

# Strange Bedfellows: Criminal Law, Family Law, and the Legal Construction of Intimate Life

Melissa Murray\*

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\* Assistant Professor of Law, U.C. Berkeley School of Law; J.D., Yale Law School; B.A., University of Virginia. This Article has benefited greatly from the generous suggestions and comments of more readers than I can thank here. I owe a special debt of gratitude to my colleagues at Berkeley Law School, and particularly to Kathy Abrams, Catherine Albiston, Michelle Anderson, Ian Haney-López, Angela Harris, Oona Hathaway, Amy Kapczynski, Herma Hill Kay, Chris Kutz, Gillian Lester, David Lieberman, Goodwin Liu, Mary Ann Mason, Ali Miller, Erin Murphy, David Sklansky, Steve Sugarman, Molly Van Houweling, Leti Volpp, and Chuck Weisselberg, as well as to the participants of the U.C. Berkeley School of Law's Faculty Retreat, Berkeley JWIG, the University of Utah's New Frontiers in Family Law Conference, the SMU Law and Citizenship Colloquium, the Washington University School of Law Faculty Colloquium, University of California, Irvine School of Law's Faculty Colloquium, the 2008 Family Law Emerging Scholars Workshop, the University of Chicago's Regulation of Family, Sex, and Gender Workshop, UCLA's Critical Race Studies Seminar, Stanford Law School's Legal Studies Workshop, and the 2008 Association for the Study of Law and the Humanities Conference. I am indebted to Kent McKeever, Dana Neascu, and Andrew Larrick of Columbia Law School's Arthur W. Diamond Law Library for their persistence in obtaining the court documents in *State v. Koso*, as well as Michael Levy and Doug Avila of the Berkeley Law Library for fantastic research support. Erica Franklin, Cynthia Hsu, Ruth Issacson, Sarah King, and Caroline McKay provided excellent research assistance. Joseph Daniels and the staff of the *Iowa Law Review* offered outstanding editorial assistance. Finally, I thank Joshua Hill for his helpful comments and unwavering support.

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## I. INTRODUCTION

*If two things are inextricably tied to together, and you can think of one without thinking of the other, why then, you have a legal mind.*

—Ruth Bader Ginsburg<sup>1</sup>

In a comic scene in Shakespeare's *The Tempest*, a shipwrecked jester, Trinculo, seeks shelter from an impending storm. Unfortunately for him, the only shelter available is beneath the cloak of Caliban, a monster who appears to be a "man or a fish."<sup>2</sup> Acknowledging that the circumstances are less than ideal, but eager to escape the coming storm, Trinculo wryly observes that "misery acquaints a man with strange bedfellows."<sup>3</sup>

In modern parlance, the phrase "strange bedfellows" refers to individuals who differ in their tastes, outlooks, and interests, yet who manage to work together in service of a common goal. Frequently, the phrase is used in the context of politics—"politics makes strange bedfellows"—a nod to the way in which political interests can bring together people who otherwise have little in common.

The phrase also is apt in the legal context.<sup>4</sup> In this Article, I offer an account of two legal doctrines—criminal law and family law—that are strange bedfellows whose interaction is frequently overlooked. On the surface, criminal law and family law would appear to have little in common. Criminal law crafts a system of public regulation that is enforced by the threat of punishment or other sanction.<sup>5</sup> Family law obviously has public

1. Letter from Ruth Bader Ginsburg to John Reinstein (Aug. 15, 1978) (paraphrasing without attribution a quote by Thomas Reed Powell), *quoted in* LINDA K. KERBER, NO CONSTITUTIONAL RIGHT TO BE LADIES 257 (1998); *see also* Thurman W. Arnold, *Criminal Attempts—The Rise and Fall of an Abstraction*, 40 YALE L.J. 53, 58 (1930) (quoting Thomas Reed Powell as saying "[i]f you think you can think about something which is attached to something else without thinking about what it is attached to, then you have what is called a legal mind." (citation omitted)).

2. WILLIAM SHAKESPEARE, *THE TEMPEST* act 2, sc. 2.

3. *Id.*

4. Legal scholars have identified a veritable laundry list of strange bedfellows, such as intellectual property and international trade. *See generally* Loren K. Allison & Eric H.J. Stahlhut, *Arbitration and the ADA: Do the Two Make Strange Bedfellows?*, 37 RES GESTAE 168 (1993) (noting the relationship between arbitration and employment law); Renee A. Pistone, *Environmental Advocacy Makes Strange Bedfellows: A Plea for Lawyers, Scientists, and Theologians to Caucus & Promote Environmental Sustainability*, 15 PENN ST. ENVTL. L. REV. 323 (2007) (exploring the relationship between science and theology in the context of environmental problems); Robert J. Gutowski, Comment, *The Marriage of Intellectual Property and International Trade in the TRIPs Agreement: Strange Bedfellows or a Match Made in Heaven?*, 47 BUFF. L. REV. 713 (1999) (describing the relationship between international trade and intellectual property law).

5. Guyora Binder, *Punishment Theory: Moral or Political?*, 5 BUFF. CRIM. L. REV. 321, 321–22 (2002) (positing that punishment is an institution that enforces social norms via sanctions); Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 602–03 (1996) (asserting that society uses punishment to discourage citizens from violating the law); Ronald J.

import, but nonetheless is understood to involve the private sphere—the home and family.<sup>6</sup> Moreover, while criminal law, which carries the threat of deprivation of liberty, is seen as punitive and coercive,<sup>7</sup> family law generally is considered more ameliorative and attentive to the well-being of those involved.<sup>8</sup>

This Article focuses on the relationship between criminal law and family law in the regulation of marriage, sex, and intimate life.<sup>9</sup> In doing so, it accomplishes two things. First, it challenges an ingrained narrative that argues that until quite recently, the home and family were impervious to criminal intervention. This Article reveals that, in fact, criminal law, working in tandem with family law, has long played an important role in the legal construction of intimate life.

In addition to this contribution, the Article argues that we have overlooked, to our detriment, criminal law and family law's cooperative role in organizing intimate life. Historically, criminal law and family law have worked in tandem to produce a binary view of intimate life that categorizes intimate acts and choices as *either* legitimate marital behavior *or* illegitimate criminal behavior.

More recently, however, cases like *Eisenstadt v. Baird*<sup>10</sup> and *Lawrence v. Texas*<sup>11</sup> appear to reorganize sex in a more continuous fashion. In these cases, I argue, the traditional marriage–crime binary is disrupted in favor of a continuum where marriage and crime remained fixed as outer extremes framing an interstitial space where intimate acts and choices are neither valorized as marital behavior nor vilified as criminal behavior. This zone,

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Ronald J. Rychlak, *Society's Moral Right to Punish: A Further Exploration of the Denunciation Theory of Punishment*, 65 TUL. L. REV. 299, 321 (1990) (noting that, to regulate conduct, society imposes or threatens to impose punishment on citizens who break the law).

6. NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 1–2 (2000) (observing that the private marital relationship has public value and requires public recognition and support); Libby S. Adler, *Federalism and Family*, 8 COLUM. J. GENDER & L. 197, 240–241, 257 (1999) (noting that although the family has a “fundamentally private center,” it also involves rights and interests that bring it within the public sphere); Martha Albertson Fineman, *What Place for Family Privacy?*, 67 GEO. WASH. L. REV. 1207, 1207–09 (1999) (noting that the family is a private institution that maintains an active “symbiosis” with the state).

7. See H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 49 (1968) (noting that criminal law “distributes its coercive sanctions”).

8. Family law's holistic “best interest of the child” standard is a quintessential example of this impulse.

9. Although the term “family law” encompasses a broad range of familial relationships and legal principles, this Article, recognizing the centrality of marriage to the broad corpus of family law, focuses exclusively on the interaction between criminal law and the legal regulation of adult relationships through marriage. See Carl E. Schneider, *The Channelling Function in Family Law*, 20 HOFSTRA L. REV. 495, 497–505 (1992) (discussing the centrality of marriage in family law). Additionally, I use the term “intimate life” throughout the Article to denote the range of interactions that occur within the private sphere.

10. *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

11. *Lawrence v. Texas*, 539 U.S. 558 (2003).

where sex is tolerated outside of both marriage and crime, is one of incredible potential and promise. However, as this Article makes clear, this potential has been largely unrealized. Because we have been inattentive to the relationship between criminal law and family law, it has operated under our radar and the binary that it produces has become the ingrained and reflexive way to understand, organize, and regulate sex. When faced with the prospect of disrupting this binary in favor of a zone where sex is not regulated by criminal or family law, we reflexively revert back to what we have known and attempt to interpret this new space through our binary lens. As such, we have bypassed an important opportunity to theorize and work towards a new understanding of sex outside of law.

The Article proceeds in five parts. Part II recounts the traditional historical narrative that posits the home, and those who occupy it, as impervious to criminal intervention and regulation. It also discusses how, in recent years, this traditional narrative gradually has yielded to a new account in which criminal law's force is brought to bear on intimate violence within the home and family. Part III challenges this traditional account of criminal law's relationship to the home and family by explaining that, in fact, criminal law historically has worked in tandem with family law to define, elaborate, and organize the normative content of intimate life.

To further explain criminal law and family law's cooperative regulatory enterprise, Part IV turns to a recent statutory rape case, *State v. Koso*.<sup>12</sup> *Koso*, I maintain, offers a unique lens through which to view the relationship between criminal law and family law and the way that it organizes intimate life. In this Part, I argue that criminal law and family law produce a binary view of intimate life. Intimate acts and choices are categorized as *either* legitimate marital behavior *or* as a crime.

Parts V and VI consider why, as a normative matter, it is important to consciously excavate and explore the interaction between criminal law and family law and the binary way that they have organized intimate life. Part IV argues that in recent years, the Supreme Court's jurisprudence in the areas of privacy and sexuality gradually has shifted from the traditional binary view towards a more continuous way of organizing intimate life. Instead of the stark binary dividing marriage from crime seen in *Griswold v. Connecticut*<sup>13</sup> and *Loving v. Virginia*,<sup>14</sup> cases like *Eisenstadt v. Baird*<sup>15</sup> and *Lawrence v. Texas*<sup>16</sup> offer the possibility of a space between marriage and crime where intimate acts and choices are expressly permitted as neither marital nor criminal.

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12. *State v. Koso*, No. CR05-20 (Richardson County Ct., Neb. Dec. 14, 2005).

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

14. *Loving v. Virginia*, 388 U.S. 1 (1967).

15. *Eisenstadt*, 405 U.S. at 438.

16. *Lawrence*, 539 U.S. at 558.

Finally, Part VI argues that a more continuous view of intimate life offers tremendous promise and possibility for those who wish to live their intimate lives beyond the law's reach. However, the opportunity for an intimate zone free of legal regulation that this continuum offers is unrealized—largely because our binary tradition prompts incredible discomfort and anxiety about the prospect of sex without law. As such, our response to a more continuous understanding of intimate life has been to reflexively revert back to the marriage–crime binary that always has shaped our understanding of intimate life. This Part concludes by calling for greater attention to the relationship between criminal law and family law in organizing intimate life. It asserts that in order to make informed choices about how we organize intimate life going forward, we must be cognizant of how criminal law and family law have worked in tandem to organize intimate life thus far.

## II. CRIME AND THE FAMILY: THE TRADITIONAL NARRATIVE

When I explain to people that my scholarship considers the interaction between criminal law and family law, I am often met with puzzled looks. “How do criminal law and family law interact with one another?” is a frequent refrain. Those who do recognize that criminal law and family law interact and intersect with one another assume that my work concerns domestic violence.

These responses are not altogether unexpected. The understanding of criminal law and family law has rested on the notion that these two doctrines are incompatible with one another and have little, if anything, to say to one another.<sup>17</sup> Indeed, a casual perusal of the leading casebooks in each field makes clear, with few exceptions, that the two doctrines are understood to be distinct systems with separate normative aims.<sup>18</sup>

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17. Jeannie Suk, *Criminal Law Comes Home*, 116 YALE L.J. 2, 9 n.16 (2006) (“[C]riminal law is commonly thought to vindicate the public interest in a way different from family law . . . .”); Barbara Bennett Woodhouse, *Reframing the Debate About the Socialization of Children: An Environmentalist Paradigm*, 2004 U. CHI. LEGAL F. 85, 135 (noting that, in the context of child welfare, we “deal systematically” with situations, labeling them as either criminal law or family law, and providing specific—rather than integrated—responses based on this categorization).

18. In most family law and criminal law casebooks, there is little discussion of the way in which these two doctrines work cooperatively to regulate intimate life. Although most criminal law casebooks provide some discussion of adultery as a basis for provocation and the marital rape exemption, these topics are not linked to a broader discussion of criminal law's role in reinforcing marital and family norms. See, e.g., RICHARD J. BONNIE ET AL., CRIMINAL LAW 343–45, 359–60 (2d ed. 2004) (discussing the distinction between marital and non-marital sex in structuring rape law); JOSHUA DRESSLER, CASES AND MATERIALS ON CRIMINAL LAW 436–37 (3d ed. 2003) (discussing marital rape and the marital rape exemption); SANFORD H. KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 357 (8th ed. 2007) (discussing marital rape and the marital rape exemption); JOHN KAPLAN ET AL., CRIMINAL LAW: CASES AND MATERIALS 350–61 (5th ed. 2004) (discussing adultery in the context of homicide); CYNTHIA LEE & ANGELA HARRIS, CRIMINAL LAW: CASES AND MATERIALS 479, 607 (1st ed. 2005) (briefly

Despite its public role as a cornerstone of society, the family has been characterized as a private entity in which individual members provide emotional and material support and care to one another.<sup>19</sup> As such, the normative aims of family law are concerned with creating and preserving families, promoting family autonomy, and securing the family as a private space impervious to state intrusion and intervention.<sup>20</sup>

By contrast, criminal law is assumed to be preoccupied with an entirely different agenda. A quintessentially public enterprise, criminal law identifies conduct incompatible with prevailing social norms by marking and punishing such conduct as crimes.<sup>21</sup> It also seeks to deter proscribed

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discussing marriage in the context of the criminalization of prostitution and the marital rape exemption). *But see* FRANKLIN E. ZIMRING & BERNARD E. HARCOURT, *CRIMINAL LAW AND THE REGULATION OF VICE* (2007) (providing a view of criminal law as a means of controlling and re-channeling vice, including sexual vice). Most family law casebooks offer some discussion of domestic violence and the role of family privacy in insulating the family from the ambit of the criminal law. *See, e.g.*, JUDITH AREEN & MILTON C. REGAN, JR., *FAMILY LAW: CASES AND MATERIALS* 281–345 (5th ed. 2006) (discussing domestic violence in the context of family law); IRA MARK ELLMAN ET AL., *FAMILY LAW: CASES, TEXT, PROBLEMS* 176–93 (4th ed. 2004) (discussing domestic violence and the marital rape exemption); LESLIE J. HARRIS ET AL., *FAMILY LAW* 113–37 (3d ed. 2005) (discussing domestic violence). Nevertheless, in these casebooks, there is little sustained discussion of the way in which criminal law has reinforced, through the criminalization of adultery, polygamy, prostitution, and fornication, family law’s understanding of marriage as the lawful site of sexual activity. AREEN & REGAN, JR., *supra*, at 98–109 (briefly mentioning criminal prohibitions on polygamy); WALTER WADLINGTON & RAYMOND C. O’BRIEN, *DOMESTIC RELATIONS: CASES AND MATERIALS* 66, 305 (5th ed. 2002) (discussing the criminalization of polygamy and briefly discussing adultery in the context of civil dissolution); D. KELLY WEISBERG & SUSAN FRELICH APPLETON, *MODERN FAMILY LAW: CASES AND MATERIALS* 494–99 (3d ed. 2006) (noting that historically, the crime of adultery pertained to extramarital sex with a married woman). *But see* HARRY D. KRAUSE ET AL., *FAMILY LAW: CASES, COMMENTS, AND QUESTIONS* (5th ed. 2003) (devoting an entire section entitled “Criminal Law” to a discussion of adultery, bigamy, fornication, rape, and sodomy, and cross-referencing child abuse and domestic violence entries).

19. Martha L.A. Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 VA. L. REV. 2181, 2187 (1995) (noting that dependency is privatized within the family unit); Jennifer S. Hendricks, *Essentially a Mother*, 13 WM. & MARY J. WOMEN & L. 429, 464 (2007) (describing legal regulation of the family as “a system that privatizes dependence, placing responsibility for caretaking on the family rather than the state”); Laura A. Rosenbury, *Friends With Benefits?*, 106 MICH. L. REV. 189, 193 (2007) (observing that states have “recognized families as a means to privatize dependency, particularly the dependency of children on their parents and the financial and emotional dependencies thought to arise when individuals share a household”).

20. Family law achieves these ends primarily by channeling adults into marriage, and then into married parenthood. *See* Schneider, *supra* note 9, at 497–98 (discussing family law’s “functions,” and marriage’s role in achieving these aims); *see also* Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385, 409 (2008) (discussing family law’s “stated interest in facilitating and enabling caregiving” within the private family).

21. *See* Gerard E. Lynch, *The Role of Criminal Law in Policing Corporate Misconduct*, 60 LAW & CONTEMP. PROBS. 23, 27 (1997) (noting that criminal actions are intended “to punish and deter violations of social norms”).

conduct by incapacitating and punishing those who engage in such behavior.<sup>22</sup>

The legal responses to domestic violence and marital rape exemplify the understanding of criminal law and family law as divorced from one another. Historically, domestic violence was understood to be beyond criminal law's reach because it involved actors, generally husbands and wives, who were firmly rooted within the institution of the family and as such were subject to family law's understanding of the marital family as a private space impervious to public regulation.<sup>23</sup>

Initially, the common law doctrine of coverture precluded criminal prosecution of domestic violence. Under coverture, the legal identity of a married woman merged into that of her husband, such that he was responsible for her conduct and, under certain circumstances, liable for her contracts, torts, and even some crimes.<sup>24</sup> As such, husbands retained the privilege to physically "correct" or "chastise" errant wives, so long as they did

22. See JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 165 (J.H. Burns & H.L.A. Hart eds., Clarendon Press 1996) (1823) (noting that the purpose of punishment is to "prevent mischief"); Peter Arenella, *Convicting the Morally Blameless: Reassessing the Relationship Between Legal and Moral Accountability*, 39 UCLA L. REV. 1511, 1529 (1992) (noting that criminal law has been used "to deter rational, self-interested actors from violating legally protected state interests and to incapacitate those individuals who were not deterred"); Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361, 1390 (2003) ("[T]he criminal law incapacitates and deters offenders by attaching to crimes sufficiently unpleasant and restrictive punishment.").

23. MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 6, 11 (1985) (discussing the private character of the home in the nineteenth century); Martha Minow, *Between Intimates and Between Nations: Can Law Stop the Violence?*, 50 CASE W. RES. L. REV. 851, 852 (2000) (noting that "[f]or husbands and wives, it was the boundary of the home" that placed intimate violence "beyond the reach of the law"); Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2147 (1996) (noting that in the nineteenth century, it became "commonplace" to depict the home and family as "fundamentally distinct from other spheres of social life").

24. See 1 WILLIAM BLACKSTONE, COMMENTARIES \*442-45 ("By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and cover, she performs every thing . . . ."); 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 109 (New York, O. Halsted 1827) ("The general rule is, that the husband becomes entitled, upon the marriage, to all the goods and chattels of the wife, and to the rents and profits of her lands, and he becomes liable to pay her debts, and perform her contracts."). See generally NORMA BASCH, IN THE EYES OF THE LAW: WOMEN, MARRIAGE, AND PROPERTY IN NINETEENTH-CENTURY NEW YORK 51-54 (1982) (summarizing analysis of Blackstone's Commentaries); MARLYNN SALMON, WOMEN AND THE LAW OF PROPERTY IN EARLY AMERICA 15-18, 41-44 (1986) (discussing doctrine of marital unity as it applied to conveyances and contracts); Anne M. Coughlin, *Excusing Women*, 82 CAL. L. REV. 1, 31-32 (1994) (discussing the marital coercion doctrine, under which a married woman who committed a crime in the presence of her husband was presumed to be acting under his coercion, and as such, could not be held personally responsible for her conduct); Murray, *supra* note 20, at 397 (describing the principles of coverture).



not inflict permanent injury.<sup>25</sup> Even after states formally abolished coverture, the emerging interest in promoting marital privacy and harmony provided the state with new reasons to resist entering the private space of the family to police spousal violence.<sup>26</sup>

Just as domestic violence was understood to be a private family matter, the legal rules surrounding marital rape made clear that this too was rooted in the rubric of the family.<sup>27</sup> At common law, the crime of rape was defined as “carnal knowledge of a woman forcibly and against her will.”<sup>28</sup> Furthermore, a husband could not be found guilty of raping his wife.<sup>29</sup> The premise for the marital rape exemption was that because of “their mutual

25. 1 BLACKSTONE, *supra* note 24, at \*444. According to Blackstone:

The husband also . . . might give his wife moderate correction. For, as he is to answer for her misbehaviour, the law thought it reasonable to intrust him with this power of restraining her, by domestic chastisement, in the same moderation that a man is allowed to correct his servants or children . . . .

*Id.* For an overview of the husbandly privilege of marital chastisement, see R. EMERSON DOBASH & RUSSELL DOBASH, *VIOLENCE AGAINST WIVES: A CASE AGAINST THE PATRIARCHY* 48–74 (1979).

26. See Suzanne A. Kim, *Reconstructing Family Privacy*, 57 HASTINGS L.J. 557, 573 (2006) (discussing the role of family privacy in the context of domestic violence); Wayne A. Logan, *Criminal Law Sanctuaries*, 38 HARV. C.R.-C.L. L. REV. 321, 341 (2003) (same); Siegel, *supra* note 23, at 2151–53 (discussing marital privacy).

27. Indeed, this understanding of marital rape as a family matter was codified in the Model Penal Code, which retained the common law marital rape exemption. MODEL PENAL CODE § 213.1 (1962) (imposing criminal liability for rape only upon “[a] male who has sexual intercourse with a female not his wife”); see also *id.* § 213.1 cmt. 8(c) (asserting that “[r]etaining the spousal exclusion avoids this unwarranted intrusion of the penal law into the life of the family”).

28. 4 BLACKSTONE, *supra* note 24, at \*210; see also *State v. Williams*, 23 P. 335, 337 (Mont. 1890) (noting that rape “would exist in an act of sexual intercourse with any female . . . with the exception, not of a class of females, but of a single individual, . . . the wife of the perpetrator”) (emphasis added); *State v. Golden*, 430 A.2d 433, 435 (R.I. 1981) (defining common law rape as the “act of sexual intercourse committed by a man with a woman not his wife and without her consent”); *State v. Huffman*, 87 S.E.2d 541, 555 (Va. 1955) (“At common law . . . the crime of rape is carnal knowledge, forcibly and against her will, of a female person, not his wife, by a male person who is capable of performing such act.”).

29. Nineteenth century legal treatises underscored that husbands could not be convicted of raping their wives. See 3 J. CHITTY, *A PRACTICAL TREATISE ON THE CRIMINAL LAW* 811 (1816) (“A man cannot, indeed, be himself guilty of a rape on his own wife . . . .”); 1 WILLIAM L. CLARK & WILLIAM L. MARSHALL, *A TREATISE ON THE LAW OF CRIMES* 422 (1900) (“[A] man cannot be guilty of this offense [rape] by having carnal knowledge of his wife, and it can make no difference that he does so by force and against her will.”); WILLIAM L. CLARK, JR., *HAND-BOOK OF CRIMINAL LAW* 190 (1894) (“It is lawful for a husband to have carnal knowledge of his wife, and the fact that he uses force does not make him guilty of rape.”); IRA M. MOORE, *A PRACTICAL TREATISE ON CRIMINAL LAW, AND PROCEDURE IN CRIMINAL CASES, BEFORE JUSTICES OF THE PEACE AND IN COURTS OF RECORD IN THE STATE OF ILLINOIS* 306 (Chicago, Callaghan & Co. 1876) (“The Husband Cannot be Guilty of Rape upon his own Wife . . . .”); FRANCIS WHARTON, *A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES* 438 (Philadelphia, James Kay, Jr. & Brother ed., 2d ed. 1852) (1846) (“[A] husband cannot be convicted of the offence [of rape] . . . .”).

matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract.”<sup>30</sup> That is, the legal understanding of marriage as a status relationship to which the parties had freely consented, and from which they could not retract their consent, precluded criminalizing unwanted marital sex as rape.<sup>31</sup> Instead, marital rape was characterized as a private matter to be dealt with within the family.

In the 1970s and 1980s, feminist legal scholars and reformers began agitating for a change in the legal conception of domestic violence and marital rape.<sup>32</sup> By characterizing domestic violence and marital rape as private family matters, they argued, the law allowed the family to shelter gender subordination and violence; and in so doing, impeded women’s ability to function as equal citizens in and outside of the home.<sup>33</sup> Domestic

30. 1 MATTHEW HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* 628 (1st Am. ed. 1847) (1778).

31. *State v. Haines*, 25 So. 372, 372 (La. 1899) (“The husband of a woman cannot himself be guilty of an actual rape upon his wife, on account of the matrimonial consent which she has given, and which she cannot retract.”); *Frazier v. State*, 86 S.W. 754, 755 (Tex. 1905) (stating that “all the authorities hold that a man cannot himself be guilty of actual rape upon his wife” and that “one of the main reasons being the matrimonial consent which she gives when she assumes the marriage relation, and which the law will not permit her to retract in order to charge her husband with the offense of rape.”); Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CAL. L. REV. 1373, 1398–1400 (2000) (discussing Sir Matthew Hale’s consent theory); Rebecca M. Ryan, *The Sex Right: A Legal History of the Marital Rape Exemption*, 20 LAW & SOC. INQUIRY 941, 944–47 (1995) (discussing the origins of the marital rape exemption).

32. Michelle J. Anderson, *Marital Immunity, Intimate Relationships, and Improper Inferences: A New Law on Sexual Offenses by Intimates*, 54 HASTINGS L.J. 1465, 1485 (2003) (“Until the mid-1970s in this country, there were no serious legal challenges to the marital rape exemption . . .”); Ruth Colker, *Marriage Mimicry: The Law of Domestic Violence*, 47 WM. & MARY L. REV. 1841, 1851–57 (2006) (describing reform efforts).

33. CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 193 (1989) (“[T]he legal concept of privacy can and has shielded the place of battery, marital rape, and women’s exploited domestic labor. It has preserved the central institutions whereby women are deprived of identity, autonomy, control, and self-definition. It has protected a primary activity through which male supremacy is expressed and enforced.”); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1020 (1984) (“The rhetoric of privacy . . . reinforces a public/private dicotomy [sic] that is at the heart of the structures that perpetuate the powerlessness of women.”); Linda C. McClain, *Inviolability and Privacy: The Castle, the Sanctuary, and the Body*, 7 YALE J.L. & HUMAN. 195, 208 (1995) (noting that critical examination of the concept of privacy has been a “significant component of feminist jurisprudence”); Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973, 981–82 (1991) (arguing that the expectation of family privacy has impeded state intervention to curb domestic violence). However, not all feminists favored eliminating the legal right to privacy. See JEAN BETHKE ELSHTAIN, *PUBLIC MAN, PRIVATE WOMAN: WOMEN IN SOCIAL AND POLITICAL THOUGHT* 217, 222, 321–22, 326, 335–36, 351 (1981) (arguing for the importance of a right to privacy); Anita Allen, *Privacy*, in *A COMPANION TO FEMINIST PHILOSOPHY* 456, 456–65 (Alison M. Jaggar & Iris Marion Young eds., 1998) (discussing egalitarian conceptions of privacy and private choice); Anita Allen, *Coercing Privacy*, 40 WM. & MARY L. REV. 723, 743 (1999) (accepting the “basic feminist critique of privacy,” but asserting that “worthwhile, egalitarian conceptions of privacy and private choice survive the critique”); Kim, *supra* note 26, at 581 (noting that “liberal feminists dispute the notion that privacy inherently damages women”).

violence and marital rape, they insisted, were not family matters, but rather were questions of dignity and citizenship that required the public intervention of the criminal law.<sup>34</sup> As such, they argued that both domestic violence and marital rape should be legally understood as crimes for which perpetrators, whether family members or not, would be subject to criminal enforcement and punishment.<sup>35</sup>

In all, this reform project was remarkably successful. Presently, domestic violence has been codified as a crime throughout the United States<sup>36</sup> and prosecutorial discretion in domestic violence cases has been sharply curtailed.<sup>37</sup> In many jurisdictions, marital rape exemptions have been struck from the books and are no longer available as a defense to charges of criminal rape.<sup>38</sup>

The recent trend towards the criminalization of domestic violence and marital rape has not gone unexamined. For example, a number of legal scholars have acknowledged the unique dynamics that have resulted from the increased criminalization of the private sphere for purposes of domestic violence enforcement.<sup>39</sup> However, both the reform project and the critiques

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34. MACKINNON, *supra* note 33; SUSAN MOLLER OKIN, JUSTICE, GENDER, AND THE FAMILY 110–33 (1991).

35. DAVID PETERSON DEL MAR, WHAT TROUBLE I HAVE SEEN: A HISTORY OF VIOLENCE AGAINST WIVES 171 (1996) (“[W]ife beating should be treated as a serious crime with serious consequences.”); Schneider, *supra* note 33, at 989–90 (arguing for legal remedies for the victims of domestic violence); Martin D. Schwartz, *The Spousal Exemption for Criminal Rape Prosecution*, 7 VT. L. REV. 33, 46–48 (1982) (rebutting arguments that spousal rape is inappropriate for criminal intervention and sanction).

36. Colker, *supra* note 32, at 1857 (“Today, all states prohibit domestic violence.”). *But see* Town of Castle Rock v. Gonzales, 545 U.S. 748, 760–61 (2005) (finding that a municipal police department acted within its discretion in refusing to enforce a domestic violence restraining order); Colker, *supra* note 32, at 1857–58 (noting that domestic violence laws may not protect those in non-traditional domestic relationships).

37. Many prosecutors’ offices have implemented no-drop policies, which require prosecution of domestic violence, even where victims are uncooperative. *See* Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WIS. L. REV. 1657, 1672 n.75 (citing sources listing jurisdictions that have adopted no-drop policies). In addition to this, many states have enacted mandatory arrest laws that require police to arrest upon probable cause in domestic violence cases. *See* G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservatization of the Battered Women’s Movement*, 42 HOUS. L. REV. 237, 239 n.2 (2005) (listing state mandatory arrest statutes).

38. Anderson, *supra* note 32, at 1485 (noting that twenty-four states and the District of Columbia have abolished marital immunity for sexual offenses); Helaine Olen, *Most States Now Ban Marital Rape*, L.A. TIMES, Oct. 22, 1991, at A7.

39. *See, e.g.*, Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review*, 4 BUFF. CRIM. L. REV. 801, 830 (2001) (arguing that mandatory arrest policies “make battered women more vulnerable to state control”); Leigh Goodmark, *When Is a Battered Woman Not a Battered Woman? When She Fights Back*, 20 YALE J.L. & FEMINISM 75, 119–21 (2008) (arguing that the success of the battered women’s movement ironically has silenced and disempowered battered women who fight back); Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 825 (2007) (“Rather than conservatives becoming more progressive, the net effect of domestic violence reform has been a subsumption of the feminist movement into the state’s

that it has engendered fail to grasp that criminal regulation of the private sphere is not a new phenomenon. In this Article, I argue that despite a narrative that has, until quite recently, cast the family and family law as wholly outside of criminal law's reach, in fact, criminal law long has played a critical role in structuring and organizing intimate life.

### III. THE PRIVATE LIFE OF CRIMINAL LAW

Traditionally, we have credited family law with constructing the legal framework in which we forge our intimate lives. As anyone who has tried to obtain a marriage license understands, family law governs intimate life by regulating the entry into marriage through procedural and substantive restrictions.<sup>40</sup> Through these restrictions, family law clearly establishes those relationships that are eligible for state recognition; but equally important, it also enunciates a normative ideal for intimate life.<sup>41</sup>

Procedurally, lawful marriage requires compliance with the state's licensing apparatus.<sup>42</sup> Through licensing, the couple confirms to each other, and the overseeing state, their consent to the union. In contrast to the procedural requirements, the substantive restrictions that family law prescribes articulate who may and may not marry. Presently, all jurisdictions prohibit marriages between more than two persons, between consanguineous relations, and between parties where one (or both) of the participants is below the jurisdiction's age of consent.<sup>43</sup> Historically, this

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goal of managing undesirables."); Holly Maguigan, *Wading into Professor Schneider's "Murky Middle Ground" Between Acceptance and Rejection of Criminal Justice Responses to Domestic Violence*, 11 AM. U. J. GENDER SOC. POL'Y & L. 427, 442-43 (2003) (noting that mandatory arrest policies have led to dramatic increases in the number of women arrested for domestic violence, particularly among women of color).

40. This is not to suggest that entry into marriage is the full extent of family law's regulatory domain. In addition to entry to marriage, family law regulates exit from marriage (divorce and annulment), parenthood, adoption, child welfare, and more recently, assisted reproductive technologies and alternatives to marriage (civil unions and domestic partnerships). Nor is the regulation of marriage the only place where family law and criminal law work in tandem. The juvenile justice system and the child welfare system are two other points of intersection. However, the scope of this Article is confined to articulating the structural relationship between criminal law and family law in regulating marriage and sex. As such, it focuses on family law and criminal law's interaction in defining and policing the normative content of marriage.

41. For example, in restricting from marriage relationships between more than two persons, relationships between persons of the same gender, and relationships between persons related by blood or affinity, most U.S. jurisdictions have constructed and codified a normative understanding of marriage as a heterosexual enterprise between two unrelated persons.

42. See, e.g., ALASKA STAT. § 25.05.011 (2006); CONN. GEN. STAT. § 46b-24 (2007); DEL. CODE ANN. tit. 13, § 107 (1999); IOWA CODE § 595.3 (2001); MINN. STAT. § 517.07 (2008); MO. REV. STAT. § 451.040 (2000); OR. REV. STAT. § 106.077 (2007); TENN. CODE ANN. § 36-3-103 (2005); TEX. FAM. CODE ANN. § 2.001 (Vernon 2006); WASH. REV. CODE § 26.04.140 (2008); WYO. STAT. ANN. § 20-1-103 (2007).

43. See, e.g., ALA. CODE § 30-1-4 (LexisNexis 2007) (prohibiting marriage if below age of consent); ALASKA STAT. § 25.05.021 (2006) (prohibiting polygamy and consanguineous

litany of substantive restrictions was even more robust. Until 1967, many southern states prohibited interracial marriages;<sup>44</sup> and until quite recently, states universally prohibited marriages between persons of the same gender as well.<sup>45</sup>

These procedural requirements and substantive restrictions were not inadvertent or coincidental. Indeed, they purposefully articulated an ideal of marriage and intimate life. Until the twentieth century, these rules and restrictions made clear that marriage was an intraracial, monogamous, exogamous, and heterosexual union between consenting adults. And while

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marriage); ARK. CODE ANN. § 9-11-105 (2008) (prohibiting marriage if below age of consent), § 106 (prohibiting consanguineous marriage); CAL. FAM. CODE § 2200 (West 2004) (prohibiting consanguineous marriage); *id.* § 2201 (prohibiting polygamy); COLO. REV. STAT. § 14-2-110 (2008) (prohibiting polygamy and consanguineous marriage); CONN. GEN. STAT. § 46b-21 (2007) (prohibiting consanguineous marriage); *id.* § 46b-30 (prohibiting marriage if below age of consent); DEL. CODE ANN. tit. 13, § 101(a) (1999) (prohibiting consanguineous marriage), § 123 (prohibiting marriage if below age of consent); GA. CODE ANN. § 19-3-2 (2008) (prohibiting marriage if below age of consent, polygamy, and consanguineous marriage); IND. CODE § 31-11-8-2 (1998) (prohibiting polygamy); *id.* § 31-11-8-3 (prohibiting consanguineous marriage); KAN. STAT. ANN. § 23-101 (2007) (prohibiting polygamy and marriage if below age of consent); *id.* § 23-102 (prohibiting consanguineous marriage); ME. REV. STAT. ANN. tit. 19-A, § 701 (2008) (prohibiting polygamy and consanguineous marriage); NEV. REV. STAT. § 125.290 (2007) (same); 23 PA. CONS. STAT. ANN. § 1304 (2007) (prohibiting consanguineous marriage and marriage if below age of consent); S.C. CODE ANN. § 20-1-10 (2008) (prohibiting consanguineous marriage); *id.* § 20-1-80 (prohibiting polygamy); *id.* § 20-1-100 (prohibiting marriage if below age of consent); TENN. CODE ANN. § 36-3-101 (2005) (prohibiting consanguineous marriage); *id.* § 36-3-102 (prohibiting polygamy); *id.* § 36-3-105 (prohibiting marriage if below age of consent); WYO. STAT. ANN. § 20-1-102 (2007) (prohibiting marriage if below age of consent).

44. See *Loving v. Virginia*, 388 U.S. 1, 12–13 (1967) (holding unconstitutional a Virginia law criminalizing interracial marriages).

45. In the last decade, there has been greater acceptance of same-sex couplings. At present, three U.S. jurisdictions, Massachusetts, Connecticut, and Iowa, have expanded civil marriage to include same-sex couples. *Varnum v. Brien*, 763 N.W.2d 862, 905–07 (Iowa 2009); *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 418 (Conn. 2008); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 969–70 (Mass. 2003). In April 2009, the Vermont legislature overrode the governor’s veto of a bill legalizing same-sex marriage. Abby Goodnough, *Gay Rights Groups Celebrate Victories in Marriage Push*, N.Y. TIMES, Apr. 8, 2009, at A1, available at [http://www.nytimes.com/2009/04/08/us/08webvermont.html?\\_r=1](http://www.nytimes.com/2009/04/08/us/08webvermont.html?_r=1). The new law will take effect on September 1, 2009. S. 115, 2009–2010 Leg., Reg. Sess. (Vt. 2009). On May 6, 2009, the Maine legislature passed, and the governor signed into law, a bill legalizing same-sex marriage. Abby Goodnough, *Maine Governor Signs Same-Sex Marriage Bill*, N.Y. TIMES, May 7, 2009, at A21, available at <http://www.nytimes.com/2009/05/07/us/07marriage.html>. A handful of other states have afforded same-sex couples civil recognition—and many of the benefits and privileges of civil marriage—through alternative statutes like the civil union and registered domestic partnerships. See CAL. FAM. CODE § 297.5 (West 2004 & Supp. 2007) (granting registered domestic partners the same rights and responsibilities under California law as spouses); N.J. STAT. ANN. § 37:1-29 (West 2008) (codifying civil unions for same-sex partners); VT. STAT. ANN. tit. 15, §§ 1201–07 (2002) (same). For a discussion of these developments, see Melissa Murray, *Equal Rites and Equal Rights*, 96 CAL. L. REV. 1395, 1396–97 (2008) [hereinafter Murray, *Equal Rites*] (discussing the development of civil-union statutes); Murray, *supra* note 20, at 439–42 (same).

the modern day understanding of marriage includes interracial and same-sex unions (albeit more limitedly), marriage continues to be understood as a monogamous and exogamous enterprise undertaken by consenting adults.

Through the legal regulation of entry into marriage, family law lays out the normative parameters for intimate life by articulating what marriage is and should be. In so doing, family law marks marriage as the normative ideal of intimate life.<sup>46</sup> Moreover, it constructs a boundary that separates sexual behavior deemed worthy and legitimate (marriage) from that which is unworthy and illegitimate (behavior ineligible for, or inimical to, marriage).<sup>47</sup>

However, even as it articulates this normative vision, family law is hobbled in trying to police its boundaries. The rhetoric of family privacy traditionally has marked the interior of family life as impervious to state intrusion and regulation.<sup>48</sup> Thus, although family law may regulate who can enter into a marriage and how the couple negotiates their exit from marriage, it may not regulate *in* an intact marriage or in intimate arrangements that exist outside of marriage.<sup>49</sup> It may prohibit consanguineous relatives from marrying, but it cannot prohibit them from choosing to have an intimate relationship with one another outside of marriage. It can limit marriages to adult couples, but it cannot prohibit minors from being intimate with each other without the benefit of a marriage license.

If family law is limited to policing at the gates of marriage and only gestures vaguely to what exists outside of marriage, how then does it enforce the normative ideal of marriage as the archetype of intimate life and protect it from the corrosive influences of external forces? As I explain, family law

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46. Murray, *supra* note 20, at 441 (discussing “marriage’s entrenchment as the normative ideal for regulating adult intimacy”); Christopher Wolfe, *Moving Beyond Rhetoric*, 57 FLA. L. REV. 1065, 1092 (2005) (“Americans continue to regard monogamous heterosexual marriage as the normative ideal . . .”).

47. In describing this phenomenon, cultural anthropologist Gayle Rubin divides sex into “the charmed circle” of good, normal, natural, blessed sex and “the outer limits” of bad, abnormal, unnatural, damned sex. Within the charmed circle, marriage occupies a position of primacy—it is deemed worthy and legitimate, and importantly, is the model by which all other sexual behavior is measured. Not surprisingly, sexual behavior outside of the charmed circle is not recognized as worthy and legitimate. See Gayle Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, in PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY 267, 281 (Carole S. Vance ed., 1984).

48. *McGuire v. McGuire* generally is used to illustrate this principle. 59 N.W.2d 336, 337 (Neb. 1953). There, the court refused to compel a husband to support his wife in the manner she desired on the ground that “[p]ublic policy” dictated that “[t]he living standards of a family are a matter of concern to the household, and not for the courts to determine.” *Id.* at 342; see also HENDRIK HARTOG, *MAN AND WIFE IN AMERICA: A HISTORY* 9–10 (2000) (discussing *McGuire* and the tradition of family privacy); Kerry Abrams, *Immigration Law and the Regulation of Marriage*, 91 MINN. L. REV. 1625, 1679 (2007) (same).

49. *McGuire*, 59 N.W.2d at 344–45; see also Abrams, *supra* note 48, at 1681 (noting “courts’ [historic] reluctance to interfere in internal family matters”).

relies on criminal law to assist in defining what marriage is and is not, and to police marriage's normative boundaries.<sup>50</sup> More importantly, while family law constructs marriage as the normative ideal, it only references that which is outside of marriage by the vaguest implication. That is, though family law can mark what is "good," it is far less forceful in marking what is "bad." For this reason, criminal law's intervention is doubly important. Not only does criminal law reinforce marriage's position as the normative ideal for intimate life by preventing that which is normatively bad from corrupting and contaminating marriage, it also explicitly marks what is bad *as* bad.

Criminal law accomplishes all of this in a number of ways. In most, if not all, jurisdictions, family law's substantive restrictions on entry to marriage are reinforced by criminal bars on the same conduct. For example, not only was interracial marriage once prohibited as a civil matter, it also was subject to criminal penalties.<sup>51</sup> Indeed, interracial sex itself was criminalized as miscegenation,<sup>52</sup> simultaneously underscoring the understanding of

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50. This is not to say that criminal law is the only doctrinal area that reinforces family law's normative concerns. As Professor Jill Hasday has shown, a wide range of non-family law areas—from tax law and property law to civil procedure and evidence—help to reinforce family law's normative commitments. See Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 875 (2004) (calling attention to the ways in which "federal social security law, employee benefit law, immigration law, tax law, Indian law," among others, help regulate family life). Nevertheless, there is something distinctive about criminal law's role in regulating the family. Unlike many of these other doctrinal areas, criminal law plays a particularly coercive role in reinforcing family law's normative understanding of intimate life. See generally Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986) (discussing the coercive and punitive power of law). Although property law's principles regarding the equitable distribution of marital property underscore family law's professed interest in characterizing marriage as a partnership of equals, it does not do so by threatening the immediate deprivation of liberty, as criminal law does. Because of the threat of liberty deprivation—or as Robert Cover put it, legal "violence"—to achieve the normative ends espoused by family law, the relationship between criminal law and family law is worth studying independently.

It also is worth noting that although this Article focuses on the interaction between criminal law and family law in the regulation of sexuality and intimacy, family law and criminal law inform one another in other areas as well. The legal regulation of child welfare and neglect and parental kidnapping, just to name two examples, both require considerable input from criminal law and family law. The scope of this Article is limited to the legal construction of marriage, sexuality, and intimate life because our understanding of adult intimacy is central to the regulation of other family relationships. See Martha Albertson Fineman, *Why Marriage?*, 9 VA. J. SOC. POL'Y & L. 239, 267 n.77 (2001) (noting the "historic role that marriage plays in defining other family relationships and responsibilities").

51. *Jackson v. State* dramatically underscored the criminal aspect of interracial marriage bans. There, Linnie Jackson, an African-American woman, was sentenced to five years' imprisonment in the state penitentiary for marrying a white man. *Jackson v. State*, 72 So. 2d 114 (Ala. Ct. App. 1954), *cert. denied*, 72 So. 2d 116 (Ala. 1954), *cert. denied*, 348 U.S. 888 (1954). The Alabama law in question provided for a punishment of between two and seven years' imprisonment for interracial marriages. ALA. CODE tit. 14, § 360 (1940).

52. See, e.g., *McLaughlin v. Florida*, 379 U.S. 184, 196 (1964) (striking down a Florida statute forbidding miscegenation); *Pace v. Alabama*, 106 U.S. 583, 585 (1883) (upholding an Alabama statute prohibiting intermarriage, adulterous cohabitation, and fornication between

marriage as intraracial and the notion of sex as deeply constitutive of marriage itself. Likewise, while marriage between consanguineous relatives is prohibited as a civil matter, sex (again, an essential incident of marriage) between such relatives is criminalized as incest.<sup>53</sup> At every turn, criminal law's prohibitions reinforce family law's substantive restrictions. Family law says what marriage is, and criminal law underscores this normative understanding by criminalizing behavior, and actors, ineligible for marriage. In this way, there is a structural symmetry between criminal law and family law. They work together, cooperatively defining what marriage is and what it is not.

But this is not the full extent of criminal law's role in helping family law regulate marriage and intimate life. Until the late twentieth century, the criminal law in most jurisdictions prohibited fornication<sup>54</sup>—sex outside of marriage—thereby highlighting marriage's role as the licensed locus for sexual activity.<sup>55</sup> Further, the historic availability of marriage as a defense to

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"any white person and any negro, or the descendant of any negro to the third generation"); *see also* ROBERT DESTY, A COMPENDIUM OF AMERICAN CRIMINAL LAW § 59a (1882) (stating that natural law prohibits miscegenation); GROSSBERG, *supra* note 23, at 105–08 (outlining the adoption of traditional nuptial prohibitions); THOMAS WELBURN HUGHES, A TREATISE ON CRIMINAL LAW AND PROCEDURE § 802 (1919) (providing the definition of miscegenation); EDWARD W. SPENCER, A TREATISE ON THE LAW OF DOMESTIC RELATIONS AND THE STATUS AND CAPACITY OF NATURAL PERSONS AS GENERALLY ADMINISTERED IN THE UNITED STATES § 57 (1911) (examining the effect of marriages within prohibited degrees of relationship); 2 FRANCIS WHARTON, A TREATISE IN CRIMINAL LAW § 1754 (9th ed. 1885) (describing miscegenation).

53. 2 JOEL PRENTISS BISHOP, COMMENTARIES ON THE CRIMINAL LAW § 15 (1858) (describing the crime of incest); LAWRENCE FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 128 (1993) (noting the criminalization of incest); FRANCIS WHARTON, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES § 2621 (4th ed. 1857) (describing the crime of incest in New York); Christine McNiece Metteer, *Some "Incest" Is Harmless Incest: Determining the Fundamental Right to Marry of Adults Related by Affinity Without Resorting to State Incest Statutes*, 10 KAN. J.L. & PUB. POL'Y 262, 273–74 (2000) (discussing the criminalization of incest in the United States).

54. *See, e.g.*, Doe v. Duling, 782 F.2d 1202, 1204 (4th Cir. 1986) (discussing Virginia's fornication law, enacted in 1819); BISHOP, *supra* note 53, § 46 (discussing the long history of the criminalization of fornication); JOHN D'EMILIO & ESTELLE B. FREEDMAN, INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA 18 (1988) (discussing colonial social norms regarding out-of-wedlock sex); FRIEDMAN, *supra* note 53, at 127 (discussing marriage's place as the approved site for sexual activity); 2 FRANCIS WHARTON, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES § 2667 (5th ed. 1861) (discussing fornication); Mary Anne Case, *Marriage Licenses*, 89 MINN. L. REV. 1758, 1769 (2003) (acknowledging that marriage licenses sexual activity, but noting that, presently, unwanted marital sex is restricted by the criminal law).

55. D'EMILIO & FREEDMAN, *supra* note 54, at 16 (noting that prohibitions on sex were not intended to "squelch sexual expression, but rather to channel it into what they considered to be its proper setting . . . marriage"); FRIEDMAN, *supra* note 53, at 127 ("By law, only married people were entitled to any kind of sex life at all."); Ariela R. Dubler, *Immoral Purposes: Marriage and the Genus of Illicit Sex*, 115 YALE L.J. 756, 777 (2006) ("Marriage, in other words, was the core legal site for licit sex.").



fornication effectively channeled the offensive conduct and actors into marriage where “lust was transformed into virtue.”<sup>56</sup>

Beyond simply identifying marriage as the appropriate site for sex, criminal law also assisted in elaborating the normative content of married life. For example, sodomy and other forms of same-sex sex historically have been criminalized.<sup>57</sup> In this way, criminal law underscored marriage’s heterosexual character.<sup>58</sup> Similarly, the criminalization of prostitution reinforced the understanding of marriage as involving non-commercial, private sex.<sup>59</sup>

In addition to affirmatively articulating what marriage was not, criminal law, quite paradoxically, bolstered the normative understanding of marriage by refusing to intervene in intact marriages. Recall the earlier discussion of marital rape and domestic violence.<sup>60</sup> Historically, spousal violence was exempted from state intervention and criminal prosecution.<sup>61</sup> In the case of domestic violence, state intervention was considered unwarranted because, at common law, husbands retained the prerogative to physically chastise errant wives.<sup>62</sup> In the case of marital rape, criminal prosecution was deemed unsuitable because consent to marriage included consent to conjugal sex.<sup>63</sup>

In discussing these omissions, most scholars have focused on privacy’s role in secluding the family from state intervention.<sup>64</sup> However, family law’s construction of the private family is only one aspect of this dynamic. In refusing to intervene in these situations, criminal law further elaborated the normative content of marriage. By refusing to characterize spousal violence as assault and unwanted conjugal sex as rape, criminal law underscored that marriage was a status relationship with attendant obligations and prerogatives that could not be redefined or renegotiated by the parties. It

56. Dubler, *supra* note 55, at 763; *see also* MILTON C. REGAN, JR., *FAMILY LAW AND THE PURSUIT OF INTIMACY* 136 (1993) (describing the channeling function of family law by emphasizing how “law may shape behavior in complex ways through its affirmation or condemnation of various types of conduct”); Schneider, *supra* note 9, at 498–502 (same).

57. *See generally* WILLIAM N. ESKRIDGE, JR., *DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA 1861–2003* (2008) (canvassing the history of anti-sodomy laws).

58. Of course, criminal sodomy prohibitions as an explicit condemnation of same-sex intimacy are a product of the late-twentieth century. *See* Brief for Professors of History George Chauncey et al. as Amici Curiae Supporting Petitioners, *Lawrence v. Texas*, 539 U.S. 558 (No. 02-102), 2003 WL 152350, at \*2–3, \*7 (indicating that anti-sodomy laws were not directed at same-sex couples until the 1970s).

59. PAUL WILSON, *THE SEXUAL DILEMMA: ABORTION, HOMOSEXUALITY, PROSTITUTION, AND THE CRIMINAL THRESHOLD* 80 (1971) (noting that prostitution stands in opposition to marriage, “the legal and moral opposite of promiscuity”).

60. *Supra* notes 23–38 and accompanying text.

61. *Supra* notes 23–25 and accompanying text.

62. *Supra* note 25 and accompanying text.

63. *Supra* note 31 and accompanying text.

64. *Supra* notes 19–20 and accompanying text.

was a space where husbands had a right to “correct” wives and where conjugal sex was expected and welcomed.

Finally, and perhaps most importantly, criminal law has reflected and furthered family law’s stated interest in protecting and promoting the family as a cornerstone of society. Part of this mission involves reinforcing the private character of the family by exempting it from public regulatory intervention. However, an equally important part of this task has involved the criminalization of conduct considered inimical to the marital family. The criminalization of sodomy and other forms of same-sex sex is instructive on this point. On one level, criminalizing this conduct reiterates the understanding of marriage as a heterosexual undertaking; however, these laws also were intended to denounce the non-procreative character of same-sex sex.<sup>65</sup> In this way, anti-sodomy laws were not solely about defining marriage as a heterosexual enterprise; they also were intended to clarify marriage’s procreative purpose.<sup>66</sup>

The criminalization of adultery and prostitution also served a similar function. As an initial matter, criminal laws prohibiting adultery and prostitution reflected marriage’s place as the lawful site for sexual expression; however, these laws also were intended to protect and stabilize the marital family from the destructive influences of extramarital sex.<sup>67</sup>

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65. *Lawrence v. Texas*, 539 U.S. 558, 568 (2003) (“[E]arly American sodomy laws were not directed at homosexuals as such but instead sought to prohibit nonprocreative sexual activity more generally.”); *see also Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972) (“The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis.” (citations omitted)). The procreation concerns undergirding anti-sodomy laws also suggested that the begetting of children was expected in marriage. Legal rules governing annulments echoed this aspect of marriage. As a general matter, annulments were available in rare circumstances. However, one commonly accepted ground for annulment was that one of the parties had been defrauded as to the other’s ability or desire to have children. *See, e.g., Vileta v. Vileta*, 128 P.2d 376, 376–77 (Cal. Ct. App. 1942) (granting annulment where wife had concealed physician’s determination that she would never be able to have children); *Aufort v. Aufort*, 49 P.2d 620, 620–21 (Cal. Ct. App. 1935) (granting annulment where mentally ill wife concealed fact that she had been sterilized); *Turney v. Avery*, 113 A. 710, 710 (N.J. Ch. 1921) (granting annulment where wife had concealed the fact that her ovaries had been removed); *see also D’EMILIO & FREEDMAN, supra note 54*, at 30 (noting that, historically, sodomy, buggery, and bestiality were prohibited because they “frustrat[ed] the ordinance of marriage and . . . hinder[ed] . . . the generation of mankind” (internal quotations omitted)).

66. *See Brief for Professors of History, supra note 58*, at \*2, \*10 (arguing that procreation, rather than same-sex animus, animated early anti-sodomy laws in the United States).

67. *United States v. Bitty*, 208 U.S. 393, 401 (1908) (denouncing prostitution on the ground that it was “host[ile to] ‘the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony’” (citations omitted)); *see also D’EMILIO & FREEDMAN, supra note 54*, at 51 (detailing the strong opposition to, and violent attacks on, brothels as “sexuality . . . began to move outside the private sphere of the family and away from its reproductive moorings”); *WILSON, supra note 59*, at 80 (noting that prostitution was “often felt to be a threat” to family life); *Kerry Abrams, Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641, 643 (2005) (explaining that

The modern liberalization of sexual mores<sup>68</sup> might lead some to assume that criminal law and family law's cooperative regulation of marriage and sexuality has been relegated to an archaic past. However, the loosening of these social moorings also reflects this regulatory relationship. Take, for example, four of the most important decisions in the family law canon: *Griswold v. Connecticut*,<sup>69</sup> *Eisenstadt v. Baird*,<sup>70</sup> *Loving v. Virginia*,<sup>71</sup> and *Lawrence v. Texas*.<sup>72</sup> These decisions are etched into the foundations of family law because they reflect the unraveling of tightly wound social conventions regarding marriage, sex, and intimate life in favor of greater privacy protections for intimate behavior and decision-making.

In *Griswold*, the U.S. Supreme Court famously struck down a Connecticut state law prohibiting the use of contraception.<sup>73</sup> In *Eisenstadt*, a Massachusetts statute prohibiting the distribution of contraception to anyone but married persons was held unconstitutional.<sup>74</sup> In *Loving* and *Lawrence*, the Court held unconstitutional a Virginia anti-miscegenation law<sup>75</sup> and a Texas anti-sodomy statute,<sup>76</sup> respectively.

While these four cases have carved out constitutional protections for private decision-making in intimate life, they also reveal, indirectly, criminal law's role in regulating in this arena. In all four cases, the offending laws were *criminal* statutes. Prior to the Court's decision, Estelle Griswold and Dr.

nineteenth- and twentieth-century immigration laws prohibiting the immigration of women for prostitution and other "immoral purposes" were intended to protect the normative understanding of marriage as a monogamous institution); Kristin Luker, *Sex, Social Hygiene, and the State: The Double-Edged Sword of Social Reform*, 27 *THEORY & SOC'Y* 601, 614–16 (1998) (discussing the regulation of prostitution in the twentieth century); Ruth Eva Rosen, *The Lost Sisterhood: Prostitution During the Progressive Era 137* (1972) (unpublished Ph.D. dissertation, University of California, Berkeley) (on file with author) ("As a symbol of non-reproductive sexuality, moreover, the prostitute symbolized the disorder, pollution and corruption which seemed to threaten traditional family life.").

It also is worth noting that, prior to the twentieth century, laws prohibiting prostitution were "sporadically enforced" by the state, as prostitution was viewed as a "marital safety-valve" that offered men an opportunity to fulfill their sexual desires while "sparing their wives from unwanted sex and pregnancy." D'EMILIO & FREEDMAN, *supra* note 54, at 140. Of course, the mere fact that prostitution was criminally regulated signaled its condemnation and its distinction from lawful marriage. The understanding of prostitution as corrosive to the marital family would flourish under the moral reform campaigns of the nineteenth and twentieth centuries, where prostitution was framed as a threat to the moral and physical health—literally and figuratively—of the family. *Id.* at 144–45; Luker, *supra*, at 609–10.

68. FRIEDMAN, *supra* note 53, at 342–50 (discussing the deregulation of sex).

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

70. *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

71. *Loving v. Virginia*, 388 U.S. 1 (1967).

72. *Lawrence v. Texas*, 539 U.S. 558 (2003).

73. *Griswold*, 381 U.S. at 485.

74. *Eisenstadt*, 405 U.S. at 454–55.

75. *Loving*, 388 U.S. at 12.

76. *Lawrence*, 539 U.S. at 563, 578–79.

Lee Buxton had been “found guilty as accessories [to the crime of illegal distribution of contraception] and fined \$100 each.”<sup>77</sup> In *Eisenstadt*, William Baird was convicted for “exhibiting contraceptive articles in the course of delivering a lecture on contraception to a group of students at Boston University and . . . for giving a young woman a package of [contraceptive foam] at the close of his address.”<sup>78</sup> Similarly, Mildred and Richard Loving were charged with, and pled guilty to, violating Virginia’s ban on interracial marriage.<sup>79</sup> They faced a year in jail for their crime.<sup>80</sup> John Geddes Lawrence and Tyron Garner were arrested, held overnight in jail, and charged with violating Texas’s anti-sodomy statute.<sup>81</sup>

Thus, while these four cases are part of the family law canon, they also reveal the degree to which criminal law has been an important player in enunciating a normative ideal of intimate life. As these cases make clear, criminal law has worked alongside family law to foster an ideal of acceptable intimate behavior—an ideal that was built upon marriage. As such, criminal law was not absent from the home, as the inherited narrative suggests. Instead, it “was on the porch with shotgun in hand—policing and protecting the boundaries of private life.”<sup>82</sup>

But if criminal law has been on the porch helping family law to govern intimate life, why have we not given more thought to this relationship? Why is it that we consider *Griswold*, *Eisenstadt*, *Loving*, and *Lawrence* to be family law cases,<sup>83</sup> without appreciating the degree to which they also are criminal law cases?<sup>84</sup> In the following Part, I consider why we have overlooked this

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77. *Griswold*, 381 U.S. at 480. Griswold was the Executive Director of the Planned Parenthood League of Connecticut and Buxton was a licensed physician and professor at Yale Medical School who served as Medical Director of the League at its New Haven office. *Id.* In these roles, “[t]hey gave information, instruction, and medical advice to *married persons* as to the means of preventing conception.” *Id.* For further discussion, see *infra* Part IV.A.

78. *Eisenstadt*, 405 U.S. at 440. For further discussion, see *infra* Part V.B.

79. *Loving*, 388 U.S. at 3. For further discussion, see *infra* Part V.A.

80. The sentencing court suspended the sentence for a period of twenty-five years on the condition that the Lovings leave the state and not return to Virginia together for twenty-five years. *Loving*, 388 U.S. at 3.

81. *Lawrence*, 539 U.S. at 563. For further discussion, see *infra* Part V.B.

82. Melissa Murray, *The Private Life of Criminal Law*, in CRIMINAL LAW CONVERSATIONS (Stephen Garvey, Paul Robinson & Kimberly Ferzan eds., forthcoming 2009).

83. Some scholars have noted that these cases often are categorized as constitutional law cases, with little attention given to the fact that they also are family law cases. See Emily J. Sack, *The Burial of Family Law*, 61 SMU L. REV. 459, 476–77 (2008) (noting that “the line of substantive due process and equal protection cases involving the right to privacy . . . are rarely characterized as family law cases”). This oversight, they argue, suggests family law’s invisibility within federal law. Hasday, *supra* note 50, at 870–71 (noting “the exclusion of federal law from the family law canon”); Sack, *supra*, at 476.

84. To be clear, I do not mean to suggest that *Griswold*, *Buxton*, *Baird*, *Lawrence*, *Garner*, and the *Lovings* did not understand these restrictions on intimate behavior to be criminal restrictions with criminal sanctions. No doubt, anyone whose intimate behavior is circumscribed by criminal regulation understands all too clearly the force of the criminal law in their lives. See

regulatory relationship, and explore a case that brings this relationship back into focus.

#### IV. STRANGE BEDFELLOWS: CRIMINAL LAW AND FAMILY LAW IN *STATE V. KOSO*

Recall the popular Magic Eye images.<sup>85</sup> Each image contains a single repeating pattern. When you stare at the image, the pattern appears to be nothing more than a series of visual elements. However, if you step back, or turn the image upside down or on its side, the figure of a spaceship (or a train, or something else) comes into focus. When you return the image to its original orientation, the figure recedes beneath the surface and the repeating pattern once again is visible. Disrupt the orientation—step back, or turn the image upside down or on its side—and the figure comes back into focus.

These Magic Eye images illustrate an important facet of the relationship between criminal law and family law. As Part III demonstrated, criminal law and family law historically have worked in tandem to regulate marriage, sex, and sexuality. However, despite its long history, this relationship rarely has been deeply scrutinized in legal scholarship.<sup>86</sup> Part of the reason for this omission is that this relationship has been hiding in plain sight. By this I mean that the interaction between criminal law and family law is so seamless in its operation, and so deeply entrenched in the way law has conceptualized marriage and sexuality, that it is assumed and taken for granted.<sup>87</sup> We all

David Alan Sklansky, “*One Train May Hide Another*”: Katz, Stonewall, and the Secret Subtext of Criminal Procedure, 41 U.C. DAVIS L. REV. 875, 911 (2008) (explaining that in the 1960s, simply being criminally charged with sodomy, let alone convicted of the charge, was sufficient to “destroy, in a blow, a man’s reputation and livelihood, his family life” and his place in the community”). Instead, my point is simply that these four cases also are criminal law cases and that this fact is often overlooked in academic discourse, which mainly discusses and categorizes them as constitutional law cases. *But see* Jamal Greene, *Beyond Lawrence: Metaprivacy and Punishment*, 115 YALE L.J. 1862, 1866 (2006) (applying *Lawrence* to the context of capital sentences); Adil Ahmad Haque, *Lawrence v. Texas and the Limits of the Criminal Law*, 42 HARV. C.R.-C.L. L. REV. 1, 4 (2007) (identifying in *Lawrence* a “connection between the constitutional limits of the criminal law and the legitimate aims of criminal punishment”).

85. See Magic Eye Inc., <http://www.magiceye.com> (last visited May 4, 2009).

86. Of course, the idea of criminal law and family law working in tandem to regulate sexuality would not be strange to some scholars. See, e.g., 1 MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY: THE WILL TO KNOWLEDGE* 37–39 (1978) (discussing marriage and the criminalization of “unnatural” sex); Rubin, *supra* note 47, at 281 (describing the “charmed circle” of acceptable sex practices and noting that sex outside of this boundary typically has been subject to criminalization). However, in mainstream legal scholarship, the relationship between criminal law and family law in organizing intimate life has been less studied.

87. Part of the reason why the interaction is taken for granted may be because the criminalization of sexuality and intimate behavior is viewed as an outgrowth of family law, rather than as a manifestation of a deliberate relationship between criminal law and family law in regulating marriage and sexuality. For example, in an influential Article, Professor Carl Schneider noted “prohibitions against non-marital sexual activity” and “[l]aws criminalizing

know that family law prevents siblings from marrying each other and criminal law prohibits siblings from having sex with one another, but we do not necessarily reflect on the degree to which these edicts are animated by a common interest in policing a normative ideal of intimate life. We may understand that both laws reflect a general distaste for sexual relations between consanguineous relatives, but we may not connect it to some overarching normative understanding of marriage, sexuality, and intimate life.

The fact that the two doctrines are structured consistently in their regulatory content also explains the difficulty of discerning and understanding this cooperative regulation. By this I mean that although criminal law and family law work in tandem to regulate marriage, sex, and sexuality, ordinarily they do not govern the same acts. Within each jurisdiction, the lines are drawn clearly such that some behavior falls into the ambit of criminal law, while others fall into the ambit of family law. For example, in most jurisdictions, adults whose relationships are consensual, heterosexual, monogamous, and exogamous will be governed by family law and not by criminal law. By contrast, in most jurisdictions, siblings in a sexual relationship will not be governed by family law, but rather will be subject to criminal law's intervention.

Because the relationship between criminal law and family law is so entrenched, and because the acts to be regulated generally are easily categorized, it is difficult to recognize how the two actually work together to forge the legal framework in which we live our intimate lives. In order to peel back these surface layers and reveal this historic relationship and the way in which it operates in organizing intimate life, a disruptive event—akin to turning the image upside down or on its side—is necessary.

*State v. Koso* is such an event. This recent but little-known case is one where the seamless relationship between criminal law and family law is disrupted, exposing the overlapping regulatory efforts of each doctrine. In the Sections that follow, I first detail the facts of the case. I then discuss the case as a disruptive event that brings the relationship between criminal law and family law into sharper focus. I then turn to the parties and other constituencies in the case and their reactions to the situation at issue. These reactions, I argue, reveal the way in which criminal law and family law work together to produce a binary view of intimate relationships in which some acts are valorized (marriage), while others are vilified (crime).

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fornication, cohabitation, adultery and bigamy," but appeared to attribute them to family law's broad interest in channeling individuals into marriage and married parenthood. Schneider, *supra* note 9, at 502.

## A. THE FACTS

Matthew Koso and Crystal Guyer first met when he was playing video games with her older brother. At the time, he was a developmentally delayed sixteen-year-old and she was eight.<sup>88</sup> Although they were initially friends, over time the relationship took a romantic turn. When Crystal was twelve and Matthew was twenty, they became a couple, often spending nights together in the basement of Matthew's parents' home.<sup>89</sup>

Their families did not welcome the shift in their relationship. When Crystal's mother, Cecilia Guyer, learned that the couple was having sex, she obtained a restraining order directing Matthew to stay away from her daughter.<sup>90</sup> Peggy Koso cautioned her son about the possible legal consequences of the relationship<sup>91</sup>—in Nebraska, where the couple resided, such a relationship was legally prohibited as statutory rape.<sup>92</sup>

These warnings and efforts ultimately were unavailing. Matthew and Crystal continued their relationship, and in April 2005, Crystal discovered that she was pregnant with Matthew's child.<sup>93</sup> When confronted by their parents, Matthew and Crystal declared their love for one another and their intent to be married. All agreed that with a baby on the way, marriage was the appropriate course of action.<sup>94</sup>

There was one complication, however. At fourteen years old, Crystal was ineligible to marry in Nebraska, which set the age of consent for marriage at seventeen.<sup>95</sup> Neighboring Kansas, however, was more permissive in its marriage policies. Indeed, by statute<sup>96</sup> and custom, minors as young as

88. Jodi Wilgoren, *In Nebraska, Rape Charge Follows Legal Marriage, in Kansas, to 14-Year-Old*, N.Y. TIMES, Aug. 30, 2005, at A10. In his motion to suppress an earlier statement, Koso averred that he had "some type of limited intellectual or mental capabilities," but "no evidence [was] submitted to [the court] on that issue." See Transcript of Change of Plea Hearing at 10, *State v. Koso*, No. CR05-20 (Richardson County Ct., Neb. Dec. 13, 2005). During sentencing, Koso's attorney, Willis Yoesel, also suggested that Koso was developmentally delayed. *Id.* at 28 (arguing that Matthew Koso could not be considered "a grown man, either cognitively or developmentally"). This condition was never medically diagnosed.

89. Wilgoren, *supra* note 88.

90. Pam Grout, *He's 22, She's 14. Should They Be Allowed to Marry?*, PEOPLE, Sept. 12, 2005, at 87.

91. Wilgoren, *supra* note 88.

92. NEB. REV. STAT. § 28-319(1) (1995 & Supp. 2006) ("Any person who subjects another person to sexual penetration . . . (c) when the actor is nineteen years of age or older and the victim is at least twelve but no less than sixteen years of age is guilty of sexual assault in the first degree.").

93. Wilgoren, *supra* note 88.

94. *Good Morning America* (ABC television broadcast Sept. 13, 2005) (interviewing Peggy Koso, who noted that marriage was the "right thing to do," as "there was a child coming[] that we needed to provide for").

95. NEB. REV. STAT. §§ 42-102, -105 (2004).

96. Although eighteen was the age of consent for marriage in Kansas, this requirement could be circumvented if minors seeking to marry secured the consent of their parents and a

twelve years old could marry in Kansas with the consent of their parents and a state judicial officer.<sup>97</sup> Accordingly, on May 3, 2005, Matthew and Crystal traveled from their homes in Falls City, Nebraska to Hiawatha, Kansas. There, in the presence of their mothers, they were married by a Kansas state court judge.<sup>98</sup> They immediately returned to Nebraska, where their daughter, Samara Ann, was born on August 28, 2005.<sup>99</sup>

While marriage solved the problem of bearing a child out of wedlock, the couple faced a still more complicated legal problem. Under Nebraska's criminal law, sex between anyone nineteen years old or older and a partner less than sixteen years old was punishable as first-degree sexual assault—statutory rape.<sup>100</sup> The couple was well within the age frame identified as criminal in the Nebraska statute, and Crystal's pregnancy—and the subsequent birth of their daughter—was incontrovertible evidence that the couple had engaged in proscribed sexual activity while she was underage.<sup>101</sup> Accordingly, Matthew was subject to criminal liability for the statutory rape

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state court judge. See KAN. STAT. ANN. § 23-106 (2000) (“No clerk or judge shall issue a license authorizing the marriage of any person under age of 18 years *without* the express consent of such person's father, mother or legal guardian and the consent of the judge . . . .” (emphasis added)).

97. Steve Painter, *Sebelius: Prohibit Under-16 Marriage*, WICHITA EAGLE (Kan.), Oct. 22, 2005, at B1 (“Kansas law sets no minimum marriage age with parental or judicial consent. In practice, however, the age has been 12 for girls, 14 for boys.”). Since the *Koso* case, Kansas's governor, Kathleen Sebelius, publicly denounced the state's permissive age requirements for marriage. *Id.* On February 13, 2006, the Kansas House of Representatives introduced legislation that would set the age of consent for marriage at eighteen, or sixteen with parental consent. Chris Moon, *Marriage Limit Sees Universal Support*, TOPEKA CAPITAL-JOURNAL (Kan.), Feb. 14, 2006, at B3. Governor Sebelius signed the bill into law on May 17, 2006. Press Release, Kan. Office of the Governor, *Sebelius Establishes Minimum Marriage Age (May 17, 2006)*; see also KAN. STAT. ANN. § 23-106(c) (2007). The statute provides:

(1) No clerk or judge shall issue a license authorizing the marriage of any person: Under the age of 16 years, except that a judge of the district court may, after due investigation, give consent and issue the license authorizing the marriage of a person fifteen years of age when the marriage is in the best interest of the person fifteen years of age; or (2) who is sixteen or seventeen years of age without the express consent of such person's father, mother or legal guardian and the consent of the judge unless consent of both the mother and father and any legal guardian or all then living parents and any legal guardian is given in which case the consent of the judge shall not be required.

§ 23-106(c).

98. Affidavit of Probable Cause, *State v. Koso*, No. CR 05-318 (Richardson County Ct., Neb. July 25, 2005).

99. Wilgoren, *supra* note 88.

100. NEB. REV. STAT. § 28-319(1)(c) (1995 & Supp. 2006).

101. Indeed, during the sentencing proceedings, the State's attorney noted that while *Koso* had only averred that he had been “intima[te] with Miss Guyer,” their child served as evidence of their sexual relationship during her minority. See Transcript of Sentencing Proceedings, *supra* note 88, at 18.



of his wife, and under Nebraska law, their subsequent marriage was no defense to the criminal acts that preceded it.

Insisting that he would not “stand by while a grown man has a sexual relationship with a 13-year-old,”<sup>102</sup> Attorney General Bruning filed statutory rape charges against Matthew Koso in July 2005.<sup>103</sup> On August 31, 2005, Matthew Koso appeared before Judge Daniel E. Bryan in the District Court of Richardson County for arraignment.<sup>104</sup> Koso pleaded not guilty to all of the charges and the court set a date for a jury trial.<sup>105</sup> After an unsuccessful effort to suppress an earlier statement made to the police,<sup>106</sup> Matthew Koso entered a guilty plea and was convicted of statutory rape on December 14, 2005.<sup>107</sup>

#### B. REVEALING CRIMINAL LAW AND FAMILY LAW'S COOPERATIVE REGULATION

Undoubtedly, the facts presented in *State v. Koso* are unusual, perhaps even aberrant. But the case's distinctiveness is instructive. As I discussed earlier, criminal law and family law historically have worked cooperatively to regulate marriage and sexuality.<sup>108</sup> Through its licensing procedures and substantive restrictions on marriage, family law offers an ideal of appropriate sexual behavior.<sup>109</sup> This ideal is reinforced through criminal law prohibitions on behavior deemed ineligible for or inimical to marriage itself.<sup>110</sup> Together, the two legal regimes work seamlessly to stabilize the ideal of marital sex and the marital family.

*Koso* is instructive not because it exemplifies the seamless operation of this cooperative regulatory enterprise, but rather because it is a rare example of its disruption. As such, *Koso* allows us an opportunity to bring this regulatory enterprise back into focus.

Criminal law and family law's cooperative enterprise is apparent from the facts of the case and the statutory law at issue. The couple resided in Nebraska, where the law denounced sex between an adult and a minor below the age of sixteen as criminal statutory rape.<sup>111</sup> The public denunciation of this sort of sexual relationship was further reflected in

102. Butch Mabin, *Man, 22, Charged After He Marries Girl, 14*, LINCOLN J. STAR (Neb.), July 27, 2005, at A1.

103. Information, *State v. Koso*, No. CR 05-20 (Richardson County Ct., Neb. Aug. 30, 2005).

104. § 28-319(1)(c); Order, *State v. Koso*, No. CR 05-20 (Richardson County Ct., Neb. Aug. 31, 2005) [hereinafter *Koso Order*].

105. *Koso Order*, *supra* note 104.

106. Motion to Suppress, *State v. Koso*, No. CR 05-20 (Richardson County Ct., Neb. Oct. 28, 2005).

107. Ruling, *State v. Koso*, No. CR 05-20 (Richardson County Ct., Neb. Dec. 14, 2005).

108. See *supra* Part III (discussing the intersection of criminal and family law).

109. See *supra* Part III (discussing family law's enunciation of a normative ideal for intimate life).

110. See *supra* Part III (discussing criminal law's prohibitions on sexual conduct).

111. NEB. REV. STAT. § 28-319(1)(c) (1995 & Supp. 2006).

Nebraska's family law, which made such couplings ineligible for marriage.<sup>112</sup> In short, Nebraska's family law and criminal law were structurally symmetrical and aligned—the prohibitions of one echoed by the other.<sup>113</sup>

Upon learning that they could not marry in Nebraska, Matthew Koso and Crystal Guyer went to neighboring Kansas, which permitted minor marriages.<sup>114</sup> Had the Kosos chosen to stay in Kansas to live as a married couple, the criminal law would have reflected the state's acceptance of their unorthodox relationship. While Kansas generally criminalizes sex between adults and minors below the age of sixteen as statutory rape,<sup>115</sup> it makes an exception for married couples. No doubt recognizing that sex is a constitutive element of marriage,<sup>116</sup> Kansas's criminal law offers a marital statutory rape exemption that allows married adults and minors to have conjugal sex free from criminal liability.<sup>117</sup> In so doing, Kansas's criminal law is congruent with its marriage law, which permits adult–minor unions.

But the Kosos did not stay in Kansas. They immediately returned to Nebraska to live as a married couple.<sup>118</sup> And therein lay the problem. The move across jurisdictions disrupted the ordinary operation of each jurisdiction's criminal law and family law. Instead of working with the criminal law of its own jurisdiction, the jurisdictional move forced Kansas's marriage law to confront Nebraska's criminal law. Likewise, instead of working with its own marriage law, Nebraska's criminal law confronted Kansas's marriage law. As such, conjugal sex that would have been permitted in Kansas was now subject to Nebraska's statutory rape law, which, in turn, reflected Nebraska's denunciation of adult–minor marriages. Coordination between each system was impossible.

It would be convenient to dismiss *Koso's* unusual circumstances as a federalism fluke. Certainly it is the jurisdictional disjunction that gives rise to these unusual facts. But this disruption nonetheless makes clear that the interaction of family law and criminal law is not coincidental or inadvertent. Indeed, in embodying the moment of rupture between criminal law and family law, *Koso* reveals the way in which they are supposed to work.

112. *Id.* § 42-102 (2004).

113. For a discussion of structural symmetry in family law and criminal law, see *supra* Part III.

114. See *supra* notes 96–97 and accompanying text (discussing Kansas's marriage laws); see also Affidavit of Probable Cause, *supra* note 98 (describing the circumstances of the Kosos' marriage).

115. KAN. STAT. ANN. § 21-3502(a)(2) (2007) (prohibiting “sexual intercourse with a child who is under 14 years of age”).

116. See BRENDA COSSMAN, SEXUAL CITIZENS: THE LEGAL AND CULTURAL REGULATION OF SEX AND BELONGING 78 (2007) (illustrating the role of sex in legitimizing and constituting marriage).

117. KAN. STAT. ANN. § 21-3502(b) (2007) (providing an exemption for liability for statutory rape where “the child was married to the accused at the time of the offense”).

118. *Supra* notes 98–99 and accompanying text.

### C. PRODUCING A BINARY VIEW OF INTIMATE LIFE

The facts of *Koso* illustrate the breakdown of the relationship between criminal law and family law. It is this disruption that lays bare the way in which these two doctrines are intended to work. But the disruption in *Koso* reveals something more. In constructing a normative ideal of intimate life and providing the substantive content for this vision, criminal law and family law produce a polarized view of intimate life. On one side is marriage—the normative ideal of intimate life. On the other side is criminal sex—a broader category defined first by its criminality, and then again by its ineligibility to be recognized by the state through marriage. Together, criminal law and family law have organized intimate life in a stark binary—sex is either marital or criminal.<sup>119</sup>

Ordinarily, the legal boundary between acceptable intimacy and unacceptable criminality is relatively clear. However, the Kosos' move across jurisdictions disrupts the ordinary operation of criminal law and family law. In so doing, it blurs the normative boundary between acceptable and unacceptable sexual behavior, making it unclear how the behavior in question should be categorized. In the end, the various constituencies in *Koso* are left to puzzle over how to categorize the behavior and identify the normative boundary between acceptable and unacceptable sexuality. In the process, they must do what ordinarily is obvious and unnecessary—they must articulate why one system should take precedence over the other to govern the conduct in question.

In the Subsections that follow, I detail the way in which the constituencies in *Koso* attempted to reinstate the boundary between lawful and unlawful sex by categorizing the conduct at issue squarely within the rubric of either criminal law or family law.

#### 1. The Prosecution

For the state of Nebraska, the boundary between virtue and vice was clear, and Matthew Koso's behavior, sex with a minor, was criminal. However, the couple's subsequent Kansas marriage complicated what ordinarily would have been a cut-and-dried prosecution. By running to

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119. Of course, there is a great deal of discretion in drawing these boundaries. The distinction between acceptable marital behavior and criminal behavior is a narrow one. As the disruption at the heart of *Koso* makes clear, the *same* conduct—conjugal sex between an adult and a minor—has a different social and legal meaning in Kansas and Nebraska. In Kansas, where adult-minor marriages were permitted, sex within such a marriage was accepted and lawful. However, in Nebraska, where such unions were prohibited, the same marital conduct was considered a crime. Put another way, in Kansas, Matthew and Crystal's relationship—and sexual expression within that relationship—is credited as legitimate. It is a marriage. However, in Nebraska, their relationship—and sex within it—is anything but legitimate. It is deviant and predatory—it is a crime. In this way, the disruption in *Koso* illuminates the way in which each jurisdiction uses the interaction between criminal law and family law to draw the line differently between responsible family behavior and criminal sexual conduct.

Kansas, Matthew and Crystal sought legitimacy for their relationship.<sup>120</sup> One might argue that they looked to marriage to transform them from outlaws to in-laws.

Undoubtedly, Attorney General Bruning understood the allure of marriage for the couple. Their child would be born in wedlock, and the respectability and lawfulness of marriage might mute, if not erase, the transgressive nature of their premarital conduct. But according to Bruning, marriage could not erase the criminality of the underlying conduct.<sup>121</sup> If anything, going to Kansas to circumvent Nebraska's own understanding of marriage seemed to be an instrumental end run around the law that the state should not reward.

In framing the case for the public, Bruning detailed why it fell on the criminal side of the boundary, and more importantly, emphasized why family law could not govern the conduct at issue. From the outset, he went to great lengths to stress that Matthew Koso's relationship with Crystal Guyer was not lawful or licit, but rather was a criminal offense that required enforcement and punishment.<sup>122</sup> In so doing, Bruning took pains to distance the underlying offense from the couple's subsequent marriage. As an initial matter, Bruning made clear that under Nebraska law this couple was ineligible for marriage, and in any case, their foreign Kansas marriage was no defense to the statutory rape that preceded it.<sup>123</sup> He insisted that regardless of the couple's legal status, a crime had occurred, and prosecution was necessary to make clear that "we don't allow grown men to have sex with children."<sup>124</sup>

The issue was not obstructing star-crossed lovers or intruding into a lawful family. Instead, he argued, it was about protecting children—and

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120. To this end, Koso's attorney noted at sentencing that "prosecution for statutory rape is very, very rare on occasions when the male has married a minor partner." Transcript of Sentencing Proceedings at 27, *State v. Koso*, No. CR05-20 (Richardson County Ct., Neb. Feb. 7, 2006) [hereinafter Transcript of Sentence Proceedings].

121. Mabin, *supra* note 102.

122. Butch Mabin, *Koso Pleads Guilty to Sexual Assault*, LINCOLN J. STAR (Neb.), Dec. 14, 2005, at A1 (quoting Bruning: "The case was not about two star-crossed lovers in a modern-day version of 'Romeo and Juliet' . . . This case was about a grown man having sex with a child."); Gretchen Ruethling, *Husband Pleads Guilty to Sex Assault of Child*, N.Y. TIMES, Dec. 14, 2005, at A30 ("Guilt and innocence were not really at issue here," Mr. Bruning said. "It's clear that he violated the [criminal] statute."); Wilgoren, *supra* note 88 (quoting Bruning as saying that "[t]his was not a close call . . . [W]e [a]re talking about a grown man and a child.").

123. Interestingly, Nebraska chose to recognize civilly the Kansas marriage as valid for purposes of the Full Faith and Credit Clause. I suspect that the state did so because invalidating the marriage would have rendered the Kosos' infant daughter illegitimate. See NEB. REV. STAT. § 43-1406(2) (2004) ("A child whose parents marry is legitimate.").

124. Butch Mabin, *Bruning Defends Charge of Rape*, LINCOLN J. STAR (Neb.), July 28, 2005, at A1 (internal quotations omitted). Interestingly, the Nebraska Attorney General's Office went forward with the prosecution after the Richardson County Attorney declined to prosecute. Martha Stoddard, *Statutory Rape Cases Seldom Are Pursued*, OMAHA WORLD-HERALD, Aug. 31, 2005, at B1.

society at large—from sexually predatory adults. In short, it was the type of public safety threat for which the public force of the criminal law was ideally suited.<sup>125</sup> In press conferences and statements about the prosecution, Bruning stressed that Koso willfully disregarded the terms of a restraining order initiated by Crystal's mother prohibiting him from having contact with her daughter,<sup>126</sup> and that he repeatedly had relationships with teenaged girls.<sup>127</sup>

Further, Koso circumvented Nebraska's marriage laws by going to Kansas to marry his underage lover. Violating restraining orders, carrying on intimate relationships with much younger girls, and using marriage to avoid prosecution—this behavior was not the conduct of a responsible husband and father. It was a clear sign of a sexual predator who had little respect for the wishes of parents or the strictures of the law.<sup>128</sup> More importantly, Koso's dogged persistence in flouting the law strongly signaled that the criminal law—and specifically, criminal punishment—was necessary to incapacitate his predatory tendencies and deter similar incidents in the future.<sup>129</sup>

## 2. The Public

Bruning's attempts to distinguish the crime from the couple's marriage are testament to the marriage-crime binary that is produced by criminal law and family law's interaction, and marriage's role as a normative ideal for intimate life.<sup>130</sup> However, though Attorney General Bruning understood Matthew Koso to be a criminal in need of punishment, others in the community disagreed. A sizable contingent<sup>131</sup> of the community believed that marriage, and the subsequent birth of their daughter, made the Kosos a family.<sup>132</sup> In their view, concern for the family's welfare outweighed the

125. Mabin, *supra* note 122.

126. Mabin, *supra* note 124.

127. Butch Mabin, *More Charges Against Koso Could Be Coming*, LINCOLN J. STAR (NEB.), Aug. 18, 2005, at A1 (“Bruning said his office received ‘many credible reports’ from Falls City residents stating Koso has had sex with other underage girls.”).

128. See Kevin O'Hanlon, *Man Pleads Not Guilty in Sex Assault of Teen Wife*, HOUSTON CHRON., Aug. 31, 2005, at A4 (noting that Bruning was contemplating filing “additional charges against Koso involving other girls”).

129. Mabin, *supra* note 127.

130. Dubler, *supra* note 55, at 776 (explaining an “isomorphic typology” in which “[m]arital sex was licit, [and] nonmarital sex was illicit”).

131. Grout, *supra* note 90 (acknowledging that Bruning reported that at least eighty percent of the calls that his office received supported the couple, and urged the state to abandon the prosecution); see also Butch Mabin, *Bruning to Look at Birth Records for Proof of Any Sex Crimes*, LINCOLN J. STAR (NEB.), Nov. 11, 2005, at A1 (noting that Bruning's office recognized that the Koso prosecution drew “intense criticism from the public”).

132. Marriage's redemptive possibilities are not limited to the Kosos. The lore of the “shotgun wedding” makes clear the way in which marriage has figured prominently as a means of correcting or “curing” deviant—or criminal—sexual behavior. See Dubler, *supra* note 55, at 776–78 (explaining that marriage rendered certain criminal acts licit); Walter Wadlington,

need for criminal prosecution.<sup>133</sup> For this constituency, the case clearly fell on the family law side of the divide.

In categorizing *Koso* as a family matter, these supporters emphasized several attributes that traditionally have been associated with marriage and the family—specifically, the privatization of dependency within the family and the role of consent and personal autonomy in constituting family life. By focusing on these attributes, public supporters tried to show that criminal law was obliged to recede so that this vulnerable family could be preserved.

As many scholars have noted, marriage and the privatization of economic dependency are inextricably intertwined.<sup>134</sup> Marriage traditionally has been viewed as a means of privatizing dependency within the family such that it is not a public responsibility.<sup>135</sup> The links between marriage, family,

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*Shotgun Marriage by Operation of Law*, 1 GA. L. REV. 183, 193 (1967) (stating that in some jurisdictions, marriage was a defense to certain crimes). *But see* Dubler, *supra* note 55, at 777 (“Marriage, to be sure, could not cure all forms of illicit sex . . .”). Even contemporary politics has endorsed this view of marriage. In the 2008 presidential campaign, vice-presidential candidate Sarah Palin unexpectedly announced that her unmarried teenage daughter, Bristol, was pregnant and planned to marry the child’s father. *See* Katherine Q. Seelye, *Palin’s Teen Daughter Is Pregnant*; *New G.O.P. Tumult*, N.Y. TIMES, Sept. 1, 2008, <http://www.nytimes.com/2008/09/02/us/politics/02PALINDAY.html?em> (describing the public and political reaction to Bristol Palin’s pregnancy). Any criticism of Bristol Palin’s pregnancy was muted by her impending nuptials. Her decision to have the child and marry the father was celebrated as worthy and, critically, as a “private, family matter.” *Id.* Both Bristol and her fiancé, Levi Johnston, appeared together at the Republican National Convention days after announcing the pregnancy. Critically, Johnston, who days earlier had disavowed fatherhood on an online networking site, was transformed into a respectable would-be father and husband. *See* Donald G. McNeil, Jr., *With This Tattoo, I Thee Wed*, N.Y. TIMES, Sept. 12, 2008, *available at* <http://www.nytimes.com/2008/09/14/fashion/14tattoo.html?fta=y> (“Now, with the mother of his pregnant girlfriend running for vice president, [Johnston] had cut his mullet, shaved his peach fuzz, swapped his hockey sweater for a rep tie and an American flag pin, and manifested his love with a ring tattoo.”). The couple’s transformation from out-of-wedlock teen parents to prospective spouses and political scions was manifested in other ways. The couple was publicly embraced by Senator John McCain, the Republican presidential candidate, and was enthusiastically cheered by the crowds at the convention hall.

133. Kevin O’Hanlon, *Crackdown*, CASPER STAR-TRIB. (Wyo.), Nov. 12, 2005, <http://www.trib.com/articles/2005/11/14/news/regional/3be81ab9399ecc1f872570b60062dcef.txt> (noting that “Bruning has acknowledged receiving a ‘significant’ amount of mail from the public saying he should leave the couple alone.”).

134. Ariela R. Dubler, *In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State*, 112 YALE L.J. 1641, 1684 (2003) (arguing that efforts to reform dower were intended to maintain marriage’s role in the privatization of family dependency); Rosenbury, *supra* note 19, at 242 (“The law of marriage was originally designed to privatize women’s dependency.”).

135. *See* MARTHA ALBERTSON FINEMAN, THE AUTONOMY MYTH 35–40 (2004) [hereinafter FINEMAN, AUTONOMY MYTH] (discussing the family’s role in absorbing “inevitable dependency”); MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES 226 (1995) [hereinafter FINEMAN, THE NEUTERED MOTHER] (“In our individualistic society, the state relies on the family—allocating to it the care and protection of society’s weaker members.”); Martha Albertson Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, 8 AM. U. J. GENDER SOC. POL’Y &

and the privatization of dependency contributed to the public's understanding of the *Koso* case as a family matter, rather than a crime worthy of traditional punishment. By all accounts, the Kosos' situation was disturbing and problematic. Few believed that a sexual relationship between an adult and a minor was something to encourage or celebrate. Nevertheless, many believed that the couple's subsequent marriage changed the field of play significantly.

By marrying, the couple signalled that they would take responsibility for themselves and for their child. Indeed, Matthew, who had been something of a lay-about before the marriage, secured steady employment so that he could support his wife and daughter.<sup>136</sup> Many felt that, left alone to live as a family, the couple would care for themselves and their child successfully.<sup>137</sup> However, if the state insisted on prosecuting the case as a crime, the resulting prison sentence would ensure that Crystal and her child would become public charges.<sup>138</sup>

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L. 13, 14 (2000) ("The assumed family is a specific ideological construct with a particular population and a gendered form that allows us to privatize individual dependency and pretend that it is not a public problem.").

Marriage's role in privatizing economic dependency was especially pronounced in the 1996 welfare reforms. In the effort to "end welfare as we know it," Congress famously enacted provisions aimed at improving marriage rates among public assistance recipients. See Angela Onwuachi-Willig, *The Return of the Ring: Welfare Reform's Marriage Cure as the Revival of Post-Bellum Control*, 93 CAL. L. REV. 1647, 1648 (2005) (discussing Congress's "imposition of a marital solution to poverty"); DORIAN SOLOT & MARSHALL MILLER, ALTERNATIVES TO MARRIAGE PROJECT, LET THEM EAT WEDDING RINGS: THE ROLE OF MARRIAGE PROMOTION IN WELFARE REFORM 4 (2002), available at <http://www.unmarried.org/rings.pdf> (critiquing marriage promotions initiatives and making recommendations for framing issues of family structure). Certain that marriage could alleviate poverty by providing the poor with economic and moral stability, the federal government offered states funds to promote marriage among the poor. For a discussion of these efforts, see THEODORA OOMS ET AL., CTR. FOR LAW & SOC. POL'Y, BEYOND MARRIAGE LICENSES: EFFORTS IN STATES TO STRENGTHEN MARRIAGE AND TWO PARENT FAMILIES 5-10 (2004), available at [http://www.clasp.org/publications/beyond\\_marr.pdf](http://www.clasp.org/publications/beyond_marr.pdf) (describing marriage promotion efforts in the wake of the 1996 welfare reforms).

136. Wilgoren, *supra* note 88.

137. *Id.*

138. Indeed, a good deal of family law and related policies focus on ensuring that dependence remains privatized within the family, such that family members do not become dependent on the public fisc. *Jevning v. Cichos*, 499 N.W.2d 515, 517 (Minn. Ct. App. 1993) ("The purpose of the [Minnesota Parentage Act] [is] . . . to protect the public by preventing the child from becoming a public charge"); Dubler, *supra* note 134, at 1645 n.6 (observing that, historically, unmarried women signified likely poverty and, thus, represented a potential threat to the public fisc); Andowah A. Newton, *Injecting Diversity into U.S. Immigration Policy: The Diversity Visa Program and the Missing Discourse on Its Impact on African Immigration to the United States*, 38 CORNELL INT'L L.J. 1049, 1079 (2005) (noting that, for immigration purposes, those admitted under the family-based visa category must demonstrate that they will not become public charges); Susan Wolfson, *Premarital Waiver of Alimony*, 38 FAM. L.Q. 141, 147 (2004) (noting that courts often will refuse to enforce an otherwise valid premarital agreement if it would render one spouse a public charge).

Faced with the choice of characterizing the offender as a rapist or a responsible husband and father, many preferred the latter. As one citizen wrote: “[W]hat will society prove by throwing Matthew Koso in jail? . . . If he goes to jail, the family will be miserable and the taxpayers will get to support all three of them.”<sup>139</sup>

Certainly, the link between marriage and economic dependency contributed to the public’s perception of *Koso* as a family matter; however, equally important was marriage’s role in signaling the couple’s consent to the marriage itself, as well as to the (unlawful) conduct that preceded it. Substantively, the crime of statutory rape is notable in that it renders the minor’s consent to sex inoperative and legally meaningless. Indeed, it is as if there was no consent at all.<sup>140</sup> By contrast, a critical component of marriage is the requirement of mutual consent—indeed, a marriage is inoperative absent consent.<sup>141</sup> Here, the couple’s marriage allowed the issue of Crystal’s consent to reenter the discussion. Although Crystal could not consent lawfully to sex, she had consented to the marriage,<sup>142</sup> and implicitly to the sexual relationship that preceded it. While many doubted whether a fourteen-year-old girl was capable of informed consent, the marriage nonetheless underscored Crystal’s own claim that the relationship had not been coercive or abusive and that she had been a willing participant to their courtship and subsequent marriage.<sup>143</sup>

By reintroducing consent into the proceedings, the marriage, for many, undermined the state’s decision to prosecute the case as a criminal matter. After all, if criminal enforcement was partly intended to redress harm perpetrated against the victim, what was the harm to be redressed in *Koso*? Who was the victim? Crystal’s consent to the subsequent marriage intimated

139. Kathleen L. Helger, Letter to Editor, *Don’t Charge Father*, LINCOLN J. STAR (Neb.), July 31, 2005, at C9.

140. 3 CHARLES E. TORCIA, WHARTON’S CRIMINAL LAW § 285 (15th ed. 1995) (noting that, in most states, statutory rape statutes conclusively presume that an underage victim is incapable of giving consent).

141. Vivian Hamilton, *Principles of U.S. Family Law*, 75 FORDHAM L. REV. 31, 40 (2006); Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225, 1257 (1998).

142. That Crystal was unable to consent to premarital sex but was able to consent to marriage hinges on the differences in the laws of Nebraska and Kansas. The couple’s courtship and sexual relationship was conducted in Nebraska, where the age of consent for sex and marriage is sixteen and seventeen, respectively. Accordingly, the couple’s sexual relationship was considered statutory rape, and was ineligible for recognition as a marriage in Nebraska. Because they could not marry in Nebraska, the couple traveled across state lines to Kansas, where the age of consent for sex was fourteen, and minors as young as twelve could marry with a parent’s consent and the approval of a state magistrate. I discuss the interaction of criminal law and family law in each of these jurisdictions in more detail in Part IV.B *supra*.

143. Transcript of Sentencing Proceedings, *supra* note 120, at 34 (testifying that she had been willing participant who had “loved [her] husband . . . way before [they] got married, before [she] was even pregnant”).



that the criminal law's understanding of statutory rape, and the legal silencing of consent in that venue, was, in this instance, overly formalistic. If she had agreed to marry him, and insisted that she had entered into the relationship of her own volition, had she been harmed? Was this the sort of situation that required deploying scarce criminal resources?

The marriage also made clear that not only was Crystal a voluntary participant in the relationship, she had parental approval as well. At first, Crystal's mother, Cecilia Guyer, was implacably opposed to the relationship—indeed, at one point, she filed a restraining order directing Matthew to stay away from her daughter.<sup>144</sup> However, upon learning that her daughter was having Matthew's child, Mrs. Guyer agreed that the couple should marry; indeed, she consented to the marriage in the chambers of the Kansas judge.<sup>145</sup>

To the public, Mrs. Guyer's consent to her daughter's marriage communicated some kind of exercise of parental autonomy.<sup>146</sup> Certainly, Mrs. Guyer's approval of the marriage was grudgingly offered. If she had her way, Matthew Koso would have left her daughter alone in the first place. But given the precarious situation—an underage girl and a baby on the way—Mrs. Guyer had made up her mind to support her daughter and her desire to form a family with Matthew Koso. If Cecilia Guyer had not wanted her daughter to marry Matthew Koso, she could have alerted the authorities, thereby setting the stage for the criminal prosecution, and signaling her disapproval of the relationship.<sup>147</sup> Instead, by consenting to the marriage, Mrs. Guyer suggested that she too believed that marriage was the best solution, and that this was a family matter to be handled privately by the couple and their parents.

In all, the couple's marriage and their decision to raise their child together as a family were flashpoints that shaped the public's perceptions of the situation and the state's decision to initiate a statutory rape prosecution. Accordingly, the Kosos' public supporters marshaled their claims to family law's precedence by reiterating all of the ways in which the case implicated core family law values—the privatization of dependency, consent, and parental autonomy.

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144. See Grout, *supra* note 90. Of course, the restraining order was unavailing—the couple continued to meet and Crystal eventually became pregnant.

145. Affidavit of Probable Cause, *supra* note 98.

146. Murray, *supra* note 20, at 396 (discussing principles of parental autonomy).

147. Indeed, statutory rape charges usually are initiated as a result of a parent's complaint to law enforcement. This comports with the historical and modern understanding of these laws. Historically, statutory rape law was constructed as a tool to protect a father's interests in his daughter's marriageability. Kay L. Levine, *No Penis, No Problem*, 33 FORDHAM URB. L.J. 357, 373–79 (2006). In modern times, statutory rape laws have been used to assist parents in protecting their children from sexual predators and policing their children's sexual behavior. *Id.*

### 3. The Defense

The defense, like the public, also tried to categorize the case as requiring family law's intervention. Of course, the defense's reasons for doing so were different from those of the public supporters. Charged with statutory rape, a class two felony in Nebraska, Matthew Koso faced up to fifty years in prison for his crime.<sup>148</sup> Desperate to avoid incarceration, the defense's strategy was to convince the court that prison was unnecessary and that probation was an appropriate punishment that would respect the couple's family status. To do so, the defense emphasized the family concerns that, they believed, outweighed criminal law's interest in the case.

First, the defense sought to rebut the prosecution's claim that Matthew was a sexual predator. Although Matthew had strayed from the straight-and-narrow path in the past, marriage had redeemed him and extinguished any criminal impulses. Willis Yoesel, Matthew's attorney, made the point explicitly: Matthew, because of his developmental disabilities,<sup>149</sup> had "always been more comfortable with persons that are somewhat younger," seeking out younger people as friends and lovers.<sup>150</sup> Marriage, however, made these efforts unnecessary. By definition a monogamous undertaking,<sup>151</sup> marriage eliminated the need for Matthew to seek new sexual companions. He was a happily married man in a committed, monogamous relationship with his wife.<sup>152</sup> Recidivism, Yoesel argued, was unlikely under the circumstances.<sup>153</sup>

The defense also went to great lengths to demonstrate that the law's classification of the Kosos' relationship as a crime was an unrealistic formalism. According to Yoesel, Matthew simply had "fallen in love"<sup>154</sup> with someone who, despite her youth, was "quite mature."<sup>155</sup> That their relationship was a crime was the product of inflexible laws that offered no "leeway" for situations that did not comport with traditional accounts of child abuse and sexual coercion.<sup>156</sup> Instead, Yoesel asserted, the relationship and marriage, for the most part, comported with the standard narrative of family life—the couple had met, fallen in love, married, and had a child

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148. *Case Against Koso Could Be Resolved Soon*, LINCOLN J. STAR (Neb.), Dec. 10, 2005, at B3 ("First-degree sexual assault is punishable by one to 50 years in prison.").

149. As the court noted, there was no medical confirmation of his disability. Transcript of Sentencing Proceedings, *supra* note 120, at 28.

150. *Id.* at 28, 47–48.

151. Monogamy historically has been understood as a key attribute of marriage—so much so that polygamy, bigamy, and adultery continues to be criminalized in most U.S. jurisdictions. See Elizabeth F. Emens, *Monogamy's Law: Compulsory Monogamy and Polyamorous Existence*, 29 N.Y.U. REV. L. & SOC. CHANGE 277, 290 n.51 (collecting polygamy statutes).

152. Wilgoren, *supra* note 88.

153. Transcript of Sentencing Proceedings, *supra* note 120, at 27.

154. *Id.*

155. *Id.* at 28.

156. *Id.* at 26–27.

together.<sup>157</sup> And critically, their courtship had culminated in marriage with the approval and active participation of both parties and their families. Indeed, Yoessel argued that, far from being a victim, Crystal was “kind of in control of the relationship.”<sup>158</sup> Treating the situation as a crime, as Attorney General Bruning insisted, overlooked the reality of the couple’s relationship.<sup>159</sup>

Taking the stand on her husband’s behalf, Crystal Koso’s testimony echoed this characterization of the relationship, but went further by emphasizing the likely harm of incarceration to the family.<sup>160</sup> While the prosecution framed the case as a criminal matter, for Crystal, it was a deeply personal issue that went to the heart of her family life. In her testimony, she maintained that categorizing the case as a crime profoundly mischaracterized their circumstances.<sup>161</sup> First, by framing the situation as a crime, she necessarily was cast as the victim—a role she vehemently rejected.<sup>162</sup> As she asserted before the court, she had not been coerced into a criminal and abusive relationship by a cunning older man. She had been—and continued to be—a willing participant who “loved [her] husband . . . way before [they] got married, before [she] was even pregnant.”<sup>163</sup> She was not a victim, but rather had exercised her own autonomy and formed a family. There was no need to invoke the criminal law on her behalf.<sup>164</sup>

Beyond rejecting her assigned role as victim, Crystal Koso also argued that treating the case as a criminal law matter for which imprisonment was

157. *Id.* at 26. Yoessel told the court: “I’ve asked [Matthew] . . . what the most important and the happiest days of his life have been. His response was immediate. He says the first is the day he married Crystal. And the second was the day his baby was born.” *Id.*

158. Transcript of Sentencing Proceedings, *supra* note 120, at 28.

159. *Id.* at 27 (arguing that bright-line application of the statutory rape statute precludes the fact that the couple had fallen in love).

160. *Id.* at 32–34.

161. *Id.* at 34 (“None of [this] should be going on right now.”).

162. *Id.* (“I’m Crystal Koso. I am *supposedly* the victim.” (emphasis added)).

163. Transcript of Sentencing Proceedings, *supra* note 120, at 34.

164. *Id.* (“I don’t understand what this is supposed to do, ‘cause it wouldn’t benefit me, wouldn’t benefit my husband, wouldn’t benefit my daughter any. What good is it going to be if you send my husband to jail exactly?”). Of course, whether or not a fourteen year old is capable of providing informed consent to either sex or marriage is an open question. See JUDITH LEVINE, HARMFUL TO MINORS: THE PERILS OF PROTECTING CHILDREN FROM SEX 72 (2002) (“But statutory rape is not about sex the victim says she did *not* want. It is about sex she *did* want but which adults believe she only thought she wanted because she wasn’t old enough to know she did not want it.”); Jennifer Ann Drobac, *Sex and the Workplace: “Consenting” Adolescents and a Conflict of Laws*, 79 WASH. L. REV. 471, 507–39 (2004) (discussing inconsistent approaches to the issue of a minor’s consent to sex in the Title VII context); Michelle Oberman, *Regulating Consensual Sex with Minors: Defining a Role for Statutory Rape*, 48 BUFF. L. REV. 703, 718–29 (2000) (presenting cases where it appears unlikely that the victim consented to sex); Charles A. Phipps, *Misdirected Reform: On Regulating Consensual Sexual Activity Between Teenagers*, 12 CORNELL J.L. & PUB. POL’Y 373, 376–83 (2003) (acknowledging that in some statutory rape cases, it is difficult to discern whether the act was consensual).

the suitable punishment would compromise her family. If her husband was imprisoned, she would lose a partner and co-parent and the family would lose its primary breadwinner.<sup>165</sup> She would be forced to raise their infant daughter as a single parent with only a ninth-grade education under her belt.<sup>166</sup>

Further, she made clear that a lengthy prison term would adversely affect her daughter in both the short-term and the long-term:

What good is it going to be if you send my husband to jail exactly? . . . My daughter would grow up not knowing him. I didn't know my father at all. Maybe if you send my husband to jail, maybe you'll see my daughter in there in about fifteen years being married to some older guy because she didn't have that—a father figure there.<sup>167</sup>

In raising the effects of Matthew's incarceration on their infant daughter, Samara, Crystal—whether intentionally or not—tapped into broader social anxieties about fatherlessness and paternal disengagement.<sup>168</sup> Crystal Koso's own experience was testament to these anxieties. As she testified, she had grown up without a father and understood the consequences of paternal absence.<sup>169</sup> She was fourteen, a mother, and standing before a court pleading for her husband's freedom. Without a father, her daughter likely would follow in her footsteps. If one of the goals of criminal law was to deter similar conduct in the future, then this goal would be frustrated by prosecuting and punishing Matthew Koso. Just as Crystal had sought a replacement for her absent father through a relationship with an older man, "in about fifteen years"<sup>170</sup> her daughter likely would fill her own paternal void by seeking an older romantic partner.

Further, in raising the specter of fatherlessness, Crystal also offered another reason to frame the case as one about families, rather than as a

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165. Transcript of Sentencing Proceedings, *supra* note 120, at 34–35.

166. *Id.* at 35.

167. *Id.*

168. See generally DAVID BLANKENHORN, FATHERLESS AMERICA: CONFRONTING OUR MOST URGENT SOCIAL PROBLEM 1 (1995) (arguing that fatherlessness is "the engine driving our most urgent social problems"); David Popenoe, *Life Without Father*, in LOST FATHERS: THE POLITICS OF FATHERLESSNESS IN AMERICA 33–36, 46–47 (Cynthia R. Daniels ed., 1998) (explaining, with a conservative slant, the historic causes of fatherlessness and proposing methods for strengthening fatherhood and marriage); Solangel Maldonado, *Beyond Economic Fatherhood: Encouraging Divorced Fathers to Parent*, 153 U. PA. L. REV. 921, 943–45 (2005) (discussing social attitudes toward fatherlessness); Susan Chira, *War Over Role of American Fathers*, N.Y. TIMES, June 19, 1994, § 1, at 22 (noting a "renewed cultural and political focus on fatherhood"). But see Judith Stacey, *Dada-ism in the 1990s: Getting Past Baby Talk About Fatherlessness*, in LOST FATHERS: THE POLITICS OF FATHERLESSNESS IN AMERICA, *supra*, at 51, 64 (noting that social science has not settled on a definition of "fatherlessness" and so cannot identify its impact, if any).

169. Transcript of Sentencing Proceedings, *supra* note 120, at 35.

170. *Id.* at 35.

crime. By marrying and forming a family, the couple had legitimated their child and their relationship. As the child of two married parents, Samara, by society's standards, was in a desirable position.<sup>171</sup> Ostensibly, she would be part of a financially stable family helmed by two parents, and she would have her parents' example as a model for her own family life in the future. Treating the Kosos' situation as a crime and subjecting the family to the consequences of incarceration, by contrast, exposed the child to a far riskier future.

Eager to avoid a prison sentence, the defense sought to show that the case belonged on the other side of the boundary—it was a family matter. In doing so, the defense emphasized familiar family law themes—the well-being of children within the family, personal autonomy, the redemptive qualities of marriage, and the economic advantages of married couples.

#### 4. The Court

Although both the public response and the defense strategy during the sentencing proceedings sought to categorize the case as a family law matter, ill-suited for criminal enforcement and punishment, the sentencing court disagreed. The court's sentence, and its reasoning, made clear that it viewed the case as firmly located in criminal law's domain.<sup>172</sup>

As an initial matter, the court dismissed any arguments that the Kosos' relationship should be understood as anything other than a crime.<sup>173</sup> The conduct in question, a sexual relationship between an adult and a minor, was unambiguously proscribed as first-degree sexual assault.<sup>174</sup> The criminal law, Judge Bryan noted, “doesn't take into any [sic] consideration of love or whatever.”<sup>175</sup> By law, “Nebraska has deemed a child a child,” precluding minors from “making decisions of love and consent . . . . It's not going to be argued. It's just plain and simple.”<sup>176</sup> The case fell squarely within the rubric of criminal law and Matthew Koso would be subject to criminal punishment, irrespective of his marriage and the family that had been formed in its wake.

In articulating criminal law's claim to the conduct at issue, the sentencing court focused on the goals of criminal punishment. While the defense proposed probation on the ground that it would spare the Koso family the economic and emotional hardships of prison, the court rejected

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171. Jason DeParle, *Panel Urges Expanding Aid for Two-Parent Homes*, N.Y. TIMES, Dec. 10, 1993, at A18 (noting the “stability” of two-parent households).

172. Transcript of Sentencing Proceedings, *supra* note 120, at 42.

173. *Id.* at 50 (observing that “marriage can't cover up a crime [a]nd it can't make it go away”).

174. *Id.*

175. *Id.*

176. *Id.*

this option out of hand.<sup>177</sup> Reflecting on probation's purposes, and the broader principles of punishment, the court concluded that Matthew was unsuitable for this alternative.<sup>178</sup> The principal condition for probation, the court reasoned, was the defendant's capacity to comport with the law throughout the probationary period and beyond.<sup>179</sup> Matthew's history of dating underage girls against the wishes of their families, and in violation of court-issued restraining orders, all indicated that he was incapable of controlling his sexual impulses and observing the strictures of the law.<sup>180</sup>

More critically, the couple's marriage, far from signaling family law's claim, actually elaborated Matthew Koso's propensity for deviance. The court understood that Matthew and Crystal's marriage meant that they were having sex—indeed, Matthew admitted as much in a conversation with an investigating police officer that he unsuccessfully sought to suppress.<sup>181</sup> And it was the sexual activity implicit in marriage that alerted the court to Matthew's continuing criminality. Even though the Kosos' marriage was valid and recognized by Nebraska, sex within marriage continued to be proscribed by Nebraska's statutory rape laws because Crystal was below the age of consent. Nebraska's statutory rape law meant that for a couple like the Kosos (that is, a couple who, technically, would not have been permitted to marry in Nebraska because of Crystal's age), marital sex was a crime.<sup>182</sup> Certainly, it was a crime distinct from that with which Matthew had been charged, but it made clear to the court that Matthew Koso was not on the

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177. See *infra* notes 186–190 and accompanying text (documenting the sentencing court's reasons for denying probation).

178. Transcript of Sentencing Proceedings, *supra* note 120, at 52 (finding Matthew Koso did not deserve probation because his behavior demonstrated “a total disrespect for the law”).

179. *Id.* at 48–49.

180. *Id.* at 47–48.

181. *Id.* at 48. However, even without this admission, it was undoubtedly apparent to the court that, as a married couple, Matthew and Crystal were having sex. After all, historically, marriage was understood as the legally sanctioned site for sexual activity, and marriages have been declared null and void due to the absence of sex. See COSSMAN, *supra* note 116, at 74–83 (discussing the importance of sex in constituting marriage).

182. As I discussed in Part IV.B, this improbable result illustrates the cooperative regulatory efforts of criminal law and family law. Nebraska's marriage law and statutory rape laws were intended to work together—because of Crystal's age (and, thus, her inability to consent to sex), the two could not lawfully marry, nor could they lawfully engage in sex. That the couple was in the perverse position of being married, but unable to consummate lawfully their marriage, turned on the fact that they were married in Kansas, where minors were permitted to marry (with parental consent) and the statutory rape law contained an exemption for married couples. Essentially, in both Kansas and Nebraska, the statutory rape laws and marriage laws were complementary—Nebraska's age restrictions for marriage were reinforced by the statutory rape law that criminalized sex (an essential attribute of marriage) with an underage partner, while Kansas's permissive marriage laws were reflected in marriage's role as a defense to the crime of statutory rape. See *supra* notes 111–117 and accompanying text (describing the intricacies of both Nebraska's and Kansas's marriage laws).

straight-and-narrow path. In order to fulfill the promise (and expectations) of marriage, Matthew Koso would have to violate the law.

The court's colloquy with Shelley Thompson, an officer of Nebraska's Department of Health and Human Services ("DHHS"), further demonstrates that the court understood marital sex between the couple to be criminal conduct and further evidence of Matthew's deviance. After the defense had presented its case for sentencing, the court, *sua sponte*, called Thompson to the stand and questioned her about the state's child protection efforts on Crystal's behalf.<sup>183</sup> In particular, Judge Bryan was concerned that the state had taken no steps to remove Crystal from her husband's home, even though it was apparent that she had "be[en] sexually abused" by her husband from the "time of the marriage until the present day."<sup>184</sup> What constituted this apparent abuse? In the court's view, the couple's marriage—and its consummation—was clear evidence of ongoing sexual abuse. Every time the couple consummated their marriage, they engaged in an illegal activity.

Interestingly, Thompson's response underscored the way in which the couple's marriage structured DHHS's response to the charges of abuse. As Thompson carefully explained to the court, because the couple had married, the state had no authority to intervene, even if, by having sex with her husband, Crystal "technically [was] being sexually assaulted."<sup>185</sup> Trained to provide services to families, DHHS noted the couple's marriage and family status and was inclined to view the case through a family law lens. Although the department recognized that sex between an adult and a minor was "technically" a crime, the couple's marital relationship overrode these criminal concerns, emancipating Crystal and shrouding the couple and their relationship in a veil of privacy that precluded state intervention.<sup>186</sup>

For Judge Bryan, however, the marriage was not a basis for conferring privacy and deference. Instead, marriage was a clear indication that there was ongoing criminal activity that rendered probation utterly inappropriate. Marriage did not transform the situation into a family matter; it simply created regular opportunities for ongoing criminal activity. By living with Crystal as a married couple—and having sex with her, as married couples are wont to do—Matthew Koso had again broken the law (and continued to do so). As the court noted with disfavor, "from day one [of your married

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183. Transcript of Sentencing Proceedings, *supra* note 120, at 37.

184. *Id.* at 38–40.

185. *Id.* One reason why DHHS had no authority to intervene was because marriage legally had emancipated Crystal from her parents' care. *See* NEB. REV. STAT. § 43-2101 (2004) ("All persons under nineteen years of age are declared to be minors, but in case any person marries under the age of nineteen years, his or her minority ends."). Accordingly, the state lacked *parens patriae* authority to intervene to protect her welfare.

186. Transcript of Sentencing Proceedings, *supra* note 120, at 39.

life] you've lived in Nebraska with this child, violating Nebraska law."<sup>187</sup> Probation was clearly ill-suited to an offender who "couldn't stay away from [the victim even] when he knows that it's a repeat first degree sexual assault."<sup>188</sup>

Convinced that probation was unsuitable for a situation where the offender continued to engage in proscribed criminal conduct, the court sentenced Matthew to eighteen to thirty months' imprisonment.<sup>189</sup> Under Nebraska's parole system, which halved sentences for parole purposes, he was expected to serve between nine and fifteen months in prison.<sup>190</sup>

In crafting and explaining his sentence, Judge Bryan made clear why Matthew Koso's conduct fell on the criminal side of the line. By emphasizing criminal law's concern for public safety, general deterrence, and legal compliance, the court claimed the case for criminal law, thereby requiring family law to yield.

#### D. REFLECTING ON KOSO

As *Koso* amply demonstrates, the legal regulation of marriage, sexuality, and intimate life relies on—indeed, requires—input from both criminal law and family law. In capturing an unexpected moment of dissonance between criminal law and family law, *Koso* inadvertently illuminates the way that these two doctrines actually have worked in concert to structure the normative terrain in which we forge our intimate lives.

However, *Koso*'s lessons go beyond simply identifying criminal law and family law as co-venturers in an overlooked regulatory enterprise. The case makes evident the process by which the two doctrines operate, as well as the product of their shared enterprise. At bottom, the interaction between criminal law and family law has produced a stark black-and-white binary that reads sex as either marriage or crime. Together, criminal law and family law have structured a polar dichotomy that is intended to encompass the entire universe of sexual expression. Sexual behavior must fall on one side or the other. It is either acceptable sexual behavior, entitled to the protection, privacy, and recognition offered by family law (marriage), or it is unacceptable criminality suitable for prosecution and punishment (crime). And as *Koso* and the efforts of its various constituencies make clear, the process of classifying sexual behavior as virtue or vice requires one doctrinal system to govern the conduct exclusively.

Though *Koso* reveals the way criminal law and family law historically have worked together, and in the narrow context of statutory rape, continue

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187. *Id.* at 48.

188. *Id.* at 49.

189. *Id.* at 52.

190. Koso was released from prison on May 5, 2007, having served fifteen months. Colleen Kenney, *Koso Set to Come Home from Prison*, LINCOLN J. STAR (Neb.), May 5, 2007, at A1.



to work together, we might ask whether this relationship and the binary it produces continue to be relevant. After all, as briefly discussed in Part III, the Supreme Court recently has expanded constitutional privacy protections for intimate acts and choices—a process that has depended largely on the decriminalization of certain intimate acts and choices. What has this development portended for the relationship between criminal law and family law and the organization of intimate life? In the following Parts, I take up this important question.

#### V. THE TURN TOWARDS DECRIMINALIZATION

In the preceding Parts, I detailed a regulatory relationship between criminal law and family law that is historic and so deeply entrenched in the legal construction of intimate life that it requires a disruptive event like *State v. Koso* to render it visible once again. But if this relationship usually operates without incident under the radar, why is it important to excavate and examine it more carefully? What does the relationship between criminal law and family law mean for contemporary intimate life?

It is important to consider the relationship between criminal law and family law and the way it historically has organized marriage, sex, and sexuality, because we are in the process of renegotiating how intimate life is organized. The last forty-five years have witnessed a developing constitutional jurisprudence that relies on the decriminalization of sexuality and intimate choices to give shape and meaning to robust due process rights and privacy protections. In Sections A and B, I describe the trajectory of this decriminalization project by returning to the four cases—*Griswold v. Connecticut*, *Loving v. Virginia*, *Eisenstadt v. Baird*, and *Lawrence v. Virginia*—that I briefly discussed in Part III.<sup>191</sup> In particular, I explain that while these four cases decriminalize intimate acts and choices, they have meaningfully different consequences for the organization of intimate life.

As I discuss in Section A, the decriminalization that occurs in *Griswold* and *Loving* is consistent with the traditional marriage–crime binary produced by the interaction of criminal law and family law. Both cases decriminalize a particular act and relocate it squarely within the rubric of marriage.

In Section B, I consider *Eisenstadt* and *Lawrence*, both of which, I argue, can be read to depart from the traditional binary organization of intimate life. In *Eisenstadt* and *Lawrence*, the Court decriminalizes contraceptive use by unmarried couples and same-sex sodomy, respectively. In so doing, the Court's decisions can be read to dismantle the binary view of intimate life in favor of a continuum that accommodates intimate behavior and choices that are neither valorized through marriage nor vilified as crimes.

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191. *Supra* text accompanying notes 69–81.

## A. AFFIRMING A BINARY VIEW OF INTIMATE LIFE—GRISWOLD AND LOVING

1. *Griswold v. Connecticut*

At issue in *Griswold v. Connecticut* was a Connecticut state law that prohibited contraceptive use, even by married couples.<sup>192</sup> In striking down the Connecticut statute, the Court identified constitutionally protected “zones of privacy” for intimate decision-making.<sup>193</sup> Within these zones of privacy, criminalization of intimate conduct was constitutionally disfavored, and indeed, repugnant to the very notion of marriage itself. As Justice Douglas mused, “[w]ould we allow the police to search the sacred precincts of marital bedrooms for telltale signs of [criminal activity]?”<sup>194</sup> The answer of course was a resounding “no.”

Although it was heralded as a path-breaking move towards greater intimate liberty,<sup>195</sup> *Griswold* is quite traditional in one important respect. Its notion of privacy is consonant with the binary view of sex that the interaction of criminal law and family law historically has produced. In *Griswold*, decriminalizing contraceptive use by married persons relocates this intimate decision from the zone of criminality to the zone of valorized sex—marriage. Indeed, the Court’s entire understanding of a zone of privacy free from criminal law’s intervention is tethered to the understanding of marriage as a space removed from criminal law.<sup>196</sup>

In this way, *Griswold* echoes the binary view of intimate life where intimate acts and choices are either criminal behavior or marital behavior. Accordingly, *Griswold*’s notion of privacy is at once liberating and contingent. *Griswold* imagines married couples making decisions about contraception in a zone free from criminal law’s regulation. But critically, it is not a zone where law is completely absent. The couples are *married*. Thus, while their decisions about contraception are no longer governed by criminal law, their marital status (and the privacy protections attendant to that status) is shaped by family law’s regulation.

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192. *Griswold v. Connecticut*, 381 U.S. 479, 480 (1965).

193. *Id.* at 484.

194. *Id.* at 485.

195. Robert G. Dixon, Jr., *The Griswold Penumbra: Constitutional Charter for an Expanded Law of Privacy?*, 64 MICH. L. REV. 197, 205 (1965) (concluding that *Griswold* “does much to provide varied and flexible constitutional underpinning for those situations which do not fit established categories neatly but still seem to rest on values thought to be vital and which, for lack of a better term, are called privacy”); Peter Kihss, *Bill for Liberalizing New York Statute Goes to State Senate*, N.Y. TIMES, June 8, 1965, at 1 (quoting Planned Parenthood’s president, who described the *Griswold* decision as “a tremendous step toward elimination of all restrictions on the right of parents to plan their families with the help of competent medical guidance”).

196. This is apparent from Douglas’s meditation on the “sacred precincts of marital bedrooms” and the sanctity of the marital relationship. *Griswold*, 381 U.S. at 486 (“Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred.”).

This reading of *Griswold* may strike some as unusual—particularly because the case has been interpreted as denominating marriage as a quintessentially private space free of legal regulation.<sup>197</sup> Indeed, *Griswold* makes clear that, in most cases, criminal regulation—and all that attends it—“is repulsive to the notions of privacy surrounding the marriage relationship.”<sup>198</sup>

But it is important to understand that while *Griswold* imagines marriage as free from criminal law’s governance, it does not imagine marriage as a space free of *all* modes of governance and regulation. Indeed, the fact that *Griswold*’s understanding of privacy is tethered to marriage makes clear that its conception of constitutionally protected privacy entails *some* governance—the structure and status conferred by family law through its recognition of marriage. Put another way, although *Griswold* imagines the interior of marriage as a space beyond criminal law’s reach, in order to be included in that space (and entitled to its privacy protections), one must submit to family law’s control by entering into a valid marriage.

For these reasons, *Griswold* is a decision that comports with the way criminal law and family law historically have organized intimate life. Indeed, *Griswold* emphatically affirms the stark binary dividing marriage from crime. The behavior at issue in *Griswold* is either located within marriage (and subject to its governance), or considered criminal and subject to criminal law’s regulation.

## 2. *Loving v. Virginia*

Like *Griswold*, *Loving v. Virginia* also comports with the binary view of intimate relationships that the interaction of criminal law and family law historically has produced. The facts of *Loving* are well-known. Criminally barred from marrying in Virginia, where they lived, Richard and Mildred Loving married in the District of Columbia, which permitted interracial marriages.<sup>199</sup> They then returned to Virginia where they were arrested and their marriage was declared invalid.<sup>200</sup> Although the Supreme Court struck down the offending Virginia statute on equal protection grounds, it nonetheless considered the substantive due process implications of a law limiting autonomy and liberty in marriage. According to the Court,

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197. And as some scholars have argued, *Griswold*’s reification of family privacy exacerbates the difficulty of addressing spousal abuse and intimate violence. See Schneider, *supra* note 33, at 974 (“The concept of marital privacy, established as a constitutional principle in *Griswold*, historically has been the key ideological rationale for state refusal to intervene to protect battered women within ongoing intimate relationships.” (citation omitted)).

198. *Griswold*, 381 U.S. at 486.

199. *Loving v. Virginia*, 388 U.S. 1, 2 (1967).

200. *Id.* at 5 (noting that § 20-57 of Virginia’s marriage law automatically voided “all marriages between ‘a white person and a colored person’ without any judicial proceeding” (internal citation omitted)).

marriage was a “basic civil right[,]” and the decision to “marry, or not marry, a person of another race” was entitled to constitutional protection.<sup>201</sup>

The *Loving* decision decriminalized interracial marriages. However, in so doing, it cleaved to the binary view of sex as either marital behavior or criminal behavior. As Professor Katherine Franke explains, the Court’s decision transformed the Lovings and their relationship in a strict binary fashion:

On June 11, 1967, the Lovings were criminals in the Commonwealth of Virginia, but on June 12, 1967 (the day the Supreme Court issued the decision in their favor), they were not. On June 11, 1967, the Lovings were not legally married in the Commonwealth of Virginia, but on June 12, 1967, they were.<sup>202</sup>

In one fell swoop, the Court transported interracial marriage from the zone of criminality and relocated it within the confines of family law. In *Loving*, as in *Griswold*, the marriage–crime binary is preserved. The conduct at issue—marrying outside of one’s race—was vilified, and then, by virtue of the Court’s decision, was legitimized.

Again, it is worth noting that in transforming interracial unions from crimes to lawful marriages, *Loving* does not necessarily contemplate the absence of legal regulation. The Lovings were no longer subject to criminal law’s regulation, but they were ushered into the status of marriage and therefore subject to family law’s governance.<sup>203</sup> As in *Griswold*, there are only two options for the Lovings and their relationship. They are either criminals or they are spouses—outlaws or in-laws.

In this way, the binary tradition does more than simply consign sex to one of two categories. It makes clear that legal regulation of sex is the default position. Because intimate acts and choices are categorized as either marital or criminal, they always are subject to either family law or criminal law. In the binary tradition, sex always is subject to law’s governance.

#### B. BEYOND THE BINARY—EISENSTADT AND LAWRENCE

Understanding the way in which *Griswold* and *Loving* affirm criminal law and family law’s binary view of intimate relationships is important for understanding what follows. Here, I argue that in two subsequent cases, *Eisenstadt v. Baird* and *Lawrence v. Texas*, the Court elaborates constitutional protections for intimate acts and choices in ways that are meaningfully different from that seen in *Griswold* and *Loving*. In so doing, I argue, these

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201. *Id.* at 12 (quoting *Skinner v. State of Oklahoma*, 316 U.S. 535, 541 (1942)).

202. Katherine M. Franke, *Longing for Loving*, 76 FORDHAM L. REV. 2685, 2687 (2008).

203. *See id.* (referencing *Loving* and challenges to criminal bans of the sort at issue there, and noting that “the district attorney walks the file containing your criminal case over to the clerk in the marriage license office. You and your relationship never leave the building.”).

two cases suggest a move beyond the binary organization of intimate life towards something more continuous.

### 1. *Eisenstadt v. Baird*

In *Eisenstadt*, the Court struck down a Massachusetts criminal law prohibiting the dissemination of contraception to anyone but married couples.<sup>204</sup> Though the law pertained specifically to contraception, it was understood to be a means of expressing disapproval of sex outside of marriage.<sup>205</sup>

The Court decided the issue on equal protection grounds, concluding that the Massachusetts criminal law impermissibly distinguished between married and unmarried persons.<sup>206</sup> In so doing, the *Eisenstadt* Court noted that “the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals.”<sup>207</sup> As such, it concluded that the privacy associated with marriage was essentially “the right of the individual, married or single, to be free from unwarranted governmental intrusion” in his or her intimate life.<sup>208</sup>

However, the *Eisenstadt* Court did more than simply expand *Griswold*'s conception of privacy to encompass individuals, whether married or not. Instead, *Eisenstadt* represents a subtle shift in the organization of intimate life.

At the outset, it should be noted that *Eisenstadt* does not confront squarely the question of a substantive due process right to engage in out-of-wedlock sex.<sup>209</sup> The fact that *Eisenstadt* was decided on equal protection grounds allowed the Court to avoid ruling on whether criminal fornication statutes, many of which had fallen into desuetude and were rarely enforced, violated the right to privacy.<sup>210</sup> That said, the Court's holding that a criminal statute prohibiting contraceptive use could not apply only to the unmarried

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204. *Eisenstadt v. Baird*, 405 U.S. 438, 440–42 (1971).

205. *Id.* at 448 (explaining that “the object of the legislation is to discourage premarital sexual intercourse”).

206. *Id.* at 453.

207. *Id.*

208. *Id.* (emphasis omitted).

209. Indeed, the Court consciously avoided this question. *Eisenstadt*, 405 U.S. at 453 (“We need not and do not, however, decide that important question in this case because, whatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike.”).

210. When earlier presented with a law that prohibited interracial sex outside of marriage, the Court declined to consider whether the law violated substantive due process rights and instead decided the issue on equal protection grounds. See *McLaughlin v. Florida*, 379 U.S. 184, 187 (1964); see also *id.* at 198 n.\* (Stewart, J., concurring) (“Since I think this criminal law is clearly invalid under the Equal Protection Clause of the Fourteenth Amendment, I do not consider the impact of the Due Process Clause of that Amendment, nor of the Thirteenth and Fifteenth Amendments.”).

has important consequences for sex outside of marriage and the way in which marriage and sexuality are organized.

By decriminalizing contraceptive use by unmarried couples, the *Eisenstadt* Court implies that the act that accompanies contraceptive use—sex—is no longer strictly off limits to unmarried persons. Although the Court does not declare criminal fornication statutes beyond constitutional bounds, it nonetheless suggests a new way to think about sex outside of marriage—a way that goes beyond the black-and-white binary that criminal law and family law traditionally have produced. Instead of a stark divide between marriage and criminality, *Eisenstadt* gestures towards a space between marriage and crime where sex may take place without the legal imprimatur of marriage, but also without the threat of criminal sanction. *Eisenstadt* suggests that in some cases—here, where it is private, consensual, heterosexual—we may permit sex as neither criminal nor marital.

This move, I argue, goes beyond the strict binary affirmed in *Griswold* and *Loving*. In *Eisenstadt*, the Court appears to be floating the possibility of organizing intimate life in a more continuous way than previously seen. No doubt responding to the decline in criminal enforcement of fornication statutes and the rise in adult non-marital cohabitation,<sup>211</sup> *Eisenstadt* suggests that contraceptive use by unmarried couples (and the attendant non-marital sexual activity) will be permitted as neither marital nor criminal.

Because *Eisenstadt* is an equal protection case, rather than a substantive due process case, it does not fully articulate legal protections for sex outside of marriage. Accordingly, it is not until *Lawrence v. Texas*<sup>212</sup> that the continuum towards which *Eisenstadt* gestures becomes more fully elaborated.

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211. The loosening of social mores regarding out-of-wedlock sexuality can be seen in a variety of contexts. See D'EMILIO & FREEDMAN, *supra* note 54, at 300 (noting that in the 1960s, “sex became an integral part of the public domain”). This cultural shift was echoed by legal developments. In 1962, the American Law Institute promulgated a Model Penal Code that decriminalized adult consensual sex acts, including sodomy. MODEL PENAL CODE § 213.2 cmts. (1962) (discussing the exclusion of private, consensual homosexual activity from criminalization); see also William N. Eskridge, Jr., *No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review*, 75 N.Y.U. L. REV. 1327, 1341–42 (2002) (discussing the 1955 tentative draft of the Model Penal Code, which recommended decriminalizing sodomy). Over the next two decades, twenty-two states also decriminalized sodomy. See Yao Apasu-Gbotsu et al., *Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity*, 40 U. MIAMI L. REV. 521, 526 n.28 (1986) (listing twenty states that enacted statutes to “decriminalize private, consensual homosexual acts” in the 1970s); see also Diana Hassel, *The Use of Criminal Sodomy Laws in Civil Litigation*, 79 TEX. L. REV. 813, 819–20 (2001) (detailing the “loosening of sexual mores” in law and culture from the 1960s through the 1980s).

212. *Lawrence v. Texas*, 539 U.S. 558 (2003).

2. *Lawrence v. Texas*

In *Lawrence*, the Court struck down a Texas criminal statute prohibiting same-sex sodomy.<sup>213</sup> In so doing, the Court rejected the marriage–crime binary in favor of a more continuous view of intimate life. Writing for the majority, Justice Kennedy sketched out the structure of a new sexual continuum by identifying its outer boundaries:

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.<sup>214</sup>

For Kennedy, the conduct at issue in *Lawrence*, same-sex sodomy, was distinct from this litany of other sexual activities. The behavior at issue in the case was not adult–minor sex (statutory rape, as in *Koso*). It did not involve physical harm, coercion, or forced consent (domestic violence and rape). It was not public and/or commercial (lewdness and prostitution). And, importantly, it was not a relationship that sought formal legal recognition—it was not a marriage, nor was it eligible to be a marriage.

By making clear what the conduct at issue in *Lawrence* was not, Kennedy gives content to the continuum glimpsed in *Eisenstadt*. After *Lawrence*, same-sex sodomy is no longer criminal. Indeed, Kennedy underscores that the Court has removed it from the zone of criminality by expressly juxtaposing it with acts that remain indelibly criminal (e.g., statutory rape, domestic violence, rape, and prostitution). But though same-sex sodomy has been removed from the zone of criminality, *Lawrence* does not relocate it to family law's governance, as was the case in *Criswold* and *Loving*. Although it is no longer a criminal act, *Lawrence* does not re-categorize same-sex sodomy as a marital act.

In this way, *Lawrence* elaborates the continuum tentatively offered in *Eisenstadt*. Instead of organizing intimate life along the marriage–crime binary, *Lawrence* poses a continuum where marriage and criminality remain fixed as opposite extremes. However, between these two poles exists an interstitial space where sex is neither valorized or vilified, but is simply permitted.

The importance of this interstitial space between marriage and criminality goes beyond simply organizing intimate life in a more continuous fashion. As Professor Katherine Franke has astutely observed, the zone that exists between marriage and crime is one that, in theory, remains

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213. *Id.* at 578 (“The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.”).

214. *Id.*

unregulated (or, at least, *under-regulated*) by law.<sup>215</sup> Comparing *Loving* with *Lawrence* illustrates this point.

In *Loving*, the Court's decision transformed the Lovings from criminals to spouses in a validated, legitimate marriage. But, critically, this transformation occurred within the structures of legal governance. As Franke notes, the Lovings' relationship never left the bounds of law—they went from being criminally prosecuted by the local district attorney to having their marriage license processed by a city clerk.<sup>216</sup> By contrast, in *Lawrence*, John Geddes Lawrence and Tyron Garner are transformed from criminals ineligible for marriage to non-criminals who continue to be ineligible for marriage. The continuum that *Eisenstadt* gestures towards and *Lawrence* puts forth is one that dismantles the marriage–crime binary by creating a space where some acts are not subject to either criminal law's or family law's governance.

To be clear, my reading of *Eisenstadt* and *Lawrence* is not the prevailing interpretation. Generally, both cases have been read as modest attempts to extend privacy protections to a broader group of people,<sup>217</sup> rather than a wholesale reorganization of intimate life to accommodate unrestrained sexual liberty. Nevertheless, my reading of these cases, though perhaps novel, is consistent with the text of both opinions and does not diminish the applicability of other interpretations. Instead, my interpretation is an effort to situate these cases in a broader context that makes clear the twin roles of criminal law and family law in structuring intimate life—a context that has been overlooked in legal scholarship.

However, by tracing the trajectory of the marriage–crime binary, my reading of *Griswold*, *Loving*, *Eisenstadt*, and *Lawrence* does more than merely situate these cases in a broader conversation about criminal law and family

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215. Franke, *supra* note 202, at 2687 (asserting that, post-*Lawrence*, the lesbian, gay, bisexual, and transsexual community is “in a unique spot of un- or under-regulation by the state”).

216. *Id.*

217. Ariela R. Dubler, *From McLaughlin v. Florida to Lawrence v. Texas: Sexual Freedom and the Road to Marriage*, 106 COLUM. L. REV. 1165, 1184 (2006) (noting that *Lawrence* might be considered quite conventional because in “hearkening back to *Griswold*” it “recognize[s] that nonmarital sexual relationships can have significance and import for the individuals involved in them much as marriage can for married couples”); Ann Laquer Estin, *Family Governance in the Age of Divorce*, 1998 UTAH L. REV. 211, 211 (noting that *Eisenstadt* “brought the relationships of nonmarital children and parents within a larger rubric of family law”). Of course, some have argued that both decisions could have a more radical slant. See Janet L. Dolgin, *The Family in Transition: From Griswold to Eisenstadt and Beyond*, 82 GEO. L.J. 1519, 1545 (1994) (arguing that *Eisenstadt* is “revolutionary” because its notion of privacy is contingent on “the autonomous individual,” rather than on marriage or the marital couple); Dubler, *supra*, at 1187 (asserting that *Lawrence* could be “seen as the beginning of the extension of constitutional protection to a range of sexual practices that do not fall within monogamous marriage”); Katherine M. Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399, 1426 (2004) (arguing that *Lawrence* offers “an uncharted territory that is worth exploring, and possibly expanding”).



law. It makes clear that the evolving nature of our organization of intimate life is one that could accommodate a zone where law is not present. And because neither family law nor criminal law governs it, this space between marriage and criminality that *Eisenstadt* gestures towards and *Lawrence* enunciates is one of incredible promise and possibility.

The recent struggles over same-sex marriage have reinforced the idea that marriage (and access to marriage) is an essential component of citizenship, a potent symbol of one's membership in, or exclusion from, the polity.<sup>218</sup> But marriage also has a more complicated history.<sup>219</sup> Historically and modernly, it has served as a means of social control and discipline.<sup>220</sup> It has articulated and demanded compliance with a particular model of intimate life, and in so doing, has stigmatized non-conformists as deviant and unworthy.<sup>221</sup> A place between marriage and crime where sex is permitted as neither marital nor criminal is promising because it offers the possibility of a hospitable place for those who wish to live their intimate lives outside of marriage, but do not want to be judged as criminals.<sup>222</sup>

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218. COSSMAN, *supra* note 116, at 7 (claiming that heterosexuality, and indirectly marriage, has been a boundary that historically has separated those considered citizens within the polity and those considered beyond the borders of political and civil inclusion); Katherine M. Franke, *Becoming a Citizen: Reconstruction Era Regulation of African American Marriages*, 11 YALE J.L. & HUMAN. 251, 277 (1999) ("Formerly enslaved people and abolitionists generally deemed the right to marry one of the most important ramifications of emancipation."); Murray, *Equal Rites*, *supra* note 45, at 1401–02.

219. Murray, *Equal Rites*, *supra* note 45, at 1402 (noting that marriage "has not been a wholly positive force in achieving equality and exercising citizenship rights").

220. Franke, *supra* note 218, at 295 (discussing the postbellum use of marriage as a "civilizing" agent for newly freed African-American men and women); Onwuachi-Willig, *supra* note 135, at 1694 (arguing that the contemporary emphasis on marriage promotion is an attempt to force African-American families to conform to Anglo-American family norms and practices).

221. See generally MIMI ABRAMOVITZ, *REGULATING THE LIVES OF WOMEN: SOCIAL WELFARE POLICY FROM COLONIAL TIMES TO THE PRESENT* (1988) (documenting the historical role of American social welfare policy in stigmatizing and punishing women who do not conform to the traditional model of marriage and motherhood); FINEMAN, *THE NEUTERED MOTHER*, *supra* note 135, at 101–03 (noting that law and public opinion define unmarried mothers and their children as "deviant").

222. In some respect, the marriage–crime binary functions on two levels. On one level, the binary refers to the bifurcated understanding of sex as either marital or criminal. As such, the binary constructs two zones of legal governance. There is a zone for those who submit willingly to legal regulation (family law, and marriage specifically), and another zone for those who refuse to submit (criminal law). However, the binary also functions on another level. It makes clear that although there are two zones with distinct regulatory content, the underlying presumption has been that the law always is present. In this Article, I have argued that *Eisenstadt* and *Lawrence's* constitutional privacy protections have disrupted the marriage–crime binary, creating an interstitial space where law need not be present and where sex is simply permitted, rather than valorized or vilified. As such, a new model emerges—one that neither condemns nor celebrates sex. This new model offers individuals the prospect of opting in or out of legal regulation.

However, as I will demonstrate in Part VI, the promise and possibility of this interstitial space has been unrealized. More importantly, the prospect of sex and intimate life untethered to legal governance will continue to be unrealized unless we recognize and appreciate how our understanding of intimate life continues to be shaped by a history in which criminal law and family law have worked together to produce a binary view of intimate acts and choices.

## VI. SEX WITHOUT LAW?

In the preceding Parts, I traced the development of a new way of organizing sexuality and intimate life. Although criminal law and family law historically have produced a binary in which sexual acts and choices are categorized as either legitimate (marriage) or illegitimate (crime), the possibility of a more continuous organization of intimate life is emerging. In this emerging continuum, marriage and criminality remain fixed as polar extremes. What has changed is that between these two poles exists an interstitial space occupied by intimate acts and choices that are neither criminal nor marital.

The fact that neither family law nor criminal law governs intimate acts and choices that are located in the space between marriage and crime suggests that this interstitial space is a legal vacuum.<sup>223</sup> It is a space unregulated—or, at least, under-regulated—by law.<sup>224</sup> As such, it may signal greater opportunities for intimate life unfettered by the dictates of law. In

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223. It is worth considering the connection between this binary view of sexuality and the omnipresence of law within the binary construction. This question seems even more pressing in light of *Lawrence*. As I discussed, *Lawrence* offers the possibility of disrupting the binary to carve out a space between marriage and crime where law is not present. This new space then prompts an ancillary question: if *Lawrence* offers the possibility of a legal vacuum, could its privacy protections also structure a place where sexual acts and choices are neither marital nor criminal, but nonetheless regulated by law? It is beyond the scope of this Article to address this question, but clearly, it should prompt further attention and discussion.

224. Some may argue that even this interstitial space between marriage and crime is not completely divested of legal governance. As other scholars have argued, marriage is a totalizing institution that casts a long shadow, implicating the lives of those who live outside of its borders. See Ariela R. Dubler, "Exceptions to the General Rule": *Unmarried Women and the "Constitution of the Family,"* 4 THEORETICAL INQUIRIES L. 797, 809 (2003) (arguing that "common law doctrines of female support pushed single women into . . . the shadow of marriage"); Dubler, *supra* note 134, at 1645 ("Historically, marriage has functioned as a gnomon, the central pillar of a sundial, casting shadows outward and covering even women not formally under the law of coverture . . . or more modernized forms of marital status law."). Additionally, those who live lawfully outside of marriage may nonetheless use private-law vehicles to structure their intimate lives. Murray, *supra* note 20, at 426–47 n.160 (explaining that contract theory has been used to structure intimate relationships that do not comport with the legal understanding of intimate life); see also *Marvin v. Marvin*, 557 P.2d 106, 122 (Cal. 1976) (recognizing an oral agreement for support between unmarried cohabitants). Accordingly, although this interstitial space may not be a complete legal vacuum, it nonetheless differs from the binary tradition in that law may function as an optional tool for structuring private life, rather than as a regulatory default.

this Part, however, I argue that the promise of an unregulated space between marriage and crime ultimately is unrealized.

As I will show, the idea of unregulated sexuality is one that prompts incredible discomfort and anxiety. This anxiety can be explained by reference to that which preceded the emerging continuum. Because our understanding of intimate life historically has been organized by the marriage–crime binary, there is a path-dependency that emerges when we are faced with the prospect of organizing intimate life in an alternative way. Put differently, we have been conditioned to view intimate life as an either/or proposition. Intimate acts and choices are either marital or they are criminal.<sup>225</sup> To date, there has been no legal rubric for thinking about sex in more nuanced terms.<sup>226</sup>

Relatedly, the anxiety over a space unregulated by law is rooted in the fact that the marriage–crime binary that has organized intimate life thus far creates clear standards for categorizing sex.<sup>227</sup> A space where the law does not regulate sex has the capacity to foster experimentation and deviation from the norms and standards that give content to these categories.<sup>228</sup> Accordingly, the fear of such a space is that it will erode these normative boundaries, rendering unintelligible all categories of sexuality.

With these anxieties in mind, we have responded to the prospect of the continuum by embracing the comfort of the familiar. We translate the familiar binary to this unregulated continuum and attempt to organize this

225. “We” refers to members of the legal community—legal scholars, judges, and lawyers—not to members of the public at large. As noted earlier, the legal understanding of sex and sexuality often has shifted in response to extant changes in social life. For example, the decriminalization of contraceptive use by unmarried couples in *Eisenstadt* reflected in part loosening social mores regarding out-of-wedlock sex. See *supra* note 211 and accompanying text.

226. This is not to say that there have been no social or cultural rubrics for thinking about sex outside of the categories of marriage and crime. For example, the collegiate “hook up culture” is one that explicitly embraces sex and sexual pleasure on their own terms, not as conduits to marriage or as deviant acts. See generally KATHLEEN A. BOGLE, *HOOKING UP: SEX, DATING, AND RELATIONSHIPS ON CAMPUS* (2008) (describing and critiquing the collegiate hook up culture); LAURA SESSIONS STEPP, *UNHOOKED: HOW YOUNG WOMEN PURSUE SEX, DELAY LOVE, AND LOSE AT BOTH* (2007) (same); see also Stephanie Rosenbloom, *A Disconnect on Hooking Up*, N.Y. TIMES, Mar. 1, 2007, at G1 (citing studies showing that “the hookup is the predominant way that [college] students sexually interact”).

227. See *supra* Part IV (discussing the way in which criminal law and family law are understood to govern distinct acts).

228. This phenomenon has occurred in other contexts. See, e.g., Tomiko Brown-Nagin, *Toward a Pragmatic Understanding of Status-Consciousness: The Case of Deregulated Education*, 50 DUKE L.J. 753, 845 (2000) (noting that, in the absence of legal standards mandating equal educational facilities for African-American children, local communities began creating “experimental educational academies” intended to forge new standards for the education of African Americans); Wayne A. Logan, *Street Legal: The Court Affords Police Constitutional Carte Blanche*, 77 IND. L.J. 419, 444–45 (2002) (noting that the absence of clear constitutional standards for police oversight offers states the opportunity to experiment with their own standards).

unfamiliar, ungoverned space in ways that are more recognizable to us. In so doing, we sacrifice the potential (and perhaps, daunting) liberty of a legal vacuum in favor of the comfort of familiar governance.

A. *THE PERSISTENCE OF A BINARY VIEW OF INTIMATE LIFE*

As this Article has explained, historically, criminal law and family law always have regulated intimate life, and have done so in a binary way.<sup>229</sup> Intimate acts and choices either have been regulated by criminal law or family law. Where one doctrine leaves off, the other picks up, and vice versa. Accordingly, as a historical matter, there has been no space where sex has existed in the absence of legal regulation and governance.

The way in which we think about and organize marriage, sex, and intimate life has been completely shaped by this binary construction that consigns sexual acts and choices to the governance of either family law or criminal law. Even as we attempt to construct alternatives to this binary, it continues to loom large in our understanding of intimate life. Justice Scalia's vigorous dissent in *Lawrence v. Texas* is instructive on this point.

Recalling morals-based legislation criminalizing "bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity,"<sup>230</sup> Scalia predicts that *Lawrence* will call "[e]very single one of these laws" into question, placing them beyond criminal law's reach.<sup>231</sup> More importantly, Scalia insists that the decriminalization of same-sex sodomy will lead inexorably to same-sex marriage. Although the majority claims that its "disapprobation of homosexual conduct is strong enough to disallow homosexual marriage, but not strong enough to criminalize private homosexual acts,"<sup>232</sup> Scalia "[d]o[es] not believe it."<sup>233</sup>

To understand the persistence of the binary framework in the way we think about sex, it is necessary to unpack the anxiety that *Lawrence* prompts for Justice Scalia. At bottom, Scalia has trouble "believ[ing]"<sup>234</sup> in the majority's notion of a sexual continuum. And importantly, his lack of faith in—and disgust with—the prospect of a continuum is linked directly to the fact that we historically have organized sex in a binary fashion. For Scalia, decriminalizing same-sex sodomy necessarily gestures towards expanding marriage to include same-sex couples because that is the way we have always organized sex. If it is not marital, it *must* be criminal. And if it is not criminal, it *must* be marital. Because Scalia's understanding of sex is rooted in the binary tradition, the idea of sex that is not criminal, but not eligible

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229. See *supra* Part IV.C. (discussing the binary produced by the interaction of criminal law and family law).

230. *Lawrence v. Texas*, 539 U.S. 558, 590 (Scalia, J., dissenting).

231. *Id.*

232. *Id.* at 604.

233. *Id.*

234. *Id.*

for marriage is completely unintelligible. Sex always has been subject to law—whether criminal law or family law. The idea of a zone where law is not present—where neither of these two doctrines governs—is preposterous and untenable.

To be sure, Justice Scalia is not the only one who has difficulty imagining a more continuous organization of sex. Recall the majority opinion in *Lawrence*. Despite his efforts to promote a more fluid understanding of sex and intimate life, even Justice Kennedy has trouble dealing with a sexual continuum on its own terms. Even as it decriminalizes same-sex sodomy and affords constitutional protections to these private acts, the decision goes to great lengths to paint the plaintiffs, John Geddes Lawrence and Tyron Garner, with the brush of marital domesticity.<sup>235</sup> Although there was scant evidence for it, Kennedy's opinion speaks of Lawrence and Garner as though they are long-term partners sharing a life in common.<sup>236</sup> The pair was not having sex simply for the sake of having sex, but in furtherance of "a personal bond that is more enduring."<sup>237</sup> Thus, while Kennedy constructs a continuum where same-sex sex is neither eligible for marriage, nor considered a crime, he, like Scalia, has a hard time thinking of sex outside of these two categories. Having clearly decriminalized the conduct at issue in *Lawrence*, Kennedy attempts to render intelligible the dissonance that decriminalization without marriage produces by likening Lawrence and Garner to a married couple.

The persistence of these binary impulses also is evident in the political reactions to *Lawrence*. In *Lawrence's* wake, advocates in the LGBT community heralded the decision as an opening salvo in the fight to secure marriage rights for same-sex couples.<sup>238</sup> For LGBT advocates, the decriminalization of same-sex sodomy pointed directly towards the inevitable introduction of same-sex marriage.<sup>239</sup> Likewise, social conservatives also understood the decision to gesture towards same-sex marriage and immediately began organizing a campaign to define marriage in traditional terms and to restrict its expansion to same-sex couples.<sup>240</sup>

Put together, these responses to the decriminalization of same-sex sodomy all suggest the power of the marriage–crime binary as a rubric for understanding sex. When faced with *Lawrence's* decriminalization of same-

235. Franke, *supra* note 217, at 1407 ("Justice Kennedy takes it as given that the sex between John Lawrence and Tyron Garner took place within the context of a relationship.")

236. In fact, Lawrence and Garner were not long-term partners at all. *Id.* at 1408 (noting that neither the facts of the case nor the briefs offered anything that would suggest that Lawrence and Garner were in a long-term relationship).

237. *Lawrence*, 539 U.S. at 567.

238. Sarah Kershaw, *Adversaries on Gay Rights Vow State-by-State Fight*, N.Y. TIMES, July 6, 2003, § 1, at 8.

239. *Id.*

240. *Id.*

sex sex, the immediate reaction has been to turn towards marriage to render intelligible and legible a sexual free zone that is foreign and unfamiliar.

### B. THE PROBLEM OF BOUNDARY EROSION

Our binary tradition has other equally important consequences for a more continuous organization of intimate life. Not only does the binary construction compel us to read decriminalization as inevitably prompting marriage, it also produces a profound attachment to the categories of marriage and crime, and fear that these categories will lack meaning in a world where some intimate acts and choices are not subject to either criminal law or family law's governance. As a place unregulated by law, the space between marriage and crime has the potential to encourage autonomy and liberty in intimate life. However, in so doing, this space also may permit and encourage experimentation with and deviation from the standards set within those sites—marriage and crime—where law does regulate.

This sort of experimentation with and deviation from intimate norms may be precisely what we expect in a zone where law is largely absent and non-marital, non-criminal sex is expressly permitted. However, the fact that this unregulated interstitial space exists in close proximity to marriage and criminality prompts discomfort and fear that eventually, the experimentation and deviation that occur in this interstitial space will erode the boundaries that separate it from marriage and crime. As these boundaries are breached, that which has been deemed criminal will inevitably seep into the interstitial space where it will be tolerated and unchecked by law, and that which was confined to the interstitial space between marriage and criminality will begin to impinge upon marriage's borders.

Justice Scalia's dissent reflects this anxiety. In lamenting *Lawrence's* unorthodox decriminalization without marriage, Scalia announces a litany of other criminal sex acts that he predicts also will be decriminalized.<sup>241</sup> As Scalia's sexual jeremiad suggests, the prospect of an unregulated space between marriage and crime has the potential to divest both of these categories of their content and meaning. If same-sex sodomy is no longer criminal, but does not alter the normative understanding of marriage, what other sex acts will be swept from the criminal zone to a place of toleration and deregulation? The rising tide of decriminalization may sweep a wide swath of behavior into this interstitial zone where it will exist in closer proximity to marriage than before. Implicit in this scenario is the erosion of marriage's boundaries. As more acts are ushered into this unregulated zone, the traditional boundaries of marriage may be threatened as the content of

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241. *Lawrence*, 539 U.S. at 590 (Scalia, J., dissenting) (predicting that “[s]tate laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity” will be called into question after *Lawrence*).

this interstitial space retools and reshapes intimate norms at all points along the continuum.

In short, the fear of a continuum is that it will be *too* fluid, and will compromise the integrity of the institutions that purport to give it structure. The anxiety is that these structural boundaries will dissolve and the idea of legal regulation will either become completely unintelligible, or that a wide range of behavior will be subject to a single type of legal governance—here, marriage.

### C. RECONSTITUTING THE BINARY WITHIN THE SPACE BETWEEN

The weight of the binary on our collective legal imagination has consequences beyond the inability to imagine other ways of organizing sex. As I detail here, these binary impulses not only prevent us from embracing the possibilities inherent in organizing intimate life along a continuum, they affirmatively shape the intimate acts and choices that do occupy the space between marriage and crime. By this I mean that because we are conditioned to think about intimate life in this binary way, and because there is anxiety about the dissolution of these binary categories, we attempt to reconstitute this binary in the interstitial space that exists between marriage and crime. As such, we construct a hierarchy of sexual values that continues to reify marriage and condemn crime, and gauges the worth of any individual intimate act or choice by its proximity to marriage and distance from crime.

Consider the way law regards heterosexual sex outside of marriage. For many years, sex outside of marriage has been accepted as a legal and social matter.<sup>242</sup> In most cases, non-marital sex occupies the interstitial space between marriage and crime. That is, out-of-wedlock sex is clearly outside of marriage, but is no longer criminal. Nevertheless, out-of-wedlock sex is not necessarily celebrated or valorized. Instead, its status, and that of the parties engaged in it, depends entirely on its proximity to either marriage or criminal sex.

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242. See *Marvin v. Marvin*, 557 P.2d 106, 109 (Cal. 1976) (recognizing plaintiff's palimony claim because "[d]uring the past 15 years, there has been a substantial increase in the number of couples living together without marrying"). After *Lawrence*, this sort of acceptance is even more explicit. Criminal bans on non-marital sex were in a state of desuetude and unlikely to be enforced even before *Lawrence*. See *Doe v. Duling*, 782 F.2d 1202, 1206 (4th Cir. 1986) (dismissing a challenge to the constitutionality of a criminal ban on out-of-wedlock cohabitation because plaintiffs faced "only the most theoretical threat of prosecution" and therefore lacked standing to sue). After *Lawrence*, the constitutionality of such laws has been called into question. See *Martin v. Zihel*, 607 S.E.2d 367, 371 (Va. 2005) (applying *Lawrence* and finding unconstitutional a criminal ban on fornication); *Hobbs v. Smith*, No. 05 CVS 267, 2006 WL 3103008, at \*1 (N.C. Super. Ct. Aug. 25, 2006) (relying on *Lawrence* to strike down a state fornication law); cf. *Berg v. State*, 100 P.3d 261, 264, 267 (Utah Ct. App. 2004) (dismissing a challenge to the constitutionality of a criminal ban on fornication because, after *Lawrence*, the statute was not enforced in the context of private, consensual, heterosexual intimacy, and plaintiff therefore lacked standing to sue).

Take, for example, the situation at issue in *Hann v. Housing Authority*.<sup>243</sup> There, the plaintiffs were long-term, cohabiting partners with children.<sup>244</sup> They challenged a local housing-authority regulation limiting public housing to those families composed of “two or more persons who will live together in the dwelling and are related by blood, marriage or adoption.”<sup>245</sup> Critically, the local regulation was intended to discourage “immoral” cohabitation by unmarried adults of the opposite sex.<sup>246</sup> In concluding that the regulation violated a broader federal housing policy,<sup>247</sup> the court made much of the fact that the plaintiffs looked like a marital family. They had lived together for many years, were integrated into each other’s extended families, and, importantly, were raising children together.<sup>248</sup> As the court noted, “[t]he only thing missing [was] a marriage certificate.”<sup>249</sup>

The *Hann* plaintiffs were not married, but instead lived together in a manner that sounded in the register of marriage. As such, their intimate behavior outside of marriage was more proximate to marriage than to crime, and they received some of the benefits reserved to married couples (here, eligibility for public housing), rather than being penalized for their unmarried status.

Of course, the *Hann* plaintiffs’ close proximity to marriage was evident not only by the fact that they had lived as though they were married for some time. Equally important, though unstated in the *Hann* opinion, was the fact that the *Hann* plaintiffs *could* eventually get married. Certainly, nothing in the facts before the court suggested that they were interested in formalizing their relationship, but, as a heterosexual, exogamous adult couple, they were certainly eligible for marriage in Pennsylvania. Though unmarried at the time, they had the option of marrying in the future.<sup>250</sup>

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243. *Hann v. Hous. Auth.*, 709 F. Supp. 605 (E.D. Pa. 1989). Though *Hann* precedes *Lawrence v. Texas* by fifteen years, I discuss it because it reflects the changing understanding of out-of-wedlock sex that emerges in *Eisenstadt*’s wake.

244. *Id.* at 606.

245. *Id.* (quoting the Housing Authority’s interpretation of what constitutes a “family”).

246. *Id.*

247. *Id.* (finding the local regulations “in conflict with the purposes of the United States Housing Act of 1937”).

248. *Hann*, 709 F. Supp. at 610.

249. *Id.*

250. Importantly, sexual acts that occupy the interstitial space between marriage and crime are not the only acts whose value is subject to whether or not they might eventually culminate in marriage. In the context of statutory rape, criminal sex between an adult and minor may be subject to “Romeo and Juliet” exemptions that mitigate penalties for the crime where the parties are relatively close in age. *See, e.g.*, GA. CODE ANN. § 16-6-3(b) (2007) (providing misdemeanor qualification for statutory rape when a “victim is at least 14 but less than 16 years of age and the person convicted . . . is 18 years of age or younger and is no more than four years older than the victim”); KAN. STAT. ANN. § 21-3522 (2007) (mitigating penalties for statutory rape where the child is “14 years of age but less than 16 years of age and the offender is less than 19 years of age and less than four years of age older than the child and the child and the



Another example also illustrates this point. Although it has never been established by legislative or judicial fiat, private sex between more than two consenting adults is likely to be the sort of conduct to occupy the interstitial space between marriage and crime. As a private act between consenting adults, group sex is less likely to be found criminal after *Lawrence*,<sup>251</sup> but, of course, such groupings are ineligible for marriage, which all jurisdictions continue to restrict to two persons.<sup>252</sup>

Even though group sex may exist in the zone where it is understood as neither marital nor criminal sex, the way we think about it is clearly shaped by the marriage–crime binary. Because we reconstitute the marriage–crime binary within this interstitial space, sex between more than two persons is likely to be valued less than the relationship in *Hann*. Unlike the *Hann* plaintiffs, those who participate in group sex are less proximate to the normative understanding of marriage.<sup>253</sup> They may not live together. They

offender are the only parties involved and are members of the opposite sex”). These exemptions are intended for situations where the sex in question seems more like an incident of courtship and less like coercion. But it is not just that the relationship appears distant from coercive sex, which is undoubtedly criminal. It is that as a “courtship,” there is the possibility that it may culminate in marriage between the parties. It is not a coincidence that these exemptions are named for Shakespeare’s star-crossed lovers. After all, Romeo and Juliet were notable in that they were teenagers who, despite considerable impediments, married. See WILLIAM SHAKESPEARE, *ROMEO AND JULIET* act 2, sc. 6 (“Come, come with me, and we will make short work; / For, by your leaves, you shall not stay alone / Till holy church incorporate two in one.”).

With this in mind, it is perhaps unsurprising that the “Romeo and Juliet” exemptions often do not apply to adult–minor sex that appears less normative and that will not—or is unable to—culminate in marriage. Recently, a gay teenager successfully challenged Kansas’s “Romeo and Juliet” exemption, which applied only to opposite-sex couples. *State v. Limon*, 122 P.3d 22, 40 (Kan. 2005) (holding that the exemption violated the equal protection provisions of the U.S. and Kansas Constitutions). If one considers that in Kansas, same-sex couples are ineligible for marriage, the fact that the “Romeo and Juliet” exemption did not extend to statutory rape situations involving same-sex couples is not at all surprising.

251. See *Lawrence v. Texas*, 539 U.S. 558, 572 (2003) (providing “substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex”); *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738, 745 (5th Cir. 2008) (relying on *Lawrence* to invalidate a law prohibiting the sale of sex toys); *Martin v. Zihler*, 607 S.E.2d 367, 371 (Va. 2005) (applying *Lawrence* and finding unconstitutional a criminal ban on fornication). *But see* *Lofton v. Sec’y of Dep’t of Children & Family Servs.*, 358 F.3d 804, 816–17 (11th Cir. 2004) (finding *Lawrence* inapplicable to a law that barred gays and lesbians from adopting children); *Williams v. Attorney Gen. of Ala.*, 378 F.3d 1232, 1238 (11th Cir. 2004) (refusing to apply *Lawrence* to invalidate a criminal ban on sex toys).

252. See *Bronson v. Swensen*, 394 F. Supp. 2d 1329, 1332–33 (D. Utah 2005) (upholding civil and criminal prohibitions on plural marriage), *aff’d on other grounds*, 500 F.3d 1099, 1113 (10th Cir. 2007) (holding that plaintiffs lacked standing to challenge the constitutionality of Utah’s criminal ban on polygamy and had forfeited the opportunity to challenge civil prohibitions on polygamy); see also *supra* note 43 and accompanying text (discussing the present law in all U.S. jurisdictions, which prohibits marriages between more than two persons).

253. Of course, as Professor Mary Anne Case reminds us, married couples need not comport with the normative understanding of marriage at all. They may elect to live apart and not have children. Their marriage license *licenses* them to live an intimate life that is framed by

may not be raising children together. And, critically, group sex involves more than two participants. Because of their numerosity, this grouping not only *appears* more distant from marriage, it actually is *ineligible* for marriage.

More importantly, not only does group sex seem less like marriage, it appears more proximate to crime. Although group sex or relationships between more than two people are not necessarily criminal acts—particularly when performed and practiced in private by consenting adults—seeking formal recognition of an intimate relationship between more than two persons will certainly run afoul of the laws criminalizing polygamy.<sup>254</sup>

The recent challenge to Alabama's Anti-Obscenity Enforcement Act,<sup>255</sup> a criminal ban on sexual devices, also is illustrative.<sup>256</sup> Though the decision was announced after *Lawrence*, it considered the act in question, the commercial sale of sexual devices and products, in terms that reinstate the marriage–crime binary. In *Williams*, the Eleventh Circuit upheld the criminal ban on sex toys and refused the “invitation to recognize a right to sexual intimacy” untethered to marriage or crime.<sup>257</sup> In short, the *Williams* court balked at the prospect of organizing sex along a continuum. Instead, the court's analysis doggedly adheres to the binary view of sex, arguing that any right to “sexual intimacy,” even if limited to consenting adults, “would theoretically encompass such [criminal] activities as prostitution, obscenity, and adult incest.”<sup>258</sup>

In order to contextualize the court's decision, it is important to understand the arguments to which it responds. In *Williams*, the plaintiffs, a group of vendors and married and unmarried users of sexual devices, argued that the use of sexual products was protected under the Supreme Court's privacy jurisprudence.<sup>259</sup> Because plaintiffs filed their brief before *Lawrence* was announced, they framed their privacy rights, and the use of sexual devices, around marriage and in opposition to crime. For example, the plaintiffs emphasized that the use of such products was not obscene or criminal, but rather benefited marital and marriage-like relationships. One vendor plaintiff stipulated that her clients reported that the products

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law but, in the interior of married life, only lightly governed by it. *Case*, *supra* note 54, at 1774 (concluding that “marriage today provides far more license, and has the potential to be far more flexible, liberatory, and egalitarian than most available alternatives”).

254. This is not to suggest that those who participate in group sex necessarily want to formalize their ties to one another.

255. ALA. CODE § 13A-12-200.2 (LexisNexis 2005) (prohibiting, *inter alia*, the commercial distribution of “any device designed or marketed as useful primarily for the stimulation of human genital organs for any thing of pecuniary value”).

256. *Williams v. Attorney Gen. of Ala.*, 378 F.3d 1232 (11th Cir. 2004).

257. *Id.* at 1240.

258. *Id.*

259. Plaintiffs filed their brief on January 23, 2003, well before *Lawrence* was announced. As such, plaintiffs relied on cases like *Griswold* in which the concept of marital privacy figured prominently.

“greatly improved their marital and sexual relations.”<sup>260</sup> Several married plaintiffs averred that “incorporating sexual devices” into their relationships improved marital communication, “both in and out of the bedroom.”<sup>261</sup> Indeed, one couple testified that their use of the banned products “saved” their marriage.<sup>262</sup> And two expert witnesses averred that “‘sexual aids help in the revitalization of potentially failing marital relations,’ and that the use of sexual devices is recommended in ‘therapy for couples who are having sexual problems in their marriage.’”<sup>263</sup>

The statements of unmarried plaintiffs, though less prominent in the argument, also emphasize how these banned sexual devices improved the quality of unmarried sexual relationships. And while different from the arguments offered on behalf of the married couples, these arguments too are testament to plaintiffs’ efforts to locate the use of sexual toys within the rubric of marriage.<sup>264</sup> Prior to their use of the banned products, the unmarried plaintiffs recounted considerable difficulties in their sexual relationships.<sup>265</sup> Using the banned sexual products not only improved the quality of their sexual relations, it enabled them to have better relationships with their partners. As such, these products not only “saved” and improved marriages, they improved unmarried relationships.<sup>266</sup> In so doing, one can assume, the use of the banned devices made it more likely that these non-marital relationships eventually would turn into marriages or long-term, marriage-like relationships.

In the interim between when the *Williams* plaintiffs filed their brief and the court announced its decision upholding Alabama’s criminal ban on the sale and distribution of sex toys and devices, the Supreme Court issued its decision in *Lawrence*.<sup>267</sup> As such, the *Williams* court did not have to render their decision with reference to the marriage–crime binary. Instead, it could have acknowledged a more continuous organization of sex and attempted to locate the sale and distribution of sex toys and devices along that continuum. However, instead of taking the opportunity to think about the use of these banned devices in more nuanced terms, the *Williams* court “decline[d] to extrapolate from *Lawrence* and its *dicta* a right to sexual

260. Brief of Plaintiffs-Appellees, *Williams v. Pryor*, 378 F.3d 1232 (11th Cir. 2004) (No. 02-16135-DD), 2003 WL 23872867, at \*5.

261. *Id.* at \*7.

262. *Id.*

263. *Id.* at \*6 (quoting *Williams v. Pryor*, 220 F. Supp. 2d 1257, 1305 (N.D. Ala. 2002)).

264. *Id.* at \*7–8.

265. Brief of Plaintiffs-Appellees, *supra* note 260, at \*7 (noting that “virtually all of the individual plaintiffs have experienced some level of sexual dysfunction or inhibition” in their relationships).

266. *Id.*

267. Plaintiffs’ brief was filed on January 23, 2003. *Lawrence* was announced on June 26, 2003. *Williams* was decided on July 28, 2004.

privacy.”<sup>268</sup> In so doing, it dismissed the prospect of a more continuous understanding of sex that would accommodate the use of sex toys as part of an intimate life beyond the boundaries of either marriage or crime. In determining the constitutionality of the sex-toy ban, the court, like the plaintiffs, weighed the use of sexual toys and devices by judging its distance from marriage (and marriage’s established privacy protections) and its proximity to criminal obscenity (and its attendant government regulation). As such, the *Williams* court interposed the marriage–crime binary atop *Lawrence*’s efforts to forge a more continuous view of intimate life.

All of these examples make clear the persistence of the marriage–crime binary. Where intimate behavior occupies this interstitial space—where it is not subject to either family law or criminal law—we cannot conceive of it outside of the binary framework. Even where we have the opportunity to further elaborate that interstitial space, we refer back to the marriage–crime binary. We cannot conceive of sex outside of law. In *Hann*, a non-marital relationship is likened to marriage. In the case of group sex, its place in the continuum is located through its distance from marriage and the degree to which it appears similar to criminal polygamy. In *Williams*, the opportunity to locate the use of sexual devices and products in the space between marriage and crime is surrendered to the force of the marriage–crime binary. We consistently reconstitute the binary by trying to understand sex in relation to marriage and crime.

In theory, the interstitial space between marriage and crime is one of tremendous possibility. Indeed, it is a place where law is largely absent and intimate life is not regulated by family law or criminal law. As such, it offers the prospect of dislodging marriage’s position as the benchmark for acceptable intimacy, and in so doing, provides refuge and dignity to those who wish to construct their intimate lives beyond marriage’s boundaries. However, there have been few efforts to think about this interstitial space, with its possibilities and pitfalls, on its own terms. When faced with the prospect of a zone free of law’s governance, we have rushed to reinstate law’s authority. As *Williams* and the other examples illustrate, marriage and crime continue to shape our understanding of the acts and choices that occupy (or could occupy) the interstitial zone between these polar entities.

Of course, some might argue that the response to this space between marriage and crime is perfectly plausible and legitimate. And, indeed, it may be the case that our responses to those acts that are both non-criminal and non-marital are policy choices intended to encourage marriage and to make clear that we do not want sex without law. But, at some level, these choices do not seem completely conscious and purposive. The fact that we have not fully explored the relationship between criminal law and family law and the way in which they organize intimate life suggests that we have responded to

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268. *Williams v. Pryor*, 378 F.3d 1232, 1238 (11th Cir. 2004).

changes in the way sex is organized from a position of path-dependence. We cannot think about how we might organize sex differently because we have never really examined how we have organized it in the past. As such, we disregard the novelty and promise of sex without law and attempt to reconstruct what we have always known.

#### VII. CONCLUSION

This Article not only reveals the long-standing relationship between criminal law and family law and the binary view of intimate life that it produces, it also explains the costs of our inattention to this relationship. By failing to appreciate the work that these strange bedfellows do in organizing sex, we also have failed to appreciate that the marriage–crime binary is only one rubric for organizing intimate life. As such, instead of taking the time to consider the possibilities and pitfalls of a more continuous understanding of intimate life, we have allowed the space between marriage and crime to be reclaimed by law. Put differently, we have surrendered the idea of a fluid space ungoverned by law and almost reflexively have rushed to extend some form of legal governance to the behavior that occupies this space.

Of course, it is not too late to take back what has been lost. Greater attention to the relationship between criminal law and family law and the role that they have played, and continue to play, in organizing intimate life can help us think through new ways of organizing sex going forward. In the end, we may decide that we prefer organizing intimate life within a binary. Or we may decide that though we value the distinction between marital sex and criminal sex, we also value a space that is outside of law's reach and shadow. Or, even more radically, we may decide that we want sex without law full-stop. Either way, we cannot move forward without understanding and appreciating where we have been. The ways in which we have governed our intimate lives in the past continue to shape intimate governance in the present, and presumably will shape it in the future. We need not fear the past's influence so long as we are conscious and cognizant of the way in which we allow it to construct our future. By reflecting on the way in which we have constructed the normative parameters of intimate life in the past and present, we can better determine whether these boundaries and dichotomies should structure our understanding of sex in the future.

