

ESSAY

RIGHTS AND REGULATION: THE EVOLUTION OF SEXUAL REGULATION

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Since it was decided in 2003, Lawrence v. Texas has underwritten the effort to expand access to marriage to same-sex couples. It is curious that Lawrence has served as a foundation for same-sex marriage. After all, Lawrence was not a case about marriage—same-sex or otherwise. Instead, Lawrence was a case about criminal sex and more specifically about limiting the state’s authority to regulate and punish nonmarital sex and sexuality. In short, Lawrence was a case about sexual liberty. The focus on Lawrence as a way station to same-sex marriage has allowed us to overlook a developing threat to Lawrence’s values of sexual liberty and limits on the state’s authority to regulate and punish nonmarital sex. As this Essay explains, in the twelve years since Lawrence was decided, an alternative system of sexual regulation has become more visible. Meaningfully, this alternative system is distinct from both the criminal sexual regulation that preceded Lawrence and the marital sexual regulation that has flourished in Lawrence’s wake. But while it exists outside of both criminal law or marriage law—the two domains that, historically, have served as the principal sites of state sexual regulation—this alternative system of civil regulation nonetheless incorporates the values of both of these regulatory domains by condemning and punishing sex outside of marriage. And perhaps most troublingly, this civil system of sexual regulation resists the constitutional protections for nonmarital sex that Lawrence conferred.

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This Essay surfaces and explores this emergent form of civil sexual regulation that, until now, has been neglected and overlooked. As it explains, this alternative system of civil sexual regulation achieves many of the same punitive ends that criminal sexual regulation accomplished before Lawrence and in so doing repudiates Lawrence's core values. In this way, this system of civil regulation poses a threat to the prospect of greater liberty in intimate life.

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INTRODUCTION

In *Obergefell v. Hodges*, the Supreme Court of the United States famously struck down state laws prohibiting same-sex marriages.¹ In so doing, the Court referenced an earlier decision, *Lawrence v. Texas*.² In *Lawrence*, a narrow majority of the Court struck down a Texas statute criminalizing same-sex sodomy.³ According to Justice Kennedy, who authored both decisions, *Lawrence* established that “same-sex couples have the same right as opposite-sex couples to enjoy intimate association.”⁴

In *Obergefell*, however, Justice Kennedy went further, noting that *Lawrence*'s recognition of a right to same-sex intimate association “extend[ed] beyond mere freedom from laws making same-sex intimacy

1. 135 S. Ct. 2584, 2608 (2015).

2. 539 U.S. 558 (2003).

3. See *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.”).

4. *Obergefell*, 135 S. Ct. at 2589.

a criminal offense.”⁵ Indeed, throughout its decision legalizing same-sex marriage, the *Obergefell* majority referenced *Lawrence* repeatedly—and construed its terms expansively to undergird “broader principles” of intimate choice and autonomy.⁶ Initially, the *Obergefell* Court relied upon *Lawrence* as evidence of shifting societal views regarding homosexuality, same-sex intimacy, and same-sex marriage.⁷ Later in the opinion, however, the Court cited *Lawrence* alongside canonical right-to-marry cases like *Loving v. Virginia* and *Zablocki v. Redhail* to underscore its view that “[d]ecisions concerning marriage are among the most intimate that an individual can make” and that the right to marry included the right to marry a person of the same sex.⁸

It is curious that *Lawrence* has come to serve as a foundation for the legalization of same-sex marriage. After all, *Lawrence* was not a case about marriage⁹—same sex or otherwise. It was a case about criminal sex¹⁰ and more specifically about imposing limits on the state’s authority to regulate and punish sexual acts that occur outside of marriage.¹¹

Lawrence’s promise for sexual liberty *outside of marriage* has been overshadowed by its promise for same-sex couples’ claims to live *inside of marriage*. In this way, commentators, including myself, have critiqued the inexorable march toward marriage equality and the use of *Lawrence* to

5. *Id.*

6. See *id.* at 2589 (asserting *Lawrence* “expressed broader principles” of “individual autonomy” and “intimate association”).

7. *Id.*

8. *Id.* at 2599.

9. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (noting case did not “involve [the question of] whether the government must give formal recognition to any relationship that homosexual persons seek to enter”).

10. See Melissa Murray, *Strange Bedfellows: Criminal Law, Family Law, and the Legal Construction of Intimate Life*, 94 *Iowa L. Rev.* 1253, 1272–73 (2009) [hereinafter Murray, *Strange Bedfellows*] (discussing criminal aspect of *Lawrence*); J. Kelly Strader, *Lawrence’s Criminal Law*, 16 *Berkeley J. Crim. L.* 41, 47–48 (2011) (observing most commentators “tend not to focus on *Lawrence* as a criminal law case” and stating intention to “refocus[] on *Lawrence* as the criminal law case that it is”).

11. See Ariela R. Dubler, *From McLaughlin v. Florida to Lawrence v. Texas: Sexual Freedom and the Road to Marriage*, 106 *Colum. L. Rev.* 1165, 1183–84 (2006) [hereinafter Dubler, *Sexual Freedom and the Road to Marriage*] (noting Court rejected legislature’s “very power to regulate a broad area of sexual behavior”); Katherine M. Franke, *Longing for Loving*, 76 *Fordham L. Rev.* 2685, 2686 (2008) [hereinafter Franke, *Longing for Loving*] (“*Lawrence*, as a liberty case, explicitly limits the state’s ability to punish nonmarital sex”); Melissa Murray, *Marriage as Punishment*, 112 *Colum. L. Rev.* 1, 57 (2012) [hereinafter Murray, *Marriage as Punishment*] (“The opinion speaks of liberty, autonomy, and dignity—and the possibility of sex that is not subject to the state’s disciplinary project.”); Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 *Sup. Ct. Rev.* 27, 39–42 (emphasizing steps Court took to “clarify [the] scope” of its ruling as relating to state’s authority to control private, consensual, adult intimate relationships).

underwrite this effort.¹² As we have explained, marriage is, by itself, a species of state regulation of sex and sexuality.¹³ In this way, it is ironic that a case that purports to limit the state's authority to regulate sex was in fact used to expand the state's regulatory reach.

The critique of the marriage-equality movement (and the movement's use of *Lawrence*) assumes two things. First, going forward, marriage will be the predominant vehicle of state regulation of sex and sexuality—regulation through *recognition*. Second, because *Lawrence* divests the state of its authority to use the criminal law to regulate private, consensual nonmarital sex, sexual regulation will no longer be punitive. Although the critique of marriage as a vehicle of regulation is apt, these assumptions overlook a developing regulatory threat to *Lawrence*'s promise of sexual liberty and restraint on the state's ability to regulate sex and sexuality. This Essay remedies this oversight and in so doing, provides a more nuanced account of the post-*Lawrence* regulatory landscape.

In the twelve years since *Lawrence* was decided, an alternative system of sexual regulation has quietly become more visible. Meaningfully, this alternative system is distinct from both the criminal sexual regulation that preceded *Lawrence* and the marital sexual regulation that has flourished in *Lawrence*'s wake. But while it exists outside of either criminal law or marriage law—the two domains that, historically, have served as the principal sites of state sexual regulation¹⁴—this alternative system nonetheless incorporates the values of both of these regulatory domains by condemning and punishing sex outside of marriage or sex that is deemed threatening or inimical to marriage. And perhaps most troublingly, it resists the constitutional protections for nonmarital sex that *Lawrence* conferred.

This Essay surfaces a series of cases in which the state regulates and civilly sanctions the private sexual conduct of public employees and military personnel. In focusing on these cases, it explores this emergent form of civil sexual regulation that, until now, has been neglected and

12. See Katherine M. Franke, *The Politics of Same-Sex Marriage Politics*, 15 *Colum. J. Gender & L.* 236, 244 (2006) (suggesting drive toward same-sex marriage divests society of “opportunity to explore the possibilities of a ‘lawless homosexuality’”); Melissa Murray, *Paradigms Lost: How Domestic Partnership Went from Innovation to Injury*, 37 *N.Y.U. Rev. L. & Soc. Change* 291, 302 (2013) [hereinafter Murray, *Paradigms Lost*] (“Almost immediately after [*Lawrence*] was announced, LGBT advocates heralded the decision as leading inexorably towards the legalization of same-sex marriage. A few months later, the Massachusetts Supreme Judicial Court announced its decision in *Goodridge*, legalizing same-sex marriage.” (footnote omitted)); Michael Warner, *Response to Martha Nussbaum*, 98 *Calif. L. Rev.* 721, 728 (2010) (arguing liberty and dignity concerns surfaced in *Lawrence* are in tension with state-sanctioned marriage).

13. See Murray, *Marriage as Punishment*, *supra* note 11, at 53 (discussing marriage's role as mechanism of sexual regulation).

14. See Murray, *Paradigms Lost*, *supra* note 12, at 301 (identifying marriage and crime as “the two primary sites through which the state historically has regulated sex and sexuality”).

overlooked. As it explains, this alternative system of civil sexual regulation achieves many of the same punitive ends that criminal sexual regulation accomplished before *Lawrence* and in so doing repudiates *Lawrence's* core values. In this way, this system of civil regulation poses a threat to the prospect of greater liberty in intimate life.

The Essay proceeds in four parts. Part I discusses the Court's decision in *Lawrence v. Texas*. It explains how *Lawrence* fundamentally disrupted the established system of sexual regulation by both providing constitutional protection for nonmarital sex and sexuality and creating space for sex and sexuality outside of marriage and crime, the two principal sites of state sexual regulation.

Part II then shifts to the post-*Lawrence* landscape, introducing a series of cases where the state, despite *Lawrence*, has intervened to regulate and sanction the private, nonmarital consensual sexual conduct of public employees. In these cases, public servants like police officers, teachers, and military personnel are subject to adverse employment actions—terminations, reprimands, and the like—because of their private, nonmarital sexual conduct. And although all of the public employees in these cases assert rights under *Lawrence*, their claims ultimately prove unavailing.

As Part II explains, state regulation of the sexual conduct of public employees is not necessarily new. Even before *Lawrence*, state employers had the authority to regulate the private lives of their employees. The difference, however, was that in this earlier period, the alternative system of regulation depended upon, and interacted with, criminal law's regulation of nonmarital sex or sex deemed deleterious to marriage. In this regard, the alternative regulatory system often existed in the shadow of criminal law—and criminal law functioned as the predicate for the state's regulatory efforts. In the post-*Lawrence* landscape, where criminal law has receded as a means of regulating nonmarital sex and sexuality, we would expect this shadow form of regulation to be diminished. But in fact, in *Lawrence's* wake, this alternative system of sexual regulation has stepped out of the shadows to become more visible as an independent engine of sexual regulation and punishment.

Part III goes on to analyze the operation of this alternate system of sexual regulation in the post-*Lawrence* landscape. As it explains, not only does this alternative system of regulation proceed under the auspices of civil regulatory modalities, like professional codes of conduct and sexual harassment laws, but the state also justifies this regulation in novel ways. That is, the state no longer justifies regulation by resort to majoritarian sexual norms and values, as it did under the regime of criminal sexual regulation. Instead, the justification for state regulation is predicated on an appeal to the public interest and a desire to promote and protect public institutions. In this way, the state has recast the public-private divide in order to regulate nominally private sexual conduct on the

ground that the conduct implicates some important public interest, policy, or institution.

As this Part makes clear, despite its morally neutral posture, this civil form of regulation nonetheless has a normative cast, signaling disapprobation of the conduct itself. In this regard, the system of civil sexual regulation is deeply in tension with the values and goals of *Lawrence v. Texas*, which provided constitutional protection for nonmarital sex and insisted that state regulation of sex and sexuality could not proceed from a preference for majoritarian sexual values.

Part IV considers the implications of these developments for the legal regulation of sex and sexuality and seeks to locate this emergent form of sexual regulation in the broader trajectory of state regulation of intimate life. As it explains, this alternative form of sexual regulation reflects a long-standing effort to maintain some form of state regulation over sex and sexuality. In this regard, the increased visibility and use of this alternative system of sexual regulation has profound consequences for the effort to cultivate a more robust principle of sexual liberty.

I. *LAWRENCE V. TEXAS* AND ITS IMPLICATIONS FOR SEXUAL REGULATION

Historically, marriage and the criminal law have served as the primary sites for the legal regulation of sex and sexuality.¹⁵ Working cooperatively, these two regulatory domains divided the universe of sexual activity into legitimate, valued sex (that is, sex eligible for marriage) and illegitimate, deviant sex (sex subject to criminal prohibitions).¹⁶ The state, through laws that regulated entry to marriage, defined the domain of lawful, legitimate sex as heterosexual, intraracial, exogamous, and monogamous.¹⁷ Criminal law supported this normative vision of marriage and licit sex by criminalizing sex outside of marriage (fornication), as well as sexual conduct deemed inimical (incest) or

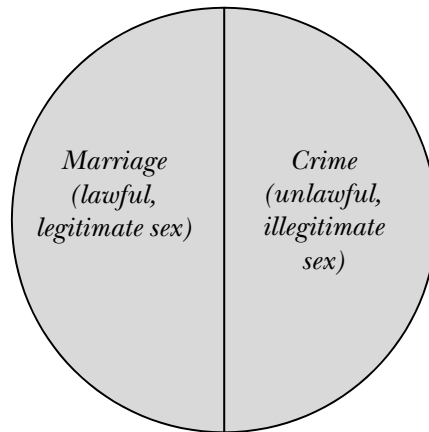
15. Murray, *Marriage as Punishment*, supra note 11, at 53. This is not to suggest that marriage and crime were the *only* sites for sexual regulation. Other forms of law, such as amatory torts, sexual harassment laws and, professional codes of conduct have played a role in regulating sex and sexuality. See, e.g., Jeffrey Brian Greenstein, *Sex, Lies and American Tort Law: The Love Triangle in Context*, 5 *Geo. J. Gender & L.* 723, 728 (2004) (describing judicial regulation of romantic liaisons through amatory torts); Vicki Schultz, *The Sanitized Workplace*, 112 *Yale L.J.* 2061, 2088 (2003) [hereinafter Schultz, *Sanitized Workplace*] (arguing sexual harassment law and employment law now contribute to regulation of sex and articulation of acceptable and unacceptable sexual practices); infra section II.A (discussing use of professional codes of conduct to punish unacceptable sexual conduct). Still, these forms of regulation have been less robust than marriage and crime in their regulatory force. See Murray, *Marriage as Punishment*, supra note 11, at 15 (discussing decreased impact of amatory torts). In this regard, marriage and crime have been the *predominant* modes through which sex and sexuality have been regulated.

16. Murray, *Marriage as Punishment*, supra note 11, at 53.

17. Murray, *Strange Bedfellows*, supra note 10, at 1265. Over time, of course, the normative contours of marriage have been redefined. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2595–97 (2015) (discussing marriage's evolution over time).

threatening to marriage (adultery).¹⁸ Almost all sex that occurred outside of marriage was subject to state criminal regulation and as such, was punishable and deeply stigmatized.¹⁹ In this way, criminal law not only marked sex that was inimical or threatening to marriage as deviant and “bad” but also, through these forceful legal deterrents, actively channeled sex into marriage.²⁰ Elsewhere, I have termed this cooperative regulatory enterprise “the marriage–crime binary.”²¹

FIGURE 1: THE MARRIAGE–CRIME BINARY



Evidence of the marriage–crime binary and its role in regulating and structuring the legal regulation of sex and sexuality dot our legal landscape. Consider *Griswold v. Connecticut*, which invalidated a Connecticut statute prohibiting the use of contraception, even by married couples.²² Before *Griswold* was decided, married couples’ use of contraception was a criminal act—one justified by the state’s interest in deterring promiscuity and other forms of sexual immorality.²³ *Griswold*, however, not only

18. Murray, *Strange Bedfellows*, supra note 10, at 1270.

19. See *id.* (“[C]riminal law has reflected and furthered family law’s stated interest in protecting and promoting the family as a cornerstone of society.”).

20. See Carl E. Schneider, *The Channeling Function in Family Law*, 20 Hofstra L. Rev. 495, 502 (1992) (“[P]rohibitions against non-marital sexual activity and discouragements against quasi-marital arrangements . . . confine sexual life to marriage.”).

21. Murray, *Marriage as Punishment*, supra note 11, at 54 (“*Lawrence* challenged the marriage–crime binary”); Murray, *Strange Bedfellows*, supra note 10, at 1256 (“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.”).

22. 381 U.S. 479, 485 (1965).

23. John D. Pomfret, *Marital Status Becomes an Issue in High Court Birth-Control Case*, N.Y. Times, Mar. 31, 1965, at 41 (quoting Connecticut’s special prosecutor arguing before Supreme Court that purpose of ban on contraceptive devices was “[t]o reduce the

invalidated the Connecticut ban but also recast contraceptive use as something that was moral and appropriate when conducted within marriage.²⁴ Put differently, the Court's decision relocated the use of contraception by married couples from criminal law's regulatory domain to the domain of marriage.²⁵

Likewise, in *Loving v. Virginia*, the Court's decision striking down Virginia's laws prohibiting miscegenation and interracial marriage²⁶ transformed Richard and Mildred Loving from outlaws to in-laws.²⁷ Prior to the Court's historic decision, the state considered the Lovings' conduct—miscegenation and interracial marriage—a crime because it deviated from the “natural” order of racial homogeneity.²⁸ But in one fell swoop, the *Loving* Court relocated miscegenation from criminal law's domain to the regulatory purview of marriage. In doing so, it made clear that this conduct was neither criminal nor immoral but entirely appropriate for recognition as a lawful marriage.²⁹

Together, *Loving* and *Griswold* not only illustrate the operation of the marriage–crime binary but also suggest the totality of this model of sexual regulation. Under this binary structure, sex could either be marital (legitimate and moral) or criminal (illegitimate and immoral). But regardless of whether it was characterized as criminal or marital, sex was subject to some form of state governance and the state's account of its normative worth.³⁰

chances of immorality . . . [and] [t]o act as a deterrent to sexual intercourse outside marriage”).

24. See Murray, *Strange Bedfellows*, supra note 10, at 1294 (describing how *Griswold* characterized contraceptive ban as “criminalization of intimate conduct . . . [which is] repugnant to the very notion of marriage itself”).

25. *Id.* (explaining *Griswold's* decriminalization of contraceptive use by married persons was grounded in idea of “marriage as a space removed from criminal law”).

26. 388 U.S. 1, 12 (1967) (holding Virginia's statutes violated “freedom to marry” on equal protection and due process grounds).

27. See Franke, *Longing for Loving*, supra note 11, at 2687 (“On June 11, 1967, the Lovings were criminals in . . . 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 . . . but on June 12, 1967, they were.”).

28. Indeed, in applying the law against the Lovings, the Virginian trial judge noted that the “fact that he separated the races show[ed]” that miscegenation offended the sensibilities of “Almighty God” himself. *Loving*, 388 U.S. at 3 (quoting Virginia trial court's opinion).

29. Murray, *Strange Bedfellows*, supra note 10, at 1296 (“In one fell swoop, the Court transported interracial marriage from the zone of criminality . . . [to] the confines of family law . . . [M]arrying outside of one's race . . . was legitimized.”).

30. See Franke, *Longing for Loving*, supra note 11, at 2687 (noting, in context of *Loving*, shift from criminal regulation to civil regulation through marriage means sex remains “under the direct control of government and governance”); Murray, *Strange Bedfellows*, supra note 10, at 1296 (“[T]he binary tradition . . . 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.”).

If *Loving* and *Griswold* reflect this binary arrangement, then they are also evidence of its last gasps. Over the last fifty years, there have been important changes that suggest the unraveling of this binary regulatory model.³¹ Today, most Americans engage in—or have engaged in—some kind of sexual conduct outside of marriage.³² Moreover, most do not fear the threat of criminal prosecution when they engage in private, consensual sexual conduct with another adult.³³ There appears to be some space for sex that is neither criminal nor marital and as such is outside of the state’s regulatory ambit.

This shifting regulatory landscape is the result of three key developments: (1) the liberalization of laws criminalizing private, consensual adult sex;³⁴ (2) the emerging sensibility that the state should not use the criminal law to express moral judgments about private, consensual, sexual behavior;³⁵ and (3) the emergence—and expansion—of

31. The loosening of social mores regarding out-of-wedlock sexuality can be seen in a variety of contexts. See John D’Emilio & Estelle B. Freedman, *Intimate Matters: A History of Sexuality in America* 300 (2d ed. 1997) (noting “sex became an integral part of the public domain” in 1960s); Lawrence M. Friedman, *Crime and Punishment in American History* 342–50 (1993) (discussing these changes). Legal developments echoed this cultural shift. In 1962, the American Law Institute (ALI) promulgated a Model Penal Code (MPC) that decriminalized adult consensual sex acts, including sodomy. Model Penal Code and Commentaries § 213.2 cmt. 2 (Am. Law Inst., Official Draft 1980) (including text as adopted in 1962, discussing 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 (2000) (discussing 1955 tentative draft of MPC, 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, 526–27, 526 n.28 (1986) (listing twenty-two states that “decriminalize[d] private, consensual homosexual acts” in 1970s); Diana Hassel, *The Use of Criminal Sodomy Laws in Civil Litigation*, 79 Tex. L. Rev. 813, 819–20 (2001) (detailing “loosening of sexual mores” in law and culture from 1960s through 1980s).

32. Lawrence B. Finer, *Trends in Premarital Sex in the United States, 1954–2003*, 122 *Pub. Health Rep.* 73, 73–78 (2007) (“Data from the 2002 survey indicate that by age 20, 77% of respondents had had sex, 75% had had premarital sex, and 12% had married . . .”).

33. See Dubler, *Sexual Freedom and the Road to Marriage*, *supra* note 11, at 1187 (noting individuals “can engage in noncommodified acts of consensual, nonmarital sex in their homes without fearing that they might run afoul of the criminal law”).

34. See Melissa Murray, *Griswold’s Criminal Law*, 47 *Conn. L. Rev.* 1045, 1049–54 (2015) [hereinafter Murray, *Griswold’s Criminal Law*] (providing more detailed discussion of this liberalization effort); see also Paul Brest et al., *Processes of Constitutional Decision-Making: Cases and Materials* 1630 (6th ed. 2015) (discussing criminal law liberalization efforts of 1950s and 1960s).

35. Murray, *Griswold’s Criminal Law*, *supra* note 34, at 1049–54 (identifying voices calling for “limits on the state’s authority to criminalize private, consensual conduct” in 1940s and 1950s).

constitutional protection for private, consensual adult sex, whether marital or not.³⁶

*Lawrence v. Texas*³⁷ exemplifies—and indeed, is the culmination of—all of these impulses and the changed regulatory landscape they underwrite. In invalidating Texas’s criminal ban on same-sex sodomy,³⁸ *Lawrence* fundamentally disrupted the marriage–crime binary that has traditionally structured the legal regulation of sex and sexuality.³⁹ Although *Lawrence* decriminalized same-sex sodomy, it made clear that the conduct (and those engaged in it) were not eligible for marriage.⁴⁰ In stark contrast to *Griswold* and *Loving*, where formerly criminal sexual conduct was recast as legitimate marital conduct,⁴¹ *Lawrence* restructured the marriage–crime binary to interpose a space between these two sites of regulation for sex that was neither marital nor criminal.⁴² Lodged between marriage and crime, the two traditional sites of legal governance, this interstitial space was distinct in that it existed outside of the state’s regulatory presence.⁴³

36. Murray, *Strange Bedfellows*, supra note 10, at 1299–301; see also Franke, *Longing for Loving*, supra note 11, at 2686 (observing *Lawrence* “explicitly limits the state’s ability to punish nonmarital sex, and in so doing recognizes new rights to sexuality outside marriage”).

37. 539 U.S. 558 (2003).

38. *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.”).

39. Murray, *Strange Bedfellows*, supra note 10, at 1256 (suggesting in *Lawrence*, “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”); see also Murray, *Marriage as Punishment*, supra note 11, at 54 (“In decriminalizing same-sex sodomy while also reserving the question of same-sex marriage, *Lawrence* challenged the marriage–crime binary that traditionally has been used to regulate sex and sexuality.”).

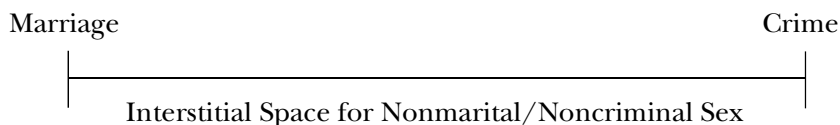
40. 539 U.S. at 578 (noting “present case . . . does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter”).

41. See supra notes 22–30 and accompanying text (analyzing *Griswold* and *Loving* within marriage–crime binary).

42. See Murray, *Strange Bedfellows*, supra note 10, at 1300 (“[I]n *Lawrence*, John Geddes Lawrence and Tyron Garner are transformed from criminals ineligible for marriage to non-criminals who continue to be ineligible for marriage.”). Ever attentive to claims that the decriminalization of sodomy would lead inexorably to the legal recognition of same-sex marriage, the Court took great care to specify that its decision in *Lawrence* did not constitute such recognition. Supra note 40.

43. Murray, *Paradigms Lost*, supra note 12, at 301 (“*Lawrence* interposed a space between marriage and crime—the two primary sites through which the state historically has regulated sex and sexuality. This interstitial space is less thickly regulated than the legal categories of marriage and crime that frame it.”); Murray, *Strange Bedfellows*, supra note 10, at 1300 (“The continuum that . . . *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.”).

FIGURE 2—THE INTERSTITIAL SPACE BETWEEN MARRIAGE AND CRIME



And meaningfully, by its terms, *Lawrence* suggested that a range of nonmarital, noncriminal sexual acts that were private, consensual, and conducted by adults might come to reside comfortably alongside same-sex sodomy in this minimally regulated space between marriage and crime.⁴⁴ On this account, the space between marriage and crime would not only accommodate same-sex sodomy, but arguably fornication, adultery, nonmarital cohabitation, and other forms of private, consensual, nonmarital sex.⁴⁵

Critically, *Lawrence* did more than simply restructure the apparatus of sexual regulation. By limiting criminal law's regulatory ambit to a discrete cohort of indelibly criminal acts,⁴⁶ it also purported to limit the punitive and stigmatic aspects of sexual regulation for the nonmarital sex acts that might reside in the interstitial space between marriage and crime. As the Court acknowledged, criminal regulation of same-sex sodomy historically had been the product of majoritarian sexual mores that sought to discredit and punish homosexuality.⁴⁷ Nevertheless, the Court made clear that, going forward, the desire to enforce majoritarian sexual mores could not furnish the basis for discrediting and punishing

44. Justice Kennedy, writing for the majority, stated:

The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.

539 U.S. at 578. Although the *Lawrence* Court was speaking to same-sex sodomy, the decision's logic arguably would accommodate other private, consensual sexual conduct between unmarried adults.

45. Murray, *Marriage as Punishment*, supra note 11, at 57 ("The constitutional protection afforded in the space between marriage and crime is available to certain types of sex: private consensual sex between two adults [A] wide range of sexual practices . . . might comport with these indicia—everything from ordinary sex between cohabiting adults to sadomasochism ('S&M').") (footnote omitted).

46. *Lawrence*, 539 U.S. at 578 ("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."); see also Murray, *Strange Bedfellows*, supra note 10, at 1299 ("Kennedy underscores that the Court has removed [same-sex sodomy] from the zone of criminality by expressly juxtaposing it with acts that remain indelibly criminal (e.g., statutory rape, domestic violence, rape, and prostitution).").

47. *Lawrence*, 539 U.S. at 571 (discussing moral foundations of sodomy prohibitions).

private, consensual, adult sexual conduct.⁴⁸ As the Court explained, “The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. ‘Our obligation is to define the liberty of all, not to mandate our own moral code.’”⁴⁹

By its terms, *Lawrence* offers constitutional protections for the kinds of sexual conduct that might exist in the interstitial space between marriage and crime—nonmarital, noncriminal sex. As importantly, the decision imposes limits on the state’s authority to regulate sex in order to achieve conformity with majoritarian sexual values.

But twelve years after *Lawrence*, is it the case that the decision furnishes strong protections for those engaged in nonmarital, noncriminal sex? Is it the case that the diminution of criminal law’s regulatory presence means that the state no longer punishes or sanctions private, consensual sex outside of marriage? Is it the case that the state no longer regulates sex for the purpose of vindicating majoritarian sexual mores?

The answer to all of these questions is no. As the following Parts explain, despite *Lawrence*’s protections for nonmarital sexual acts, sexual regulation of this conduct survives in the form of an alternative civil system of sexual regulation. Although this civil system of sexual regulation does not involve deprivations of liberty or criminal convictions, it does impose concrete sanctions that serve to punish and sanction nonmarital sex. The following Part brings this civil system of punitive regulation into view by surfacing a series of post-*Lawrence* cases in which the state has entered the private sphere for the purpose of regulating nonmarital sex and enforcing a particular normative vision of acceptable sex and sexuality.

II. THE CIVIL SIDE OF PUNITIVE SEXUAL REGULATION

Since *Lawrence v. Texas*, criminal law has receded as a dominant force in the regulation of sex and sexuality. This is not to say that criminal law has *no* role in regulating sex.⁵⁰ Indeed, *Lawrence* affirmed the criminal law’s continued role in marking and punishing certain

48. See *id.* (“For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives. These considerations do not answer the question before us, however.”).

49. *Id.* (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 850 (1992)).

50. As discussed earlier, there remains a quite robust category of sex that is subject to criminal regulation. See *supra* notes 46–47 and accompanying text (noting criminal acts); see also *Bushco v. Shurtleff*, 729 F.3d 1294, 1305 (10th Cir. 2013) (upholding Utah sexual solicitation statute as furthering important governmental interest in regulating public sexual conduct); *Coyote Pub., Inc. v. Miller*, 598 F.3d 592, 604 (9th Cir. 2010) (holding Nevada’s restrictions on legal brothel advertising furthered “substantial” state interest in “preventing the commodification of sex”); *Doe v. Jindal*, 851 F. Supp. 2d 995, 1000–01 (E.D. La. 2012) (discussing state laws prohibiting various forms of commercial sex).

forms of sex.⁵¹ But insofar as private, consensual sex between unmarried adults is concerned, criminal law no longer imposes the same clear prohibitions that it did only a generation ago.

Criminal law's departure from the regulation of nonmarital sex and sexuality suggests that the post-*Lawrence* regulatory landscape will be decidedly less punitive than what preceded it. In this regard, criminal law's departure suggests that sexual regulation will no longer involve the threat of criminal prosecution, conviction, and sanctions or the imposition of the collateral civil sanctions that have historically attended criminalization. The embrace of marriage equality is consistent with this assumption. Although marriage is a species of state sexual regulation,⁵² its regulatory power lies in state *recognition* of relationships and the institution's ability to cultivate comportment with certain norms of sexual respectability and discipline.⁵³ It does not involve the explicit sanctions, stigma, and punishment that characterized criminal law's brand of sexual regulation.⁵⁴

Despite these changes, punitive sexual regulation has not been consigned to the dustbin of history. And the expansion of civil marriage is not the only regulatory prospect on the post-*Lawrence* horizon. As this Part explains, society has overlooked another form of sexual regulation that has gathered force in *Lawrence's* wake. Critically, this alternative system of regulation does not proceed from criminal law; indeed, it might be considered a species of employment law because it involves state regulation of public employees and military personnel. Despite these civil antecedents, this alternative system of regulation, like criminal law, has punitive qualities that warrant greater attention and study.

The following sections describe and detail this alternative system of civil regulation and its impact on the lives of public employees and military personnel. Section I.A describes its origins and in so doing,

51. As the Court noted, its holding did not extend to circumstances involving "minors" or "persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused." *Lawrence*, 539 U.S. at 578. Further, it did "not involve public conduct or prostitution." *Id.* On this account, there remained a cadre of sexual acts—statutory rape, rape, domestic violence, lewdness, and prostitution—that remained indelibly criminal.

52. See Murray, *Marriage as Punishment*, supra note 11, at 8 (noting ways marriage "continues to be a tool of state discipline and regulation"); Murray, *Paradigms Lost*, supra note 12, at 301 ("Though marriage offers a broad range of rights, benefits, and entitlements, it also entails a considerable degree of state oversight, discipline, and regulation.").

53. See generally Katherine M. Franke, *Becoming a Citizen: Reconstruction Era Regulation of African American Marriages*, 11 *Yale J.L. & Human.* 251 (1999) (discussing, in postbellum context, marriage's role in cultivating ethos of middle-class respectability among newly freed African Americans); Murray, *Marriage as Punishment*, supra note 11 (documenting marriage's role as vehicle for cultivating norms of disciplined and respectable sexuality).

54. Cf. Murray, *Marriage as Punishment*, supra note 11, at 5–7 (explaining historically, marriage *did* serve some of these punitive and disciplinary ends).

emphasizes that this alternative regulatory system is not necessarily new. Historically, it has existed alongside the criminal system of sexual regulation and indeed, it has operated in tandem with the criminal system. Because of this dependence on criminal law, we might have expected the diminution of this civil system of sexual regulation after *Lawrence*. However, as section I.B demonstrates, this alternative regulatory system continues to operate in the post-*Lawrence* regulatory landscape. And as this Part makes clear, although these cases are limited to the sphere of public employment and military service, the logic of this regulatory regime extends beyond these specific contexts. For these reasons, this system of regulation merits further scholarly scrutiny.

A. *Criminal Law's Handmaiden: Pre-Lawrence Civil Sexual Regulation of Public Employees*

Historically, criminal law was among the most visible means by which the state could punish nonmarital sex.⁵⁵ But it was not the only means. Through civil and administrative channels like professional codes of conduct, the state, in its role as a public employer, could penalize the private sexual conduct of public employees. Under this system, police officers, public school teachers, and other public employees could face adverse employment consequences (refusals to hire, terminations, reprimands) because of their private sexual conduct.⁵⁶

Meaningfully, this type of civil state regulation of sex and sexuality often occurred in the shadow of extant criminal laws that prohibited the underlying conduct.⁵⁷ In many cases, these criminal laws were never

55. See Murray, *Strange Bedfellows*, supra note 10, at 1267–69 (discussing criminal law's role in punishing transgressive sex).

56. See, e.g., *Fleisher v. City of Signal Hill*, 829 F.2d 1491, 1498–99 (9th Cir. 1987) (upholding discharge of probationary police officer for statutory rape of his fifteen-year-old girlfriend while he was nineteen); *Shawgo v. Spradlin*, 701 F.2d 470, 482–83 (5th Cir. 1983) (upholding suspension and demotion of two police officers who were cohabiting out of wedlock); *Andrade v. City of Phoenix*, 692 F.2d 557, 559–60 (9th Cir. 1982) (per curiam) (upholding suspension of police officers for adultery); *Hollenbaugh v. Carnegie Free Library*, 436 F. Supp. 1328, 1332 (W.D. Pa. 1977) (reviewing case of two public library employees who had been terminated for living together in “open adultery”), aff'd, 578 F.2d 1374 (3d Cir. 1978).

57. See, e.g., *Fleisher*, 829 F.2d at 1498 (concluding plaintiff's termination for uncharged commission of statutory rape was proper because “[t]his conduct was illegal, inappropriate in an individual who aspired to become an officer on the Department's police force, and detrimental to the Department as a whole”); *Andrade*, 692 F.2d at 559–60 (concluding police officers could validly be disciplined for sexual misconduct if their actions fell within state criminal definition of adultery); *Suddarth v. Slane*, 539 F. Supp. 612, 617–18 (W.D. Va. 1982) (concluding discharge of police officer for adultery was proper because “adultery is not protected by the First Amendment” and was criminally proscribed in the jurisdiction); *Wasemann v. Roman*, 168 S.E.2d 548, 550 (W. Va. 1969) (upholding police officer's discharge based on bastardy because “[v]iolation of the criminal laws of immoral conduct has been held sufficient ground for the removal of police officers”); see also *Cronin v. Town of Amesbury*, 895 F. Supp. 375, 384 (D. Mass.

enforced; nevertheless, they could have serious collateral civil consequences for violators.⁵⁸ For example, in *Andrade v. City of Phoenix*, three Phoenix police officers were suspended from their jobs for “engaging in sexual relations with women who were not their wives.”⁵⁹ Although their extramarital conduct violated existing criminal laws prohibiting adultery,⁶⁰ none of the officers were actually criminally prosecuted for their adultery.⁶¹ Nevertheless, the department initiated disciplinary actions against them for violating the department’s code of conduct. Two of the officers were administratively charged with “conduct unbecoming” a police officer.⁶² Critically, what made the conduct unbecoming was not simply that it offended majoritarian sexual values that prioritized marital fidelity and monogamy. Instead, the department’s understanding of what was and was not unbecoming was informed by the fact that the underlying conduct was a crime (albeit one that was infrequently enforced). Put differently, the fact that the conduct was criminal made it per se “unbecoming.” In this way, the criminal prohibition on adultery furnished the predicate for the administrative charge.⁶³

In upholding the disciplinary actions, the Ninth Circuit elaborated on the relationship between extant criminal laws and civil disciplinary sanctions:

It seems clear that criminal activity by an officer charged with enforcement of the law will diminish his respect in the eyes of the community, arouse cynicism, discourage public cooperation, and perhaps encourage crime by others. Furthermore, a policeman who commits a crime places himself in a position where his interests as an individual and his interests as an officer may conflict. We therefore conclude that a[n] [administrative]

1995) (noting “wide agreement [among lower courts] that [a public employee’s] off-duty sexual activities are not protected when they violate a statute”), aff’d, 81 F.3d 257 (1st Cir. 1996); *Briggs v. N. Muskegon Police Dep’t*, 563 F. Supp. 585, 592 (W.D. Mich. 1983) (suggesting violation of sexual morality statute would be sufficient to support police officer’s discharge”), aff’d, 746 F.2d 1475 (6th Cir. 1984).

58. See Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by “Unenforced” Sodomy Laws*, 35 Harv. C.R.-C.L. L. Rev. 103, 135–78 (2000) (explaining way unenforced criminal prohibitions on sodomy fueled discriminatory treatment of LGBT persons in civil contexts). These laws could also have other criminal consequences, beyond enforcement. For example, although sodomy was infrequently prosecuted independently, it could be deployed to “induce guilty pleas in . . . problematic sexual assault cases.” William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 Yale L.J. 1, 7 (1997).

59. 692 F.2d at 558.

60. *Id.* at 559.

61. See *id.* (noting in administrative disciplinary proceedings, the three officers were “charged” with commission of a crime).

62. *Id.* at 558.

63. Indeed, one officer was administratively charged with “commission of a crime and immorality.” The other two officers were administratively charged with “conduct unbecoming an officer.” *Id.* For one of these officers, “lewd and lascivious acts” were alleged in addition to adultery as the “underlying offensive conduct.” *Id.*

rule prohibiting the commission of a crime has a rational basis.⁶⁴

Likewise, in *Suddarth v. Slane*,⁶⁵ a married police officer admitted to having an affair with, and fathering a child by, his married neighbor. Upon learning of the conduct, the police department suspended the officer and charged him with violating various provisions of the departmental code of conduct.⁶⁶ As with *Andrade*, the administrative violations were predicated on the fact that the officer's conduct violated extant criminal laws.⁶⁷

As these cases make clear, the state had *two* opportunities to mark and sanction the offending conduct. It could prosecute the individual under the criminal prohibition, and it could initiate a civil employment action based on the violation of the criminal law. And even if the state chose not to enforce the criminal prohibition, the interaction of these two systems meant that the public employee could nevertheless face the collateral *civil* consequences of engaging in unlawful, criminal behavior. At a time when many objected to the enforcement of laws criminalizing private, consensual sex between adults,⁶⁸ the civil regulatory system provided a useful alternative to criminal regulation. By resorting to the civil system of sexual regulation, the state could continue to communicate its antipathy for the underlying conduct without exposing individuals to the devastating consequences of a criminal conviction or incarceration.⁶⁹ In this way, the civil system functioned as criminal law's handmaiden—doing much of the regulatory work at criminal law's behest.

The civil sexual regulation glimpsed in *Andrade* and *Suddarth* depended on the interaction between criminal law and professional codes of conduct. In some circumstances, however, public institutions could regulate sex and sexuality in ways that blurred the distinction

64. *Id.* at 559.

65. 539 F. Supp. 612 (W.D. Va. 1982).

66. *Id.* at 615.

67. *Id.* at 615–16. The officer in the case was charged with violations of General Order 17, Paragraph 3: engaging in “criminal, infamous, dishonest, immoral or notoriously disgraceful conduct, or other conduct prejudicial to the Department” and Paragraph 4: violating “the laws of the United States, the Commonwealth of Virginia, the ordinances of any city, county, or municipality of the Commonwealth of Virginia, or the rules and regulations of the Department.” *Id.*

68. These concerns were among those that animated the ALI's reform of sexual offenses in the MPC. In 1955, at the inauguration of the MPC project, Judge Learned Hand made clear his views of the state's use of criminal law as a vehicle for enforcing sexual morality. He explained, “I think [the criminal regulation of sex] is a matter of morals, a matter largely of taste, and it is not a matter that people should be put in prison about.” Anthony Lewis, *Morals Issue: Crime or Not?*, *N.Y. Times*, Nov. 29, 1964, at E10.

69. This is not to say that the civil penalties could not have devastating effects. As the Essay later discusses, the adverse consequences of civil sexual regulation can have quite pernicious effects on the individual and her dependents. See *infra* section III.C.

between criminal law and civil codes of conduct. For example, historically, the Uniform Code of Military Justice (UCMJ) functioned as both a criminal code within the jurisdiction of the armed services *and* as a professional code of conduct for military personnel.⁷⁰ On this account, the military not only criminalized a range of sexual conduct, including nonmarital sex and extramarital sex, it also signaled clearly that such conduct was “unbecoming” and inconsistent with the professional demeanor expected of military personnel.⁷¹

In this regard, unlike the civilian context where the distinction between professional codes of conduct and criminal prohibitions was easily discernible, in the military context, the distinction between civil administrative conduct codes and criminal prohibitions was less clearly delineated. Nevertheless, criminal prohibitions on sex in the military often interacted with military standards of conduct in ways that recalled the interaction in the civilian context of criminal law and administrative codes of conduct. The UCMJ clearly criminalized certain forms of sexual conduct, while also separately prohibiting and sanctioning “conduct unbecoming.”⁷² Nevertheless, conduct-unbecoming charges could be deployed in tandem with charges of sexual misconduct.⁷³ For example, in *United States v. Ross*, the military charged an Air Force captain with

70. See Joint Serv. Comm. on Military Justice, Manual for Courts-Martial, United States I-1 (2012 ed.), https://www.loc.gov/rr/frd/Military_Law/pdf/MCM-2012.pdf [<http://perma.cc/756Z-5R8Y>] [hereinafter MCM] (stating purposes of military laws are to “promote justice, to assist in maintaining good order and discipline in the armed forces, [and] to promote efficiency and effectiveness in the military establishment”); see also Katherine Annuschat, An Affair to Remember: The State of the Crime of Adultery in the Military, 47 San Diego L. Rev. 1161, 1171 (2010) (“When Congress enacted the UCMJ, it incorporated two types of offenses: civilian crimes, such as murder, and special military offenses, such as dereliction of duty.”).

71. See MCM, *supra* note 70, at IV-99 (stating “conduct unbecoming an officer and gentleman” is action that “compromises the officer’s character as a gentleman” or “dishonor[s] or disgrac[es] the officer personally, seriously compromis[ing] the person’s standing as an officer”); see also Annuschat, *supra* note 70, at 1185–86 (discussing military prosecutions for adultery under Article 133 of UCMJ, including distinct burden of proof for conviction “requiring . . . that the conduct constitutes *unbecoming* conduct”).

72. See, e.g., 10 U.S.C. § 925 (2012) (proscribing forcible sodomy and bestiality); *id.* § 933 (proscribing “conduct unbecoming an officer and a gentleman”); see also MCM, *supra* note 70, at IV-103–04 (discussing prosecution of adultery under Article 134 of UCMJ).

73. See, e.g., *Penland v. Mabus*, 643 F. Supp. 2d 14, 16–17 (D.D.C. 2009) (discussing plaintiff’s conviction under UCMJ for conduct unbecoming an officer and adultery based on her sexual relationship with married subordinate officer); *United States v. Ross*, No. ACM 31378, 1996 WL 73357, at *4 (A.F. Ct. Crim. App. Jan. 31, 1996) (affirming conviction of married Air Force captain convicted of conduct unbecoming an officer, adultery, and fraternization, based on affair with another married officer); *United States v. Moore*, 38 M.J. 490, 491 (C.M.A. 1994) (discussing conviction of Air Force colonel for sodomy and conduct unbecoming an officer for a long-term sexual relationship); *United States v. Eastman*, No. ACM 28884, 1992 WL 97149, at *1 (A.F.C.M.R. Apr. 7, 1992) (affirming conviction of Air Force captain convicted of sodomy, conduct unbecoming an officer, and adultery for his sexual encounters with several different women).

adultery, fraternization, and conduct unbecoming an officer under Articles 133 and 134 of the UCMJ for his affair with another married officer.⁷⁴ Although the conduct-unbecoming charges were distinct from the charges of adultery and fraternization, they all were nonetheless linked in that adulterous behavior with a fellow officer *was* considered unbecoming conduct.

Likewise, in *United States v. Moore*, a court-martial convicted a colonel of sodomy and conduct unbecoming an officer based on his “sordid” relationship with a woman that began when he was twenty and she was fourteen and that he maintained periodically for the next twenty-eight years.⁷⁵ There, the conduct-unbecoming charge functioned as an enhancement to the underlying sexual misconduct charge. According to the military court, the conduct-unbecoming charge arose from the officer’s statements to the woman concerning “graphic, lascivious descriptions of past and anticipated sexual acts.”⁷⁶ In this regard, the instances of sexual misconduct themselves constituted separate criminal acts, while the officer’s “graphic” statements tipped the balance, rendering the episode one that warranted a separate charge of unbecoming conduct.⁷⁷

In principle, *Lawrence* should have altered this regulatory landscape, muting the effects of this shadow system of sexual regulation. By decriminalizing private, consensual, nonmarital sexual conduct,⁷⁸ *Lawrence* would have eliminated the criminal predicate on which this civil regulation rested. Accordingly, after *Lawrence*, civil and administrative actions of the sort seen in *Andrade* and *Suddarth* arguably would be untenable—or at least more difficult to sustain. If the administrative charges were premised on a violation of criminal law, the fact that the underlying conduct was no longer criminal in nature would mean that there was no longer a predicate for a related civil employment action. Moreover, after *Lawrence*, these kinds of sexual acts ostensibly would be

74. *Ross*, 1996 WL 73357, at *1.

75. 38 M.J. at 491.

76. *Id.*

77. *Id.* at 491–92, 491 n.1.

78. See, e.g., Dubler, *Sexual Freedom and the Road to Marriage*, supra note 11, at 1186–87 (“*Lawrence* dramatically altered the entire legal landscape of nonmarital sexual intimacy [A]fter *Lawrence* cross-sex and same-sex adult couples alike can engage in noncommodified acts of consensual, nonmarital sex in their homes without fearing that they might run afoul of the criminal law.”); Strader, supra note 10, at 42 (“[*Lawrence*] seemingly invalidated all criminal laws that infringe on private, consensual, non-commercial sexual acts.”); Jennifer A. Herold, *Statute Note, A Breach of Vows but Not Criminal: Does Lawrence v. Texas Invalidate Utah’s Statute Criminalizing Adultery?*, 7 *J.L. & Fam. Stud.* 253, 261 (2005) (“Criminalizing the private sexual conduct, such as adultery, that occurs between two consenting adults is an unconstitutional restriction on the right to privacy [after *Lawrence*].”).

subject to constitutional privacy protections.⁷⁹ Adults would have some kind of liberty interest in engaging in private, consensual, nonmarital sexual activity.⁸⁰

Similarly, *Lawrence*'s effort to affirmatively articulate some degree of privacy protections for private, consensual, nonmarital sex would have imposed some limits on the military's efforts to regulate such conduct as either criminal misconduct or as conduct unbecoming under the USMJ. Indeed, after *Lawrence*, military courts sought to reconcile the decision's protections for private, consensual sex between unmarried adults with the UCMJ standards of military conduct. In *United States v. Marcum*, the military courts adopted a standard that sought to balance the liberty interests identified in *Lawrence* with military standards of conduct for enlisted personnel.⁸¹ Under *Marcum*, a military court must determine whether: (1) the conduct was "within the liberty interest identified" in *Lawrence*; (2) "the conduct encompassed any behavior or factors identified by the Supreme Court as outside the analysis in *Lawrence*;" and (3) there are "additional factors relevant solely in the military environment that affected the nature and reach of the *Lawrence* liberty interest."⁸² On this account, prosecution as a military offense is now reserved only for sexual conduct that is clearly ungoverned by *Lawrence* or involves circumstances where other factors relevant to the military require circumventing *Lawrence*'s privacy protections for nonmarital sex.

B. *An Independent Engine of Sexual Regulation: Post-Lawrence Civil Sexual Regulation of Public Employees*

As the foregoing section makes clear, punitive civil regulation of nonmarital sex and sexuality is not a new phenomenon. Nevertheless, in the past, this kind of civil regulation often operated in tandem with, and in the shadow of, criminal law's regulation of nonmarital sex. In this regard, just as *Lawrence* muted criminal law's regulatory power over nonmarital sex, one would expect it to also mute the civil system of regulation that existed in tandem with the criminal system. But despite these expectations, this alternative system of civil sexual regulation survives *Lawrence*. Through a series of cases involving public employees and military personnel, the following subsections detail the post-*Lawrence* operation of this system of civil sexual regulation.

79. See *supra* notes 44–45 (discussing range of sexual acts that arguably enjoy constitutional protection after *Lawrence*).

80. See *supra* note 45 and accompanying text (arguing *Lawrence* provided some measure of constitutional protection to other forms of sex, including same-sex sodomy, fornication, adultery, and nonmarital cohabitation).

81. See 60 M.J. 198, 206 (C.A.A.F. 2004) (“[A]n understanding of military culture and mission cautions against sweeping constitutional pronouncements that may not account for the nuance of military life.”).

82. *Id.* at 206–07.

1. *Private Sex and Public Employees*. — If *Lawrence* gestured toward a more accepting environment for nonmarital sex, then the facts of *Seegmiller v. LaVerkin City*⁸³ suggest the elusiveness of *Lawrence's* grant of sexual freedom. In *Seegmiller*, Sharon Johnson, a police officer in the midst of a contentious divorce, attended an out-of-town training conference paid for in part by the city.⁸⁴ During the conference, but after the training sessions had ended for the day, Johnson had “a brief affair with an officer from another department who was also attending the conference.”⁸⁵

Based on her estranged husband's allegations of other professional misconduct, the LaVerkin City Council began an investigation into Johnson's activities on and off the job.⁸⁶ During the course of the investigation, the Council learned of Johnson's affair at the training conference and reprimanded her, invoking a provision in the law enforcement code of ethics requiring an officer to “keep [her] private life unsullied as an example to all and [to] behave in a manner that does not bring discredit to [the officer] or [the] agency.”⁸⁷ According to the reprimand, Johnson had allowed “her personal life [to] interfere with her duties as an officer by having sexual relations with an officer from [another department] while attending a training session out of town which was paid for in part by LaVerkin City.”⁸⁸ The reprimand advised her to “avoid the appearance of impropriety” and to “conduct [herself] in the future . . . in a manner that will be consistent with the city policies and the police department policies.”⁸⁹ To concretize the city's expectations, the reprimand warned her that future violations of the professional code would result in “additional discipline up to and including termination.”⁹⁰

Johnson contended that as a result of the reprimand, which was made public, her credibility as an officer was “seriously undermined,” prompting her to resign from her position in the police department.⁹¹ She subsequently filed suit claiming that the City Council's investigation and reprimand “infringed on her fundamental liberty interest in sexual privacy.”⁹² In doing so, she relied heavily on *Lawrence* as establishing constitutional protections for private, consensual adult sex.⁹³

83. 528 F.3d 762, 764–66 (10th Cir. 2008).

84. *Id.* at 764.

85. *Id.* at 765.

86. *Id.*

87. *Id.*

88. *Id.* at 766.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 769.

93. See generally Brief of Appellant, *Seegmiller*, 528 F.3d 762 (No. 07-4096), 2007 WL 2426131 (referencing *Lawrence* repeatedly).

Although the Tenth Circuit conceded that “[b]roadly speaking, no one disputes a right to be free from governmental interference in matters of consensual sexual privacy,”⁹⁴ it nonetheless rejected Johnson’s reading of *Lawrence*. Instead, the court interpreted *Lawrence* narrowly, concluding that the decision did not identify a broadly defined fundamental “right to private sexual activity.”⁹⁵ Absent a fundamental right, the city’s actions were subject to rational basis review—a standard that, in the court’s view, was easily satisfied: “It is well-settled that a police department may, ‘in accordance with its well-established duty to keep peace, [place] demands upon the members of the police force . . . which have no counterpart with respect to the public at large.’”⁹⁶ In terms startlingly reminiscent of cases like *Andrade* and *Suddarth*, the Tenth Circuit concluded that “it [is] reasonable for the police department to privately admonish [the officer’s] personal conduct consistent with its code of conduct when the department believes it will further internal discipline or the public’s respect for its police officers and the department they represent.”⁹⁷

2. *Private Sex and Public Policies*. — If *Seegmiller* suggests that professional codes of conduct may furnish state employers with broad license to regulate the private sexual conduct of public employees, the facts of *Anderson v. City of LaVergne*⁹⁸ and *Beecham v. Henderson County*⁹⁹ show that the state’s ability to reach the private conduct of its employees goes beyond the use of professional codes of conduct to include other forms of civil law.

Like many American adults, Michael Anderson and Lisa Lewis began a romantic relationship after meeting on the job.¹⁰⁰ Anderson was a

94. *Seegmiller*, 528 F.3d at 769.

95. *Id.* at 770–72.

96. *Id.* at 772 (alterations in original) (quoting *Kelley v. Johnson*, 425 U.S. 238, 245 (1976)).

97. *Id.*

98. 371 F.3d 879 (6th Cir. 2004).

99. 422 F.3d 372 (6th Cir. 2005).

100. *Anderson*, 371 F.3d at 880. The workplace often serves as an incubator for romantic attachments. See Anna C. Camp, Cutting Cupid out of the Workplace: The Capacity of Employees’ Constitutional Privacy Rights to Constrain Employers’ Attempts to Limit Off-Duty Intimate Associations, 32 *Hastings Comm. & Ent. L.J.* 427, 430–31 (2010) (recognizing many romantic relationships begin in workplace); Sharon Rabin-Margalioth, Love at Work, 13 *Duke J. Gender L. & Pol’y* 237, 237–38 (2006) (noting workplace romances are “inevitable”); Schultz, Sanitized Workplace, *supra* note 15, at 2165–66 (“In today’s economy, many people work extremely long hours and have little time for social lives outside work. As a practical matter, these people may have to find potential partners through their employment.”); Melissa Murray, Black Marriage, White People, Red Herrings, 111 *Mich. L. Rev.* 977, 992 (2013) (book review) (noting workplace is often site for forming attachments); Timothy S. Bland, Romance in the Workplace: Good Thing or Bad?, *Wash. Bus. J.* (Oct. 23, 2000, 12:00 AM), <http://www.bizjournals.com/washington/stories/2000/10/23/focus10.html> [<http://perma.cc/KC9Q-GTK6>] (citing surveys indicating “one-third to one-half of all romances now start at work”); Soc’y for Human Res. Mgmt.,

police officer for the city of LaVergne, and Lewis worked as an administrative assistant for the department.¹⁰¹ Three months after the couple began their relationship, the police chief, concerned that “intra-office dating between employees of different ranks . . . might lead to sexual harassment claims against the department,” ordered Anderson and Lewis to “cease all contact with each other outside of the workplace.”¹⁰² Despite the order, Anderson and Lewis continued to be “romantically and sexually involved.”¹⁰³ Anderson was eventually fired for failing to follow his supervisor’s order to stop seeing Lewis outside of the office.¹⁰⁴

Anderson filed suit, arguing that the order violated his rights of intimate association.¹⁰⁵ Noting that Anderson and Lewis “lived together at some point, were romantically and sexually involved,” and were monogamous,¹⁰⁶ the appellate court agreed that Anderson’s nonmarital relationship with Lewis was a “highly personal relationship[] within the ambit of intimate associations” and thus was entitled to constitutional protection.¹⁰⁷

Nevertheless, “[b]ecause Anderson continued to enjoy the ability to form intimate associations with anyone other than fellow police department employees of differing rank,” the appellate court concluded there had been no direct and substantial interference with his constitutional rights that would warrant heightened scrutiny.¹⁰⁸ Deploying the deferential rational basis standard, the court concluded that the supervisor’s stated interest in avoiding sexual harassment suits was the sort of general administrative policy “critical to the [police department]’s overall functioning” and thus was a legitimate government interest sufficient to uphold the order and the policy.¹⁰⁹

Like *Anderson*, *Beecham v. Henderson County* confronted the difficulties of running a functioning and productive workplace in the

SHRM Survey Findings: Workplace Romance 2 (2013), <http://www.shrm.org/research/surveyfindings/articles/pages/shrm-workplace-romance-findings.aspx> (on file with the *Columbia Law Review*) (finding forty-three percent of human resources professionals reported current incidences of workplace romances and one in four employees have been or are currently involved in workplace romance).

101. *Anderson*, 371 F.3d at 880.

102. *Id.* (internal quotation marks omitted) (quoting Chief of Police Howard Morris).

103. *Id.* at 882.

104. *Id.* at 880. Apparently, the police chief later reconsidered the termination and “offered Anderson the option of resigning” without “any negative information about the incident” or subsequent investigation being included in his employment record, which Anderson accepted. *Id.*

105. *Id.* at 880–81.

106. *Id.* at 882.

107. *Id.* (internal quotation marks omitted) (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984)).

108. *Id.*

109. *Id.* at 882–83.

face of an office romance—albeit a messy office love triangle.¹¹⁰ In October 2002, Steve Milam proposed marriage to June Beecham, with whom he was “deeply involved in a romantic relationship.”¹¹¹ In doing so, Steve seemed to have gotten ahead of himself, for he was still married to Patricia Leigh Milam, who happened to work “down the hall” from Beecham at the county courthouse.¹¹² Not surprisingly, this small town love triangle “caus[ed] tension in the courthouse in general and in the Circuit Clerk’s office,” where Beecham served as Deputy Clerk.¹¹³ Finding Beecham’s relationship with her coworker’s husband to be “unacceptably disruptive to the workplace,” her supervisor terminated her, prompting Beecham to file a wrongful termination lawsuit claiming violation of her rights under *Lawrence*.¹¹⁴

Although the appellate court conceded that the Beecham–Milam relationship was within the scope of constitutional protection, it, like the *Anderson* court, focused on whether the termination imposed a “direct and substantial influence [sic]” on Beecham’s right of intimate association.¹¹⁵ Analogizing the employer’s termination decision to antinepotism policies, the *Beecham* court determined that the termination did not pose a “direct” and “substantial” influence on Beecham’s association rights.¹¹⁶ That is, her employer’s decision did not prevent Beecham from forming or maintaining an intimate relationship. It merely required her to choose between her relationship and her job. Moreover, Beecham’s termination did not “bar her from every form of employment in every sector of society.”¹¹⁷ Although she was discharged from one position at one courthouse, “[a]ll other employment opportunities [we]re available to her,” regardless of her relationship.¹¹⁸ Lacking a basis for heightened scrutiny, the *Beecham* court applied rational basis review and upheld Beecham’s termination on the ground that the employer’s interest in minimizing the workplace disruptions caused by the Beecham–Milam affair was a legitimate governmental interest.¹¹⁹

3. *Private Sex and Public Institutions*. — In addition to concerns about the professional conduct of public employees and the vindication of public policy goals, the state has also identified concern for public insti-

110. *Beecham v. Henderson County*, 422 F.3d 372 (6th Cir. 2005).

111. *Id.* at 375 (internal quotation marks omitted) (quoting June Beecham).

112. *Id.* at 378.

113. *Id.* at 374.

114. *Id.* at 374–76, 378.

115. *Id.* at 376 (internal quotation marks omitted) (quoting *Anderson v. City of LaVergne*, 371 F.3d 879, 882 (6th Cir. 2004)) (misquotation); see also *Anderson*, 371 F.3d at 882 (applying “direct and substantial interference” test).

116. *Beecham*, 422 F.3d at 376–78.

117. *Id.* at 376.

118. *Id.*

119. See *id.* at 378 (“Plaintiff’s claim cannot prevail upon the application of rational-basis review to the employment action taken by her employer.”).

tutions as a basis for the continued regulation of private sexual conduct. Consider the facts of *United States v. Harvey*¹²⁰ and *United States v. Orellana*,¹²¹ both of which involved private, nonmarital sex in the context of military service.

In *Harvey*, a serviceman was dishonorably discharged from the military for conduct unbecoming an officer following a conviction by a court-martial.¹²² Notably, the conduct that gave rise to the charge—homosexual sodomy in a private home—was precisely the kind of sexual conduct deemed constitutionally protected under *Lawrence*.¹²³ And indeed, in challenging his dishonorable discharge, the officer referred to *Lawrence* and its protections for private, consensual sex between adults.¹²⁴

In reviewing the claim, the military appellate court noted that after *Lawrence*, military prosecutions and discharges arising from the UCMJ's prohibitions on private, consensual sexual conduct were subject to *Marcum*'s contextual, "as-applied" analysis to determine whether the action passed constitutional muster.¹²⁵ Under the *Marcum* test, military courts were obliged to consider whether: (1) the conduct was "within the liberty interest identified by the Supreme Court in *Lawrence*," (2) the conduct "encompassed any behavior or factors identified by the Supreme Court as outside the analysis in *Lawrence*," and (3) there were "additional factors relevant solely in the military environment that affect the nature and reach of the *Lawrence* liberty interest."¹²⁶

Considering these factors, the *Harvey* court determined that the serviceman's conduct did not fall under the rubric of the UCMJ's criminal sodomy prohibition because it was private conduct within the meaning of *Lawrence*.¹²⁷ That is, the conduct was protected under *Lawrence* and could not be prosecuted as criminal adultery under the UCMJ. Nevertheless, the court concluded that the act of same-sex sodomy *could* be sanctioned under the UCMJ as conduct unbecoming an officer and a gentleman.¹²⁸ In rendering its decision, the *Harvey* court

120. 67 M.J. 758 (A.F. Ct. Crim. App. 2009).

121. 62 M.J. 595 (N-M. Ct. Crim. App. 2005).

122. See 67 M.J. at 759 (noting conviction).

123. See *id.* (describing appellant's challenge based on *Lawrence*).

124. *Id.*

125. *Id.* at 760–61 (discussing as-applied analysis articulated under *United States v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004)).

126. *Id.* at 761; see also *supra* notes 81–82 and accompanying text (introducing *Marcum* court's analysis).

127. See *Harvey*, 67 M.J. at 761 ("We find the appellant's conduct was within the *Lawrence* liberty interest.").

128. See *id.* at 762–63 (finding such conduct could be proscribed by the UCMJ). The court reasoned:

[T]he appellant's act of performing fellatio on a Turkish national at a time when the appellant, an officer, was serving as a representative of the United States military abroad, and at a time when the appellant had been confronted about and knew rumors abounded on and off base

emphasized that the serviceman's conduct "disgraced and dishonored" the military and the serviceman's status as an officer, while "seriously expos[ing] [the serviceman] to public opprobrium."¹²⁹

Likewise, in *United States v. Orellana*, a court-martial convicted a twenty-three-year-old, married, noncommissioned officer of adultery under Article 134 of the UCMJ.¹³⁰ The serviceman challenged his conviction under *Lawrence*,¹³¹ claiming that the decision "extends a constitutional right of privacy to discreet, consensual adultery with an adult where there is no other legitimate government interest furthered by prosecuting the offense."¹³²

In assessing the serviceman's claim, the appellate court noted that, after *Lawrence*, there were strong limits on the military's ability to prosecute and punish adultery.¹³³ Despite these limits, the court nonetheless upheld Orellana's conviction. According to the court, Orellana was a "noncommissioned officer who was not legally separated from his wife" when he engaged in multiple adulterous acts.¹³⁴ More troublingly, he committed his adulterous acts "in his quarters on board a military installation," which the court compared to a public act performed in "the barracks where other soldiers could see or find out about it."¹³⁵ Moreover, the serviceman "was intent on persisting in his misconduct, even after being discovered by his wife."¹³⁶ All of this made clear to the court that the adulterous behavior, though arguably subject to constitutional protection, was "demonstrably prejudicial to good order and discipline, as well as service discrediting."¹³⁷ In this way, "there [we]re additional factors . . . that weigh[ed] against constitutional protection."¹³⁸

* * *

about his alleged homosexual relationship with another Turkish national . . . evinced, as the trier of fact found, a degree of indecorum that disgraced and dishonored the appellant and seriously compromised his standing as an officer.

Id.

129. Id.

130. 62 M.J. 595, 596 (N-M Ct. Crim. App. 2005).

131. Id. at 597.

132. Id. at 598 (internal quotation marks omitted) (quoting Brief of Appellant, *Orellana*, 62 M.J. 596).

133. See id. at 599 (discussing various executive limits on prosecution of adultery and similar sexual offenses under UCMJ).

134. Id. at 600.

135. Id.

136. Id.

137. Id. at 601.

138. Id.

What is one to make of these cases? Because they involve public employees and military personnel, it would be easy to dismiss them as anomalous or context specific. But regardless of their context, these cases are meaningful. Public employment (outside of military service) constitutes almost a fifth of the American labor force.¹³⁹ This means that nearly twenty percent of working Americans, as well as their dependents, look to the state not only as a sovereign but as an employer who provides income and associated benefits. In this regard, these cases surface a regulatory regime that has the potential to impact a wide swath of the public.

Moreover, although these cases reflect the experiences of a handful of employees, arguably, their logic may extend beyond these isolated circumstances. Indeed, we may glimpse the logic of these cases, and the regulatory regime that they underwrite, in another domain that impacts the lives of millions—child custody. Consider the facts of *Vanderveer v. Vanderveer*, where a court divested a mother of custody of her son.¹⁴⁰ In making the decision to modify custody, the court noted that the mother had relocated to Florida to live with “a man she had met in a bar.”¹⁴¹ This fact, coupled with the mother’s “financial dependence on a man who was not her husband,” convinced the trial court that “the moral atmosphere for the child” was inconsistent with the child’s best interests.¹⁴²

On appeal, the mother challenged the decision, arguing that the modification violated her rights under *Lawrence*.¹⁴³ Despite the fact that after *Lawrence*, Virginia courts overruled extant criminal laws prohibiting nonmarital fornication and cohabitation,¹⁴⁴ the appellate court concluded that *Lawrence* did not “involve minors” and thus “does not prevent a trial court from considering the atmosphere present in a

139. See Bureau of Labor Statistics, Industry Employment and Output Projections to 2022, tbl.1 (2013), <http://www.bls.gov/opub/mlr/2013/article/industry-employment-and-output-projections-to-2022.htm> [<http://perma.cc/99GZ-22B7>] (finding in 2012, federal government and state and local government employed fifteen percent of U.S. workforce); see also Crosby Burns et al., Ctr. for Am. Progress, *The State of Diversity in Today’s Workforce* (2012), <https://www.americanprogress.org/issues/labor/report/2012/07/12/11938/the-state-of-diversity-in-todays-workforce/> [<http://perma.cc/UC5U-L8MG>] (citing 2011 Bureau of Labor Statistics data that government employs 16.49% of American labor force).

140. No. 0122-04-02, 2004 WL 2157930, at *1 (Va. Ct. App. Sept. 28, 2004) (holding custody should be transferred to father).

141. *Id.*

142. *Id.* at *2–4.

143. See *id.* at *4 (explaining why *Lawrence* did not support mother’s argument).

144. See *Martin v. Zihlerl*, 607 S.E.2d 367, 370–71 (Va. 2005) (finding law unconstitutional because it infringed on “liberty interest” in “private, consensual conduct between adults”); see also *Thong v. Andre Chreky Salon*, 634 F. Supp. 2d 40, 47 (D.D.C. 2009) (“While it could not be said that [*Martin*] strikes down the adultery statutes per se, it makes clear that it considers statutes criminalizing private, consensual, sexual intercourse irrelevant for the purposes of civil litigation.”).

parent's home in determining the best interest of the child."¹⁴⁵ Although the criminal law was no longer a vehicle for signaling disapproval of nonmarital sex and sexuality, civil law—in this case child custody—could express and censure departure from the marital model of sex and sexuality.

Vanderveer gestures toward another insight that may be gleaned from these cases. These cases are important not only because their logic may operate outside of the context of public employment. They are meaningful because they make clear that, even after *Lawrence*, this civil system of sexual regulation continues to operate forcefully to regulate sex and sexuality. In the following Part, this Essay provides details of its operation and its consequences.

III. MAKING SENSE OF POST-LAWRENCE CIVIL REGULATION

To elaborate the foregoing discussion of case law, this Part explores how the post-*Lawrence* system of civil regulation operates. This Part focuses first on the *modes* of civil regulation. As it explains, this civil system of civil regulation relies on administrative codes of conduct, as its predecessor did, but it also relies on other legal modalities—sexual harassment law and standards of judicial review. In doing so, it continues to regulate sex and sexuality, while avoiding the privacy protections that *Lawrence* conferred. This Part then turns to the rationales by which the state *justifies* civil sexual regulation under this system. In the post-*Lawrence* era, the state no longer relies on bare morality as a basis for regulation. Instead, the state offers more neutral justifications. Nevertheless, despite these neutral justifications, regulation continues to have a normative cast, allowing the state to achieve the expressive and communicative goals of sexual regulation. Finally, this Part concludes by explaining that this system of civil regulation repudiates the values of *Lawrence v. Texas* and in so doing, poses a significant threat to the prospect of sexual liberty.

A. *The Modes of Post-Lawrence Civil Sexual Regulation*

As section I.A discussed, for years, an alternative system of civil sexual regulation existed alongside criminal prohibitions on sex and sexuality. Under the auspices of administrative regulations and professional codes of conduct, the state could mark and punish sexual behavior it deemed non-normative. Critically, however, this civil system of sexual regulation operated in tandem with the criminal system of sexual regulation. As section I.A explained, in many cases, criminal laws prohibiting certain forms of sexual conduct frequently went unenforced. Nevertheless, the fact that the conduct was criminally proscribed furnished the predicate for the imposition of civil sexual regulation.

145. *Vanderveer*, 2004 WL 2157930, at *4–5.

In the post-*Lawrence* era, criminal law no longer functions as the predicate for civil regulation.¹⁴⁶ Accordingly, the post-*Lawrence* civil system of sexual regulation that has emerged from criminal law's shadow operates as a freestanding regulatory regime. Instead of relying on the interaction of criminal laws and administrative codes of conduct to fuel its regulatory engine, today the civil system relies on the interaction of civil laws, administrative rules and regulations, and judicial standards of review for civil causes of action.

The use of professional codes of conduct as a mode of sexual regulation is a point of continuity between the earlier system of civil regulation and the system that has developed after *Lawrence*. However, the use of other kinds of civil law appears to have gained traction in the post-*Lawrence* era. In *Anderson*, for example, the employer, fearing the legal and economic repercussions of a sexual harassment claim, advised Anderson and Lewis to end their relationship and "cease all contact" outside of the workplace.¹⁴⁷ The emergence of sexual harassment laws is a relatively recent phenomenon—one inspired by a feminist-led legal reform effort in the 1980s and 1990s.¹⁴⁸ Although sexual harassment laws are animated by an interest in purging the workplace of gender discrimination, some critics have argued that they may go beyond their stated antidiscrimination objectives to actively articulate and police standards of acceptable sex and sexuality.¹⁴⁹

But as the facts of *Anderson* suggest, sexual harassment laws can also regulate in a more indirect fashion. According to Professor Vicki Schultz, the threat of sexual harassment litigation—that is, the very fact that the laws exist on the books—may prompt employers to "proscrib[e] sexual conduct that would not amount to sexual harassment, let alone sex discrimination, under the law."¹⁵⁰

When Professor Schultz identified these likely implications of sexual harassment laws, *Lawrence* had not yet been decided. Still, the decision and the protections that it offers do little to mute the concerns that Professor Schultz articulated. In *Anderson*, there are no allegations of

146. See *supra* notes 50–54 and accompanying text (noting civil sexual regulation's diminished reliance on criminal law).

147. *Anderson v. City of LaVergne*, 371 F.3d 879, 880 (6th Cir. 2004).

148. See Holly B. Fechner, *Toward an Expanded Conception of Law Reform: Sexual Harassment Law and the Reconstruction of Facts*, 23 U. Mich. J.L. Reform 475, 475–76 (1990) (noting "[f]eminist theorists and activists spurred a dramatic change in attitude" and thinking around sexual harassment); Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 Yale L.J. 1683, 1685 (1998) ("Over the past twenty years, feminists have succeeded in naming 'sexual harassment' and defining it as a social problem.").

149. See generally Schultz, *Sanitized Workplace*, *supra* note 15, at 2119 ("Sexual harassment law has also provided new momentum for policing consensual intimate relationships between employees. In the name of preventing harassment, employers are not simply prohibiting employees' sexual misconduct on the job: They are also policing employees' sexual relationships off the job.").

150. *Id.* at 2065.

sexual harassment at work. But sexual harassment laws nonetheless operate indirectly in this case. Again, it is the mere possibility of a future sexual harassment claim that prompts the supervisor to direct Anderson and Lewis to end a relationship that is, after *Lawrence*, entitled to constitutional protection.¹⁵¹

But it is not simply these indirect effects of sexual harassment laws that serve to facilitate the state's project of civil sexual regulation. The process of adjudication may, by itself, work to privilege sexual regulation over the recognition of rights to sexual liberty. Both *Anderson* and *Beecham* suggest the importance of judicial standards of review for insulating state regulatory actions from the scope of constitutional privacy protections. In both cases, the courts acknowledged that the relationships and conduct for which the employees were terminated was constitutionally protected under *Lawrence*.¹⁵² But even as the courts acknowledged the petitioners' rights, they eviscerated the power of these protections by concluding that the employers' actions did not "direct[ly] and substantial[ly]" interfere with the exercise of the right.¹⁵³ On this logic, the employers' actions did not pose a burdensome imposition on the employees' right to engage in the relationship. Anderson could continue to cohabit with Lewis and Beecham could continue her relationship with Milam, so long as both were willing to discontinue their employment.¹⁵⁴ In this way, it was not simply that the employers' actions

151. See supra note 147 and accompanying text (discussing employer action at issue in *Anderson*).

152. See *Beecham v. Henderson County*, 422 F.3d 372, 376 (6th Cir. 2005) (describing plaintiff's relationship as "protected form of intimate association"); *Anderson v. City of LaVergne*, 371 F.3d 879, 882 (6th Cir. 2004) (finding Anderson's relationship to be "intimate association"); see also supra notes 100–109 and accompanying text (discussing *Anderson*); supra notes 110–119 and accompanying text (discussing *Beecham*).

153. *Beecham*, 422 F.3d at 376 (concluding plaintiff's termination did not constitute unconstitutional interference with protected intimate association because it "did not bar her from every form of employment in every sector of society" and "[s]he was discharged from one position at one courthouse"); *Anderson*, 371 F.3d at 882 (concluding because plaintiff "continued to enjoy the ability to form intimate associations with anyone other than fellow police department employees of differing rank," department's policy prohibiting dating relationships between employees of different ranks did not constitute direct and substantial interference with his right to intimate association).

154. By allowing public employment to be conditioned on certain decisions related to personal relationships, the courts' understanding of the issue recalls the doctrine of "unconstitutional conditions." Under the unconstitutional-conditions-doctrine, the government is prohibited from conditioning the receipt of a benefit or subsidy in a manner that infringes upon the recipient's constitutionally protected rights, even if the government has no obligation to offer the benefit in the first instance. See *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) ("[E]ven though a person has no 'right' to a valuable governmental benefit and . . . the government may deny him the benefit for any number of reasons, . . . [i]t may not deny a benefit . . . on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech."); *All. for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev.*, 651 F.3d 218, 231 (2d Cir. 2011) (discussing unconstitutional-conditions-doctrine). As the Supreme Court has observed,

led to an infringement of the petitioners' rights; it was that the courts' conclusion that the right at issue was not subject to heightened scrutiny, and the concomitant use of rational basis review allowed the infringement of the petitioners' rights to go unchecked.

Harvey and *Orellana* suggest a similar dynamic in the context of the military. In both cases, the courts-martial acknowledge that, after *Lawrence*, there is a new standard of review for charges involving nonmarital sex and sexuality.¹⁵⁵ Under *Marcum*, military courts must determine whether the underlying act is within the liberty interest identified in *Lawrence*, and if it is, the courts may determine whether other countervailing interests warrant punishing the conduct as a military crime.¹⁵⁶

In *Harvey*, the court-martial agreed that the conduct (same-sex sodomy) was within the liberty interest identified in *Lawrence*.¹⁵⁷ Nevertheless, it upheld the unbecoming conduct charge on the ground that the conduct evinced a "degree of indecorum that disgraced and dishonored the appellant and seriously compromised [the appellant's] standing as an officer."¹⁵⁸

While the *Orellana* court conceded that the serviceman's extramarital affair was nominally private conduct, the circumstances under which the affair was conducted rendered it "demonstrably prejudicial to

"the government may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom . . . even if he has no entitlement to that benefit." *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 59 (2006) (internal quotation marks omitted) (quoting *Bd. of Comm'rs v. Umbehr*, 518 U.S. 668, 674 (1996)).

The point is not that the state's actions in *Anderson* and *Beecham* are unconstitutional under this doctrine. As Kathleen Sullivan has observed, in order to have a cognizable claim under the unconstitutional-conditions doctrine, "the constitutional interest at issue must rise to the level of a recognized right—indeed, a *preferred* right normally protected by strict judicial review." Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 *Harv. L. Rev.* 1413, 1427 (1989). The courts' narrow framing of the issues at stake in *Anderson* and *Beecham* make clear that not only can the state condition employment (and all of its attendant benefits) on the surrender of constitutional rights, but that the right in question is not a "preferred" right for which more searching judicial review is required.

155. See *United States v. Harvey*, 67 M.J. 758, 760–61 (A.F. Ct. Crim. App. 2009) (explaining *Lawrence* "recognized a constitutionally protected liberty interest in private, consensual sexual conduct" and discussing three-part *Marcum* test that applies post-*Lawrence*); *United States v. Orellana*, 62 M.J. 595, 597–98 (N-M Ct. Crim. App. 2005) (noting following *Lawrence*, "military courts must apply a contextual, 'as-applied' analysis, to determine if a prosecution under Article 125, UCMJ, passes constitutional muster").

156. *United States v. Marcum*, 60 M.J. 198, 206–07 (C.A.A.F. 2004) (discussing considerations of "as applied" analysis); see also *supra* notes 82, 125–126 and accompanying text (discussing application of *Marcum* test).

157. *Harvey*, 67 M.J. at 761 ("We find the appellant's conduct was within the *Lawrence* liberty interest.").

158. *Id.* at 762–63 ("[W]e conclude that the fact that conduct may fall within a recognized liberty interest under the Constitution does not mean that the conduct cannot be proscribed [as unbecoming conduct] under Article 133, UCMJ.").

good order and discipline, as well as service discrediting.”¹⁵⁹ Accordingly, the conduct was outside of the ambit of *Lawrence*’s protections.

Taken together, these cases suggest an important development in the trajectory of state sexual regulation. In the aftermath of *Lawrence* and its limitations on the state’s authority to criminally regulate private, consensual, adult sex, a different form of sexual regulation has emerged. Critically, this system of civil regulation relies on a myriad of different regulatory modalities. Through the interaction of civil laws, administrative rules, professional codes of conduct, and judicial standards of review, this civil system of sexual regulation continues to regulate nonmarital sex and sexuality—even after *Lawrence*.

B. *The Justifications for Civil Sexual Regulation*

Just as the modes by which the civil system of sexual regulation operates have shifted post-*Lawrence*, the rationales on which the regulation rests also have changed. As the *Lawrence* Court noted, criminal regulation of sex and sexuality proceeded from the state’s interest in vindicating majoritarian sexual mores and values.¹⁶⁰ In the period before *Lawrence*, the civil system of sexual regulation reflected these moralistic underpinnings because civil regulation was inextricably linked to the extant (but unenforced) criminal prohibitions.¹⁶¹

Lawrence, however, explicitly questioned “the power of the State to enforce [majoritarian views of sexual morality] on the whole society through operation of the criminal law.”¹⁶² In so doing, it signaled a retreat from morals-based sexual regulation.¹⁶³ With this in mind, it is not surprising that, after *Lawrence*, the state’s justifications for regulating private, consensual sex outside of marriage do not center on morality or majoritarian sexual values, as they did before *Lawrence*. Instead, the state’s intrusion into the private sphere is justified in morally neutral terms. Specifically, state regulation of private, consensual, nonmarital sex is framed as necessary to vindicate the public interest. And critically, what constitutes the public interest is broadly construed, justifying the state’s regulation of quintessentially private sexual conduct.

159. *Orellana*, 62 M.J. at 600–01.

160. *Lawrence v. Texas*, 539 U.S. 558, 571 (2003).

161. See *infra* notes 184–186 and accompanying text (discussing pre-*Lawrence* linkage between civil and criminal sexual regulation).

162. *Lawrence*, 539 U.S. at 571.

163. See Dale Carpenter, *Is Lawrence Libertarian?*, 88 Minn. L. Rev. 1140, 1158 (2004) (suggesting *Lawrence* stands for proposition “that morals justifications for regulation do not count as a state interest sufficient to trump a fundamental right”); Adil Ahmad Haque, *Lawrence v. Texas* and the Limits of the Criminal Law, 42 Harv. C.R.-C.L. L. Rev. 1, 2 (2007) (noting *Lawrence* Court’s “rejection of the state’s asserted interest in the promotion of morality”); Strader, *supra* note 10, at 43 (“The most remarkable aspect of the *Lawrence* decision was its rejection of . . . majoritarian morality—a popular determination of what is ‘right’ and what is ‘wrong’—as a legitimate basis for criminal law.”).

For example, in *Seegmiller*, Sharon Johnson was reprimanded for an off-duty affair with an officer from another department.¹⁶⁴ In upholding the employer's reprimand, the court emphasized Johnson's status as a *public* employee working in a *public* institution charged with maintaining the *public* trust.¹⁶⁵ According to the court, the police department's mandate to maintain public order was a legitimate governmental interest that provided the department with wide latitude to impose on its employees obligations and duties that would have "no counterpart with respect to the public at large."¹⁶⁶ Accordingly, it was reasonable for the department to require its employees to project a particular image to the public.¹⁶⁷ As a public employee—and a representative of the state and its authority—Johnson (and her private, nonmarital sexual conduct) were not entitled to *Lawrence's* protections. Her private, off-duty conduct implicated the department's ability to maintain public order and the public's trust and thus was properly the subject of state public regulation.

Likewise, in *Anderson*, the fact that Anderson and Lewis were public employees within the police department transformed their private sexual conduct into matters of public concern suitable for public regulation.¹⁶⁸ But it was not just Anderson's public status as a police officer that convinced the court that the intrusion into his private life was justified. Also at issue was the department's stated interest in preventing sexual harassment in the workplace.¹⁶⁹ Concern about sexual harassment—rightly an issue of public-policy concern, as evidenced by Title VII and a range of state-level antidiscrimination laws¹⁷⁰—was sufficient to strip a private relationship (that by all accounts was consensual) of any available constitutional protections and instead transform it into a matter suitable for state intervention and public regulation.

164. See *supra* notes 83–92 and accompanying text (discussing facts of *Seegmiller*).

165. *Seegmiller v. LaVerkin City*, 528 F.3d 762, 772 (10th Cir. 2008) ("We think it reasonable for the police department to privately admonish Ms. Johnson's personal conduct . . . when the department believes it will further internal discipline or the public's respect for its police officers and the department they represent.").

166. *Id.*

167. *Id.*

168. *Anderson v. City of LaVergne* 371 F.3d 879, 832–33 (6th Cir. 2004); see also *supra* notes 106–109 (discussing public concern rationale of *Anderson*).

169. See *supra* notes 102, 109 and accompanying text.

170. See, e.g., Cal. Civ. Code § 51.9 (West 2014) ("A person is liable in a cause of action for sexual harassment under this section . . ."); Fla. Stat. § 110.1221 (2014) ("It is the policy of the state that sexual harassment is a form of discrimination. The department shall adopt uniform sexual harassment rules applicable to all executive agencies. The rules must define the term 'sexual harassment' in a manner consistent with the federal definition."); Iowa Code § 19B.12 (2015) ("A state employee shall not sexually harass another state employee, a person in the care or custody of the state employee or a state institution, or a person attending a state educational institution."); Vt. Stat. Ann. tit. 21, § 495h (2014) ("All employers, employment agencies and labor organizations have an obligation to ensure a workplace free of sexual harassment."). See generally 42 U.S.C. § 2000e(2)(a)(1) (2012).

The Sixth Circuit's disposition of *Beecham* accords with these themes in important respects. Using the deferential rational basis standard, both the appellate court and trial court justified Beecham's termination on the ground that it was a legitimate response to the "unacceptabl[e] disrupt[on]" that the Beecham–Milam affair caused in the workplace.¹⁷¹ In crediting the employer's rationale as a "plausible policy reason," the appellate court repeatedly noted the nature of Beecham's employment.¹⁷² As the Deputy Clerk for the Circuit Court of Henderson County, Beecham was a *public* employee whose job required her to engage with the public on matters of public importance—the administration of the county judicial system. In this regard, even though Beecham's relationship with Steve Milam was conducted privately, away from her desk at the courthouse, the fact that she and her rival (Milam's wife) were public employees in the same county courthouse meant that her private acts had public consequences—they thwarted the efficient transaction of business and provided her employer with a legitimate justification for terminating her employment.

The decision in *United States v. Harvey* is consistent with this regulatory appeal to the public interest, broadly defined.¹⁷³ Although the court concluded that the same-sex sodomy at issue did not fall under the rubric of the UCMJ's criminal sodomy prohibition because it was private conduct within the meaning of *Lawrence*,¹⁷⁴ the court nevertheless determined that, despite *Lawrence*, the act of same-sex sodomy could be punished as conduct unbecoming an officer and a gentleman.¹⁷⁵ In rendering its decision, the *Harvey* court emphasized that the serviceman's conduct, which took place in a foreign country and involved a foreign national, "disgraced and dishonored" the military and the serviceman's status as an officer, while "seriously expos[ing] [the serviceman] to public opprobrium" in his overseas military installation.¹⁷⁶

The understanding of the military as a public institution that implicates the public interest also looms large throughout *Orellana*.¹⁷⁷ For the *Orellana* court, it was meaningful that Orellana "committed his adulterous acts . . . in his quarters on board a military installation."¹⁷⁸ Critically, these "quarters" were the private home on the base that Orellana shared with his family. Still, the home's location on a "military installation" rendered it more public than private, at least to the court. Indeed, in discussing Orellana's extramarital conduct in his "quarters," the court indirectly compared the conduct to another case, which

171. *Beecham v. Henderson County*, 422 F.3d 372, 378 (6th Cir. 2005).

172. *Id.*

173. 67 M.J. 758 (A.F. Ct. Crim. App. 2009).

174. *Id.* at 761.

175. See *supra* note 128 and accompanying text (quoting opinion).

176. 67 M.J. at 762.

177. *United States v. Orellana*, 62 M.J. 595 (N-M. Ct. Crim. App. 2005).

178. *Id.* at 600.

involved sex “in the barracks where other soldiers could see or find out about it.”¹⁷⁹ In this way, the fact that Orellana’s sexual conduct took place on the military base and in the context of military service removed it from the scope of *Lawrence’s* protection. As the court explained, Orellana’s conduct could lead “the general public [to] think less of a military service whose noncommissioned officers are free to engage in multiple acts of adultery on board a military installation.”¹⁸⁰

But the military’s reputation among the public was not the only matter of public interest implicated by *Orellana’s* sexual conduct. The court also cited the military’s “particular interest in promoting the preservation of marriages within its ranks.”¹⁸¹ The concern with preserving marriage was of particular importance in the military, the court noted, “[b]ecause military families are often required to endure extended separations from a spouse due to operational commitments.”¹⁸² On this account, vindicating the public interest required accounting for the military’s “unique responsibility to ensure that the morale of their deployed personnel (and that of the spouses left behind) is not adversely affected by concerns over the integrity of their marriages.”¹⁸³

In this vein, *Anderson*, *Beecham*, *Orellana*, *Harvey*, and *Seegmiller* not only demonstrate a rhetorical shift in the justifications for sexual regulation; they all gesture toward the transformation of private conduct into public conduct by virtue of the fact that their circumstances involve public employees in public institutions (the military, the justice system, law enforcement) and matters of public concern (public order and safety, the operation and administration of the military, marriage, and the avoidance of sexual harassment). Importantly, the recasting of private conduct into publicly regulable conduct underscores the inherent instability of these categories (and indeed, the public–private distinction, more generally), as well as their plasticity and malleability. All of this is troubling when one considers that the distinction between that which is public and that which is private is a critical means by which the individual may shield herself and her choices from the arm of the state.

But these cases also gesture toward another troubling development. In all of these cases, the underlying sexual conduct is not only rendered a matter of public interest; it is marked as normatively undesirable and offensive. In this regard, despite the neutral appeal to the public interest, this system of civil regulation packs a normative punch.

179. *Id.* (citing *United States v. Green*, 39 M.J. 606 (A.C.M.R. 1994)).

180. *Id.* at 601.

181. *Id.*

182. *Id.*

183. *Id.*

C. *The Expressive and Punitive Functions of Post-Lawrence Civil Sexual Regulation*

Historically, criminal sexual regulation served punitive and expressive functions.¹⁸⁴ That is, it *punished* those who deviated from the norm of marital sex, and it communicated—strongly—that sex outside of marriage was unacceptable and should not be tolerated.¹⁸⁵ Prior to *Lawrence*, the civil system of sexual regulation assumed these punitive and communicative qualities by virtue of the fact that it served to reiterate—in a civil vernacular—criminal law’s prohibitions.¹⁸⁶ Today, the post-*Lawrence* system of civil sexual regulation does not rely on the criminal law as it once did;¹⁸⁷ nevertheless, it continues to function in a manner that is both expressive and punitive.

Although this alternative system of regulation is civil in nature, it *punishes* sexual conduct that it deems undesirable or non-normative. This Essay’s use of the term “punish” purposely elides the distinctions between criminal punishment and civil penalties. In its jurisprudence, the Supreme Court has, in most cases, limited the term “punishment” to criminal sanctions.¹⁸⁸ On this account, a “punishment” involves, *inter alia*, the imposition of physical confinement and a deprivation of liberty

184. See Cass R. Sunstein, On the Expressive Function of Law, 144 U. Pa. L. Rev. 2021, 2023 n.10 (1996) (discussing how laws prohibiting “certain sexual activity such as homosexuality, adultery, and fornication” are often supported by people on expressive grounds); see also Carol S. Steiker, Punishment and Procedure: Punishment Theory and the Criminal–Civil Procedural Divide, 26 Ann. Rev. Crim. Proc. 775, 818–19 (1997) (discussing punitive and expressive functions of Kansas law applying to violent sex offenders).

185. See Melissa Murray, The Space Between: The Cooperative Regulation of Criminal Law and Family Law, 44 Fam. L.Q. 227, 230–34 (2010) (discussing ways in which criminal law reinforced normative ideal of marriage and marital sex).

186. See *supra* section II.A (describing pre-*Lawrence* deployment of civil sexual regulation to augment criminal sexual regulation).

187. See *supra* notes 50–54 and accompanying text (discussing diminution of criminal law’s force in regulating sex and sexuality).

188. See, e.g., *Hudson v. United States*, 522 U.S. 93, 103 (1997) (rejecting notion of civil sanctions as “punishment” for purposes of double jeopardy); *Kansas v. Hendricks*, 521 U.S. 346, 362–64 (1997) (reasoning civil commitment does not qualify as “punishment”); *Helvering v. Mitchell*, 303 U.S. 391, 400 (1938) (asserting remedial sanctions such as “[f]orfeiture of goods or their value and the payment of fixed or variable sums of money” are not criminal punishments). Of course, the Court has recognized that a “civil label is not always dispositive” of the issue of whether a sanction is or is not punitive in nature. See, e.g., *Allen v. Illinois*, 478 U.S. 364, 369 (1986). Nevertheless, it has viewed this determination as “first of all a question of statutory construction.” *Id.* at 368. Accordingly, in making the determination, the Court relies on the legislature’s intent and “will reject the legislature’s manifest intent only where a party challenging the statute provides the clearest proof that the statutory scheme is so punitive either in purpose or effect as to negate the State’s intention to deem it civil.” *Hendricks*, 521 U.S. at 361 (internal citations and quotation marks omitted) (quoting *United States v. Ward*, 448 U.S. 242, 248–49 (1980)).

imposed by the state.¹⁸⁹ This rigid, categorical view of punishment does not encompass other kinds of legal penalties¹⁹⁰—e.g., an employer's reprimand, the loss of a job, or a military discharge; it is about incarceration or those things that we have always regarded as punishment.

In this regard, the adverse consequences that the petitioners in the foregoing cases suffered were not *punishments* in a strict sense. But it would be a mistake to say that these petitioners were not *punished* or that the state's regulation of their private, sexual conduct did not have a *punitive* bent. Although the courts took scant notice of it, the loss of a job or benefits may impact the lives of individuals in ways that are as burdensome as a criminal conviction or a criminal sentence. The impact of the loss of employment may be especially difficult in regions where employment opportunities are scarce or in communities where a single employer, like the government, dominates the labor market. Likewise, these effects may also be acutely felt in small communities where the reputational damage of an adverse employment decision may have long-term repercussions for future employment prospects. To be sure, these kinds of adverse consequences are not the same as criminal sanctions. But make no mistake—they are *punitive*. They impose significant costs on the nonconforming actor.

Perhaps more troublingly, these sanctions, as much as a criminal conviction and sentence, serve *expressive* functions for the state. Although the underlying conduct is no longer illegal, the fact of civil regulation makes clear that it is decidedly unprofessional and undesirable in the context of a particular workplace.

The facts of *Beecham* are instructive on this point.¹⁹¹ June Beecham was terminated because her affair with her coworker's husband was disruptive to her workplace.¹⁹² On its face, the employer's concern for workplace administration seems eminently reasonable—and morally neutral. But if we modify the facts slightly, the circumstances of *Beecham* may appear more troubling.

Suppose that none of the parties in *Beecham* were married. Instead of an adulterous romance, the workplace love triangle was simply the kind of situation that might arise when someone dates one person, finds the relationship wanting, and then moves on to date her coworker. Under these circumstances, the opportunity for workplace disruption is as likely as it was under the facts of *Beecham*. The differences, of course, are that there is no imperiled marriage and it is not obvious that any one person

189. See *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963) (discussing indicia of criminal punishment).

190. See Alice Ristroph, *Sexual Punishments*, 15 Colum. J. Gender & L. 139, 163 (2006) (noting Supreme Court has held “other unpleasant attributes of the prison experience . . . simply are not punishments” (internal quotation marks omitted) (quoting *Rhodes v. Chapman*, 452 U.S. 337, 348 (1981))).

191. *Beecham v. Henderson County*, 422 F.3d 372 (6th Cir. 2005).

192. See *supra* notes 110–114 and accompanying text (discussing facts of *Beecham*).

should bear the brunt of the employer's effort to rid the workplace of disruptive influences. The presence of any of the three coworkers could be said to contribute to the tense work environment.

With this in mind, the employer's actions in *Beecham* take on a more normative cast. In *Beecham*, it is June Beecham—the other woman—who is singled out for termination,¹⁹³ even though it is likely that *both* women are responsible for creating the uncomfortable work environment. What makes the difference in *Beecham*? It is likely the fact that June is the mistress and Patricia is the wronged wife. On this account, one might speculate that moral disapprobation of June Beecham's extramarital relationship—and a more general interest in protecting marriage—lurks beneath the surface of this case. Despite the employer's professed concern for the disruption to the workplace, his actions—and the person at whom those actions were directed—were likely shaped by a sense of morality that condemns adultery as threatening to marriage and venerates marriage as the normative ideal for adult intimate relationships. On this view, June Beecham was terminated because her relationship disrupted the workplace *and* her coworker's marriage.

The facts of *Anderson* also underscore the expressive potential of civil sexual regulation.¹⁹⁴ There, the supervisor advised Anderson and Lewis to end their relationship because he feared the prospect of a future sexual harassment claim.¹⁹⁵ As Professor Schultz explains, sexual harassment laws may serve all manner of expressive ends.¹⁹⁶ These laws communicate that sex and sexuality do not belong in the workplace, and in so doing they “create a climate that may stifle workplace friendships and solidarity more generally.”¹⁹⁷ As importantly, these laws may be selectively enforced, targeting racial and sexual minorities as archetypal “bad” sexual actors.¹⁹⁸ But perhaps most relevant for the purposes of this Essay and the system of civil sexual regulation it documents, sexual harassment laws cultivate ideals of “good” sexuality, while punishing and censoring conduct of which employers disapprove as “deviant” or “bad.”¹⁹⁹

193. See *supra* note 114 and accompanying text (describing termination of Beecham's employment and ensuing lawsuit).

194. *Anderson v. City of LaVergne*, 371 F.3d 879 (6th Cir. 2004).

195. See *supra* note 102 and accompanying text (discussing facts of *Anderson*).

196. Schultz, *Sanitized Workplace*, *supra* note 15, at 2088–90.

197. *Id.* at 2069.

198. Critically, concerns about selective enforcement of criminal laws prohibiting private, consensual, adult sex, among other things, helped animate the effort to liberalize criminal laws. See Murray, *Griswold's Criminal Law*, *supra* note 34 at 1050–51 (describing “moral offenses” reform efforts as partially grounded in concerns over selective enforcement “targeting vulnerable populations”).

199. See Schultz, *Sanitized Workplace*, *supra* note 15, at 2087 (expressing concern law encourages employers to punish “bad” women and protect “good” women's sexual sensibilities”).

Civil sanctions may not only communicate to the individual that her conduct was “wrong” or “bad.” They are likely to dissuade others from engaging in the conduct—thereby extending their regulatory impact through general deterrence.²⁰⁰ It would be unsurprising if, after Sharon Johnson’s reprimand, a LaVerkin City police officer thought twice about engaging in an affair or other nonmarital sexual conduct. Michael Anderson’s termination would likely dissuade those interested in pursuing an office romance. Relatedly, cases like *Harvey* and *Orellana* are likely to deter consensual nonmarital sexual activity by military personnel.

In this regard, the civil system of sexual regulation that has become more visible after *Lawrence* carries some of the same risks that once attended—and contributed to the repudiation of—the system of criminal regulation that *Lawrence* dismantled. It has the ability to make judgments about what is and what is not appropriate nonmarital sex and sexuality, and it can enforce and communicate those normative judgments through meaningful sanctions. A critical difference, however, is that this civil system of sexual regulation does not afford litigants the same robust procedural protections that are available in the criminal context.²⁰¹

The survival of this punitive form of civil regulation is utterly at odds with *Lawrence*. Although *Lawrence* was concerned with the criminalization of sodomy, it was also deeply concerned with the civil consequences of unenforced criminal laws.²⁰² As the *Lawrence* Court acknowledged, sodomy prohibitions languished in a state of desuetude.²⁰³ They were rarely enforced.²⁰⁴ Their true power lay in the fact that they gave rise to collateral civil consequences that served to punish gay men and women

200. See Kenneth Mann, Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law, 101 Yale L.J. 1795, 1830 (1992) (discussing use of civil sanctions as means of deterrence).

201. See W. David Ball, The Civil Case at the Heart of Criminal Procedure: *In re Winship*, Stigma, and the Civil–Criminal Distinction, 38 Am. J. Crim. L. 117, 119 (2011) (“The distinction between civil and criminal has at least one indisputable real-world consequence: the constitutionally-guaranteed procedural protections that attach to each.”).

202. *Lawrence v. Texas*, 539 U.S. 558, 581–82 (2003) (O’Connor, J., concurring) (“Texas’ sodomy law brands all homosexuals as criminals, . . . making it more difficult for homosexuals to be treated [equally] Texas itself has previously acknowledged the collateral effects of the law, stipulating . . . that the law ‘legally sanctions discrimination against [homosexuals] in a variety of ways’ . . . including . . . ‘employment, family issues, and housing.’” (internal citations omitted) (quoting *State v. Morales*, 826 S.W.2d 201, 203 (Tex. Ct. App. 1992))).

203. See *id.* at 572 (majority opinion) (“[T]hese prohibitions often were being ignored . . .”).

204. *Id.*; see also *id.* at 581 (O’Connor, J., concurring) (“It appears that prosecutions under Texas’ sodomy law are rare.” (citing *State v. Morales*, 869 S.W.2d 941, 943 (Tex. 1994))); *Morales*, 869 S.W.2d at 943 (noting criminal sodomy prohibition “has not been, and in all probability will not be, enforced against private consensual conduct between adults”).

outside of the criminal justice system.²⁰⁵ In this regard, the *Lawrence* Court's repudiation of the criminal sanctions were also a repudiation of the *civil* sanctions. And yet, as one sees in these cases, these civil sanctions have survived *Lawrence*, albeit in a different and more targeted form.

With this in mind, we might interpret these cases not simply as evidence of a shadow system of sexual regulation that is becoming more visible in *Lawrence's* wake, but as part of a broader effort to repudiate *Lawrence v. Texas* and its core values of privacy, sexual liberty, and restraint of the state's ability to police and regulate sex and sexuality outside of marriage. The following section elaborates this claim.

D. *Repudiating Lawrence and its Values*

At bottom, *Lawrence* stands for three principles: The decision imposes limits on the state's authority to regulate sex and sexuality, it evinces concern for the civil consequences of sexual regulation, and it disrupts the marriage–crime binary to articulate constitutional protections for nonmarital sex and sexuality. This section elaborates each of these points.

Lawrence focused on the question of the state's authority to criminalize same-sex sodomy when conducted in private by two consenting adults.²⁰⁶ The state's imposition into the private lives of John Geddes Lawrence and Tyron Garner, in the Court's view, went beyond constitutional limits.²⁰⁷ The Texas sodomy ban sought "to control a personal relationship that, whether or not entitled to formal recognition in the law, [was] within the liberty of persons to choose without being punished as criminals."²⁰⁸ Thus for the *Lawrence* Court, the question was not simply whether the state could criminalize sodomy, but rather whether the Constitution imposed limits on the state's authority to regulate private, consensual sex and sexuality outside of marriage. In this regard, *Lawrence* not only set clear limits on the state's authority to regulate sex under the criminal law but also insisted that in regulating sex and sexuality in any context, the state's obligation was to respect "the liberty of all, not to mandate [its] own moral code."²⁰⁹

205. See *Lawrence*, 539 U.S. at 576 (majority opinion) (discussing civil consequences of criminal conviction, including job application notations); see also *id.* at 581–82 (O'Connor, J., concurring) (describing civil consequences of conviction such as restriction from certain professions or requirement to register as sex offenders).

206. *Id.* at 564 (majority opinion) ("We conclude the case should be resolved by determining whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution.").

207. *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.").

208. *Id.* at 567.

209. *Id.* at 571 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 850 (1992)).

But even as the facts of *Lawrence* focused on the scope and nature of criminal regulation, the decision was also concerned with the *civil* consequences of sexual regulation.²¹⁰ Indeed, the *Lawrence* Court specifically identified the connection between criminalization and civil penalties. As the Court explained, although the challenged Texas sodomy ban was “a minor offense,” it imposed stigmatic costs that were “not trivial.”²¹¹ Those convicted under the statute would bear the tremendous stigma of being a convicted criminal. However, beyond the stigmatic costs of the conviction itself, there were other—civil—consequences associated with a criminal conviction. As the Court observed, those convicted under similar statutes often faced the daunting prospect of sex offender registration requirements, as well as “notations on job application forms.”²¹² Justice O’Connor reiterated these concerns in her concurrence to the majority opinion. As she explained, a sodomy conviction resulted in a relatively minimal criminal penalty;²¹³ however, it could have outsized civil consequences.²¹⁴ A sodomy conviction would “restrict [an individual’s] ability to engage in a variety of professions.”²¹⁵ Moreover, in many jurisdictions, a sodomy conviction required registration as a sex offender.²¹⁶ In this way, the concern was less about the enforcement of the criminal law and more about the shadow civil consequences of criminal regulation.

Finally, *Lawrence* reflected an effort to disrupt the traditional binary that organized sex.²¹⁷ Instead of sharply categorizing the universe of sex and sexuality into marriage and crime, *Lawrence* decriminalized sodomy. In doing so, it also extended the privacy protections associated with marriage and marital sex to private, consensual, adult sex outside of marriage. The Court made clear its protections for nonmarital, noncriminal sex.

[The] right to liberty under the Due Process Clause gives [those engaged in nonmarital, noncriminal sex] the full right to engage in their [sexual] conduct without intervention of the government. It is a promise of the Constitution that there is a

210. See Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” that Dare Not Speak Its Name*, 117 Harv. L. Rev. 1893, 1896 (2004) (“Given that the criminal laws [regulating nonmarital sex] have notoriously been honored in the breach and . . . have languished without enforcement, *Lawrence* [is] about how the very *fact* of criminalization . . . can cast already misunderstood or despised individuals into grossly stereotyped roles, which [justify] treating those individuals less well than others.”).

211. *Lawrence*, 539 U.S. at 575.

212. *Id.* at 575–76.

213. *Id.* at 581 (O’Connor, J., concurring).

214. *Id.* (O’Connor, J., concurring).

215. *Id.* (O’Connor, J., concurring).

216. *Id.* (O’Connor, J., concurring).

217. See *supra* notes 15–20 and accompanying text (discussing marriage–crime binary).

realm of personal liberty which the government may not enter.²¹⁸

To be sure, the *Lawrence* Court was primarily concerned with the privacy rights of gay men and women who were, at the time *Lawrence* was decided, ineligible for marriage in every American jurisdiction.²¹⁹ But *Lawrence's* logic was not confined to the LGBT community. Indeed, Justice Kennedy specifically observed that the Fourteenth Amendment's privacy protections extended to "intimate choices by unmarried as well as married persons."²²⁰ In this regard, *Lawrence* restructured the legal regulation of sex and sexuality to create a private zone outside of the state's reach for nonmarital sex and sexuality—for gay people and straight people alike.²²¹

With all of this in mind, the civil system of sexual regulation that this Essay explores is fundamentally at odds with the logic and values of *Lawrence v. Texas*. Insofar as *Lawrence* sought to enunciate clear limits on the state's authority to regulate sex and sexuality outside of marriage, this system of civil regulation flouts these limits. It does not proceed under the auspices of the criminal law, but it achieves many of the same aims as criminal sexual regulation.²²² It does not denominate nonmarital sexual conduct as "criminal," but it nonetheless communicates that this conduct is inappropriate, undesirable, and illegitimate.²²³ More troublingly, while this alternative regulatory system is not predicated on sexual morality, it is clearly imbued with normative content—identifying those acts and actors whose sexual conduct is non-normative and offensive and thus in need of state censure and sanction.²²⁴

In essence, this civil system of sexual regulation functions as a muted replica of its criminal law predecessor. To understand what I mean by this, consider a pad of paper upon which someone has written with great force. The force of the writing makes an impression on the sheets of paper beneath, such that when you remove the top layer, the imprint of

218. *Lawrence*, 439 U.S. at 578 (internal quotation marks omitted) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 847 (1992)).

219. See Melissa Murray, *Obergefell v. Hodges* and the New Marriage Inequality, 106 *Calif. L. Rev.* (forthcoming 2016) [hereinafter Murray, *The New Marriage Inequality*] (manuscript at 16) (on file with the *Columbia Law Review*) (noting at time *Lawrence* was decided, "same-sex couples were legally barred from marrying in Texas—and in every other American jurisdiction").

220. *Lawrence*, 539 U.S. at 578 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

221. *Id.* at 574 ("Persons in a homosexual relationship may seek autonomy for [nonmarital sex and sexuality], just as heterosexual persons do.").

222. See *supra* notes 68–69 and accompanying text (noting civil regulation provided alternative means of regulating sexuality absent use of criminal sanctions).

223. See *supra* section II.B.1 (discussing post-*Lawrence* civil sanctions against public employee engaging in extramarital affair).

224. See *supra* section II.B.2 (providing example of regulatory action against public employees engaged in nonmarital sexual conduct).

the writing remains on the sheets below—fainter certainly, but clearly discernible. In the same way, criminal law’s expressive power to mark and label non-normative sex and sexuality as deviant has left a powerful impression on the law—and on the system of civil regulation that functioned by its side. Even though *Lawrence* removed this layer of criminal regulation, the residue of criminal law’s imprint can still be felt in the operation of its shadow system of civil regulation.

The civil system of sexual regulation re-inscribes many of the goals and values of criminal sexual regulation—and it does so in defiance of *Lawrence’s* concern for the collateral civil consequences of criminal regulation. If concerns about the *civil* consequences of state sexual regulation undergird *Lawrence*, then the civil sexual regulation that this Essay identifies suggests that this principle has been subordinated. More to the point, concern for the civil consequences of sexual regulation has been sidelined in order to animate an alternative system of sexual regulation that seeks to resuscitate a regime in which civil penalties are not merely collateral damage, but the means by which state censures and sanctions nonmarital sex and sexuality.

And perhaps most troublingly, this civil system of sexual regulation may be viewed as part of a broader effort to repudiate *Lawrence’s* promise of an unregulated space between marriage and crime where nonmarital sex and sexuality might be comfortably accommodated. To be clear, the *Lawrence* opinion itself may lay a foundation for the rejection of this interstitial space. As I have noted elsewhere,²²⁵ although there was scant evidence for it,²²⁶ the *Lawrence* majority depicted Tyron Garner and John Geddes Lawrence as though they were a long-term couple. In this regard, even as it appeared to articulate a space for sex and sexuality outside of the domains of marriage and crime, the opinion itself appears tethered to these categories.²²⁷ Although same-sex sodomy is no longer criminal, the *Lawrence* opinion recasts it as relational and marriage-like.²²⁸

But while the opinion itself suggests a reluctance to take seriously the prospect of the interstitial space between marriage and crime, it is the post-*Lawrence* developments that speak most clearly to the re-articulation of the regulatory binary. As discussed earlier, in the twelve years since *Lawrence* was decided, civil marriage has been expanded to

225. Murray, *Strange Bedfellows*, supra note 10, at 1305.

226. Since the decision was announced, further evidence has been proffered to show that Lawrence and Garner were not a couple. See generally Dale Carpenter, *Flagrant Conduct: The Story of Lawrence v. Texas* 41–45 (2012) (discussing case with particular attention to relationship—or lack thereof—between Lawrence and Garner).

227. Murray, *Strange Bedfellows*, supra note 10, at 1305 (“Kennedy constructs a continuum where same-sex sex is neither eligible for marriage, nor considered a crime, . . . [but he struggles to think] of sex outside . . . these two categories . . . Kennedy attempts to render intelligible the dissonance that decriminalization without marriage produces by likening Lawrence and Garner to a married couple.”).

228. *Id.*

include once-excluded same-sex couples.²²⁹ As importantly, the rhetoric that has accompanied the expansion of civil marriage has trumpeted the view that marriage is a source of respectability, dignity, legitimacy, and innumerable benefits for LGBT persons.²³⁰ This development has helped to fortify marriage's position as the normative ideal for adult intimate life and the site of legitimate sex and sexuality.

But as the cases detailed in Part II make clear, the expansion of civil marriage is only one half of the story. If the spread of marriage equality has burnished marriage's luster, then the deployment of the civil system of sexual regulation has continued to identify and mark the kinds of sex and sexuality that are marriage's antithesis. In this way, these two developments not only suggest the repudiation of the interstitial space between marriage and crime that *Lawrence* offered; they actively reconstruct the binary arrangement that distinguished between legitimate and illegitimate sex.

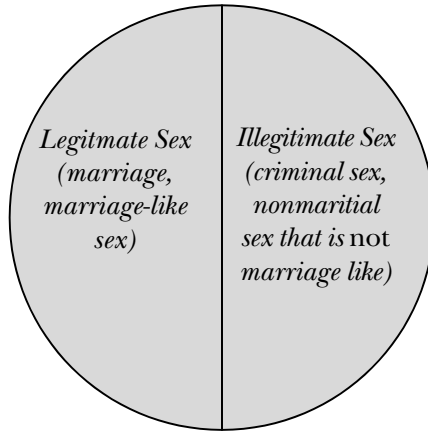
To be clear, the restructured binary that has emerged in *Lawrence's* wake differs from that which preceded *Lawrence*. The original binary arrangement divided the universe of sex and sexuality into two principal categories—marriage and criminal sex.²³¹ Today, the reconstituted binary does not turn on the distinction between marriage and criminal sex. Instead, it distinguishes between those acts that are marital or marriage-like and those that are not.²³²

229. See *supra* note 1 and accompanying text (discussing extension of marriage to same-sex couples in *Obergefell*).

230. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2594 (2015) (discussing “revered idea and reality of marriage” and noting “petitioners seek [marriage] for themselves because of their respect—and need—for its privileges and responsibilities”); see also Murray, *Marriage as Punishment*, *supra* note 11, at 4 (“The prevailing mainstream discourse depicts marriage as a source of innumerable public and private benefits, happiness, companionship, financial security, and even good health (relative to unmarried people.)”); Murray, *The New Marriage Inequality*, *supra* note 219 (manuscript at 6–10) (discussing *Obergefell* Court’s promarriage rhetoric).

231. See *supra* notes 15–20 and accompanying text (discussing interplay between marriage and criminal law in promoting normalization of heterosexual marital sex and criminalization of other forms).

232. This distinction can be glimpsed in the *Obergefell* decision. In expanding civil marriage to include same-sex couples, the *Obergefell* majority did not simply trumpet the benefits of marriage. It actively denigrated and denounced life outside of marriage (or a marriage-like relationship) as lonely, ill-conceived, and illegitimate. See *Obergefell*, 135 S. Ct. at 2600. In one telling passage, the *Obergefell* majority noted that in decriminalizing sodomy, *Lawrence* had merely transformed LGBT persons, who remained ineligible for marriage, from “[o]utlaw[s] to outcast[s].” *Id.* On this rendering, life outside of marriage remains liminal and marginalized—perhaps less vilified than criminal sexuality, but still the absolute antithesis of venerated and valued marriage. For more discussion of *Obergefell* and nonmarriage, see generally Murray, *The New Marriage Inequality*, *supra* note 219.

FIGURE 3—THE POST-*LAWRENCE* BINARY

Under the reconstructed binary, the legitimate sex that enjoys constitutional protection is sex within marriage or sex that occurs within a marriage-like relationship, like the one imagined in *Lawrence*. Sex that is illegitimate includes the category of indelibly criminal acts that survive *Lawrence*,²³³ as well as nonmarital sex that does not cohere with the indicia of marriage and marriage-like sex.

Attention to the reconstructed binary helps explain why so many of the cases explored in Part II center on adultery and extramarital sex. In these cases—*Seegmiller*, *Orellana*, and *Beecham*—the litigants’ efforts to deploy *Lawrence* to protect their extramarital sexual relationships fail.²³⁴ One way to explain the failure of constitutional privacy protections in these cases is the fact that while the relationships themselves are private, consensual, and nonmarital, they do not look like the relationship that enjoys the most robust form of constitutional protection: marriage. In all three cases, the relationships in question, though private and consensual, are in conflict with marriage. They are extramarital, and for that reason, they appear more distant from marriage and the marriage-like relationships that the *Lawrence* Court imagines as the subjects of its protections.

But if this restructured binary simply distinguishes between sex that is marital or marriage-like and that which is not, how do we explain the outcomes in *Anderson* and *Harvey*, where the sex in question *does* cohere with our intuitions of marriage-like sex? Neither *Anderson* nor *Harvey* involves extramarital conduct, which makes the success of the state’s regulatory efforts more puzzling. In *Anderson*, Officer Anderson and

233. See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (describing sexual relationships not afforded protection, including those involving minors, prostitution, public conduct, and nonconsensual intercourse).

234. See *supra* section III.B (discussing *Seegmiller*, *Orellana*, and *Beecham*).

Lewis were living together in a monogamous relationship.²³⁵ Likewise, in *Harvey*, the serviceman was engaged in exactly the same kind of conduct at issue in *Lawrence*—private, consensual sodomy with another unmarried man.²³⁶ In both cases, the conduct at issue is more proximate to marriage, or at least the conduct that *Lawrence* analogizes to marriage.

We could simply regard *Anderson* and *Harvey* as anomalies that are specific to the contexts of public employment and military service. But there is something meaningful about these two cases and their cognitively dissonant outcomes. Together, *Anderson* and *Harvey* gesture toward an important insight. The fact that marriage-like, nonmarital sex *is* punished in these two cases suggests the fragility and unpredictability of this new binary arrangement that divides legitimate sex from illegitimate sex based upon normative intuitions about marriage and marriage-like sex. In this brave new world where criminal law's force has been diminished, it may be harder to distinguish the dividing line between that which is legitimate and that which is illegitimate.

In these circumstances, the difference between good and bad sex may be unpredictable and arbitrary. For example, nonmarital cohabitation may be fine in some contexts, but more threatening in the context of a workplace, where the threat of sexual harassment looms large. Extramarital sexual relationships like June Beecham's, in which the couple actively planned to marry,²³⁷ may appear more marriage-like in some communities, while appearing utterly antithetical to marriage in others. In this regard, the new binary and the old marriage–crime binary share an important similarity—protection from state regulation is only assured and predictable in marriage.

This last insight gestures toward a more general question: How does the emergence of this civil system of punitive sexual regulation cohere with the broader trajectory of state regulation of sexuality? What goals does this reimaged form of punitive sexual regulation serve in the broader project of state sexual regulation? Part IV takes up these questions.

IV. THEORIZING CIVIL SEXUAL REGULATION

This Essay illuminates an alternative system of civil sexual regulation that has become more visible in *Lawrence's* wake. Critically, this system of sexual regulation has always existed alongside criminal law as a means of penalizing nonmarital sex. However, since *Lawrence v. Texas* has muted criminal law's role in regulating certain forms of nonmarital sex and sexuality, this civil system of sexual regulation has moved to the fore, a

235. See *supra* note 106 and accompanying text (discussing *Anderson*).

236. See *supra* notes 122–129 and accompanying text (discussing *Harvey*).

237. *Beecham v. Henderson County*, 422 F.3d 372, 374 (6th Cir. 2005) (noting relationship “included an engagement to be married”).

reinvigorated vehicle for regulating *and punishing* sex outside of marriage. Although it proceeds under different legal auspices, this alternative system of regulation accomplishes many of the same goals as its criminal law predecessor.

In many ways, the re-invigoration of the civil system of sexual regulation recalls what Professor Reva Siegel has termed “preservation-through-transformation.”²³⁸ As Professor Siegel explains, in the context of antidiscrimination law, efforts to reform and modernize a status regime often “bring about changes in its rule structure and justificatory rhetoric.”²³⁹ Despite these changes, however, the regime’s underlying value commitments remain unchanged and fixed.²⁴⁰ Indeed, the transformation of the legal rules that structure the regime and the rhetoric that justifies its aims, may actually further entrench and embed the regime’s underlying values at a time of deep contestation and struggle.²⁴¹

To illustrate this dynamic, Professor Siegel focuses on the effort to reform marital status law in the nineteenth century.²⁴² Responding to demands for “autonomy and equality in marriage,”²⁴³ state legislatures modified the common law of coverture, enacting a series of statutes that allowed a married woman “to hold property in her own name, claim wages as her own, and bring suit over a contract or tort claim.”²⁴⁴

But even as these rule changes allowed women to participate in the market economy as (relative) equals, they stopped short of affording married women the opportunity to deal with their husbands as equals.²⁴⁵ Thus, while the structure of the regime changed under these new rules, the spousal inequality that undergirded coverture remained unchanged. As importantly, new rhetorical discourses arose to explain and justify the persistence of spousal inequality. Unlike the common law regime, which justified spousal inequality through appeals to hierarchy and status relationships, the new legal regime justified rules that maintained

238. See Reva B. Siegel, “The Rule of Love”: Wife Beating as Prerogative and Privacy, 105 *Yale L.J.* 2117, 2175–78 (1996).

239. Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 *Stan. L. Rev.* 1111, 1113 (1997) [hereinafter Siegel, *Equal Protection No Longer*].

240. See *id.* at 1119 (observing “effort to disestablish a body of status law can produce changes that modernize its rule structure and justificatory rhetoric” and while “reforms may . . . improve the material and dignitary circumstances of subordinated groups . . . they will also enhance the legal system’s capacity to justify regulation that perpetuates inequalities . . .”).

241. See *id.* at 1113–14 (noting “status-enforcing state action evolves in form as it is contested” and arguing “kinds of rules and reasons employed to enforce status relationships change as they are contested”).

242. *Id.* at 1114–19.

243. *Id.* at 1116.

244. *Id.* at 1117.

245. See *id.* (“Yet, in all states, the common law still disabled a wife from dealing with her *husband* on such terms.”).

spousal inequality by resort to a “language of interiority,” spousal unity, and concern for “public polic[ies]” that promoted an ideal of companionate marriage.²⁴⁶

The renewed interest in the civil system of sexual regulation strongly comports with the dynamic of preservation-through-transformation that Professor Siegel identifies. Decriminalization and the emergence of constitutional privacy protections that arose at midcentury were all part of a legal response to a contested regime of sexual regulation that prioritized sex within marriage and subjected sex outside of marriage to criminal punishment.²⁴⁷ During this period, critics of the extant system of sexual regulation sought to reform the apparatus of sexual regulation by liberalizing criminal regulation of, inter alia, fornication, adultery, contraceptive access, and abortion and expanding constitutional protections for certain forms of nonmarital sexual conduct.²⁴⁸ To be sure, the trajectory of this reform effort was uneven.²⁴⁹ Nevertheless, in time, the reform impulse prevailed. *Lawrence*, and its interest in decriminalization and the constitutionalization of privacy, is the culmination of the effort to modernize and transform the structure of sexual regulation by sharply limiting the state’s authority to punish certain forms of sex and sexuality. *Lawrence* creates a space for sex and sexuality outside of the domains of marriage and crime. It transforms the regulatory landscape by articulating the possibility of sex without law.

Critically, *Lawrence* not only transforms the structure of sexual regulation; it also transforms the justifications for state intervention into intimate life. Going forward, bare morality alone will not suffice to furnish legitimate grounds for state regulation of nonmarital, non-criminal sex. Instead, the protections of constitutional privacy provide firm limits on state intervention, and morality is insufficient to override these protections. In this way, *Lawrence* is the repudiation of the old regime and the beginning of something new.

But as Professor Siegel reminds us, the contestation and struggle that mark the transformation of a legal regime do not necessarily dissipate once the transformation is effected.²⁵⁰ Indeed, transformation is often accompanied by a period of retrenchment that is marked by an interest in preserving the underlying values of the prior regime.²⁵¹ The

246. Id. at 1118.

247. See Murray, *Griswold's Criminal Law*, supra note 34, at 1050–61 (discussing midcentury efforts to reform and liberalize criminal law and eventual articulation of a constitutional right to privacy).

248. See id. at 1052 (discussing ALI’s 1962 meeting and final draft of MPC calling for liberalization of sexual regulation).

249. See id. at 1053–57 (referring to progression from *Rochin* and *Mapp* to *Poe*).

250. See Siegel, *Equal Protection No Longer*, supra note 239, at 1113 (“[S]tatus-enforcing state action evolves in form as it is contested.”).

251. See id. at 1115–16 (explaining attempts to address old status relations among people resulted in legal changes perpetuating same systems of hierarchy).

emergence of the civil system of sexual regulation reflects this preservationist impulse.

Although *Lawrence* transformed the structure and means for regulating sex and sexuality, amidst these changes, the normative commitments that always undergirded the legal regulation of sex and sexuality have remained fixed and unchanged. Put differently, even as criminal law has receded as a regulatory presence, the underlying commitments to regulating sex and punishing non-normative sex remain intact. They are simply served by a new system of regulation—the civil system. And instead of invoking morality and majoritarian sexual norms as criminal regulation once did, the rhetoric of sexual regulation has been transformed to sound in a more neutral tone—one that emphasizes the vindication of the public interest and support of public institutions. But as this Essay maintains, these appeals to the public interest may harbor normative aims, serving to sanction and censure sex that does not comport with our intuitions of legitimate marital or marriage-like sex.

In this regard, the civil system of sexual regulation should be understood in the context of this process of contestation, struggle, and preservation. This alternative system achieves many of the objectives that criminal regulation of sex and sexuality once accomplished. It marks certain forms of nonmarital sex and sexuality as deviant and disfavored, and more importantly, it *punishes* these acts in concrete ways that are not only felt on the individual level, but also deter others in the community from engaging in the same kind of conduct.²⁵² In this way, the post-*Lawrence* civil system of regulation is an attempt to resuscitate and preserve the values that animated the traditional marriage–crime binary that once regulated sex and sexuality. It repudiates *Lawrence's* values and constructs a new regulatory binary—ensuring that sex is always subject to the state; that, regardless of *Lawrence*, there is no possibility for sex outside of law. Thus, there is no prospect for a robust principle of liberty in intimate life.

With that in mind, it is also worth noting that the civil system of sexual regulation not only replicates aspects of the criminal system of sexual regulation; it also furthers law's abiding interest in prioritizing and protecting marriage as the normative ideal for intimate life. I raise this point because, in recent years, there has been great interest in the distinction between marital and nonmarital sex and sexuality.²⁵³ To be

252. See *supra* notes 187–190 and accompanying text (discussing punitive qualities of civil sexual regulation).

253. See, e.g., Kerry Abrams, *Marriage Fraud*, 100 *Calif. L. Rev.* 1, 7–37 (2012) (discussing attempts to distinguish between legitimate marriages and “sham” marriages); Ariela R. Dubler, *Wifely Behavior: A Legal History of Acting Married*, 100 *Colum. L. Rev.* 957, 967–74 (2000) (considering from historical perspective law's efforts to distinguish between marriage and nonmarriage); Kaaryn Gustafson, *Breaking Vows: Marriage Promotion, the New Patriarchy, and the Retreat from Egalitarianism*, 5 *Stan. J. C.R. & C.L.* 269, 286–89 (2009) (considering effort to promote marriage—and discourage

sure, this interest has largely involved the campaign to secure state recognition through marriage for same-sex couples and their relationships. In making the claim for marriage equality, advocates and courts have constructed a divide that casts life outside of marriage as stigmatized, second-rate, and injurious.²⁵⁴

I have been critical of the headlong rush toward marriage equality and the various arguments that have been deployed in favor of it.²⁵⁵ To be clear, my criticism is not rooted in any opposition to marriage equality in principle. Instead, my concerns are that marriage is by itself a form of regulation and that in expanding marriage's reach to include same-sex couples, marriage equality simply expands the reach of state regulation. But, as importantly, I have been alarmed by the degree to which arguments in favor of marriage equality cast life outside of marriage as illegitimate and undesirable and in doing so, surrender an opportunity to cultivate the interstitial space between marriage and crime as a site for sexual liberty.²⁵⁶

Despite these reservations, the cases discussed in Part II suggest another lens through which to view the drive toward same-sex marriage and the arguments deployed in its service. While we might plausibly regard the turn to same-sex marriage as a reflexive response that fails to consider the particular benefits of being outside of state regulation, the interest in marriage equality might also be understood as a rational response to the persistence of punitive sexual regulation and the uncertain status of privacy protections for nonmarital, noncriminal sex in

nonmarriage—in welfare reform); Melissa Murray, *Accommodating Nonmarriage*, 88 S. Cal. L. Rev. 661, 678–80 (2015) [hereinafter Murray, *Accommodating Nonmarriage*] (discussing legal erasure of nonmarriage and promotion of marriage); Melissa Murray, *What's So New About the New Illegitimacy?*, 20 Am. U. J. Gender Soc. Pol'y & L. 387, 412–13 (2012) [hereinafter Murray, *New Illegitimacy?*] (considering illegitimacy and legal boundary between marriage and nonmarriage); Douglas NeJaime, *Before Marriage: The Unexplored History of Nonmarital Recognition and Its Relationship to Marriage*, 102 Calif. L. Rev. 87, 112–13 (2014) (discussing marriage's role in shaping nonmarital alternative statuses).

254. See Murray, *Accommodating Nonmarriage*, supra note 253, at 675–79 (discussing effort to erase nonmarriage by translating its terms into vernacular of marriage); Murray, *Paradigms Lost*, supra note 12, at 292–93 (discussing denigration of life outside of marriage); Murray, *New Illegitimacy?*, supra note 253, at 435–37 (discussing one such argument).

255. See Murray, *Marriage as Punishment*, supra note 11, at 61–64 (stating “there is more at stake than just the right to marry” and arguing courts should explore space between marriage and crime rather than just expanding who may marry); Murray, *New Illegitimacy?*, supra note 253, at 423–35 (“[T]he marriage equality movement’s embrace of illegitimacy as injury argument permits the continued consolidation and entrenchment of the marital nuclear family as self-evidently worthwhile and valuable, and the denigration of family forms that depart from the marital model.”).

256. Murray, *Marriage as Punishment*, supra note 11, at 54 (describing *Lawrence* as offering possibility of unregulated space between marriage and crime); Murray, *Strange Bedfellows*, supra note 10, at 1303 (arguing “promise of an unregulated space between marriage and crime ultimately is unrealized”).

the post-*Lawrence* landscape. Although the interstitial space that *Lawrence* creates is one that offers the possibility of sex outside of legal regulation, the cases discussed in this Essay make clear that the privacy protections that this space affords are neither assured nor predictable. Accordingly, it is perhaps unsurprising that those whose intimate lives are lived in this interstitial space between marriage and crime may seek the established privacy protections that marriage provides.

And in this way, the civil system of sexual regulation serves to channel sex into marriage. Historically, a principal goal of criminal sexual regulation was to channel sex into marriage, where it could be disciplined and rendered socially productive.²⁵⁷ That is, by criminalizing nonmarital sex, the state provided strong incentives for individuals to enter valid marriages, where sex would be lawful and licit.²⁵⁸ Today, criminal law no longer plays this role in channeling sex into marriage. But, as these cases make clear, the state, under the auspices of the civil system of sexual regulation, continues to cultivate the conditions that steer individuals toward marriage.

This last insight gestures toward a more fundamental point. Historically, one of the underlying values that characterized the marriage-crime binary regulatory structure was its totalizing force.²⁵⁹ Regardless of whether sex occurred inside or outside marriage, it was subject to state governance and regulation. There was little space for sex where the state was not present. By interposing the interstitial space between marriage and crime, *Lawrence* disrupted the totality of law's governance of sex, gesturing toward the possibility of sex beyond the regulatory reach of law and the state.

In this regard, the emergence of the civil system of sexual regulation not only threatens to rebuild a binary regulatory system but also threatens to restructure the regulation of sex and sexuality in a manner that again allows law to be a totalizing force. The increasing visibility of the civil system of sexual regulation means that there will be *no place* for sex outside of state regulation. Criminal law will exist to regulate those acts that, after *Lawrence*, remain indelibly criminal, and marriage will continue to regulate those who are eligible for and submit to the institution.

257. See Murray, *Marriage as Punishment*, supra note 11, at 46 (discussing, in context of *Zablocki v. Redhail*, marriage's role in channeling individuals into "practice and habits of disciplined, socially productive citizens"); Laura A. Rosenbury & Jennifer E. Rothman, *Sex in and out of Intimacy*, 59 *Emory L.J.* 809, 814-15 (2010) (discussing state's attempt to channel sexual conduct into marriage); Schneider, supra note 20, at 502 (noting "prohibitions against non-marital sexual activity and discouragements against quasi-marital arrangements in principle confine sexual life to marriage").

258. See D'Emilio & Freedman, supra note 31, at 16 (noting 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").

259. See Murray, *Marriage as Punishment*, supra note 11, at 6-7 (noting "totality of state regulation of sex and sexuality" and observing historically, there has been "no refuge from state regulation of sex").

And the space between these two domains—the space that *Lawrence* carved out for the possibility of sexual liberty—will be subsumed by the prospect of marriage or marriage-like relationships or the operation of the civil system of sexual regulation.

With this in mind, cases like *Seegmiller*, *Beecham*, *Anderson*, *Orellana*, and *Harvey* reveal a truth that has been largely overlooked by those of us who write and think about the legal regulation of sex. In recent years, much attention has been focused on marriage—on its expansion and whether or not this expansion will impede a broader project that is focused on limiting state regulation of sex and increasing opportunities for sexual liberty. Although these lines of inquiry are important, they have failed to register a fact that the preceding cases surface—that the effort to expand state regulation and limit sexual liberty is being staged on multiple fronts. The campaign to recognize same-sex relationships through marriage is one aspect of this effort; the use of this alternative system of civil sexual regulation is but another.

CONCLUSION

It has been more than ten years since the Court announced its decision in *Lawrence v. Texas*. During this period, the landscape of sexual regulation has been dramatically transformed by decriminalization and the constitutionalization of privacy. These changes have been lauded as broadening the opportunities for greater liberty in intimate life. However, as this Essay suggests, we have overlooked troubling aspects of this changed landscape.

Despite these profound changes, the state continues to intervene to regulate private, consensual sex between unmarried adults. To do so, it does not rely on traditional criminal regulation, but rather on a civil system of sexual regulation that survives *Lawrence*. This alternative system of sexual regulation replicates important features of the older regime of sexual regulation, including its interests in ensuring state governance of sex and sexuality, distinguishing between legitimate and illegitimate sex, and channeling sex into marriage. Although its impact has largely been felt in particularized contexts, the logic of its regulation may be translated to other arenas. As this Essay makes clear, understanding—and addressing—this alternative system of sexual regulation that has emerged in the aftermath of *Lawrence* has important consequences for the project of ensuring greater liberty in intimate life.

