89. See *id.*

90. See *id.* at 387.

91. *Id.*

92. See *id.*

may legitimately be imposed.⁹³ However, when a classification significantly interferes with the exercise of a fundamental right, like the right to marry, that classification cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests.⁹⁴

When a court must decide whether a particular restriction is reasonable, or a significant intrusion, the court will examine the severity of the restriction in light of the implicated state and individual interests. Perhaps imposing additional waiting time on the adulterer would be viewed as a reasonable restriction on marriage⁹⁵ designed to deter speedy remarriages.⁹⁶ However, requiring the individual to wait until his or her former spouse had died would presumably be viewed as too great a restriction, since that might preclude individuals from ever remarrying.⁹⁷

Often, when statutes barred individuals from remarrying, there would be a judicial bypass provision so that the person would be permitted to marry if a court was willing to approve the marriage. However, the judicial bypass provision might raise additional constitutional worries if the judge was given either unlimited discretion or no discretion at all.

When deciding whether the adulterer should be allowed to remarry, the court was assigned the task of determining whether the adulterer had reformed.⁹⁸ To make that determination, the court might need to know whether the individual had engaged in uniformly good conduct since the divorce,⁹⁹ which itself would

93. *See id.* at 386.

94. *See id.* at 388.

95. *See Hall v. Industrial Comm'n*, 162 N.W. 312, 314 (Wis. 1917) ("Reasonable restrictions against speedy remarriage of divorced parties are becoming more common in the statutes of our states . . .").

96. *See Henderson v. Henderson*, 87 A.2d 403, 405 (Md. 1952) ("Restrictions against speedy marriage of divorced persons have been included in the statutes of many of the States."); *Heflinger v. Heflinger*, 118 S.E. 316, 322 (Va. 1923).

Lawful marriage is an honorable estate, not to be entered into "unadvisedly or lightly," but discreetly [and] advisedly . . . and the object of the statute was to remove a temptation which is too frequently the moving cause for the divorce, and to force upon the parties a deliberate consideration of the gravity of their conduct in seeking the dissolution of the contract they have so solemnly entered into.

Id.

97. *Cf. supra* notes 84-85 and accompanying text.

98. *See In re Cochrane*, 92 Mass. 276, 276 (1865) ("since the granting of the divorce she had lived with her father; and that she had maintained a good character during said period of upwards of three years; . . . and, in the opinion of the witness, a fit person to marry.").

99. *See Kiellman v. Kiellman*, 216 N.Y.S.2d 197, 198 (Sup. Ct., 1961).

need definition.¹⁰⁰ For example, a court might have to decide whether an individual had been "good" if she, having been prohibited from marrying in one state, went to another to marry. On one view, that individual would have flouted the law.¹⁰¹ On the other, perhaps the individual's having refused to have sexual relations outside of the bounds of wedlock would be viewed as evidence of good behavior,¹⁰² even if the marriage could not have been celebrated in the jurisdiction which had granted the divorce. In any event, the uniformly-good-conduct rule gave the judge great discretion,¹⁰³ which meant that an individual might have been precluded from remarrying for an extended period, if not for life.¹⁰⁴

In *Zablocki*, the respondent had sought permission to marry his pregnant fiancée.¹⁰⁵ Had there been a uniformly-good-conduct requirement, it would not have been surprising for the court to have refused to issue a license, since the respondent and his fiancée had had sexual relations outside of marriage.¹⁰⁶

Suppose that an adulterer had been barred from remarrying unless a judge approved the remarriage. The fact that a judge might permit the adulterer to remarry would be viewed as mitigating what might otherwise be viewed as a significant burden on

100. *See id.* at 198-99 ("The legislature surely could not have meant that permission to remarry must be denied to all but to those of good moral character but rather to those who show that their activities are such as to break down the institution of marriage.").

101. *See id.* at 198.

102. *See id.* at 199 ("The defendant (since her adulterous behaviour during her first marriage) may indeed have had scruples about having relationships with men except with those to whom she be tied by bonds of matrimony even if the marriage ceremonies be without leave of this court.").

103. *See In re Cochrane*, 92 Mass. at 277 ("a broad field for discretion is open to the presiding judge upon all the surrounding circumstances and facts bearing upon the particular case.").

104. For example, in *In re Cochrane*, a lower court judge had suggested that "as a general rule, a party who has violated the obligation of the marriage covenant by committing the crime of adultery is not entitled to the confidence of the court, nor to a decree that certifies such confidence, and may enable the party to practice deceit on another party." *Id.* at 276. It was only because the adulteress had been "good" and because the judge had said that he would not give her permission to remarry even if she had in fact been good that he was overruled by the Supreme Judicial Court of Massachusetts. *See id.* at 277. Had the judge merely said that the evidence and credibility of the witnesses did not clearly establish that she should have been permitted to remarry, the lower court would not have been overruled. *Id.*

105. *See Zablocki v. Redhail*, 434 U.S. 374, 379 (1978).

106. There is reason to believe that the Supreme Court would have struck down that requirement, since it would have guaranteed the birth of another child out of wedlock. *See id.* at 390.

a fundamental right.¹⁰⁷ However, even with that mitigating factor, a remarriage bar might nonetheless be viewed as too significant an intrusion on the right to marry and thus be viewed as impermissible.¹⁰⁸ The statute at issue in *Zablocki* included a provision whereby individuals could marry if they had permission from a court,¹⁰⁹ and that statute was nonetheless struck down as unconstitutional.

It is not clear whether the imposition of any special restrictions on an adulterer's right to remarry would now be considered constitutionally infirm — the relevant question would be whether this was a reasonable restriction, rather than a significant burden, on the right to marry.¹¹⁰ However, when states discuss the right of same-sex couples to marry, they contemplate imposing an absolute ban. Thus, statutes punishing adulterers and statutes banning same-sex marriage are distinguishable in a few significant respects. First, as discussed above, because adulterous relations do not promote marriage and family but same-sex marriages do, the former do not implicate the right to privacy whereas the latter do. Second, insofar as restrictions on adulterous relations are viewed as reasonable restrictions rather than significant burdens on the right to marry, they pass constitutional muster. However, because same-sex marriage bans completely preclude some individuals from marrying, they significantly burden the right to marry and thus require strong justification if they are to be held constitutionally permissible. Thus, even if an absolute ban on same-sex marriage is unconstitutional, this would not imply that a reasonable restriction on adultery would also be unconstitutional.

III. SODOMY

Commentators suggest that same-sex marriage bans are constitutional because laws prohibiting sodomy are constitutional.¹¹¹

107. See *G.G. v. R.S.G.*, 668 So.2d 828, 831 (Ala. Civ. App. 1995) (“Additionally, Ala. Code, § 30-2-8 (1975)), is distinguishable in that it allows a divorced party, who has been judicially prohibited from remarrying to petition the trial court and submit proof for leave to be allowed to marry again in the future.”).

108. See *G.G.*, 668 So.2d at 832 (striking remarriage prohibition).

109. See *Zablocki*, 434 U.S. at 375.

110. This is true notwithstanding the suggested punishment for adultery in the Bible. See *Oliverson v. West Valley City*, 875 F. Supp. 1465, 1473 (D. Utah 1995) (pointing out that the Bible suggests that adulterers be put to death). Utah classifies adultery as a misdemeanor. *Id.* at 1476.

111. See sources cited *supra* note 2.

Because the state has a legitimate interest in regulating sodomy and because same-sex couples would presumably be having sodomitical relations, the state allegedly has a legitimate interest in preventing their marrying. Indeed, it might seem absurd to allow same-sex couples to marry, since they might be breaking the law every time that they had sexual relations.

The argument that the existence of sodomy laws establishes the constitutionality of same-sex marriage bans may have been more persuasive when more states criminalized sodomy and when it was believed that sodomy within the marital context was not protected by the Constitution.¹¹² However, the majority of states do not currently criminalize sodomy¹¹³ and, further, some sodomy statutes have been struck down on due process grounds.¹¹⁴ Ironically, those who link sodomy statutes and same-sex marriage bans risk having that argument turned on its head — in those states in which the sodomy bans have been held unconstitutional on due process grounds, the states' constitutional due process guarantees might require that the right to same-sex marriage be recognized.

There is good reason to believe that, in the minority of states that have sodomy laws, sodomitical relations within the marital context are constitutionally protected.¹¹⁵ Because the Constitution protects the right to marital privacy,¹¹⁶ the states being con-

112. See *State v. Schmit*, 139 N.W.2d 800, 809 (Minn. 1966) (“[I]t is conceivable that a husband and wife could be convicted of sodomy even though the proof established consent.”); *State v. Nelson*, 271 N.W. 114, 118 (Minn. 1937) (“Thus husband and wife, if violating this [sodomy] statute, could undoubtedly be punished, whereas the normal sexual act would not only be legal but perhaps entirely proper.”), *overruled by Minnesota ex rel. Radke v. Tahash*, 166 N.W. 2d 710 (Minn. 1969).

113. See MARK STRASSER, *LEGALLY WED SAME-SEX MARRIAGE AND THE CONSTITUTION* 42 (1997) (the majority of states do not have sodomy statutes).

114. See, e.g., *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1993); *People v. Onofre*, 415 N.E.2d 936 (N.Y. 1980).

115. See *Bowers v. Hardwick*, 478 U.S. 186, 218 (1986) (Stevens, J., dissenting) (“our prior cases thus establish that a State may not prohibit sodomy within ‘the sacred precincts of marital bedrooms’”); *Cotner v. Henry*, 394 F.2d 873, 875 (7th Cir. 1968) (“Indiana courts could not interpret the statute constitutionally as making private consensual physical relations between married persons a crime absent a clear showing that the state had an interest in preventing such relations, which outweighed the constitutional right to marital privacy.”); *Lovisi v. Slayton*, 539 F.2d 349, 351 (4th Cir. 1976) (“We may thus assume that the marital intimacies shared by the Lovisis when alone and in their own bedroom are within their protected right of privacy.”); *State v. Pilcher*, 242 N.W.2d 348 (Iowa 1976) (sodomy statute unconstitutional as applied to consenting married couples); *State v. Lair*, 301 A.2d 748, 753 (N.J. 1973) (sodomy statute has marital exception).

116. See *Griswold v. Connecticut*, 381 U.S. 479 (1965).

stitutionally permitted to criminalize consensual sodomy between unmarrieds would not entitle them to criminalize consensual sodomy between marrieds.¹¹⁷ Thus, even in those states in which sodomy is criminalized, the recognition of same-sex marriage would not somehow invalidate an existing law but would only fall into an already existing exception.

That there is a marital exception for consensual sodomy is noncontroversial. Ironically, the controversial aspect of the marital exception to sodomy statutes has been whether forcible marital sodomy falls outside of this protected marital sphere. For example, it was only a little over ten years ago that an Alabama appellate court held that forcible marital sodomy was not protected¹¹⁸ by the "marital exemption."¹¹⁹ Surprisingly, in 1984 the Supreme Court of Kansas held that a married individual could not be convicted of aggravated sodomy.¹²⁰ The Kansas Supreme Court did not see any constitutional difficulties in the state's criminalizing sexual acts between persons of the same sex but not criminalizing those same acts when engaged in by persons of the opposite sex,¹²¹ or in the state's criminalizing an individual's forcibly sodomizing a nonspouse but not in criminalizing an individual's forcibly sodomizing a spouse.¹²²

In *Gryczan v. State*,¹²³ the Montana Supreme Court struck down that state's sodomy law, reasoning that "it is hard to imagine any activity that adults would consider more fundamental, more private and, thus, more deserving of protection from governmental interference than noncommercial, consensual adult sexual activity."¹²⁴ The state had criminalized same-sex sodomy

117. See *State v. Santos*, 413 A.2d 58 (R.I. 1980).

118. See *Williams v. State*, 494 So.2d 819, 828 (Ala. Crim. App. 1986) ("The right to marital privacy is not applicable when force is used to commit a sodomy.").

119. *Id.* at 829; see also *Towler v. Peyton*, 303 F.Supp. 581, 582-83 (W.D. Va. 1969) ("Because the petitioner was tried and convicted of forcing this act of sodomy on his wife, the court finds the Virginia Sodomy Statute not to be unconstitutional as applied to the facts of this case.").

120. See *State v. Dubish*, 675 P.2d 877, 886 (Kan. 1984) ("Since we have determined that the defendant and the victim were married, his conviction for aggravated sodomy was erroneous.").

121. See *id.* at 882.

122. See *id.* at 886. But see *Williams*, 494 So. 2d at 830 ("None of the rationales for the 'marital exemption' that we have discussed provide a rational basis for distinguishing between married and unmarried persons in the forcible sodomy statute.").

123. 942 P.2d 112 (Mont. 1997).

124. *Id.* at 123.

but not opposite-sex sodomy.¹²⁵ The court held that the law violated state due process guarantees.

The Montana court was echoing yet another test for determining which rights are protected by the right to privacy. The *Casey* plurality suggested that the Fourteenth Amendment protected "matters involving the most intimate and personal choices a person may make in a lifetime," believing that "choices central to personal dignity and autonomy are central to the liberty protected by the Fourteenth Amendment."¹²⁶ By suggesting that adult, consensual sexual relations are among the most fundamental and private activities deserving protection from government interference, the Montana court seemed to adopt the *Casey* plurality's language. However, the Montana court was explicating the Montana Constitution rather than the federal constitution and thus was not holding that the federal constitution precluded same-sex sodomy statutes.¹²⁷

In his concurring and dissenting opinion, Chief Justice Turnage of the Montana Supreme Court argued that a statutory scheme which "criminalizes sexual acts between persons of the same sex and decriminalizes the same sexual conduct engaged in by persons of opposite sexes"¹²⁸ violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution as well as the Montana Constitution. His point is well taken, especially since the legislature had specifically picked out same-sex sodomy to criminalize.¹²⁹

Yet, there is good reason to believe that the aim of sodomy statutes has been to disadvantage gays, lesbians, and bisexuals even when the statutory language has been neutral.¹³⁰ Further, courts have sometimes been willfully blind when examining the implications of the rationales for their opinions. In *Post v.*

125. See MONT. CODE ANN. §45-5-505 (1) (1997) ("A person who knowingly engages in deviate sexual relations or who causes another to engage in deviate sexual relations commits the offense of deviate sexual conduct.") See also MONT. CODE ANN. §45-2-201 (1997) ("Deviate sexual relations' means sexual contact or sexual intercourse between two persons of the same sex . . .").

126. *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992).

127. See *Gryczan*, 942 P. 2d at 123.

128. *Id.* at 125 (Turnage, C.J., concurring and dissenting).

129. See *supra* note 125.

130. See Joseph W. Hovermill, *A Conflict of Laws and Morals: The Choice of Law Implications of Hawaii's Recognition of Same-Sex Marriages*, 53 MD. L. REV. 450, 489 (1994) ("Traditionally, sodomy [even making no distinction between heterosexual and homosexual sodomy] laws have been directed primarily toward homosexuals.").

State,¹³¹ an Oklahoma appellate court struck down a statute prohibiting “crimes against nature” insofar as it applied to heterosexual conduct,¹³² reasoning that the state had failed to prove that “private, consensual and non-commercial heterosexual acts between adults could significantly harm society so as to provide a compelling interest in, or even a rational relationship to support, regulation of these activities.”¹³³ The court made clear that it was dealing with “the issue of heterosexual conduct, not homosexual acts,”¹³⁴ ignoring the fact that the same rationale would also establish the unconstitutionality of statutes penalizing same-sex sodomy and, further, that the statute did not distinguish between same-sex and opposite-sex activity. By the same token, the Supreme Court in *Bowers v. Hardwick*¹³⁵ limited its analysis to whether the “Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy,”¹³⁶ ignoring that the rationale used there would also establish the constitutional permissibility of statutes prohibiting opposite-sex sodomy.¹³⁷

Even those judges who mistakenly adhere to the traditions and collective conscience test may be forced to find sodomy laws unconstitutional if such laws are placed in context. Thus, it may be true that “Justice . . . would not perish”¹³⁸ were sodomy laws upheld if such laws did not simply pick out a disfavored group for adverse treatment and if such laws were applied in a nondiscriminatory fashion.¹³⁹ However, when one examines how sodomy laws have been fashioned¹⁴⁰ and used,¹⁴¹ it is clear that these laws are sometimes used to offend a “principle of justice so rooted in

131. 717 P.2d 1151 (Okla. Crim. App. 1986).

132. OKLA. STAT. tit. 21, § 886 (1998) currently does not distinguish between same-sex and opposite-sex relations: (“[e]very person who is guilty of the detestable and abominable crime against nature, committed with mankind or with a beast, is punishable by imprisonment in the penitentiary not exceeding (10) years.”). *Id.* Nor does the statute which will be come effective as of July 1, 1998. (“[a]ny person who is guilty of the detestable and abominable crime against nature, committed with mankind or with a beast, shall be guilty of a felony.”). *Id.*

133. *Post*, 717 P.2d at 1152.

134. *Id.*

135. 478 U.S. 186 (1986).

136. *Id.* at 190.

137. *See* U.S. v. Fagg, 34 M.J. 179, 180 (1992) (suggesting that statutes criminalizing heterosexual nonmarital sodomy are constitutionally permissible in light of *Bowers*).

138. *Palko v. Connecticut*, 302 U.S. 319, 326 (1937).

139. *But see, e.g., Bowers*, 478 U.S. at 200 (Blackmun, J., dissenting) (“The Court’s almost obsessive focus on homosexual activity is particularly hard to justify in light of the broad language Georgia has used.”).

140. *See supra* note 56 (Kansas’s sodomy law limited to same-sex couples).

the traditions and conscience of our people as to be ranked as fundamental."¹⁴²

Arguably, adult, consensual, noncommercial sodomy is protected by the Constitution.¹⁴³ While it is true that the *Bowers* Court held otherwise,¹⁴⁴ some suggest that the vitality of *Bowers* is in doubt.¹⁴⁵ Further, there is an additional reason to believe that statutes criminalizing same-sex but not opposite-sex sodomy are unconstitutional, namely, that they violate the Equal Protection Clause, an issue which the *Bowers* Court explicitly refused to address.¹⁴⁶ Setting aside the reasons to believe that sodomy is protected by the Constitution, however, the claim that same-sex marriage is protected by the right to privacy is not predicated on sodomy's being protected by either the Due Process or the Equal Protection Clauses of the Fourteenth Amendment.¹⁴⁷

IV. CONCLUSION

Some commentators suggest that were the Court to recognize a right to same-sex marriage, the right to privacy would have been expanded to include so much that a whole host of laws would be at risk, including laws prohibiting adultery or sodomy. Yet, were one to look at the criteria which the Court has used in the past to determine which rights were fundamental and which were not, one would see that the latter laws are quite compatible with a holding that same-sex marriage is a fundamental right. The *Bowers* Court upheld the Georgia sodomy statute because

141. The *possibility* of passing a sodomy law has been alleged to be sufficient to justify orientation discrimination. For example, Colorado does not have a sodomy law. See *Romer v. Evans*, 116 S.Ct. 1620, 1633 (1996) (Scalia, J., dissenting). The Colorado electorate voted to withdraw "from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and . . . forbid[] reinstatement of these laws and policies." *Id.* at 1625. Justice Scalia argued that because Colorado *could* enact a sodomy law, it was constitutionally permitted to withdraw these protections. *Id.* at 1631 (Scalia, J., dissenting). This kind of analysis does not inspire confidence in the fairness or integrity of some of the members of the current Court.

142. *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

143. See *supra* notes 137-39 and accompanying text.

144. See 478 U.S. at 186.

145. See *Romer*, 116 S. Ct. at 1629 (Scalia, J., dissenting) (suggesting that *Romer* contradicts *Bowers*). See also Thomas C. Grey, *Bowers v. Hardwick Diminished*, 68 U. COLO. L. REV. 373, 374 (1997) (suggesting that not much is left of *Bowers* after *Romer*).

146. See *Bowers*, 478 U.S. at 196 n.8.

147. See *United States v. Fagg*, 34 M.J. 179 (1992) (nonmarital sodomy not protected by right to privacy); *State v. Santos*, 413 A.2d 58 (R.I. 1980) (same).

no connection between marriage, family, or procreation on the one hand, and sodomy on the other, had been established.¹⁴⁸ Further, the Court worried that its striking down a sodomy law would make it difficult to uphold laws against adultery.¹⁴⁹ Even if one ignores the fact that sodomy and adultery laws are easily distinguishable,¹⁵⁰ it should be clear that the reasons allegedly justifying upholding sodomy laws would hardly apply to a law banning same-sex marriage. Thus, it would be difficult for the Court to credibly claim that no connection could be established between same-sex marriage on the one hand and marriage, family, or procreation on the other.

It is of course a separate question whether statutes banning sodomy or adultery are wise or even constitutional. Those analyses can be made in light of right to privacy jurisprudence. However, it “would be a stultification of the responsibility which the course of constitutional history has cast upon . . . [the] Court”¹⁵¹ were it to refuse to recognize the fundamental right to same-sex marriage because of the specious claim that adultery or sodomy statutes would also therefore be unconstitutional. The disingenuousness of such an analysis might indeed shock the conscience.

148. *See* 478 U.S. at 191.

149. *See id.* at 195-96.

150. *See id.* at 209, n.4 (1986) (Blackmun, J., dissenting) (“a court could find simple, analytically sound distinctions between certain private, consensual sexual conduct, on the one hand, and adultery . . . on the other . . . [A] State might conclude that adultery is likely to injure third persons, in particular, spouses and children of persons who engage in extramarital affairs.”).

151. *Rochin v. California*, 342 U.S. 165, 173 (1952).

