Florida Law Review

Volume 63 | Issue 1 Article 3

2-8-2013

The Lavender Letter: Applying the Law of Adultery to Same Sex Couples and Same Sex Couples

Peter Nicolas

THE LAVENDER[ϕ] LETTER:[◊] APPLYING THE LAW OF ADULTERY TO SAME-SEX COUPLES AND SAME-SEX CONDUCT

Peter Nicolas[*]

INTRODUCTION

In the political and legal debate over same-sex marriage, references to the rights (or benefits or privileges) and responsibilities (or burdens or obligations) associated with marriage constitute a key weapon in the rhetorical battle.[1] Most of the focus, however, has been on the "rights" side, particularly the 1,138[2] federal and countless additional state rights associated with marriage. A pair of recent newspaper headlines, however, got me thinking about the responsibilities side of the ledger, specifically, that of fidelity to one's spouse.[3]

[ϕ] In the last century, the color lavender has come to be associated with homosexuality. However, given the somewhat Victorian slant of the subject matter of this Article, it might alternatively be titled *The Green Letter*, green being the color associated with homosexuality in Victorian England. *See* DIDIER ERIBON, DICTIONNAIRE DES CULTURES GAYS ET LESBIENNES 317, 488 (2003); WAYNE DYNES, HOMOLEXIS: A HISTORICAL AND CULTURAL LEXICON OF HOMOSEXUALITY 33 (1985); WILLIAM STEWART, CASSELL'S QUEER COMPANION: A DICTIONARY OF GAY LIFE AND CULTURE 107, 143 (1995).

[◊] With apologies to NATHANIEL HAWTHORNE, THE SCARLET LETTER (1850).

* Jeffrey & Susan Brotman Professor of Law, University of Washington School of Law. I wish to thank Gabe Verdugo and Trinie Thai-Parker for their valuable research assistance, as well as Professors Helen Anderson, Karen Boxx, Mary Fan, Jim Hardisty, Maureen Howard, Mike Townsend, and Kathryn Watts for their valuable input.

1. *See, e.g.*, Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003); Lewis v. Harris, 908 A.2d 196, 224 (N.J. 2006).

2. *See* Letter from Barry R. Bedrick, Assoc. Gen. Counsel, U.S. Gen. Accounting Office, to Henry J. Hyde, Chairman, Comm. on the Judiciary, House of Representatives (Jan. 31, 1997), *available at* http://www.gao.gov/archive/1997/og97016.pdf; Letter from Dayna K. Shah, Assoc. Gen. Counsel, U.S. Gen. Accounting Office, to Bill Frist, Majority Leader, U.S. Senate (Jan. 23, 2004), *available at* http://www.gao.gov/new.items/d04353r.pdf.

3. *See, e.g.*, *In re* Marriage Cases, 183 P.3d 384, 418 (Cal. 2008); Guillory v. Guillory, 7 So. 3d 144, 147 (La. 2009). In some ways, of course, the divide between rights and responsibilities is an illusory one, particularly in this context, for the flip side of the responsibility to be faithful to one's

The first headline was about a bill introduced in New Hampshire to repeal its 200-year-old law defining adultery as a criminal offense.[4] The second was about a forthcoming study finding that a non-trivial percentage of individuals in same-sex relationships have sex outside of those relationships.[5] These two headlines, coupled with the knowledge that New Hampshire had recently become one of a handful of states in which same-sex marriage was recognized,[6] raised the following question in my mind: to what extent do laws that provide criminal penalties or civil damages for adultery or other torts related to marriage (or that otherwise make acts of adultery a relevant consideration, such as fault-based divorce) apply to same-sex couples who enter into a marriage or its functional equivalent, such as a civil union or a domestic partnership?

As I began to explore the issue, starting with case law in New Hampshire, I came across a recent case from the New Hampshire Supreme Court in which the court held that a husband—whose wife had sexual relations with another woman—was unable to obtain a fault-based divorce from his wife on the ground of adultery.[7] The court—relying in part on cases interpreting the state's criminal adultery statute and in part relying on a dictionary—held that the term adultery refers to coital sexual intercourse, which requires the insertion of a penis into a vagina, between a married person and someone other than his or her spouse.[8] Since that definition necessarily requires the involvement of a man and a woman, the court concluded that same-sex sexual conduct could never constitute "adultery" as that term is used in either the divorce laws or the criminal adultery statute.[9] Indeed, so narrow was the court's definition of adultery that non-coital sexual conduct between two people of the opposite sex, such as oral sex, likewise did not count as adultery[10] (a holding that no doubt clashes with what most married people would view as adultery).[11]

---

spouse is the right to have your spouse remain faithful to you.

4. Evan Buxbaum & Edmund DeMarche, *New Hampshire Eyes Repealing Law on Adultery*, CNN.com, Jan. 13, 2010, http://www.cnn.com/2010/CRIME/01/12/adultery.vote/index.html. Prior attempts to repeal the law have failed by narrow margins. *See* Martin J. Siegel, *For Better or for Worse: Adultery, Crime & the Constitution*, 30 J. FAM. L. 45, 49 (1991–1992). The bill introduced in 2010 likewise was not ultimately enacted into law.

5. *See* Scott James, *Many Successful Gay Marriages Share an Open Secret*, N.Y. TIMES, Jan. 29, 2010, at A17, *available at* http://www.nytimes.com/2010/01/29/us/29sfmetro.html.

6. *See* H.B. 73, 2009 Gen. Ct., 161st Sess. (N.H. 2009).

7. *In re* Blanchflower, 834 A.2d 1010, 1010–12 (N.H. 2003).

8. *Id.* at 1011.

9. *Id.* at 1012.

10. Bethany Catron, Case Note, *If You Don't Think This is Adultery, Go Ask Your Spouse: The New Hampshire Supreme Court's Faulty Interpretation of Adultery in* In Re Blanchflower, *834 A.2d 1010 (2003)—Grounds for a Fault Based Divorce*, 30 U. DAYTON L. REV. 339, 346 (2005).

11. *See* Laura W. Morgan, *What Constitutes Adultery?*, FAM. L. CONSULTING, Dec. 2003, http://www.famlawconsult.com/archive/reader200312.html ("No married person thinks that his or her spouse is adhering to the marriage vows when he or she engages in intimate sexual acts such as

Although the case did not involve a married same-sex couple, the implication of the decision for married same-sex couples in New Hampshire is clear: their sexual relations with those other than their spouse do not count as adultery (unless they happen to have a sexual affair with someone of the opposite sex that includes vaginal intercourse). Nor did the New Hampshire decision turn out to be an isolated one. Decisions from several other jurisdictions confronted with the issue (mostly in the divorce context) likewise held that same-sex sexual activity does not constitute adultery.[12] In contrast, decisions from numerous other jurisdictions point in the opposite direction, holding that same-sex extramarital sexual relations constitute adultery.[13]

In this Article, I explore the division in the courts over the question of whether same-sex sexual conduct constitutes adultery in four contexts: (1) criminal adultery prosecutions, (2) fault-based divorce actions, (3) civil tort actions for interference with the marital relationship, and (4) murder cases raising a provocation defense based on a spouse's act of adultery.

In so doing, I arrive at the following conclusions. First, as illustrated in Part I, there is a significant overlap between states that recognize same-sex marriage and states where adulterous conduct is legally relevant, making this more than an interesting theoretical exercise. Second, Part II shows that those decisions holding that same-sex conduct does not constitute adultery do so on the basis of outdated precedents that rely on a gendered concept of adultery that treats sexual dalliances by men and women differently, as well as on heteronormative statutory regimes in which same-sex adultery and opposite-sex adultery were punished differently because *all* sexual activity between individuals of the same sex was considered unlawful. Third, Part III demonstrates that the policy arguments in favor of maintaining any of these bases for criminal and civil liability (and there are certainly valid arguments against their maintenance) apply with equal force to same-sex couples and same-sex conduct as they do to heterosexual couples and conduct. And fourth, the same equality principles that have resulted in the extension of the right to marry to same sex-couples likewise require the application of adultery laws and related doctrines to same-sex couples and same-sex conduct. Indeed, a failure to apply them in those contexts devalues same-sex relationships and perpetuates antiquated,

---

oral or anal sex with another person.").

12. *See, e.g.*, People v. Martin, 180 Ill. App. 578, 578 (App. Ct. 1913); H. v. H., 157 A.2d 721, 726 (N.J. Super. Ct. App. Div. 1959); W. v. W., 226 A.2d 860, 861–62 (N.J. Super. Ct. Ch. Div. 1967); Cohen v. Cohen, 103 N.Y.S.2d 426, 427–28 (Sup. Ct. 1951); Anonymous v. Anonymous, 2 Ohio N.P. 342, 342 (C.P. 1895); Glaze v. Glaze, 46 Va. Cir. 333, 334 (Cir. Ct. 1998).

13. *See, e.g.*, Patin v. Patin, 371 So. 2d 682, 683 (Fla. 4th DCA 1979); Owens v. Owens, 274 S.E.2d 484, 485–86 (Ga. 1981); Menge v. Menge, 491 So. 2d 700, 702 (La. Ct. App. 1986); Dunn v. Contributory Ret. Appeal Bd., 705 N.E.2d 1167, 1169 & n.2 (Mass. App. Ct. 1999); RGM v. DEM, 410 S.E.2d 564, 567 (S.C. 1991).

negative stereotypes about gay people, as argued in Part IV. As ironic as it seems, despite decades of litigation to get the government out of the bedrooms of gays and lesbians, this Article concludes that principles of equality on the bases of gender and sexual orientation require that the private sexual conduct of gays and lesbians be intruded upon to the same extent as their heterosexual counterparts.

I. THE LEGAL RELEVANCE OF ADULTERY TODAY

Just as at one point in time every state in the United States had a law criminalizing sodomy,[14] so too at one time did virtually every state in the United States have a law criminalizing adultery.[15] And while many states repealed their laws criminalizing sodomy and adultery in the latter half of the 20th Century, today twenty-four states and territories still have statutes on the books making it a crime to commit adultery,[16] significantly more than the thirteen states still criminalizing sodomy at the time the U.S. Supreme Court issued its decision *Lawrence v. Texas*[17] striking down Texas's sodomy law as applied to private, consensual sex between two people of the same sex.[18]

Moreover, while one might be tempted—based on Justice Antonin Scalia's apocalyptic warning in his *Lawrence* dissent[19]—to conclude that the decision spelled the death knell for adultery laws, courts have, with virtual unanimity, upheld adultery laws' constitutionality post-*Lawrence*.[20]

---

14. Bowers v. Hardwick, 478 U.S. 186, 192–93 (1986).

15. *See* Geoffrey May, *Experiments in the Legal Control of Sex Expression*, 39 YALE L.J. 219, 219 (1929); Marvin M. Moore, *The Diverse Definitions of Criminal Adultery*, 30 U. KAN. CITY L. REV. 219, 222 & n.20 (1962).

16. *See* ALA. CODE § 13A-13-2 (2010); ARIZ. REV. STAT. ANN. § 13-1408 (2010); COLO. REV. STAT. § 18-6-501 (2010); FLA. STAT. § 798.01 (2009); GA. CODE ANN. § 16-6-19 (2010); IDAHO CODE ANN. § 18-6601 (2010); 720 ILL. COMP. STAT. 5/11-7 (West 2010); KAN. STAT. ANN. § 21-3507 (2009); MD. CODE ANN., CRIM. LAW § 10-501 (2010); MASS. GEN. LAWS ANN. ch. 272, § 14 (West 2010); MICH. COMP. LAWS ANN. §§ 750.29 to -.30 (West 2010); MINN. STAT. ANN. § 609.36 (West 2010); MISS. CODE. ANN. § 97-29-1 (2010); N.H. REV. STAT. ANN. § 645:3 (2010); N.Y. PENAL LAW § 255.17 (McKinney 2010); N.C. GEN. STAT. § 14-184 (2010); N.D. CENT. CODE § 12.1-20-09 (2010); OKLA. STAT.ANN. tit. 21, § 871 (West 2010); P.R. LAWS ANN. tit., 33, § 4147 (2009); R.I. GEN. LAWS § 11-6-2 (2010); S.C. CODE ANN. § 16-15-60 to -70 (2009); UTAH CODE ANN. § 76-7-103 (LexisNexis 2010); VA. CODE ANN. § 18.2-365 (2010); WIS. STAT. ANN. § 944.16 (West 2009).

17. 539 U.S. 558 (2003).

18. *Id.* at 578–79.

19. *See id.* at 599 (Scalia, J., dissenting).

20. *See* Beecham v. Henderson Cnty., Tenn., 422 F.3d 372, 376 (6th Cir. 2005) (expressing doubt that its earlier decision upholding the constitutionality of adultery statutes against a due process challenge was altered by *Lawrence*); Lowe v. Swanson, 639 F. Supp. 2d 857, 871 (N.D. Ohio 2009); U.S. v. Brown, No. 200201647, 2005 WL 2381094, at *3–4 (N-M. Ct. Crim. App. Sept. 14, 2005); U.S. v. Orellana, 62 M.J. 595, 598 (N-M. Ct. Crim. App. 2005) (relying both on the fact that in the military context, adultery is harmful to good order and discipline but noting also that it preserves marriages). *But see* Thong v. Andre Chreky Salon, 634 F. Supp. 2d 40, 46–47

In addition, as Professor Mary Ann Case has persuasively argued, the *Lawrence* majority's statement that, as a general rule, states cannot regulate private sexual behavior "absent injury to a person or abuse of an institution the law protects"[21] leaves ample room for states to criminalize adultery:

> Contra to the way many others have read the text, I do not take the *Lawrence* majority's reference to the continuing potential legitimacy of the State's authority "to define the meaning of the relationship or [to set] its boundaries" if there would otherwise be "abuse of an institution the law protects" to be intended to address the problem of same-sex marriage. Like so much of the rest of the majority's prose, this passage is admittedly obscure, but my best guess is that the reference is instead to something akin to the likely continuing validity of laws prohibiting bigamy and adultery, which can be seen as abuse of the institution of legal marriage even when extraordinary circumstances such as spousal consent allow the acts to take place "absent injury to a person."[22]

Indeed, post-*Lawrence*, even *sodomy* laws can be and still are enforced, so long as they are not enforced in settings that involve the sort of private consensual conduct at issue in *Lawrence* itself. After all, the *Lawrence* court was careful to distinguish the case before it from other situations:

> The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.[23]

Thus, post-*Lawrence*, courts have relied on this language in *Lawrence* to uphold the application of sodomy laws in cases involving soliciting sodomy in public,[24] engaging in sodomy with minors,[25] and to acts of

---

(D.D.C. 2009) (suggesting that the logic of *Lawrence*, as interpreted in a case striking down Virginia fornication statute, might apply to adultery statutes, reasoning that both involve "'private sexual conduct between two consenting adults'" (quoting Martin v. Ziherl, 607 S.E.2d 367, 371 (Va. 2005))).

21. *Lawrence*, 539 U.S. at 567 (majority opinion).

22. Mary Anne Case, *Of "This" and "That" in* Lawrence v. Texas, 2003 SUP. CT. REV. 75, 140–41 (quoting *Lawrence*, 539 U.S. at 567).

23. *Lawrence*, 539 U.S. at 578.

24. *See* State v. Thomas, 891 So. 2d 1233, 1237 (La. 2005); Singson v. Commonwealth, 621 S.E.2d 682, 685–88 (Va. 2005).

25. *See, e.g.*, U.S. v. Banker, 63 M.J. 657, 659–61 (A.F. Ct. Crim. App. 2006); *In re* R.L.C., 643 S.E.2d 920, 925 (N.C. 2007); McDonald v. Commonwealth, 645 S.E.2d 918, 924 (Va. 2007).

sodomy in the military between superior and inferior officers.[26]

Nor are adultery statutes as "'dead-letter'"[27] as they are sometimes thought to be. In the military today, prosecutions for adultery are relatively frequent.[28] And as recently as 2010, officials in New York arrested and indicted a woman on charges of adultery.[29] Indeed, courts view the risk of criminal prosecution for adultery as sufficient to justify upholding the invocation of the privilege against self-incrimination when a witness is asked about adulterous conduct in a civil action.[30]

Moreover, setting to one side criminal prosecutions for adultery, there are numerous other ways in which the law deems adulterous conduct to be legally relevant. First, despite the fact that today all states offer some form of no-fault divorce,[31] thirty-four jurisdictions still provide the option of seeking a fault-based legal separation or divorce.[32] Moreover, some states and territories use adultery as a factor in determining spousal support[33] or

26. *See* U.S. v. Marcum, 60 M.J. 198, 200, 206 (C.A.A.F. 2004).

27. Siegel, *supra* note 4, at 49 (quoting MODEL PENAL CODE § 213.6 (1980)).

28. Witt v. Dep't of the Air Force, 548 F.3d 1264, 1280 & n.35 (9th Cir. 2008) (Kleinfeld, J., dissenting from denial of reh'g en banc).

29. *See* Eamon McNiff, *Woman Charged with Adultery to Challenge New York Law*, ABC NEWS, June 8, 2010, http://abcnews.go.com/TheLaw/woman-charged-adultery-challenge-york-law/story?id=10857437; Michael Sheridan, *Woman Caught Having Sex in Park, Charged with Adultery–in New York*, N.Y. DAILY NEWS, June 8, 2010, http://www.nydailynews.com/news/national/2010/06/08/2010-06-08_upstate_woman_charged_with_adultery_after_lewd_act_in_a_public_park.html.

30. *See, e.g.*, Correia v. Correia, 877 N.E.2d 629, 634 n.8 (Mass. App. Ct. 2007); S.K. v. I.K., No. 203247-2008, 2010 WL 1371943, at *11 (N.Y. Sup. Ct. Mar. 29, 2010).

31. *See generally* Timothy B. Walker, *Family Law in the Fifty States: An Overview*, 25 FAM. L.Q. 417, 439–40 (1992) (surveying the different types of no-fault divorces amongst the states).

32. *See* ALA. CODE § 30-2-1(a)(2) (2010); ALASKA STAT. § 25.24.050(2) (2010); ARIZ. REV. STAT ANN. §§ 25-903(1), 904(1) (2010); ARK. CODE ANN. §§ 9-11-808(a)(1), (b)(1), 9-12-301(b)(4) (2010); CONN. STAT. § 46b-40(c)(3) (2010); DEL. CODE ANN. tit. 13, §§ 1503(6), 1505(b)(2) (2010); GA. CODE ANN. § 19-5-3(6) (2010); 19 GUAM CODE ANN. § 8203(a) (2010); IDAHO CODE ANN. § 32-603(1) (2010); 750 ILL. COMP. STAT. ANN. 5/401(a)(1) (West 2010); LA. REV. STAT. ANN. § 9:307(A)(1) (2010); LA. CIV. CODE ANN. art. 103(2) (2010); ME. REV. STAT. ANN. tit. 19-A, § 902(1)(A) (2010); MD. CODE ANN., FAM. LAW § 7-103(a)(1) (2010); MASS. GEN. LAWS ANN. ch. 208, § 1 (West 2010); MISS. CODE ANN. § 93-5-1 (2010); MO. ANN. STAT. § 452.320(2)(1)(a) (West 2010); N.H. REV. STAT. ANN. § 458:7(II) (2010); N.J. STAT. ANN. § 2A:34-2(a) (West 2010); N.M. STAT. ANN. § 40-4-1(C) (West 2010); N.Y. DOM. REL. LAW §§ 170(4), 200(4) (McKinney 2010); N.C. GEN. STAT. § 50-7(6) (2010); N.D. CENT. CODE § 14-05-03(1) (2010); OHIO REV. CODE ANN. §§ 3105.01(C), 3105.17(A)(3) (LexisNexis 2010); OKLA. STAT. ANN. tit. 43, § 101 (West 2010); 23 PENN. CONS. STAT. ANN. § 3301(a)(2) (West 2010); P.R. LAWS ANN. tit. 31, § 321(1) (2007); R.I. GEN. LAWS § 15-5-2(2) (2010); S.C. CODE ANN. § 20-3-10(1) (2009); S.D. CODIFIED LAWS § 25-4-2(1) (2010); TENN. CODE ANN. § 36-4-101(a)(3) (2010); UTAH CODE ANN. § 30-3-1(3)(b) (LexisNexis 2010); VT. STAT.ANN. tit. 15, § 551(1) (2010); VA. CODE ANN. § 20-91(A)(1) (2010); W. VA. CODE ANN. § 48-5-204 (LexisNexis 2010).

33. *See* FLA. STAT. § 61.08(1) (2010); GA. CODE ANN. § 19-6-1(b) (2010); S.C. CODE ANN. § 20-3-130(A) (2009); VA. CODE ANN. § 20-107.1(E) (2010); W.V. CODE ANN. § 48-8-104 (LexisNexis 2010).

property division[34] upon divorce, as a basis for denying inheritance rights,[35] or as a basis for deeming someone unfit as an adoptive parent.[36]

In addition, a handful of states permit a person whose spouse commits adultery to bring a tort action for "criminal conversation" against the third person with whom his or her spouse committed adultery.[37]

Furthermore, a recognized "heat of passion" defense to a charge of murdering one's spouse or paramour—which will typically reduce the crime to voluntary manslaughter—is either finding them in the act of adultery, recently being informed of their act of adultery, or in some jurisdictions, having reason to believe that they committed adultery.[38]

Finally, there are other, unusual ways that a handful of laws take adulterous conduct into account. Allowing adultery to occur in your massage parlor will result in the loss of your massage parlor license in Alabama[39] while hiring an adulterer to serve liquor will cause a bar in Kansas to forfeit its liquor license.[40]

Given the common Puritanical roots of both adultery laws and laws criminalizing homosexual conduct,[41] it is perhaps not surprising that most of the nearly two dozen states with laws criminalizing adultery neither permit nor recognize same-sex marriages, civil unions, or domestic partnerships. On the flip side, many of the states that provide for legal recognition of same-sex relationships no longer have adultery laws on the books.

Yet, there remain a handful of states, mostly in the northeast United States, that both provide legal recognition of same-sex relationships and that criminalize adultery. Two states that permit same-sex couples to marry—Massachusetts[42] and New Hampshire[43]—criminalize adultery.[44]

---

34. *See* 19 GUAM CODE ANN. § 8411(a) (2010).

35. *See* DEL. CODE ANN. tit. 25, § 744 (2010); IND. CODE ANN. § 29-1-2-14 (West 2010); KY. REV. STAT. ANN. § 392.090(2) (West 2010); MO. ANN. STAT. § 474.140 (West 2010); N.J. STAT. ANN. §§ 3B:28-15, 3A:37-2 (West 2010); N.C. GEN. STAT. § 31A-1(a)(2) (2010); OHIO REV. CODE ANN. § 2103.05 (LexisNexis 2010); P.R. LAWS ANN. tit. 31, § 2261(5) (2007).

36. *See* 750 ILL. COMP. STAT. ANN. 50/1(D)(j) (West 2010).

37. Caroline L. Batchelor, Comment, *Falling Out of Love with an Outdated Tort: An Argument for the Abolition of Criminal Conversation in North Carolina*, 87 N.C. L. REV. 1910, 1915 n.35 (2009) (identifying Hawaii, Kansas, Maine, Mississippi, Missouri, North Carolina, Tennessee, and Utah as states that continue to recognize the tort).

38. *See* 2 CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW § 165 (15th ed. 1994). *See generally* Susan D. Rozelle, *Controlling Passion: Adultery and the Provocation Defense*, 37 RUTGERS L.J.197 (2005) (discussing competing rationales for the provocation defense).

39. ALA. CODE §§ 45-2-40.10, -13-41(k) (2010).

40. KAN. STAT. ANN. §§ 41-2601(n), -2610(b) (2010).

41. *See, e.g.*, William N. Eskridge, Jr., Hardwick *and Historiography*, 1999 U. ILL. L. REV. 631, 647.

42. *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003).

43. N.H. REV. STAT. ANN. § 457:1-a (2010).

44. MASS. GEN. LAWS ANN. ch. 272, § 14 (West 2010); N.H. REV. STAT. ANN. § 645:3 (2010).

Another three states that, while not permitting same-sex couples to marry, *may* or do recognize same-sex marriages performed out-of-state—New York,[45] Rhode Island,[46] and Maryland[47]—likewise criminalize adultery.[48]

Moreover, four states that permit same-sex couples to marry—Connecticut,[49] Massachusetts, New Hampshire, and Vermont[50]—recognize adultery as a ground for divorce.[51] In addition, New Jersey, which permits same-sex couples to enter into civil unions,[52] recognizes adultery as a ground for seeking dissolution of a civil union.[53] Plus, the three states that may or do recognize same-sex marriages performed out-of-state—New York, Rhode Island, and Maryland—likewise recognize adultery as a ground for divorce.[54] A fourth state, New Mexico, which has no statute or constitutional amendment explicitly refusing to recognize out-of-state same-sex marriages,[55] likewise recognizes adultery as a ground for divorce.[56]

Furthermore, the "heat of passion" defense to a charge of homicide based on the discovery that one's spouse has committed adultery is recognized in some form in virtually every jurisdiction in the United States that permits same-sex couples to marry,[57] as well as in nearly all of the

---

Indeed, Massachusetts has a second, most unusual law on the books that provides that persons divorced from one another who thereafter cohabitate as husband and wife or live together in the same house are guilty of adultery! *See* MASS. GEN. LAWS ANN. ch. 208, § 40 (West 2010).

45. Martinez v. County of Monroe, 850 N.Y.S.2d 740, 743 (App. Div. 2008).

46. Letter from Patrick C. Lynch, Attorney Gen., R.I., to Jack R. Warner, Comm'r, R. I. Bd. of Governors for Higher Educ. (Feb. 20, 2007), *available at* http://www.domawatch.org/cases/rhodeisland/chambersvormiston/RI_AG_Opinion_on_SSM.pdf. A subsequent Rhode Island Supreme Court case cast doubt on at least a portion of the attorney general's opinion. *See* Chambers v. Ormiston, 935 A.2d 956, 958 (R.I. 2007). *But see id.* at 967–68 (Suttell, J., dissenting) (noting that the majority's opinion addressed only a narrow issue).

47. 95 Md. Op. Att'y Gen. 3 (2010).

48. MD. CODE ANN., CRIM. LAW § 10-501 (West 2010); N.Y. PENAL LAW § 255.17 (McKinney 2010); R.I. GEN. LAWS § 11-6-2 (2010).

49. CONN. GEN. STAT. ANN. § 46b-20(4) (West 2010).

50. VT. STAT. ANN. tit. 15, § 8 (2010).

51. CONN. GEN. STAT. ANN. § 46b-40(c) (West 2010); MASS. GEN. LAWS ANN. ch. 208, § 1 (West 2010); N.H. REV. STAT. ANN. § 458:7(II) (2010); VT. STAT. ANN. tit. 15, § 551(1) (2010).

52. N.J. STAT. ANN. § 37:1-30 (West 2010).

53. *Id.* § 2A:34-2.1(a).

54. MD. CODE ANN., FAM. LAW § 7-103(a)(1) (West 2010); N.Y. DOM. REL. LAW §§ 170(4), 200(4) (McKinney 2010); R.I. GEN. LAWS § 15-5-2(2) (2010). However, the Rhode Island Supreme Court has ruled that its family courts lack jurisdiction to grant divorces to married out-of-state couples. *See* Chambers v. Ormiston, 935 A.2d 956, 967 (R.I. 2007).

55. *See* 95 Md. Op. Att'y Gen. 3 (2010).

56. N.M. STAT. ANN. § 40-4-1(C) (West 2010).

57. *See, e.g.*, State v. Saxon, 86 A. 590, 594 (Conn. 1913); Nicholson v. U.S., 368 A.2d 561, 565 (D.C. 1977) (dictum); State v. Thomas, 151 N.W. 842, 843 (Iowa 1915); Commonwealth v. Bermudez, 348 N.E.2d 802, 805 (Mass. 1976); State v. Smith, 455 A.2d 1041, 1043 (N.H. 1983).

states that may or do recognize out-of-state same-sex marriages.[58]

Thus, because adultery remains legally relevant throughout the United States generally, and in states that recognize same-sex marriages specifically, the question of whether the law of adultery applies to married same-sex couples and same-sex extramarital sexual relations of opposite-sex couples is not only a theoretically interesting problem, but is also a practical one.

II. THE EARLY LAW OF ADULTERY AND ITS DEVELOPMENT

To understand the modern legal dispute over whether same-sex conduct constitutes adultery, it is necessary to examine the historical development of proscriptions on and punishment for adulterous conduct.

The first laws to proscribe and punish adultery were Biblical laws.[59] Moses, in the Ten Commandments,[60] proscribed adultery.[61] The Biblical punishment for adultery—like that for sodomy[62]—was death, for both the adulterer and the adulteress.[63] The Biblical definition of adultery was gendered in nature, focusing solely on the question whether the female was married, with the marital status of the male being irrelevant.[64] Thus, for example, the *Book of Deuteronomy* describes adultery as a situation in which a "man be found lying with a woman married to an husband."[65] Similarly, the *Book of Leviticus* refers to a "man that committeth adultery with *another* man's wife."[66] This is not to say that Biblical law condoned

58. *See, e.g.*, Bartram v. State, 364 A.2d 1119, 1153 (Md. Ct. Spec. App. 1976); People v. Wood, 27 N.E. 362, 364–65 (N.Y. 1891); State v. Imundi, 121 A. 215, 217–18 (R.I. 1923).

59. Siegel, *supra* note 4, at 46 & n.7 (citing MODEL PENAL CODE § 213.6, at 430 n.1 (1980); *Exodus* 20:14 (King James); *Leviticus* 20:10 (King James); *Deuteronomy* 22:22 (King James)).

60. *Exodus* 20:2–17 (King James); *Deuteronomy* 5:6–21 (King James).

61. *Exodus* 20:14 (King James) ("Thou shalt not commit adultery."); *Deuteronomy* 5:18 (King James) ("Neither shalt thou commit adultery.").

62. *Leviticus* 20:13 (King James) ("If a man also lie with mankind, as he lieth with a woman, both of them have committed an abomination: they shall surely be put to death; their blood *shall be* upon them.").

63. *Leviticus* 20:10 (King James) ("And the man that committeth adultery with *another* man's wife, *even he* that committeth adultery with his neighbour's wife, the adulterer and the adulteress shall surely be put to death."); *Deuteronomy* 22:22 (King James) ("If a man be found lying with a woman married to an husband, then they shall both of them die, *both* the man that lay with the woman, and the woman: so shalt thou put away evil from Israel.").

64. *See* State v. Lash, 16 N.J.L. 380, 390 (1838) (citing *Leviticus* 20:10 (King James); *Deuteronomy* 22:22–28 (King James)); S.B. v. S.J.B., 609 A.2d 124, 125 (N.J. Super. Ct. Ch. Div. 1992) ("A biblical definition of 'Adultery' is 'the lying with a woman married to a husband'. The penalty for this crime was death for both the adulterer and adulteress. Historically, there could only be adultery if the woman was married. The marital status of the male was irrelevant." (internal citations omitted) (quoting *Deuteronomy* 22:22 (King James) and citing *Leviticus* 20:10 (King James))); Moore, *supra* note 15, at 222 (noting that there is not a single instance in the Bible in which a man is said to have committed adultery with an unmarried woman (citing *Lash*, 16 N.J.L. at 384; *Leviticus* 20:10 (King James); *Deuteronomy* 22:22 (King James))).

65. *Deuteronomy* 22:22 (King James).

66. *Leviticus* 20:10 (King James).

sexual activity between a man—married or not—and an unmarried woman, but the punishment was far less severe: a fine of fifty shekels of silver, to be paid to the woman's father.[67]

This gendered approach to defining adultery found its way into the English common law. At common law in England, adultery was not, as a general matter, treated as a crime unless it was "'open and notorious,'" in which case it was punished not as the independent crime of adultery but instead under the more general rubric of "'public nuisance.'"[68] But the common law treated adultery as a private wrong for which a civil action could be brought by the aggrieved husband.[69]

The meaning of adultery at English common law was clear and tracked its definition under Biblical law: it encompassed only the situation in which a married woman had sexual intercourse with a man—single or married—who was not her husband.[70] Thus, the marital status of the woman was the key consideration and that of the man was irrelevant.[71] As under Biblical law, both the married woman and the man with whom she had sexual intercourse were deemed to have committed adultery.[72] Moreover, consistent with Biblical law, sexual intercourse between a married man and an unmarried woman at English common law, while not condoned, constituted the lesser offense of fornication[73] (an offense that also applied to sexual intercourse between an *unmarried* man and an *unmarried* woman[74]). Fornication, like adultery, was generally not treated as a crime (unless it was open and notorious, in which case it was prosecuted under the more general rubric of "'public nuisance'"[75]) but was

67. *Deuteronomy* 22:28–29 (King James) ("If a man find a damsel *that is* a virgin, which is not betrothed, and lay hold on her, and lie with her, and they be found; Then the man that lay with her shall give unto the damsel's father fifty *shekels* of silver, and she shall be his wife; because he hath humbled her, he may not put her away all his days."); *see also Lash*, 16 N.J.L. at 390 ("[C]ertain it is, that this wide distinction between criminal intercourse with a *married* woman, and a *single* woman, is emphatically settled in the Levitical law; the former being punished with death, while the latter was only a fine"); *S.B.*, 609 A.2d at 125 (citing *Deuteronomy* 22:29 (King James)).

68. *See* U.S. v. Hickson, 22 M.J. 146, 147 n.1 (C.M.A. 1986) (quoting 2 CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW § 214 (14th ed. 1979)); State v. Holland, 145 S.W. 522, 523 (Mo. Ct. App. 1912); *Lash*, 16 N.J.L. at 384; Siegel, *supra* note 4, at 47–48; 2 TORCIA, *supra* note 38, § 210.

69. *Lash*, 16 N.J.L. at 384; State v. Bigelow, 92 A. 978, 978–79 (Vt. 1915); 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 139 (4th ed. 1768).

70. *Lash*, 16 N.J.L. at 384; *Bigelow*, 92 A. at 978–79; State v. Roberts, 173 N.W. 310, 311 (Wis. 1919); Moore, *supra* note 15, at 219.

71. *See* Evans v. Murff, 135 F. Supp. 907, 911 (D. Md. 1955); *Holland*, 145 S.W. at 523; Franzetti v. Franzetti, 120 S.W.2d 123, 127 (Tex. Civ. App. 1938); 2 TORCIA, *supra* note 38, § 213.

72. *Hickson*, 22 M.J. at 146–47; 2 TORCIA, *supra* note 38, § 213; Moore, *supra* note 15, at 219.

73. *Hickson*, 22 M.J. at 147; *Roberts*, 173 N.W. at 311; 2 TORCIA, *supra* note 38, § 213; Moore, *supra* note 15, at 219.

74. 2 TORCIA, *supra* note 38, § 213; Moore, *supra* note 15, at 219.

75. *See Hickson*, 22 M.J. at 147 n.1 (quoting 2 CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW § 214 (14th ed. 1979)); *Holland*, 145 S.W. at 523; *Lash*, 16 N.J.L. at 384; 2 TORCIA, *supra*

instead a private wrong for which a civil action could be brought.[76] Although one is tempted to conclude that the common law's gendered approach to punishing extramarital sex was *purely* a form of male privilege, the approach of the common law was at least arguably logically consistent with what it viewed as the evil associated with extramarital sex: its potential impact on inheritance and property rights.[77] The common law took the term "adultery" literally, applying it only to sexual acts that might "adulterate" the bloodline of a family.[78] By having extramarital sex, a married woman risked becoming pregnant and giving birth to another man's child, exposing her husband to the possibility of unwittingly maintaining another man's children (referred to in the case law as "spurious issue" or "spurious offspring") thinking them to be his own and having them succeed to his inheritance, thus shifting his property away from his own blood to strangers.[79] If, in contrast, a married man had sexual intercourse with an unmarried woman, no comparable risk to property and inheritance rights existed:[80] there would be no risk that the married man's wife would unwittingly think the child to be hers, and under the common law, the illegitimate child of the unmarried woman had no right to inherit from either the married man or his wife.[81]

In contrast to the common law courts, the Church of England—through its canon law as enforced by its ecclesiastical courts—took a very different approach to defining adultery. The ecclesiastical courts, which, among other things, had the power to grant a divorce and to award alimony,[82] viewed the evil of extramarital sex to be not its impact on property and inheritance rights but rather its breach of the marital vows and the attendant unhappiness and demoralization that it caused.[83]

Given this focus, the canon law's definition of adultery broke from that of the common law (and, ironically enough, that of Biblical law) in that it was gender-neutral: a married person, male or female, was guilty of adultery if he or she had sexual intercourse with a third person.[84] If the

---

note 38, § 210; Siegel, *supra* note 4, at 47–48.

76. *Lash*, 16 N.J.L. at 384.

77. *Hickson*, 22 M.J. at 147.

78. *See* Evans v. Murff, 135 F. Supp. 907, 911 (D. Md. 1955); *Holland*, 145 S.W. at 523; Moore, *supra* note 15, at 220.

79. *See Murff*, 135 F. Supp. at 911; *Hickson*, 22 M.J. at 147; *Lash*, 16 N.J.L. at 384; State v. Bigelow, 92 A. 978, 978 (Vt. 1915); State v. Roberts, 173 N.W. 310, 311 (Wis. 1919); Moore, *supra* note 15, at 220; 2 TORCIA, *supra* note 38, § 210.

80. *Hickson*, 22 M.J. at 147.

81. *See Lash*, 16 N.J.L. at 384.

82. *See id.* at 385, 389.

83. *See Hickson*, 22 M.J. at 146–47; *Holland*, 145 S.W. at 523; *Lash*, 16 N.J.L. at 385; *Bigelow*, 92 A. at 979; Moore, *supra* note 15, at 221; 2 TORCIA, *supra* note 38, § 210.

84. *See Hickson*, 22 M.J. at 146–47 (citing ROLLIN M. PERKINS, CRIMINAL LAW 377 (2d ed. 1969)); *Holland*, 145 S.W. at 523; *Lash*, 16 N.J.L. at 384; Moore, *supra* note 15, at 221; 2 TORCIA, *supra* note 38, § 210.

third person was also married, he or she was guilty of adultery, but if the third person was single, he or she was guilty only of fornication[85] (the rationale being that the latter did not break a marriage vow, the focus of the canon law).[86]

When the Puritans imported England's prohibitions on adultery into the American colonies, they broke from England by choosing to make it a criminal offense—and a capital one at that.[87] During this period, some colonies adopted the common law definition of adultery, others the ecclesiastical definition, and still others a hybrid of the two, a divide that persists today across the states.[88]

Thus, in those U.S. jurisdictions that follow the common law, adultery is defined as sexual intercourse between a married woman and a man not her husband (whether married or not), with both deemed guilty of adultery; sexual intercourse between a married man and an unmarried woman is not adultery.[89] In contrast, those jurisdictions that follow the canon law provide that a married person, male or female, is guilty of adultery if he or she has sexual intercourse with someone other than his or her spouse; if the third person with whom he or she had sexual intercourse is unmarried, that third person is only guilty of the offense of fornication.[90] The hybrid jurisdictions typically use the canon law's non-gendered definition of adultery in which a married person, male or female, is guilty of the act if he or she had sexual intercourse with someone other than his or her spouse but track the common law in making the third person guilty of adultery without regard to whether he or she is married or unmarried.[91]

Of the twenty-four state and territorial adultery statutes in existence in the United States today, only one codifies the common law approach[92] (perhaps in recognition of the problems that this gendered approach presents under federal and state equal protection clauses and state equal

85. *See Hickson*, 22 M.J. at 147; *Bigelow*, 92 A. at 978–79; Moore, *supra* note 15, at 220; 2 TORCIA, *supra* note 38, § 213.

86. *See Bigelow*, 92 A. at 979.

87. Siegel, *supra* note 4, at 48 (citing Jeremy D. Weinstein, Note, *Adultery, Law, and the State: A History*, 38 HASTINGS L.J. 195, 225–26 (1986)).

88. Moore, *supra* note 15, at 221, 223–26.

89. *See id.* at 223; 2 TORCIA, *supra* note 38, § 211.

90. *See* Moore, *supra* note 15, at 223; 2 TORCIA, *supra* note 38, § 211.

91. *See* Moore, *supra* note 15, at 224–25; 2 TORCIA *supra* note 38, § 211. Some jurisdictions have followed yet another hybrid model, in which the third person, if unmarried, is guilty of adultery if that person is a man but not if it is a woman. *See* Moore, *supra* note 15, at 225. Most of these have been revised to be gender neutral. *See, e.g.*, Anti-Gender Discriminatory Language Criminal Offenses Amendment Act, 1994 D.C. Legis. Serv. 10-119, Act 10-209, § 2(d) (West) (amending D.C. Code § 22-301 to make it gender neutral); Oliverson v. W. Valley City, 875 F. Supp. 1465, 1476 (D. Utah 1995) (recounting history).

92. *See* MINN. STAT. ANN. § 609.36 (West 2010).

rights amendments),[93] five codify the canon law approach,[94] fifteen codify the hybrid approach,[95] and two criminalize adultery without defining it.[96] In some instances, the statutes criminalizing adultery provide a detailed definition, making it easy to determine whether they follow the common law definition, the canon law definition, or some hybrid of the two. Thus, for example, Minnesota law currently provides an explicit, common law definition of the crime of adultery: "When a married woman has sexual intercourse with a man other than her husband, whether married or not, both are guilty of adultery . . . ."[97]

Similarly, Utah law provides an explicit, canonical definition of adultery: "A married person commits adultery when he voluntarily has sexual intercourse with a person other than his spouse[,]"[98]and "[a]ny unmarried person who shall voluntarily engage in sexual intercourse with another is guilty of fornication."[99] And New York law is demonstrative of an explicit, hybrid definition of adultery: "A person is guilty of adultery when he engages in sexual intercourse with another person at a time when he has a living spouse, or the other person has a living spouse."[100]

Yet, in some states, lawmakers simply made it a crime to commit "adultery" without defining the term, leaving it to the courts to interpret its meaning.[101] Maryland law is demonstrative, providing simply that "[a] person may not commit adultery" without defining the term anywhere.[102]

When confronted with statutes such as these, courts have been forced to decide the question of whether the statute incorporated the common law definition of adultery, the canon law definition, or some combination of the two. In the context of criminal adultery statutes, the questions that arise are

---

93. *See* Purvis v. State, 377 So. 2d 674, 676–77 (Fla. 1979); Barbara A. Brown et al., *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 961–62 (1971); Mark Strasser, *Sex, Law, and the Sacred Precincts of the Marital Bedroom: On State and Federal Right to Privacy Jurisprudence*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 753, 779 (2000).

94. *See* COLO. REV. STAT. § 18-6-501 (2010); GA. CODE ANN. § 16-6-19 (2010); N.D. CENT. CODE § 12.1-20-09 (2009); UTAH CODE ANN. § 76-7-103 (2010); VA. CODE ANN. § 18.2-365 (2010).

95. ALA. CODE § 13A-13-2 (2010); ARIZ. REV. STAT. ANN. § 13-1408 (2010); FLA. STAT. § 798.01 (2010); IDAHO CODE ANN. § 18-6601 (2010); 720 ILL. COMP. STAT. ANN. 5/11-7 (West 2010); KAN. STAT. ANN. § 21-3507 (West 2010); MASS. GEN. LAWS ANN. ch. 272, § 14 (West 2010); N.H. REV. STAT. ANN. § 645:3 (2010); N.Y. PENAL LAW § 255.17 (McKinney 2010); OKLA. STAT. ANN. tit. 21, § 871 (West 2010); P.R. LAWS ANN. tit. 33, § 4147 (2007); R.I. GEN. LAWS § 11-6-2 (2010); S.C. CODE ANN. § 16-15-60 to -70 (2009); WIS. STAT. ANN. § 944.16 (West 2009). In addition, Michigan appears to codify the variant of the hybrid approach in which the third person is guilty of adultery if they are an unmarried man but not if they are an unmarried woman. *See* MICH. COMP. LAWS ANN. §§ 750.29 to -.30 (West 2010).

96. MD. CODE ANN., CRIM. LAW § 10-501 (West 2010); MISS. CODE. ANN. § 97-29-1 (2010).

97. MINN. STAT. ANN. § 609.36(1) (West 2010).

98. UTAH CODE ANN. § 76-7-103(1) (West 2010).

99. *Id.* § 76-7-104(1).

100. N.Y. PENAL LAW § 255.17 (McKinney 2010).

101. *See* Moore, *supra* note 15, at 222.

102. MD. CODE ANN., CRIM. LAW § 10-501(a) (West 2010).

two-fold: (1) does adultery require the involvement of a married woman; and (2) if the third person is unmarried, is his or her conduct considered adultery or merely fornication? In the context of divorce statutes, the question is whether the wife is entitled to a divorce if her husband has sexual intercourse with an unmarried woman. This, in turn, requires courts to consider two threshold matters: the appropriateness of using canon law as an interpretive tool and the question as to whether the term "adultery" necessarily means the same thing in all contexts.

Although it is not unusual to rely on England's common law when interpreting U.S. law, it is somewhat unorthodox to rely on *canon* law. Thus, when confronted with an ambiguous adultery statute and a choice between the common law and canon law definitions, some courts make the choice based on the unlikelihood that the legislature that adopted the statute would want to follow English *spiritual* law.

For example, a decision interpreting Maryland's adultery statute concluded that, given that the statute was enacted in 1715—"at a time when anticlerical feeling was high"—it was unlikely that the legislature intended to adopt the canon law definition.[103] Reinforcing the court's conclusion was the fact that the common law definition more closely tracked the Biblical definition, which the court reasoned would have had a greater influence on the Puritan framers.[104] Similarly, another court thought it absurd that, as a common law court, it would follow anything but the common law and derided the canon law as being the product of "[t]he Popish clergy," which it described as "zealous abettors of arbitrary power" who introduced into the canon law "the imperial laws of Rome."[105]

Yet, in the particular circumstance of adultery, other courts have concluded that it makes more sense to look to the canon law. Because adultery, unlike other crimes, was *not* a common law crime, they have reasoned that the common law provides less assistance than it normally does as a tool for statutory interpretation, whereas the canon law definition is more appropriate than it otherwise would be because it was the ecclesiastical courts in England that were given the task of defining and punishing people for engaging in adulterous conduct.[106] These courts also reasoned that because adulterous conduct was largely unregulated by the common law, the canon law definition (which, at the time America was founded, was the definition accepted by all Christian nations) in effect *became* the common law that the colonists brought to America with them.[107] In addition, after identifying the prevention of harm to the

103. Evans v. Murff, 135 F. Supp. 907, 911 (D. Md. 1955).

104. *See id.*

105. State v. Lash, 16 N.J.L. 380, 385 (1838).

106. *See* Chase v. U.S., 7 App. D.C. 149, 154 (1895); U.S. v. Clapox, 35 F. 575, 578 (D. Or. 1888); Commonwealth v. Call, 38 Mass. (21 Pick.) 509, 511 (1839).

107. *See Chase*, 7 App. D.C. at 155; *Clapox*, 35 F. at 578; State v. Hasty, 96 N.W. 1115,

marriage and the resultant misery and demoralization it produced in families as the purpose of the law of adultery, these courts concluded that only the canon law definition would fully effectuate that purpose.[108]

Despite the fact that courts would pick either the canon law or the common law as their tool for interpreting adultery laws, the ultimate end product of most interpretive processes usually ended up resembling the hybrid definition of adultery. This is because the statutes would often come to the court with a recent legislative amendment that would partially amend the original adultery statute by adding a sentence specifying that the statute did apply in a given circumstance, such as when there is sexual intercourse between a married man and an unmarried woman. While such an amendment might thus make clear that extramarital conduct by a married man constituted adultery, it might remain unclear whether the third party was also guilty of adultery or merely fornication.[109] To the extent that the rule of the amending language tracked the canon law (say, by specifying that sexual intercourse between an unmarried woman and a married man constitutes adultery), courts would conclude that the original language of the statute must otherwise follow the *common* law (otherwise, the amendment would not have been necessary).[110] Similarly, if the rule of the amending language tracked the common law (say, by specifying that an unmarried man is guilty of adultery if he engages in sexual intercourse with a married woman), courts would conclude that the original language of the statute must otherwise follow the *canon* law.[111] The end result was thus to arrive at a definition of adultery that was far more encompassing than either the common or canon law definitions standing alone.

A second interpretive question facing courts was whether the term "adultery" necessarily meant the same thing in both the criminal adultery laws and the statutes governing divorce. This question would typically come up in the situation in which there was a clearly established definition of the term adultery in one of the two contexts, and the court was trying to determine its meaning in the other context.

At first blush, it seems somewhat nonsensical to interpret the term differently in the two contexts, and thus, several courts would hold that there was no reason to believe the term meant something different in each of these contexts.[112] Then—either by relying on earlier precedents holding

---

1115–16 (Iowa 1903); Bashford v. Wells, 96 P. 663, 666 (Kan. 1908); State v. Holland, 145 S.W. 522, 523 (Mo. Ct. App. 1912); State v. Ryan, 234 P. 811, 814 (Or. 1925).

108. *See Holland*, 145 S.W. at 523; *Ryan*, 234 P. at 814. *See also Call*, 38 Mass. (21 Pick.) at 511 (noting that canon law definition enforces policy expressed in preamble of enforcing "due observance of the marriage covenants").

109. *See* U.S. v. Shaughnessy, 221 F.2d 578, 580 (2d Cir. 1955); Evans v. Murff, 135 F. Supp. 907, 911 (D. Md. 1955).

110. *See* State v. Bigelow, 92 A. 978, 978–79 (Vt. 1915).

111. *See Call*, 38 Mass. (21 Pick.) at 511.

112. *Id.* at 512–13; *Holland*, 145 S.W. at 523; State v. Byrum, 83 N.W. 207, 208 (Neb. 1900);

that the wife can obtain a divorce if her husband has sexual intercourse with an unmarried woman or simply asserting that "[n]o one would deny" that the wife would have the right to obtain a divorce in that circumstance—these courts would reason that this same conduct on her husband's part should subject him to a criminal prosecution for adultery.[113]

Yet in several cases, courts interpreted the term "adultery" as used in the criminal statutes differently from that used in the divorce context, with the common law definition applying in the former context and the canon law definition applying in the latter context. These courts reasoned that because the ecclesiastical courts in England were the only courts with the power to grant a divorce, it made sense that the word adultery as used in divorce statutes would have the meaning given to it by the canon law, under which infidelity by either husband or wife was grounds for divorce without regard to whether the third person was married or unmarried.[114] But because the *crime* of adultery was derived from the common law civil cause of action, it made sense to give it the narrower scope that the common law gave to it.[115]

These same questions of statutory interpretation presented themselves when courts were forced to determine the definition of adultery in cases in which civil tort actions were brought for interference with the marital relationship. As indicated above, while the common law of England did not punish adultery as a crime, it did provide husbands with the right to bring two private civil actions against those who interfered with the marital relationship. The first of these, referred to alternatively as enticement or abduction, allowed the husband to sue for damages associated with the "taking . . . away" of his wife by means of persuasion or otherwise (to which the wife lacked the legal power to consent), with the damages considered to be the loss of the wife's consortium and services.[116] The second of these, referred to alternatively as seduction or criminal conversation, was a common law action for "trespass" that a husband could bring against a person who committed adultery with his wife, with the damages being the harm to the husband's marriage and family honor as well as the risk of placing the legitimacy of the husband's children into

---

State v. Fellows, 6 N.W. 239, 239–40 (Wis. 1880).

113. *See Call*, 38 Mass. (21 Pick) at 512–13; *Holland*, 145 S.W. at 523; *Byrum*, 83 N.W. at 208; *Fellows*, 6 N.W. at 239–40.

114. *See* Smitherman v. State, 27 Ala. 23, 25 (1855); Nelson v. Nelson, 164 A.2d 234, 235 (Conn. Super. Ct. 1960); State v. Searle, 56 Vt. 516, 518–19 (1884); *see also* Panhorst v. Panhorst, 390 S.E.2d 376, 378 n.3 (S.C. Ct. App. 1990).

115. *See Smitherman*, 27 Ala. at 25; *Nelson*, 164 A.2d at 235; *Searle*, 56 Vt. at 518–19; *see also* J.L.M. v. S.A.K., 18 So. 3d 384, 391 n.5 (Ala. Civ. App. 2008) (Pittman, J., concurring in the result) (describing as a "dubious proposition" the idea that spousal-support law should precisely match the criminal law).

116. *See* Hoye v. Hoye, 824 S.W.2d 422, 424 (Ky. 1992) (citing Marshall Davidson, Comment, *Stealing Love in Tennessee: The Thief Goes Free*, 56 TENN. L. REV. 629, 630–31 (1989); WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 124, at 873 (4th ed. 1971)); 3 BLACKSTONE, *supra* note 69, at 139.

doubt.[117] In the United States, these two torts evolved into the torts of alienation of affections and criminal conversation.[118]

The tort of criminal conversation is an action brought against a person who has sexual relations with the plaintiff's spouse.[119] It is a simple tort consisting solely of the element of having sex with the plaintiff's spouse, with the only defense being the *plaintiff*-spouse's consent.[120] The tort of alienation of affections is an action brought against a person who has taken actions to deprive the plaintiff of his spouse's affections.[121] The tort does not require that the defendant have any romantic or sexual relationship with the plaintiff's spouse; all that matters is that he knew of the marital relationship and acted for the purpose of adversely affecting it.[122]

At early common law, the torts of criminal conversation and alienation of affections could only be brought by a wronged husband; a wronged wife had no comparable right to bring such causes of action against third parties who interfered with the marital relationship.[123] Moreover, the wife's consent to having her affections alienated or committing adultery was not a defense: the law viewed the wife as the husband's property, and these were causes of action to vindicate the husband's property interest in his wife's services.[124] Indeed, in the words of the common law, "it was considered that she was no more capable of giving a consent which would prejudice the husband's interests than was his horse."[125]

After states enacted Married Women's Property Acts, which gave women the right to own property and sue in their own names, common law courts had to decide whether to either abolish the torts of alienation of affections and criminal conversation or instead to extend their reach so as to permit women to sue for such wrongs.[126] Courts similarly were forced to

---

117. *See Hoye*, 824 S.W.2d at 424 (citing Marshall Davidson, Comment, *Stealing Love in Tennessee: The Thief Goes Free*, 56 TENN. L. REV. 629, 630–31 (1989)); 3 BLACKSTONE, *supra* note 69, at 139–40.

118. *Hoye*, 824 S.W.2d at 424 (citing Marshall Davidson, Comment, *Stealing Love in Tennessee: The Thief Goes Free*, 56 TENN. L. REV. 629, 630–31 (1989)); Helsel v. Noellsch, 107 S.W.3d 231, 231–32 (Mo. 2003).

119. 2 DAN B. DOBBS, THE LAW OF TORTS § 442 (2001).

120. *Id.* It is not necessary that the defendant know or believe that the person was married, and indeed, it is not a defense to liability that the plaintiff's spouse lied about his or her marital status. *See* 3 RESTATEMENT (SECOND) OF TORTS § 685 cmt. f (1977).

121. 2 DOBBS, *supra* note 119, § 442.

122. *Id.*

123. Kline v. Ansell, 414 A.2d 929, 930 (Md. 1980); 3 RESTATEMENT (SECOND) OF TORTS § 683 cmt. d (1977); Robert E. Rodes, Jr., *On Law and Chastity*, 76 NOTRE DAME L. REV. 643, 651 (2001).

124. *See* O'Neil v. Schuckardt, 733 P.2d 693, 696 (Idaho 1986); Hoye v. Hoye, 824 S.W.2d 422, 425 (Ky. 1992); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 916 (5th ed. 1984).

125. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 124 (4th ed. 1971).

126. *Hoye*, 824 S.W.2d at 424.

confront that choice after determining that the common law rule violated federal and state equal protection clauses and state equal rights amendments by discriminating on the basis of gender.[127]

Those courts that opted to extend the actions to women rather than abolishing the actions altogether re-theorized the rationale for the torts. When only husbands could bring them, the initial rationales for the torts were both to vindicate the husband's property interests in his wife's services[128] and to compensate him for the risk of "spurious issue" that the third party's conduct introduced,[129] thus tracking the common law rationale for punishing adultery. The revised theory largely tracked the canon law approach to defining adultery: preserving marital harmony by deterring wrongful interference with it;[130] providing compensatory damages for humiliation, disgrace, dishonor, and mental suffering;[131] and punishing the invasion of the exclusive right to marital intercourse.[132]

Beyond criminal and civil actions that define adultery in order to directly punish adulterous behavior, the question of how to define "adultery" has likewise arisen in murder cases in which the defendant raises a heat-of-passion defense based on discovering that his or her spouse has committed adultery. Specifically, courts have had to confront the question whether the term "adultery" in this context must track the definition of adultery used in criminal adultery statutes.

On the one hand, courts hold that, at the very least, the definition of adultery in this context requires that there be a *marriage*, and thus, they refuse to permit the defense to be raised in cases involving unmarried couples.[133] In so holding, courts will sometimes cite the definition of

127. *See Kline*, 414 A.2d at 932–33; Bland v. Hill, 735 So. 2d 414, 421 (Miss. 1999) (Smith, J., specially concurring); Fadgen v. Lenkner, 365 A.2d 147, 151 n.7 (Pa. 1976); Felsenthal v. McMillan, 493 S.W.2d 729, 729–30 (Tex. 1973); Cahoon v. Pelton, 342 P.2d 94, 99 (Utah 1959); Irwin v. Coluccio, 648 P.2d 458, 460 (Wash. Ct. App. 1982).

128. *See Hoye*, 824 S.W.2d at 424; Helsel v. Noellsch, 107 S.W.3d 231, 231–32 (Mo. 2003).

129. *See Hoye*, 824 S.W.2d at 424; Doe v. Doe, 747 A.2d 617, 621 (Md. 2000); Oppenheim v. Kridel, 140 N.E. 227, 228 (N.Y. 1923); Norton v. Macfarlane, 818 P.2d 8, 16 (Utah 1991).

130. *See Hoye*, 824 S.W.2d at 424; *Helsel*, 107 S.W.3d at 231–32; Russo v. Sutton, 422 S.E.2d 750, 752 (S.C. 1992).

131. *See Oppenheim*, 140 N.E. at 228.

132. *See id.*; *Norton*, 818 P.2d at 15–16.

133. *See* Somchith v. State, 527 S.E.2d 546, 548 (Ga. 2000); People v. McCarthy, 547 N.E.2d 459, 463 (Ill. 1989); People v. Eagen, 357 N.W.2d 710, 711–12 (Mich. Ct. App. 1984). As several commentators have noted, this limitation seems questionable given the rationale for the heat-of-passion defense. *See* WAYNE R. LAFAVE, CRIMINAL LAW § 7.10 ("The rule of mitigation does not, however, extend beyond the marital relationship so as to include engaged persons, divorced couples and unmarried lovers—as where a man is enraged at the discovery of his mistress in the sexual embrace of another man. This limitation seems questionable, however, at least in cases where there existed a long-standing relationship comparable to that of husband and wife."); Joshua Dressler, *Rethinking Heat of Passion: A Defense in Search of a Rationale*, 73 J. CRIM. L. & CRIMINOLOGY 421, 440 (1982) ("[A] married person who kills upon sight of adultery commits manslaughter, but an unmarried individual who kills upon sight of unfaithfulness by one's lover or fiancé is a

adultery found in the state's criminal adultery statute.[134] Yet beyond that, courts have decoupled the definition of adultery from the narrower definition often found in criminal adultery statutes. For example, in a case in which the criminal adultery statute only applied when the married person and the third person either "habitually" engaged in adultery or did so while living together, a court concluded that what is required to invoke the heat-of-passion defense is not adultery in its legal, criminal sense but rather in its "ecclesiastical" sense, in other words, a "violation of the marriage bed."[135]

This decoupling is, of course, consistent with the rationale for the defense: it is, after all, the violation of the marital relationship, and not the technical violation of the state's adultery laws, that triggers the emotional response in the spouse. Moreover, given that the defense is recognized in every state, including those lacking criminal adultery laws and fault-based divorce schemes, adultery in the provocation context surely cannot be too closely tied to its definition in other, substantive contexts.[136]

Despite some divisions among courts, the trend of the decisions over time has been consistent across all four of these contexts. In each of them, the trend has been toward a broader definition of adultery that does not differentiate between male and female extramarital conduct and that views the harm caused by adultery to be not the risk to bloodline purity but rather the breach of marital vows and the attendant harm to the relationship and to families.

III. THE APPLICATION OF THE LAW OF ADULTERY TO SAME-SEX CONDUCT

So how is it possible that a court might conclude that extra-marital conduct between a married person and someone of the same sex does not constitute "adultery" within the meaning of a criminal adultery statute, a fault-based divorce scheme, or in other contexts? Cases so holding rely on one or more of four different (but often overlapping) rationales: (1) the statute's terms require sexual activity between two people of the opposite sex; (2) the statute, while not in terms requiring that the activity occur between two people of the opposite sex, requires (or is interpreted to

---

murderer. Only a highly unrealistic belief about passion can explain this rule in terms of excusing conduct. It is implausible to believe that when an actor observes his or her loved one in an act of sexual disloyalty, that actor will suffer from less anger simply because the disloyal partner is not the actor's spouse.").

134. *See Somchith*, 527 S.E.2d at 548.

135. *See, e.g.*, Price v. State, 18 Tex. Ct. App. 474, 484 (1885); *see also* Dennis v. State, 661 A.2d 175, 180 (Md. Ct. Spec. App. 1995) (raising but not deciding the question of whether adultery in the provocation context requires proof of coitus or whether other forms of sexual conduct suffice).

136. *See* Vera Bergelson, *Justification or Excuse? Exploring the Meaning of Provocation*, 42 TEX. TECH. L. REV. 307, 317 & n.62 (2009).

require) a form of sexual activity that can only occur between people of the opposite sex; (3) the governing statutory scheme identifies adultery and sodomy as distinct categories of misconduct; or (4) the statute is ambiguous, and the court relies on the common law definition of adultery instead of the canon law rationale.

Perhaps the most straightforward rationale for concluding that same-sex conduct does not constitute "adultery" is in the situation in which the statute, in its terms, defines adultery as sexual activity between two people of the opposite sex. In that situation, sexual activity with someone of the same sex simply does not meet the statutory definition of the offense.[137] Most modern adultery statutes—including all of those in states that either permit same-sex couples to marry, or recognize same-sex marriages from other states—use general terms such as "person,"[138] and courts interpreting statutes using such a generic term have sometimes relied on that to conclude that they reach sexual activity with those other than one's spouse regardless of sex.[139] But a handful of adultery-related statutes use gender-specific language, including (1) those that codify the common law approach, which define adultery as the situation in which "a married *woman* has sexual intercourse with a *man* other than her husband";[140] (2) those that define adultery as sexual activity between a married person and someone of "the opposite sex";[141] and (3) those that require that the offending conduct occur between a "man" and a "woman."[142]

Somewhat less clear-cut are those statutes falling into the second category, whose terms do not define adultery as occurring between people of the opposite sex but specify the *type* of sexual conduct constituting adultery (or are so interpreted). A handful of statutes are extremely specific: Kansas, for example, defines adultery as "sexual intercourse *or*

137. *See, e.g.*, People v. Martin, 180 Ill. App. 578, 580 (1913) ("The first count contains no averment as to the sex of either J. W. Martin or Marie Watson. Even if there is a presumption as to Marie Watson from the Christian name, there can be no presumption from the initials of J. W. Martin, hence from anything that appears in that count the defendants may be both of the same sex. Adultery and fornication are statutory offenses. The alleged offenses are not charged in the language of the statute since the defendants are not averred to be a man and a woman.").

138. *See* MD. CODE ANN., CRIM. LAW § 10-501 (West 2010); MASS. GEN. LAWS ANN. ch. 272, § 14 (West 2010); N.H. REV. STAT. ANN. § 645:3 (2010); N.Y. PENAL LAW § 255.17 (McKinney 2010); R.I. GEN. LAWS § 11-6-2 (2010).

139. *See, e.g.*, Owens v. Owens, 274 S.E.2d 484, 485–86 (Ga. 1981) (fault-based divorce statute).

140. MINN. STAT. ANN. § 609.36 (West 2010) (emphasis added) (criminal adultery statute).

141. OKLA. STAT. ANN. tit. 21, § 871 (West 2010) (criminal adultery statute); S.D. CODIFIED LAWS § 25-4-3 (2010) (fault-based divorce statute).

142. IDAHO CODE ANN. § 18-6601 (2010) (criminal adultery statute); MISS. CODE. ANN. § 97-29-1 (West 2010) (criminal adultery statute); S.C. CODE ANN. §§ 16-15-60 to -70 (2009) (criminal adultery statute). Interestingly, Idaho, while defining adultery in gender-specific terms under its criminal adultery statute, defines it in gender neutral terms for purposes of fault-based divorce. *See* IDAHO CODE ANN. § 32-604 (2010).

sodomy"[143] while New York defines it as "sexual intercourse, *oral sexual conduct or anal sexual conduct*," clearly covering forms of sexual activity that can occur between people of the same sex.[144] However, most statutes, including those of Massachusetts, New Hampshire, New York, and Rhode Island, simply refer to "sexual intercourse."[145] In this instance, courts must address whether the phrase "sexual intercourse" includes non-coital intercourse, such as oral or anal sexual conduct.

Rarely, however, does the adultery statute itself define the phrase "sexual intercourse," and thus, courts look to other sources of statutory or decisional law to determine whether the term is a blanket one that covers all forms of sexual activity or whether it is limited to something narrower, such as penile-vaginal intercourse (or, in some cases, they do not look to any sources at all but simply declare it to have a particular meaning).[146] Moreover, in some instances, the adultery statute or divorce statute does *not* itself even require sexual intercourse; rather, the court first looks to common law or secondary sources to conclude that "adultery" requires "sexual intercourse," and then looks to additional sources to define the phrase "sexual intercourse."

For example, in the New Hampshire Supreme Court decision discussed in the Introduction, in which the husband sought a fault-based divorce on the grounds of adultery based on his wife having sexual relations with another woman, the divorce statute at issue did not define the term "adultery."[147] Rather, the court relied on two sources to first conclude that "adultery" requires "sexual intercourse": the parallel criminal adultery statute defining adultery as such and a dictionary definition.[148] In turn, the court relied on the same dictionary for the definition of the phrase "sexual intercourse," which defined it as "coitus" or, more specifically, the "'insertion of the penis in the vagina[],'" which the court stated, by definition, can only take place between people of the opposite gender.[149]

In looking to sources, it is difficult not to conclude that courts select those that will support the definition of adultery they wish to find. Thus, for example, a Virginia court, in deciding that adultery required penile-vaginal intercourse, relied on a case defining heterosexual rape, which

143. KAN. STAT. ANN. § 21-3507 (West 2010) (emphasis added) (criminal adultery statute).

144. N.Y. DOM. REL. LAW §§ 170(4), 200(4) (McKinney 2010) (emphasis added) (fault-based divorce statute).

145. MASS. GEN. LAWS ANN. ch. 272, § 14 (West 2010); N.H. REV. STAT. ANN. § 645:3 (2010); N.Y. PENAL LAW § 255.17 (McKinney 2010); R.I. GEN. LAWS § 11-6-2 (2010). Rhode Island's differs slightly, referring to "illicit" sexual intercourse.

146. *See, e.g.*, Anonymous v. Anonymous, 2 Ohio N.P. 342, 342 (C.P. 1895) ("The offense of sodomy manifestly does not fall within this definition.").

147. *In re* Blanchflower, 834 A.2d 1010, 1011 (N.H. 2003).

148. *Id.* at 1011–12.

149. *Id.* at 1011 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 441 (unabridged ed. 1961)).

rather naturally required penetration of the male sexual organ into the female sexual organ.[150] It thus concluded that while two individuals of the same sex can engage in "sexual relations" (including fellatio, cunnilingus, and anal sex), these types of activities are distinct from "sexual intercourse" and thus do not constitute adultery.[151] And a lower New Hampshire court decision, which pre-dated the New Hampshire Supreme Court decision discussed above, relied on the fact that a provision setting forth the definitions of terms used in a chapter of the Criminal Code governing sexual assault offenses that defined the term "sexual penetration" to mean "'sexual intercourse' as well as various other sexual acts [including] cunnilingus, fellatio, [and] anal intercourse" and from this concluded that "sexual intercourse" must be something different from fellatio, cunnilingus, and anal intercourse.[152] Similarly, a New York case (decided before the definition of adultery was clarified, as set forth above) relied on the use of the phrase "sexual intercourse" in the context of a statute involving sexual conduct with a *dead body* to conclude that sodomy was outside the scope of that phrase.[153] Moreover, depending on which dictionary a court selects to define "sexual intercourse," one can find either a broad or narrow definition of the phrase that either does or does not include non-coital acts.[154] In contrast, a South Carolina court rejected these sorts of verbal semantics in interpreting its divorce and alimony statute, stating that a definition that includes only coital acts is "unduly narrow and overly dependent upon the term sexual intercourse" and concluding that it suffices that there is "extra-marital sexual activity."[155]

Moreover, if the statute is silent, why conclude that adultery requires "sexual *intercourse*"? A New Jersey decision, for example, cited the fact that the phrase "sexual *penetration*" in the state criminal code includes vaginal sexual intercourse as well as cunnilingus, fellatio, or anal intercourse as a basis for concluding that same-sex sexual conduct falls within the scope of the phrase "adultery," thus at least implicitly defining adultery as requiring sexual *penetration* rather than sexual intercourse.[156]

In any event, to the extent courts in states that recognize same-sex

150. *See* Glaze v. Glaze, No. HJ-1323-4, 1998 WL 972306, at *1 (Va. Cir. Ct. Aug. 31, 1998) (citing Spencer v. Commonwealth, 384 S.E.2d 775, 779 (Va. 1989)).

151. *Id*.

152. Collins v. Collins, No. 00-M-1926, 2001 WL 34012426, at *2 (N.H. Super. Ct. Oct. 25, 2001).

153. Cohen v. Cohen, 103 N.Y.S.2d 426, 427–28 (Sup. Ct. 1951).

154. *Compare In re* Blanchflower, 834 A.2d 1010, 1011 (N.H. 2003) (citing 1961 edition of Webster's Third New International Dictionary with narrow definition and concluding that same-sex sexual activity does not count as sexual intercourse), *with* Menge v. Menge, 491 So. 2d 700, 702 (La. Ct. App. 1986) (citing 1981 edition of Webster's New Collegiate Dictionary with broad definition and concluding that same-sex sexual activity counts as sexual intercourse).

155. RGM v. DEM, 410 S.E.2d 564, 567 (S.C. 1991).

156. *See* S.B. v. S.J.B., 609 A.2d 124, 126 (N.J. 1992).

marriage rely on the definition of the phrase "sexual intercourse," judges may, as demonstrated above, have to resort to the definition of that phrase in other parts of its laws. As an example, Connecticut law defines the term "sexual intercourse" to include vaginal intercourse, anal intercourse, fellatio, and cunnilingus.[157] Thus, a Connecticut court might rely on this to conclude that same-sex sexual conduct is adultery. Yet, to the extent that courts do so, they should at least rely on statutory definitions that are related rather than those involving conduct with dead bodies and the like.

A third reason to hold that same-sex extramarital conduct does not constitute "adultery" is in situations in which the governing statutory scheme distinguishes adultery and either sodomy or homosexuality as different forms of misconduct serving as grounds for divorce or criminal liability. Thus, for example, if a divorce statute provides separate grounds for divorce, one of which is the spouse's "adultery" and another of which is the fact that the spouse either is homosexual or has engaged in an act of sodomy, this would be a basis for requiring that the person sue for divorce citing one ground rather than the other.

This sort of argument is most clear cut—albeit hyper-technical—in the situation in which the very jurisdiction where, say, a divorce is sought lists those as separate grounds, with the remedy for the party seeking divorce being that they re-file stating the proper ground.[158] But in some cases, the statute at issue lists adultery and other grounds for divorce yet does not list homosexuality or sodomy as a ground for divorce. Nonetheless, one such court relied on the fact that in two *other* states as well as in England, adultery is identified as a ground for divorce separate from either sodomy or crimes against nature to conclude that under the state's own divorce statute, adultery must mean something different from sodomy![159]

Certainly, if it were common historically and across the states to list these as separate grounds, that might support a conclusion that the state's own statute did not encompass sodomy or homosexuality. Yet historically, *none* of the states listed sodomy or homosexuality as a ground separate from adultery, and England added it as a separate ground for divorce in the mid-1800s, when it expanded the bases upon which a woman could obtain a divorce[160] (well after the founding of the United States and thus a dubious guide for common law interpretation). And today, only four

157. CONN. GEN. STAT. ANN. § 53a-65(2) (West 2010).

158. *See, e.g.*, Glaze v. Glaze, No. HJ-1323-4, 1998 WL 972306, at *2 & n.1 (Va. Cir. Ct. Aug. 31, 1998).

159. Cohen v. Cohen, 103 N.Y.S.2d 426, 428 (Sup. Ct. 1951).

160. *See* JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF MARRIAGE AND DIVORCE, AND EVIDENCE IN MATRIMONIAL SUITS § 474, at 447–48 (3d ed. 1859); *see also* An Act to Amend the Law Relating to Divorce and Matrimonial Causes in England, 1857, 20 & 21 Vict., c. 85, § 27 (Eng.); Matrimonial Causes Act, 1937,1 Edw. 8 & 1 Geo. 6, c. 57, § 11 (Eng.).

states—Alabama, Delaware, New Jersey, and Virginia—list sodomy or homosexuality as a ground for divorce separate from adultery.[161]

A comparable argument could be made in the criminal context: since, historically, every state criminalized sodomy, and virtually every state criminalized adultery, those statutes must therefore refer to two different things, with the latter involving extra-marital heterosexual conduct and the former covering homosexual conduct, extra-marital or otherwise. Indeed, the absence of any cases addressing the question of whether same-sex extramarital conduct constitutes adultery in the criminal context suggests that this was the path that prosecutors historically followed. After all, why go through the trouble of seeking an adultery prosecution, with its attendant uncertainties regarding the question whether the canon or common law definitions are followed, for example, when you can take the much simpler path of prosecuting someone for sodomy?[162]

Finally, there are those circumstances in which the statute is ambiguous, perhaps simply prohibiting "adultery" or stating it as a ground for divorce without defining it, and the court relies on the common law definition to interpret the statute. Although only a handful of criminal adultery statutes leave the term undefined, including Maryland's,[163]

---

161. *See* ALA. CODE § 30-2-1(a)(2), (5) (2010); DEL. CODE ANN. tit. 13, §§ 1503(6), 1505(b)(2) (2010); N.J. STAT. ANN. § 2A:34-2(a), (h) (West 2010); VA. CODE ANN. § 20-91(A)(1) (2010); *see also In re* Marriage of Pascavage, No. 923-86, 1994 WL 838136, at *4 n.8 (Del. Fam. Ct. Aug. 15, 1994) (citing Panama statute); Grove v. Grove, No. 0251-93-3, 1994 WL 259324, at *2 n.1 (Va. Ct. App. June 14, 1994) (citing North Carolina statute); SUZANNE REYNOLDS, LEE'S NORTH CAROLINA FAMILY LAW § 5.46(B), at 407 & Supp. at 63–64 (5th ed. 1993 & Supp. 2008) (noting that an earlier version of the North Carolina statute listed adultery and homosexual acts as separate grounds). While unclear on the question of whether an act of sodomy is a form of adultery or an independent ground of divorce, several early decisions and sources have indicated that sodomy qualifies as "extreme cruelty," an independent ground of divorce found in most states. *See* W. v. W., 226 A.2d 860, 861–62 (N.J. Super. Ct. Ch. Div. 1967); H. v. H., 157 A.2d 721, 726 (N.J. Super. Ct. App. Div. 1959); Anonymous v. Anonymous, 2 Ohio N.P. 342, 342 (C.P. 1895); Poler v. Poler, 73 P. 372, 373 (Wash. 1903) (citing 1 JOEL PRENTISS BISHOP, MARRIAGE, DIVORCE, AND SEPARATION § 1830, at 755 (1891); JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF MARRIAGE AND DIVORCE, AND EVIDENCE IN MATRIMONIAL SUITS § 474, at 447–48 (3d ed. 1859); JAMES SCHOULER, A TREATISE ON THE LAW OF THE DOMESTIC RELATIONS § 220b, at 314–16 (4th ed. 1889); JAMES SCHOULER, A TREATISE ON THE LAW OF HUSBAND AND WIFE, § 525, at 553 (1882); 9 AM. & ENG. ENCYC. OF LAW 747, 764 (2d ed. 1898)).

162. *Cf.* Giles v. California, 128 S. Ct. 2678, 2686 (2008) ("Judges and prosecutors also failed to invoke forfeiture as a sufficient basis to admit unconfronted statements in the cases that did apply the dying-declarations exception. This failure, too, is striking. At a murder trial, presenting evidence that the defendant was responsible for the victim's death would have been no more difficult than putting on the government's case in chief. Yet prosecutors did not attempt to obtain admission of dying declarations on wrongful procurement-of-absence grounds before going to the often considerable trouble of putting on evidence to show that the crime victim had not believed he could recover.").

163. MD. CODE ANN., CRIM. LAW § 10-501(a) (West 2010). Although one lower federal court has interpreted the scope of the Maryland adultery statute in the context of federal immigration law, Evans v. Murff, 135 F. Supp. 907, 911 (D. Md. 1955), an appellate court in Maryland has noted that the state's own courts have not yet determined whether it encompasses the common law or

virtually all fault-based divorce statutes leave the term undefined.[164]

Once again, the New Hampshire Supreme Court case is instructive in this regard. In that case, the court was called on to interpret the meaning of the word "adultery" as used in its fault-based divorce statute. Because the term was unidentified in the statute, the court looked to, inter alia, the term as defined in the criminal statute, which requires an act of "sexual intercourse." After citing cases that it said stood for the proposition that adultery in the criminal and divorce context were equated with one another, the court then quoted cases from the early 1800s that held that "'[a]dultery is committed whenever there is an intercourse from which spurious issue may arise . . . .'"[165] The court then reasoned that "[a]s 'spurious issue' can only arise from intercourse between a man and a woman, criminal adultery could only be committed with a person of the opposite gender."[166]

By citing the "spurious issue" language of earlier cases, the court majority was wittingly, or unwittingly, endorsing the common law concept of adultery. Yet, in this regard, the court's conclusion was inconsistent with the text of the then-existing New Hampshire criminal adultery statute; developments in the meaning of the term "adultery" in other, related areas of the law; and the trend nationally in interpreting the meaning of the phrase adultery.

As demonstrated earlier, the "spurious issue" rationale for adultery laws is the common law rationale, under which not only would same-sex sexual activity not constitute adultery but neither would *opposite-sex* sexual activity between a married man and an *unmarried* woman. Yet New Hampshire's current criminal adultery statute, which was extant at the time the New Hampshire Supreme Court case was decided, clearly rejects the gendered common law approach in favor of the canon law one, providing that someone is guilty of adultery if "being a married *person*, he engages in sexual intercourse with another not his spouse . . . ."[167] Moreover, as early as 1890, the New Hampshire Supreme Court had expanded the common law cause of action for criminal conversation—the tort analogue to the crime of adultery—so as to allow not just the husband to bring such actions against those who have sexual intercourse with their wives but also to permit wives to bring such actions against those who have sexual intercourse with their husbands,[168] an expansion that is consistent with the

---

canon law definition, Payne v. Payne, 366 A.2d 405, 409–10 (Md. Ct. Spec. App. 1976).

164. *See supra* note 32.

165. *In re* Blanchflower, 834 A.2d 1010, 1011–12 (N.H. 2003) (quoting State v. Wallace, 9 N.H. 515, 517 (1838)).

166. *Id.* at 1012.

167. N.H. REV. STAT. ANN. § 645:3 (2010) (emphasis added).

168. *See* Feldman v. Feldman, 480 A.2d 34, 36 (N.H. 1984) (citing Seaver v. Adams, 19 A. 776, 776–77 (N.H. 1890)).

canon law approach to adultery and inconsistent with the common law "spurious issue" rationale. The majority brushed to one side arguments that it should interpret the term adultery to cover non-coital acts on the ground that such an interpretation would be most consistent with a focus on "marital loyalty" and a "disfavor of one spouse's violation of the marriage contract with another"—the language of the canon law—reasoning that such a legislative purpose was nowhere to be found.[169]

In contrast to the New Hampshire court, courts in other jurisdictions have interpreted the term adultery as used in their fault-based divorce statutes as encompassing same-sex extramarital conduct.[170] Although few provide much analysis, those that do clearly embrace the language of the canon law, focusing on the breach of the marital vow and its attendant injury to the other spouse.[171]

Case law interpreting the application of the torts of criminal conversation and alienation of affections to same-sex extramarital conduct is almost non-existent. This may be in part due to the fact that only a handful of jurisdictions still recognize these causes of action; in the 20th Century, most states abolished the causes of action either through common law decisions or by means of so-called "heart balm" statutes.[172] Of the states that permit or potentially recognize same-sex marriage, all have abolished these causes of action,[173] with the possible exception of New Mexico.[174] One Arkansas decision upheld (with little discussion) the

169. *In re Blanchflower*, 834 A.2d at 1012.

170. *See* Patin v. Patin, 371 So. 2d 682, 683 (Fla. 4th DCA 1979); Menge v. Menge, 491 So. 2d 700, 702 (La. Ct. App. 1986) (citing Adams v. Adams, 357 So. 2d 881, 882 (La. Ct. App. 1978)); S.B. v. S.J.B., 609 A.2d 124, 126–27 (N.J. Super. Ct. Ch. Div. 1992); RGM v. DEM, 410 S.E.2d 564, 566–67 (S.C. 1991).

171. *See S.B.*, 609 A.2d at 126–27.

172. States that may continue to recognize the tort of alienation of affections include: Hawaii, Illinois, Mississippi, New Mexico, North Carolina, South Dakota, and Utah. *See* Michele Crissman, Note, *Alienation of Affections: An Ancient Tort—But Still Alive in South Dakota*, 48 S.D. L. REV. 518, 525 n.77 (2003); *see also* Helsel v. Noellsch, 107 S.W.3d 231, 231 (Mo. 2003) (abolishing the tort in Missouri). States that may continue to recognize the tort of criminal conversation include: Hawaii, Alaska, Idaho, Kansas, Mississippi, North Carolina, South Carolina, Tennessee, and Utah. *See* Batchelor, *supra* note 37, at 1911 n.3.

173. *See* CONN. GEN. STAT. ANN. §§ 52-572b, 52-572f (West 2010); MD. CODE ANN., FAM. LAW § 3-103 (West 2010); MASS. GEN. LAWS ANN. ch. 207, § 47B (West 2010); N.H. REV. STAT. ANN. § 460:2 (2010); N.J. STAT. ANN. § 2A:23-1 (West 2010); N.Y. CIV. RIGHTS LAW § 80-a (McKinney 2010); R.I. GEN. LAWS ANN. § 9-1-42 (West 2010); VT. STAT. ANN. tit. 15, § 1001 (2010); Kline v. Ansell, 414 A.2d 929, 932–33 (Md. 1980); *Feldman*, 480 A.2d at 34, 36.

174. In New Mexico, the existence of the two causes of action is unclear. New Mexico's Supreme Court recognized the tort of alienation of affections in a 1923 decision, Birchfield v. Birchfield, 217 P. 616, 617–19 (N.M. 1923), and although the supreme court has not abolished it, in general, lower court decisions hold that New Mexico will not allow tort actions related to "freely-made sexual decisions between adults." *See, e.g.*, Padwa v. Hadley, 981 P.2d 1234, 1241 (N.M. Ct. App. 1999); *see also* Lovelace Med. Ctr. v. Mendez, 805 P.2d 603, 610 (N.M. 1991) (citing such lower court decisions for their broad principles). The New Mexico Supreme Court has reviewed a

application of the tort of alienation of affections in the case of a heterosexual married couple in which the wife had a relationship with another woman.[175] To be sure, the policies in favor of applying it are the same; however, once one identifies harm to the marital relationship as the focus of the torts, it makes no difference whether the harm is caused by a third party of the same sex or whether it involves a marriage between two people of the same-sex.[176]

However, a handful of cases have considered the applicability of two other "heart balm" causes of action—breach of a promise to marry and seduction of a child—to same-sex couples and same-sex conduct.

The cause of action for breach of a promise to marry is a hybrid tort-contract action that allows a plaintiff to sue the defendant for breaching a promise to marry him or her and to claim damages for, among other things, loss of reputation, emotional harm, and expenditures made in preparation for the marriage.[177] Although many states that permit or potentially recognize same-sex marriage have abolished this action,[178] it continues to be recognized in Rhode Island,[179] in limited circumstances in Maryland,[180] and possibly in New Mexico.[181] A Washington decision suggested, in dicta, that the logic of the breach of promise to marry action might apply to a same-sex couple,[182] reasoning that seems sound given that the same sorts of damages—reputational, emotional, and actual expenditures in preparation for marriage—could occur in that context. Indeed, the logic of the decision would suggest that states such as Washington as well as

---

case involving a criminal conversation cause of action but decided the case on grounds unrelated to the question of whether such a cause of action exists. Keyes v. Keyes, 199 P. 361, 361–62 (N.M. 1921).

175. *See* Blaylock v. Strecker, 724 S.W.2d 470, 471–72, 476 (Ark. 1987).

176. *See* REYNOLDS, *supra* note 161, § 5.46(A)(1), at 400, § 5.46(B), at 406.

177. *See* Jeffrey D. Kobar, Note, *Heartbalm Statutes and Deceit Actions*, 83 MICH. L. REV. 1770, 1770 (1985). It is a hybrid tort-contract action in that it sounds in contract (the contract being the mutual promises to marry), but the damages are based on tort principles in that the plaintiff is able to recover for such things as loss to reputation, mental anguish, and injury to health, in addition to recovering for expenditures made in preparation for the marriage and loss of the pecuniary and social advantages that the promised marriage offered. *See* Bukowski v. Kuznia, 186 N.W. 311, 311–12 (Minn. 1922); Stanard v. Bolin, 565 P.2d 94, 96 (Wash. 1977); Kyle Graham, *Why Torts Die*, 35 FLA. ST. U. L. REV. 359, 407 (2008); Kobar, *supra*. In addition, some states allow for aggravated and punitive damages under certain circumstances, such as when the defendant's acts were malicious or fraudulent. *See Stanard*, 565 P.2d at 96.

178. *See, e.g.*, MASS. GEN. LAWS ch. 207, § 47A (2010).

179. *See* Cliff v. Pinto, 60 A.2d 704, 704–07 (R.I. 1948). *See also* R.I. GEN. LAWS ANN. § 9-1-42 (2010) (eliminating all other heart balm causes of action except breach of promise to marry).

180. *See* MD. CODE ANN., FAM. LAW § 3-102 (West 2010) (allowing the action to be brought if the plaintiff is pregnant).

181. The New Mexico Supreme Court adjudicated a case in which breach of promise of marriage was raised, but the case was decided on grounds unrelated to whether the action exists. State *ex. rel.* Peteet v. Frenger, 278 P. 208, 208–09 (N.M. 1929).

182. *See* State *ex. rel.* D.R.M., 34 P.3d 887, 898 (Wash. Ct. App. 2001).

Oregon,[183] which both allow same-sex couples to enter into domestic partnerships and still recognize the cause of action for breach of a promise to marry, might likewise recognize a cause of action for breach of a promise to enter into a domestic partnership.

The cause of action for seduction historically allowed the father of a female child still living at home to bring an action against her seducer.[184] The common law action has since been modified to make it gender neutral, extending its protections to male children and allowing mothers to bring the actions, thus making female third parties liable.[185] Although many states have, through their heart balm statutes, eliminated the cause of action for seduction,[186] a number of states did not abolish them.[187] The only case to consider the issue in the context of same-sex seduction appeared to view that as falling squarely within the scope of the tort.[188]

Few decisions have addressed the question whether the heat-of-passion defense based on witnessing an act of spousal adultery applies to same-sex conduct. A Louisiana court rejected the defense in the context of a case in which the defendant killed his same-sex partner after allegedly catching him in an act of adultery. While citing its prior decisions holding that same-sex extramarital conduct constituted adultery, the court rejected the claim on the ground that the two were not married to one another, which, as described earlier, is an accepted requirement for invoking the defense.[189]

IV. WHY DOES IT MATTER?

When confronted with the question of whether criminal adultery laws and related doctrines should be deemed applicable to same-sex couples and same-sex conduct, one might be tempted to shrug her shoulders and view it as irrelevant or even a good thing. Possible reactions might range anywhere from viewing it as technically interesting but ultimately irrelevant, reasoning that a person seeking a divorce can simply state a different

183. *See, e.g.*, Cade v. Thompson, 225 P.2d 396, 400 (Or. 1950); *see also* OR. REV. STAT. ANN. §§ 31.980, .982 (West 2010) (abolishing criminal conversation and alienation of affections but not other heart balm actions).

184. *See* 3 RESTATEMENT (SECOND) OF TORTS § 701 & cmt. c (1977); 2 DOBBS, *supra* note 119, § 443.

185. *See* Edwards v. Moore, 699 So. 2d 220, 221–23 (Ala. Civ. App. 1997); Franklin v. Hill, 444 S.E.2d 778, 779 & n.1, 780–81 (Ga. 1994); *see also* Destefano v. Grabrian, 763 P.2d 275, 291 & n.1 (Colo. 1988) (Mullarkey, J., specially concurring); Parker v. Bruner, 683 S.W.2d 265, 269 n.2 (Mo. 1985) (Welliver, J., dissenting).

186. *See, e.g.*, N.J. STAT. ANN. § 2A:23-1 (West 2010); N.Y. CIV. RIGHTS LAW § 80-a (McKinney 2010); VT. STAT. ANN. tit. 15, § 1001 (2010).

187. *See, e.g.*, CONN. GEN. STAT. ANN. §§ 52-572b, -572f (2010); D.C. CODE § 16-923 (2010).

188. *See* Brayman v. Deloach, 439 S.E.2d 709, 710–12 (Ga. Ct. App. 1993).

189. *See* State v. Jack, 596 So. 2d 323, 325–26 & n.1 (La. Ct. App. 1992). *But see* People v. Washington, 130 Cal. Rptr. 96, 98–99 (Dist. Ct. App. 1976) (allowing it to be invoked in the case of an unmarried same-sex couple).

ground (sodomy or homosexuality, say, instead of adultery), or the government can prosecute the person on a different ground (for committing sodomy, say, instead of adultery). Alternatively, one might view it as a good thing: for once, there is an area of the law in which heterosexuals, rather than homosexuals, get treated more harshly. Yet, I contend that for numerous reasons, important principles of equality on the basis of gender and sexual orientation are furthered by interpreting adultery laws and related doctrines to apply to same-sex conduct, and by amending those that fail to be so interpreted.

First, to the extent that the law punishes opposite-sex adultery while leaving same-sex adultery unpunished, it is perpetuating a form of sexual orientation discrimination built upon a form of sex discrimination: the punishment or lack thereof turns solely on the gender of the individuals involved in the act of adultery. This is the same equality-based argument that Professors Andrew Koppelman and Sylvia Law have persuasively made *against* laws banning same-sex marriages or laws criminalizing only same-sex sodomy,[190] and it applies with equal force when the law provides more favorable treatment to same-sex couples than it does to opposite-sex couples. Moreover, even setting their theory to one side, it is clear that the cases refusing to classify same-sex conduct as adultery are based on gender-discriminatory regimes, as they rely exclusively on arguments grounded in the common law theory of adultery that punished only the wife's acts of adultery while leaving those of the husband unpunished.

Second, to punish opposite-sex adultery while leaving same-sex adultery unpunished is a form of sexual orientation discrimination, with heterosexuals being the class that is discriminated against. Having struck down laws banning same-sex marriage in decisions holding that discrimination on the basis of sexual orientation is subject to heightened scrutiny under state analogues to the Equal Protection Clause,[191] courts in such states can hardly let the discrimination stand when it is directed in the opposite direction.

Third, it is hardly clear what the "pro-gay rights" position is in this context. While one might be tempted to say that failing to punish the gay offender is the pro-gay rights approach, one must not forget that the victim in these situations is also gay. In other words, in the context of marriage, every responsibility for one partner constitutes a corresponding right for the other.

---

190. *See* Andrew Koppelman, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 YALE L.J. 145, 149–51, 158–60 (1988); Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 199–205 (1994); Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 230–31 (1988).

191. *See, e.g.*, Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 481–82 (Conn. 2008); Varnum v. Brien, 763 N.W.2d 862, 884–85, 906 (Iowa 2009).

Fourth, to *not* punish same-sex adulterous behavior while simultaneously punishing opposite-sex adulterous behavior is to demean the value of same-sex relationships. Just as, in the words of Justice Anthony Kennedy, it "demeans the lives of homosexual persons" to have decisions such as *Bowers* on the books that make private, consensual sex between two people of the same sex a criminal act,[192] and just as denying same-sex couples the ability to marry devalues the lives of gay people,[193] so too does it demean the lives of gay people to fail to equally protect their formal, legal relationships from the harms associated with adulterous conduct. Furthermore, it demeans the value of same-sex relationships by perpetuating antiquated, negative stereotypes about gay people by associating the virtue of fidelity with heterosexuality by enforcing a faithfulness norm against them while leaving same-sex relationships unregulated and thus tacitly enforcing or endorsing a norm of promiscuity.

Finally, the risks associated with punishing same-sex adulterous conduct via a different route are extremely harmful to the cause of gay equality. Writing shortly after *Lawrence* was decided and with reference to the New Hampshire Supreme Court decision examined above, Professor Mary Ann Case wondered whether legislatures, eager to still punish homosexual conduct, might amend their adultery statutes and fault-based divorce schemes to make clear that such conduct is included within them.[194] While the risk of selective enforcement of criminal laws is always of upmost concern in the gay community—given the history of selective enforcement of sodomy laws—the truth is that there are significant risks associated with *not* amending or appropriately interpreting the term "adultery."

For, as demonstrated above, sodomy laws are still on the books and can still validly be enforced in contexts distinguishable from *Lawrence* itself, and some fault-based divorce schemes still separately identify sodomy and homosexuality as forms of fault. Yet, to allow same-sex adultery to be punished through these alternative routes is to confuse the issues in a dangerous way, punishing same-sex adultery not because adultery is wrong but instead because same-sex conduct or homosexuality itself is wrong. (Consider, in this regard, the highly publicized discharge of Margaret Witt

192. *See* Lawrence v. Texas, 539 U.S. 558, 575 (2003).

193. *See* John G. Culhane, *Uprooting the Arguments Against Same-Sex Marriage*, 20 CARDOZO L. REV. 1119, 1181 (1999).

194. Case, *supra* note 22, at 141 ("Because of these negative externalities of adultery, the more interesting question about its future is not whether it will be unconstitutional to criminalize it after *Lawrence* (most likely not, since, as noted, it can cause harm to an institution the law protects), but rather, will legislatures, eager to strengthen traditional marriage and perhaps still interested in penalizing, condemning, or discouraging those engaged in homosexual conduct, now move to amend their adultery statutes so as to include within its definition homosexual conduct by a married person, either for purposes of the criminal law or related purposes, such as assessing fault in divorce or allowing actions for alienation of affection.").

from the U.S. Air Force:[195] Ms. Witt's discharge occurred after she had an affair with a married woman, but she was discharged for her *homosexual conduct* pursuant to the military's Don't Ask, Don't Tell policy instead of for her adulterous conduct.)[196] True enough, the sodomy laws will remain invalid as applied in the contexts constitutionally protected by *Lawrence*. However, the implicit message sent by enforcement of a sodomy law (or enforcement of the military's ban on service by openly gay persons) on the one hand is very different indeed than enforcement of adultery laws on the other.

The day may ultimately come when adultery laws and other statutory schemes that take adultery into account are either repealed or struck down as unconstitutional. For now, however, they are a part of the package of rights and responsibilities that gays and lesbians have fought so hard for in marriage litigation. To accept the benefits of marriage without the corresponding responsibilities associated with it is to accept the sorts of "special rights" that gays and lesbians are so often unfairly accused of doing when otherwise seeking equal treatment under the law.

195. Witt v. Dep't of Air Force, 527 F.3d 806, 809–10 (9th Cir. 2008).

196. *See* Witt v. U.S. Dep't. of Air Force, No. 06-5195RBL, 2010 WL 3732189, at *4 (W.D. Wash. Sept. 24, 2010).