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The Space Between: The Cooperative Regulation of Criminal Law and Family Law

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I. Introduction

In this article, I offer an account of two legal doctrines—criminal law and family law whose interaction is frequently overlooked. On the surface, criminal law and family law would appear to have little in common. Criminal law crafts a system of public regulation that is enforced by the threat of punishment or other sanction. Family law obviously has public import, but nonetheless is understood to involve the private sphere—the home and family. Moreover, while criminal law, which carries the threat of deprivation of liberty, is seen as punitive and coercive, family law generally is considered more ameliorative and attentive to the well-being of those involved.

This article focuses on the relationship between criminal law and family law in the regulation of marriage, sex, and intimate life. In doing so, it accomplishes two things. First, it challenges an ingrained narrative that argues that until quite recently, the home and family were impervious to criminal intervention. This article reveals that, in fact, criminal law, working in tandem with family law, has long played an important role in the legal construction of intimate life. It further argues that we have overlooked, to our detriment, criminal law and family law’s cooperative role in organizing intimate life. Historically, criminal law and family law have worked in tandem to produce a binary view of intimate life that categorizes intimate acts and choices as either legitimate marital behavior or illegitimate criminal behavior.

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More recently, however, cases like *Eisenstadt v. Baird*¹ and *Lawrence v. Texas*² appear to reorganize sex in a more continuous fashion. In these cases, I argue, the traditional marriage-crime binary is disrupted in favor of a continuum where marriage and crime remained fixed as outer extremes framing an interstitial space where intimate acts and choices are neither valorized as marital behavior nor vilified as criminal behavior. This zone, where sex is permitted outside of both marriage and crime, is one whose incredible potential and promise has been largely unrealized. Because we have been inattentive to the relationship between criminal law and family law, it has operated under our radar and the binary that it produces has become the ingrained and reflexive way to understand, organize, and regulate sex. When faced with the prospect of disrupting this binary in favor of a zone where intimate life is not regulated by criminal or family law, we reflexively revert to what we have known and attempt to interpret this new space through our binary lens. As such, we have bypassed an important opportunity to theorize and work toward a new understanding of intimate life outside of law.

**II. Challenging the Conventional Wisdom: Criminal Law and Family Law’s Cooperative Regulation**

The understanding of criminal law and family law has rested on the notion that these two doctrines are incompatible with one another and have little, if anything, to say to one another. Indeed, a casual perusal of the leading casebooks in each field makes clear, with few exceptions, that the two doctrines are understood to be distinct systems with separate normative aims.

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

By contrast, criminal law is assumed to be preoccupied with an entirely different agenda. A quintessentially public enterprise, criminal law identifies conduct incompatible with prevailing social norms by marking and punishing such conduct as crimes. It also seeks to deter proscribed conduct by incapacitating and punishing those who engage in such behavior.

Traditionally, we have credited family law with constructing the legal framework in which we forge our intimate lives. As anyone who has tried

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to obtain a marriage license understands, family law governs intimate life by regulating the entry into marriage through procedural and substantive restrictions. Through these restrictions, family law clearly establishes those relationships that are eligible for state recognition; but equally important, it also enunciates a normative ideal for intimate life.

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

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

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


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

These procedural requirements and substantive restrictions were not inadvertent or coincidental. Indeed, they purposefully articulated an ideal of marriage and intimate life. Until the twentieth century, these rules and restrictions made clear that marriage was an intraracial, monogamous, exogamous, and heterosexual union between consenting adults. And while the modern day understanding of marriage includes interracial and same-sex unions (albeit more limitedly), marriage continues to be understood as a monogamous and exogamous enterprise undertaken by consenting adults.

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

However, even as it articulates this normative vision, family law is hobbled in trying to police its boundaries. The rhetoric of family privacy traditionally has marked the interior of family life as impervious to state intrusion and regulation. Thus, although family law may regulate who

3-102 (prohibiting polygamy); § 36-3-105 (prohibiting marriage if below age of consent); WYO. STAT. ANN. § 20-1-102 (2007) (prohibiting marriage if below age of consent).


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

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can enter into a marriage and how the couple negotiates their exit from marriage, it may not regulate in an intact marriage or in intimate arrangements that exist outside of marriage.\textsuperscript{10} It may prohibit consanguineous relatives from marrying, but it cannot prohibit them from choosing to have an intimate relationship with one another outside of marriage. It can limit marriages to adult couples, but it cannot prohibit minors from being intimate with each other without the benefit of a marriage license.

If family law is limited to policing at the gates of marriage and only gestures vaguely to what exists outside of marriage, how then does it enforce the normative ideal of marriage as the archetype of intimate life and protect it from the corrosive influences of external forces? As I explain, family law relies on criminal law to assist in defining what marriage is and is not, and to police marriage's normative boundaries. More importantly, while family law constructs marriage as the normative ideal, it only references that which is outside of marriage by the vaguest implication. That is, though family law can mark what is "good," it is far less forceful in marking what is "bad." For this reason, criminal law's intervention is doubly important. Not only does criminal law reinforce marriage's position as the normative ideal for intimate life by preventing that which is normatively bad from corrupting and contaminating marriage, it also explicitly marks what is bad as bad.

Criminal law accomplishes all of this in a number of ways. In most, if not all, jurisdictions, family law's substantive restrictions on entry to marriage are reinforced by criminal bars on the same conduct. For example, not only was interracial marriage once prohibited as a civil matter, it also was subject to criminal penalties.\textsuperscript{11} Indeed, interracial sex itself was criminalized as miscegenation,\textsuperscript{12} simultaneously underscoring the understand-

\begin{itemize}
  \item \textit{Regulation of Marriage}, 91 MINN. L. REV. 1625, 1679 (2007) (same).
  \item \textit{McGuire}, 59 N.W.2d at 344-45; see also Abrams, supra note 9, at 1681 (noting "courts' [historic] reluctance to interfere in internal family matters").
  \item \textit{Jackson v. State} dramatically underscored the criminal aspect of interracial marriage bans. There, Linnie Jackson, an African-American woman, was sentenced to five years' imprisonment in the state penitentiary for marrying a white man. Jackson v. State, 72 So. 2d 114 (Ala. Ct. App. 1954), cert. denied, 72 So. 2d 116 (Ala. 1954), cert. denied, 348 U.S. 888 (1954). The Alabama law in question provided for a punishment of between two and seven years' imprisonment for interracial marriages. ALA. CODE tit. 14, § 360 (1940).
  \item See, e.g., McLaughlin v. Florida, 379 U.S. 184, 196 (1964) (striking down a Florida statute forbidding miscegenation); Pace v. Alabama, 106 U.S. 583, 585 (1883) (upholding an Alabama statute prohibiting interracial marriage, adulterous cohabitation, and fornication between "any white person and any negro, or the descendant of any negro to the third generation"); see also ROBERT DESTY, A COMPRENDIUM OF AMERICAN CRIMINAL LAW § 59a (1882) (stating that natural law prohibits miscegenation); MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 105–08 (outlining the adoption of traditional nuptial prohibitions); THOMAS WELBURN HUGHES, A TREATISE ON CRIMINAL LAW AND PROCEDURE § 802 (1919) (providing the definition of miscegenation); EDWARD W. SPENCER, A
ing of marriage as intraracial and the notion of sex as deeply constitutive of marriage itself. Likewise, while marriage between consanguineous relatives is prohibited as a civil matter, sex (again, an essential incident of marriage) between such relatives is criminalized as incest. At every turn, criminal law’s prohibitions reinforce family law’s substantive restrictions. Family law says what marriage is, and criminal law underscores this normative understanding by criminalizing behavior, and actors, ineligible for marriage. In this way, there is a structural symmetry between criminal law and family law. They work together, cooperatively defining what marriage is and what it is not.

But this is not the full extent of criminal law’s role in helping family law regulate marriage and intimate life. Until the late twentieth century, the criminal law in most jurisdictions prohibited fornication—sex outside of marriage—thereby highlighting marriage’s role as the licensed locus for sexual activity. Further, the historic availability of marriage as a defense to fornication effectively channeled the offensive conduct and actors into marriage where “lust was transformed into virtue.”

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

In addition to affirmatively articulating what marriage was not, criminal law, quite paradoxically, bolstered the normative understanding of marriage by refusing to intervene in intact marriages. The history of crim-

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TREATISE ON THE LAW OF DOMESTIC RELATIONS AND THE STATUS AND CAPACITY OF NATURAL PERSONS AS GENERALLY ADMINISTERED IN THE UNITED STATES § 57 (1911) (examining the effect of marriages within prohibited degrees of relationship); 2 FRANCIS WHARTON, A TREATISE IN CRIMINAL LAW § 1754 (9th ed. 1885) (describing miscegenation).


inal law's regulation of intimate violence is instructive on this point. Historically, spousal violence was exempted from state intervention and criminal prosecution. In the case of domestic violence, state intervention was considered unwarranted because, at common law, husbands retained the prerogative to physically chastise errant wives. In the case of marital rape, criminal prosecution was deemed unsuitable because consent to marriage included consent to conjugal sex.

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

15. See 1 William Blackstone, Commentaries *444. According to Blackstone:

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


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

17. See Catherine A. MacKinnon, Toward a Feminist Theory of the State 193 (1989) ("[T]he legal concept of privacy can and has shielded the place of battery, marital rape, and women's exploited domestic labor."); Sylvia A. Law, Rethinking Sex and the Constitution, 132 U. Pa. L. Rev. 955, 1020 (1984) ("The rhetoric of privacy . . . reinforces a public/private dichotomy [sic] that is at the heart of the structures that perpetuate the powerlessness of women."); Linda C. McClain, Inviolability and Privacy: The Castle, the Sanctuary, and the Body, 7 Yale J.L. & Human. 195, 208 (1995) (noting that critical examination of the concept of privacy, and its role in secluding the home and its occupants from state intervention, has been a "significant component of feminist jurisprudence"); Elizabeth M. Schneider, The Violence of Privacy, 23 Conn. L. Rev. 973, 981–82 (1991) (arguing that the expectation of family privacy has impeded state intervention to curb domestic violence).
Finally, and perhaps most importantly, criminal law has reflected and furthered family law’s stated interest in protecting and promoting the family as a cornerstone of society. Part of this mission involves reinforcing the private character of the family by exempting it from public regulatory intervention. However, an equally important part of this task has involved the criminalization of conduct considered inimical to the marital family. The criminalization of sodomy and other forms of same-sex sex is instructive on this point. On one level, criminalizing this conduct reiterates the understanding of marriage as a heterosexual undertaking; however, these laws also were intended to denounce the nonprocreative character of same-sex sex. In this way, anti-sodomy laws were not solely about defining marriage as a heterosexual enterprise; they also were intended to clarify marriage’s procreative purpose.

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

The modern liberalization of sexual mores might lead some to assume that criminal law and family law’s cooperative regulation of marriage and sexuality has been relegated to an archaic past. However, the loosening of these social moorings also reflects this regulatory relationship. Take, for example, four of the most important decisions in the family law canon: *Griswold v. Connecticut*, 18 *Eisenstadt v. Baird*, 19 *Loving v. Virginia*, 20 and *Lawrence v. Texas*. 21 These decisions are etched into the foundations of family law because they reflect the unraveling of tightly wound social conventions regarding marriage, sex, and intimate life in favor of greater privacy protections for intimate behavior and decision-making.

In *Griswold*, the U.S. Supreme Court famously struck down a Connecticut state law prohibiting the use of contraception. 22 In *Eisenstadt*, a Massachusetts statute prohibiting the distribution of contraception to anyone but married persons was held unconstitutional. 23 In *Loving* and *Lawrence*, the Court held unconstitutional a Virginia anti-miscegenation law 24 and a Texas anti-sodomy statute, 25 respectively.

While these four cases have carved out constitutional protections for private decision-making in intimate life, they also reveal, indirectly, criminal law's role in regulating in this arena. In all four cases, the offending laws were criminal statutes. Prior to the Court's decision, Estelle Griswold and Dr. Lee Buxton had been "found guilty as accessories [to the crime of illegal distribution of contraception] and fined $100 each." In Eisenstadt, William Baird was convicted for "exhibiting contraceptive articles in the course of delivering a lecture on contraception to a group of students at Boston University and . . . for giving a young woman a package of [contraceptive foam] at the close of his address." Similarly, Mildred and Richard Loving were charged with, and pled guilty to, violating Virginia's ban on interracial marriage. They faced a year in jail for their crime. John Geddes Lawrence and Tyron Garner were arrested, held overnight in jail, and charged with violating Texas's anti-sodomy statute. While these four cases are part of the family law canon, they also reveal the degree to which criminal law has been an important player in enunciating a normative ideal of intimate life. As these cases make clear, criminal law has worked alongside family law to foster an ideal of acceptable intimate behavior—an ideal that was built upon marriage. As such, criminal law was not absent from the home, as the inherited narrative suggests. Instead, it "was on the porch with shotgun in hand—policing and protecting the boundaries of private life."

III. Decriminalizing Intimate Life: Two Trajectories

While criminal law and family law historically have worked in tandem to regulate and organize intimate life, we are in the process of renegotiating how intimate life is organized. The last forty-five years have witnessed a developing constitutional jurisprudence that relies on the decriminalization of sex and intimate choices to give shape and meaning to robust due-process rights and privacy protections. In sections A and B, I

26. Griswold, 381 U.S. at 480. Griswold was the executive director of the Planned Parenthood League of Connecticut, and Buxton was a licensed physician and professor at Yale Medical School who served as medical director of the League at its New Haven office. Id. In these roles, "[t]hey gave information, instruction, and medical advice to married persons as to the means of preventing conception." Id.
27. Eisenstadt, 405 U.S. at 440.
29. The sentencing court suspended the sentence for a period of twenty-five years on the condition that the Lovings leave the state and not return to Virginia together for twenty-five years. Loving, 388 U.S. at 3.
30. Lawrence, 539 U.S. at 563.
describe the arc of this decriminalization project by examining *Griswold v. Connecticut*, *Loving v. Virginia*, *Eisenstadt v. Baird*, and *Lawrence v. Texas*. While these four cases decriminalize intimate acts and choices, they produce two distinct trajectories for the organization of intimate life. The decriminalization that occurs in *Griswold* and *Loving* is consistent with the traditional marriage-crime binary produced by the interaction of criminal law and family law. Both cases decriminalize a particular act and relocate it squarely within the rubric of marriage.

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

A. A Binary View of Intimate Life—Griswold and Loving

1. GRISWOLD V. CONNECTICUT

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

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

In this way, *Griswold* echoes the binary view of intimate life where intimate acts and choices are either criminal behavior or marital behavior.

33. *Id.* at 484
34. *Id.* at 485.
Accordingly, *Griswold*’s notion of privacy is at once liberating and contingent. *Griswold* imagines married couples making decisions about contraception in a zone free from criminal law’s regulation. But critically, it is not a zone where law is completely absent. The couples are married. Thus, while their decisions about contraception are no longer governed by criminal law, their marital status (and the privacy protections attendant to that status) is shaped by family law’s regulation.

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

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

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

2. *Loving v. Virginia*

Like *Griswold*, *Loving v. Virginia* also comports with the binary view of intimate relationships that the interaction of criminal law and family law historically has produced. The facts of *Loving* are well-known. Criminally barred from marrying in Virginia, where they lived, Richard and Mildred Loving married in the District of Columbia, which permitted

35. And as some scholars have argued, *Griswold*’s reification of family privacy exacerbates the difficulty of addressing spousal abuse and intimate violence. See Schneider, supra note 17, at 974 (“The concept of marital privacy, established as a constitutional principle in *Griswold*, historically has been the key ideological rationale for state refusal to intervene to protect battered women within ongoing intimate relationships.” (citation omitted)).
interracial marriages.³⁶ They then returned to Virginia where they were arrested and their marriage was declared invalid.³⁷ Although the Supreme Court struck down the offending Virginia statute on equal protection grounds, it nonetheless considered the substantive due process implications of a law limiting autonomy and liberty in marriage. According to the Court, marriage was a “‘basic civil right[]’,” and the decision to “marry, or not marry, a person of another race” was entitled to constitutional protection.

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

> On June 11, 1967, the Lovings were criminals in the Commonwealth of Virginia, but on June 12, 1967 (the day the Supreme Court issued the decision in their favor), they were not. On June 11, 1967, the Lovings were not legally married in the Commonwealth of Virginia, but on June 12, 1967, they were.³⁸

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

Again, it is worth noting that in transforming interracial unions from crimes to lawful marriages, *Loving* does not necessarily contemplate the absence of legal regulation. The Lovings were no longer subject to criminal law’s regulation, but they were ushered into the status of marriage and therefore subject to family law’s governance.³⁹ As in *Griswold*, there are only two options for the Lovings and their relationship. They are either criminals or they are spouses—outlaws or in-laws.

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

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³⁷. *Id.* at 5 (noting that § 20-57 of Virginia’s marriage law automatically voided “all marriages between ‘a white person and a colored person’ without any judicial proceeding” (internal citation omitted)).
³⁹. See *id.* (referencing *Loving* and challenges to criminal bans of the sort at issue there, and noting that “the district attorney walks the file containing your criminal case over to the clerk in the marriage license office. You and your relationship never leave the building.”).
B. A Space Between Marriage and Crime—Eisenstadt and Lawrence

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

1. Eisenstadt v. Baird

In Eisenstadt, the Court struck down a Massachusetts criminal law prohibiting the dissemination of contraception to anyone but married couples. Though the law pertained specifically to contraception, it was understood to be a means of expressing disapproval of sex outside of marriage. The Court decided the issue on equal protection grounds, concluding that the Massachusetts criminal law impermissibly distinguished between married and unmarried persons. In so doing, the Eisenstadt Court noted that “the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals.” As such, it concluded that the privacy associated with marriage was essentially “the right of the individual, married or single, to be free from unwarranted governmental intrusion” in his or her intimate life.

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

At the outset, it should be noted that Eisenstadt does not confront squarely the question of a substantive due-process right to engage in out-of-wedlock sex. The fact that Eisenstadt was decided on equal protection grounds allowed the Court to avoid ruling on whether criminal fornication statutes, many of which had fallen into desuetude and were rarely

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41. Id. at 448 (explaining that “the object of the legislation is to discourage premarital sexual intercourse”).
42. Id. at 453.
43. Id.
44. Id. (emphasis omitted).
45. Indeed, the Court consciously avoided this question. Eisenstadt, 405 U.S. at 453 (“We need not and do not, however, decide that important question in this case because, whatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike.”).
enforced, violated the right to privacy.\textsuperscript{46} That said, the Court's holding that a criminal statute prohibiting contraceptive use could not apply only to the unmarried has important consequences for sex outside of marriage and the way in which marriage and sexuality are organized.

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

This move, I argue, goes beyond the strict binary affirmed in \textit{Griswold} and \textit{Loving}. In \textit{Eisenstadt}, the Court appears to be floating the possibility of organizing intimate life in a more continuous way than previously seen. No doubt responding to the decline in criminal enforcement of fornication statutes and the rise in adult nonmarital cohabitation,\textsuperscript{47} \textit{Eisenstadt} suggests that contraceptive use by unmarried couples (and the attendant non-

\textsuperscript{46} When earlier presented with a law that prohibited interracial sex outside of marriage, the Court declined to consider whether the law violated substantive due process rights and instead decided the issue on equal protection grounds. See McLaughlin v. Florida, 379 U.S. 184, 187 (1964); see also id. at 198 n.* (Stewart, J., concurring) (“Since I think this criminal law is clearly invalid under the Equal Protection Clause of the Fourteenth Amendment, I do not consider the impact of the Due Process Clause of that Amendment, nor of the Thirteenth and Fifteenth Amendments.”).

marital sexual activity) will be permitted as neither marital nor criminal.

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

2. **Lawrence v. Texas**

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

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

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

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

   In this way, *Lawrence* elaborates the continuum tentatively offered in *Eisenstadt*. Instead of organizing intimate life along the marriage-crime binary, *Lawrence* poses a continuum where marriage and criminality.

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49. *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.").
50. *Id.*
remain fixed as opposite extremes. However, between these two poles exists an interstitial space where sex is neither valorized or vilified, but is simply permitted.

The importance of this interstitial space between marriage and criminality goes beyond simply organizing intimate life in a more continuous fashion. As Professor Katherine Franke has astutely observed, the zone that exists between marriage and crime is one that, in theory, remains unregulated (or, at least, under-regulated) by law. Franke’s comparison of Loving and Lawrence illustrates this point.

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

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

51. Franke, supra note 38, at 2687 (asserting that, post-Lawrence, the lesbian, gay, bisexual, and transsexual community is “in a unique spot of un- or under-regulation by the state”).
52. Id.
53. Ariela R. Dubler, From McLaughlin v. Florida to Lawrence v. Texas: Sexual Freedom and the Road to Marriage, 106 COLUM. L. REV. 1165, 1184 (2006) (noting that Lawrence might be considered quite conventional because in “hearkening back to Griswold” it “recognize[s] that nonmarital sexual relationships can have significance and import for the individuals involved in them much as marriage can for married couples”); Ann Laquer Estin, Family Governance in the Age of Divorce, 1998 UTAH L. REV. 211, 211 (noting that Eisenstadt “brought the relationships of nonmarital children and parents within a larger rubric of family law”). Of course, some have argued that both decisions could have a more radical slant. See Janet L. Dolgin, The Family in Transition: From Griswold to Eisenstadt and Beyond, 82 GEO. L.J. 1519, 1545 (1994) (arguing that Eisenstadt is “revolutionary” because its notion of privacy is contingent on “the autonomous
By tracing the trajectory of the marriage-crime binary, my reading of Griswold, Loving, Eisenstadt, and Lawrence does more than merely situate these cases in a broader conversation about criminal law and family law. It makes clear that the evolving nature of our organization of intimate life is one that could accommodate a zone where law is not present. And because neither family law nor criminal law governs it, this space between marriage and criminality that Eisenstadt gestures towards and Lawrence enunciates is one of incredible promise and possibility.

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

individual," rather than on marriage or the marital couple); Dubler, supra, at 1187 (asserting that Lawrence could be "seen as the beginning of the extension of constitutional protection to a range of sexual practices that do not fall within monogamous marriage"); Katherine M. Franke, The Domesticated Liberty of Lawrence v. Texas, 104 COLUM. L. REV. 1399, 1426 (2004) (arguing that Lawrence offers "an uncharted territory that is worth exploring, and possibly expanding").

54. BRENDA COSSMAN, SEXUAL CITIZENS: THE LEGAL AND CULTURAL REGULATION OF SEX AND BELONGING 7 (2007) (claiming that heterosexuality, and indirectly marriage, has been a boundary that historically has separated those considered citizens within the polity and those considered beyond the borders of political and civil inclusion); Katherine M. Franke, Becoming a Citizen: Reconstruction Era Regulation of African American Marriages, 11 YALE J.L. & HUMAN. 251, 277 (1999) ("Formerly enslaved people and abolitionists generally deemed the right to marry one of the most important ramifications of emancipation."); see also Murray, Equal Rites, supra note 8, at 1401-02.

55. Murray, Equal Rites, supra note 8, at 1402 (noting that marriage "has not been a wholly positive force in achieving equality and exercising citizenship rights").

56. Franke, Becoming a Citizen, supra note 54, at 295 (discussing the postbellum use of marriage as a "civilizing" agent for newly freed African-American men and women); Angela Onwuachi-Willig, The Return of the Ring: Welfare Reform's Marriage Cure as the Revival of Post-Bellum Control, 93 CAL. L. REV. 1647, 1694 (2005) (arguing that the contemporary emphasis on marriage promotion is an attempt to force African-American families to conform to Anglo-American family norms and practices).

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

IV. Intimate Life in the Space Between?

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

The fact that neither family law nor criminal law governs intimate acts and choices that are located in the space between marriage and crime suggests that this interstitial space is a legal vacuum. It is a space unregulated—or, at least, under-regulated—by law. As such, it may signal greater opportunities for intimate life unfettered by the dictates of law. I contend, however, that the promise of an unregulated space between marriage and crime ultimately is unrealized.

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

Relatedly, the anxiety over a space unregulated by law is rooted in the fact that the marriage-crime binary that has organized intimate life thus far creates clear standards for categorizing sex. A space where the law does

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58. "We" refers to members of the legal community—legal scholars, judges, and lawyers—not to members of the public at large. As noted earlier, the legal understanding of sex and sexuality often has shifted in response to extant changes in social life. For example, the decriminalization of contraceptive use by unmarried couples in Eisenstadt reflected in part loosening social mores regarding out-of-wedlock sex.
not regulate sex has the capacity to foster experimentation and deviation from the norms and standards that give content to these categories. Accordingly, the fear of such a space is that it will erode these normative boundaries, rendering unintelligible all categories of sexuality.

With these anxieties in mind, we have responded to the prospect of the continuum by embracing the comfort of the familiar. We translate the familiar binary to this unregulated continuum and attempt to organize this unfamiliar, ungoverned space in ways that are more recognizable to us. In so doing, we sacrifice the potential (and perhaps daunting) liberty of a legal vacuum in favor of the comfort of familiar governance.

A. The Comfort of the Marriage-Crime Binary

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

Recalling morals-based legislation criminalizing “bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity,”59 Scalia predicts that *Lawrence* will call “[e]very single one of these laws” into question, placing the offending behavior beyond criminal law’s reach.60 More importantly, Scalia insists that the decriminalization of same-sex sodomy will lead inexorably to same-sex marriage. Although the majority claims that its “disapprobation of homosexual conduct is strong enough to disallow homosexual marriage, but not strong enough to criminalize private homosexual acts,”61 Scalia “[d]oes not believe it.”62

To understand the persistence of the binary framework in the way we think about sex, it is necessary to unpack the anxiety that *Lawrence* prompts for Justice Scalia. At bottom, Scalia has trouble “believ[ing]”63 in the majority’s notion of a sexual continuum where there is space between marriage and crime. And importantly, his lack of faith in—and disgust with—the prospect of a continuum is linked directly to the fact that we historically have organized sex in a binary fashion. For Scalia, decriminaliz-

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60. *Id.*
61. *Id.* at 604.
62. *Id.*
63. *Id.*
ing same-sex sodomy necessarily gestures toward expanding marriage to include same-sex couples because that is the way we have always organized sex. If it is not marital, it must be criminal. And if it is not criminal, it must be marital. Because Scalia’s understanding of sex is rooted in the binary tradition, the idea of sex that is not criminal, but not eligible for marriage is completely unintelligible. Sex always has been subject to law—whether criminal law or family law. The idea of a zone where law is not present—where neither of these two doctrines governs—is preposterous and untenable.

To be sure, Justice Scalia is not the only one who has difficulty imagining a more continuous organization of sex. Recall the majority opinion in Lawrence. Despite his efforts to promote a more fluid understanding of sex and intimate life, even Justice Kennedy has trouble dealing with a sexual continuum on its own terms. Even as it decriminalizes same-sex sodomy and affords constitutional protections to these private acts, the decision goes to great lengths to paint the plaintiffs, John Geddes Lawrence and Tyron Garner, with the brush of marital domesticity. Although there was scant evidence for it, Kennedy’s opinion speaks of Lawrence and Garner as though they are long-term partners sharing a life in common.64 The pair was not having sex simply for the sake of having sex, but in furtherance of “a personal bond that is more enduring.”65 Thus, while Kennedy constructs a continuum where same-sex sex is neither eligible for marriage, nor considered a crime, he, like Scalia, has a hard time thinking of sex outside of these two categories. Having clearly decriminalized the conduct at issue in Lawrence, Kennedy attempts to render intelligible the dissonance that decriminalization without marriage produces by likening Lawrence and Garner to a married couple.

The persistence of these binary impulses also is evident in the political reactions to Lawrence. For LGBT advocates, the decriminalization of same-sex sodomy pointed directly toward the inevitable introduction of same-sex marriage. Likewise, social conservatives also understood the decision to gesture toward same-sex marriage and immediately began organizing a campaign to define marriage in traditional terms and to restrict its expansion to same-sex couples.

Put together, these responses to the decriminalization of same-sex sodomy all suggest the power of the marriage-crime binary as a rubric for understanding sex. When faced with Lawrence’s decriminalization of same-sex sex, the immediate reaction has been to turn toward marriage to render intelligible and legible a sexual free zone that is foreign and unfamiliar.

64. In fact, Lawrence and Garner were not long-term partners at all. Franke, Domesticated Liberty, supra note 53, at 1408 (noting that neither the facts of the case nor the briefs offered anything that would suggest that Lawrence and Garner were in a long-term relationship).
65. Lawrence, 539 U.S. at 567.
B. The Anxiety of Boundary Erosion

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

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

Justice Scalia’s dissent reflects this anxiety. In lamenting Lawrence’s unorthodox decriminalization without marriage, Scalia announces a litany of other criminal sex acts that he predicts also will be decriminalized.66 As Scalia’s sexual jeremiad suggests, the prospect of an unregulated space between marriage and crime has the potential to divest both of these categories of their content and meaning. If same-sex sodomy is no longer criminal, but does not alter the normative understanding of marriage, what other sex acts will be swept from the criminal zone to a place of acceptance and deregulation? The rising tide of decriminalization may sweep a wide swath of behavior into this interstitial zone where it will exist in closer proximity to marriage than before. Implicit in this scenario is the erosion of marriage’s boundaries. As more acts are ushered into this unregulated zone, the traditional boundaries of marriage may be threatened as the content of this interstitial space retools and reshapes intimate norms at all points along the continuum.

66. Lawrence, 539 U.S. at 590 (Scalia, J., dissenting) (predicting that “[s]tate laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity” will be called into question after Lawrence).
In short, the fear prompted by the space between marriage and crime is that it will be too fluid, and will compromise the integrity of the institutions that purport to give it structure. The anxiety is that these structural boundaries will dissolve and the idea of legal regulation will either become completely unintelligible, or that a wide range of behavior will inevitably be subject to a single type of legal governance—here, marriage.

C. Reinstating the Binary Within the Space Between

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

Consider the way law regards heterosexual sex outside of marriage. For many years, sex outside of marriage has been accepted as a legal and social matter.67 In most cases, nonmarital sex occupies the interstitial space between marriage and crime. That is, out-of-wedlock sex is clearly outside of marriage, but is no longer criminal. Nevertheless, out-of-wedlock sex is not necessarily celebrated or valorized. Instead, its status, and that of the parties engaged in it, depends entirely on its proximity to either marriage or criminal sex.

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67. See Marvin v. Marvin, 557 P.2d 106, 109 (Cal. 1976) (recognizing plaintiff’s palimony claim because “[d]uring the past 15 years, there has been a substantial increase in the number of couples living together without marrying”). After Lawrence, this sort of acceptance is even more explicit. Criminal bans on nonmarital sex were in a state of desuetude and unlikely to be enforced even before Lawrence. See Doe v. Duling, 782 F.2d 1202, 1206 (4th Cir. 1986) (dismissing a challenge to the constitutionality of a criminal ban on out-of-wedlock cohabitation because plaintiffs faced “only the most theoretical threat of prosecution” and therefore lacked standing to sue). After Lawrence, the constitutionality of such laws has been called into question. See Martin v. Zihler, 607 S.E.2d 367, 371 (Va. 2005) (applying Lawrence and finding unconstitutional a criminal ban on fornication); Hobbs v. Smith, No. 05 CVS 267, 2006 WL 3103008, at *1 (N.C. Super. Ct. Aug. 25, 2006) (relying on Lawrence to strike down a state fornication law); cf. Berg v. State, 100 P.3d 261, 264, 267 (Utah Ct. App. 2004) (dismissing a challenge to the constitutionality of a criminal ban on fornication because, after Lawrence, the statute was not enforced in the context of private, consensual, heterosexual intimacy, and plaintiff therefore lacked standing to sue).
Take, for example, the situation at issue in *Hann v. Housing Authority*.\(^6\) There, the plaintiffs were long-term, cohabiting partners with children.\(^6\) They challenged a local housing-authority regulation limiting public housing to those families composed of ‘‘two or more persons who will live together in the dwelling and are related by blood, marriage or adoption.’’\(^7\) Critically, the local regulation was intended to discourage ‘‘immoral’’ cohabitation by unmarried adults of the opposite sex.\(^7\) In concluding that the regulation violated a broader federal housing policy,\(^7\) the court made much of the fact that the plaintiffs looked like a marital family. They had lived together for many years, were integrated into each other’s extended families, and, importantly, were raising children together.\(^7\) As the court noted, “[t]he only thing missing [was] a marriage certificate.”\(^7\)

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

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

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

Even though private, consensual group sex between adults may exist in the zone where it is understood as neither marital nor criminal sex, the way we think about it is clearly shaped by the marriage-crime binary. Because we reconstitute the marriage-crime binary within this interstitial space, sex between more than two persons is likely to be valued less than the relationship in Hann. Unlike the Hann plaintiffs, those who participate in group sex are less proximate to the normative understanding of marriage. They may not live together. They may not be raising children together. And, critically, group sex involves more than two participants. Because of their numerosity, this grouping not only appears more distant from marriage, but also is ineligible for marriage.

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

The recent challenge to Alabama’s Anti-Obscenity Enforcement Act, a criminal ban on sexual devices, also is illustrative. Though the decision was announced after Lawrence, it considered the act in question, the commercial sale of sexual devices and products, in terms that reinstate the marriage-crime binary. In Williams v. Pryor, the Eleventh Circuit

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

76. See Bronson v. Swensen, 394 F. Supp. 2d 1329, 1332–33 (D. Utah 2005) (upholding civil and criminal prohibitions on plural marriage), aff’d on other grounds, 500 F.3d 1099, 1113 (10th Cir. 2007) (holding that plaintiffs lacked standing to challenge the constitutionality of Utah’s criminal ban on polygamy and had forfeited the opportunity to challenge civil prohibitions on polygamy); see also supra note 6 and accompanying text (discussing the present law in all U.S. jurisdictions, which prohibits marriages between more than two persons).

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

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

upheld the criminal ban on sex toys and refused the "invitation to recognize a right to sexual intimacy" untethered to marriage or crime. In short, the Williams court balked at the prospect of organizing sex along a continuum. Instead, the court's analysis doggedly adheres to the binary view of sex, arguing that any right to "sexual intimacy," even if limited to consenting adults, "would theoretically encompass such [criminal] activities as prostitution, obscenity, and adult incest."  

In order to contextualize the court's decision, it is important to understand the arguments to which it responds. In Williams, the plaintiffs, a group of vendors and married and unmarried users of sexual devices, argued that the use of sexual products was protected under the Supreme Court's privacy jurisprudence. Because plaintiffs filed their brief before Lawrence was announced, they framed their privacy rights, and the use of sexual devices, around marriage and in opposition to crime. For example, the plaintiffs emphasized that the use of such products was not obscene or criminal, but rather benefited marital and marriage-like relationships. One vendor plaintiff stipulated that her clients reported that the products "greatly improved their marital and sexual relations." Several married plaintiffs averred that "incorporating sexual devices" into their relationships improved marital communication, "both in and out of the bedroom." Indeed, one couple testified that their use of the banned products "saved" their marriage. And two expert witnesses averred that "sexual aids help in the revitalization of potentially failing marital relations," and that the use of sexual devices is recommended in "therapy for couples who are having sexual problems in their marriage.",

The statements of unmarried plaintiffs, though less prominent in the argument, also emphasized how these banned sexual devices improved the quality of unmarried sexual relationships. And while different from the arguments offered on behalf of the married couples, these arguments too are testament to plaintiffs' efforts to locate the use of sexual toys within the rubric of marriage. Prior to their use of the banned products, the unmarried plaintiffs recounted considerable difficulties in their sexual

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80. Id. at 1240.
81. Id.
82. Plaintiffs filed their brief on January 23, 2003, well before Lawrence was announced. As such, plaintiffs relied on cases like Griswold in which the concept of marital privacy figured prominently.
84. Id. at *7.
85. Id.
86. Id. at *6 (quoting Williams v. Pryor, 220 F. Supp. 2d 1257, 1305 (N.D. Ala. 2002)).
relationships.\textsuperscript{87} Using the banned sexual products not only improved the quality of their sexual relations, it enabled them to have better relationships with their partners. These products not only "saved" and improved marriages, they improved unmarried relationships.\textsuperscript{88} In so doing, one can assume, the use of the banned devices made it more likely that these non-martial relationships eventually would turn into marriages or long-term, marriage-like relationships.

In the interim between when the \textit{Williams} plaintiffs filed their brief and the court announced its decision upholding Alabama's criminal ban on the sale and distribution of sex toys and devices, the Supreme Court issued its decision in \textit{Lawrence}. Accordingly, the \textit{Williams} court did not have to render their decision with reference to the marriage-crime binary. Instead, it could have acknowledged a more continuous organization of sex and attempted to locate the sale and distribution of sex toys and devices along that continuum. However, instead of taking the opportunity to think about the use of these banned devices in more nuanced terms, the \textit{Williams} court "decline[d] to extrapolate from \textit{Lawrence} and its dicta a right to sexual privacy."\textsuperscript{89} In so doing, it dismissed the prospect of a more continuous understanding of sex that would accommodate the use of sex toys as part of intimate life beyond the boundaries of either marriage or crime. In determining the constitutionality of the sex-toy ban, the court, like the plaintiffs, weighed the use of sexual toys and devices by judging its distance from marriage (and marriage's established privacy protections) and its proximity to criminal obscenity (and its attendant government regulation). Thus, the \textit{Williams} court interposed the marriage-crime binary atop \textit{Lawrence}'s efforts to forge a more continuous view of intimate life.

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

\textsuperscript{87} \textit{Id.} at *7 (noting that "virtually all of the individual plaintiffs have experienced some level of sexual dysfunction or inhibition" in their relationships).

\textsuperscript{88} \textit{Id.}

\textsuperscript{89} \textit{Williams v. Pryor}, 378 F.3d 1232, 1238 (11th Cir. 2004).
stand sex in relation to marriage and crime. In theory, the interstitial space between marriage and crime is one of tremendous possibility. Indeed, it is a place where law is largely absent and intimate life is not regulated by family law or criminal law. It offers the prospect of dislodging marriage’s position as the benchmark for acceptable intimacy and, in so doing, provides refuge and dignity to those who wish to construct their intimate lives beyond marriage’s boundaries. However, there have been few efforts to think about this interstitial space, with its possibilities and pitfalls, on its own terms. When faced with the prospect of a zone free of law’s governance, we have rushed to reinstate law’s authority. As Williams and the other examples illustrate, marriage and crime continue to shape our understanding of the acts and choices that occupy (or could occupy) the interstitial zone between these polar entities.

Of course, some might argue that the response to this space between marriage and crime is perfectly plausible and legitimate. And, indeed, it may be the case that our responses to those acts that are both noncriminal and nonmarital are policy choices intended to encourage marriage and to make clear that we do not want sex without law. But, at some level, these choices do not seem completely conscious and purposive. The fact that we have not fully explored the relationship between criminal law and family law and the way in which they organize intimate life suggests that we have responded to changes in the way sex is organized from a position of path-dependence. We cannot think about how we might organize sex differently because we have never really examined how we have organized it in the past. As such, we disregard the novelty and promise of sex without law and attempt to reconstruct what we have always known.

V. Conclusion

This article not only excavates the long-standing relationship between criminal law and family law and the binary view of intimate life that it produces, it also explains the costs of our inattention to this relationship. By failing to appreciate criminal law and family law’s interaction in organizing sex, we also have failed to appreciate that the marriage-crime binary is only one rubric for organizing intimate life. Instead of taking the time to consider the possibilities and pitfalls of a more continuous understanding of intimate life, we have allowed the space between marriage and crime to be reclaimed by law. Put differently, we have surrendered the idea of a fluid space ungoverned by law and almost reflexively have rushed to reinstate some form of legal governance in the space between marriage and crime.

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