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ARTICLE

MARRIAGE AS PUNISHMENT

*Melissa Murray**

Popular discourse portrays marriage as a source of innumerable public and private benefits: happiness, companionship, financial security, and even good health. Complementing this view, our legal discourse frames the right to marry as a right of access, the exercise of which is an act of autonomy and free will. However, a closer look at marriage's past reveals a more complicated portrait. Marriage has been used—and, importantly, continues to be used—as state-imposed sexual discipline.

Until the mid-twentieth century, marriage played an important role in the crime of seduction. Enacted in a majority of U.S. jurisdictions in the nineteenth century, seduction statutes punished those who “seduced and had sexual intercourse with an unmarried female of previously chaste character” under a “promise of marriage.” Seduction statutes routinely prescribed a bar to prosecution for the offense: marriage. The defendant could simply marry the victim and avoid liability for the crime. However, marriage did more than serve as a bar to prosecution. It also was understood as a punishment for the crime. Just as incarceration promoted the internalization of discipline

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and reform of the inmate, marriage’s attendant legal and social obligations imposed upon defendant and victim a new disciplined identity, transforming them from sexual outlaws into in-laws.

The history of marriage as punishment offers important insights for contemporary discussions of marriage. It reveals the way in which our current discourses of marriage are naïve and incomplete, emphasizing marriage’s many attributes while downplaying its role as a vehicle of state-imposed sexual discipline. In view of this history, our contemporary jurisprudence on the right to marry can be reread to reveal the disciplinary strains that continue to undergird marriage and the right to marry. Most importantly, this history reveals that state regulation of sex and sexuality has been a totalizing endeavor, relying on marriage and criminal law as two essential domains for disciplining and regulating sexuality.

With this in mind, the recent struggle for marriage equality seems unduly narrow. While achieving marriage equality is important, this history underscores an equally important interest in defining and preserving spaces for sexual liberty that exist beyond the disciplining domains of the state.

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INTRODUCTION

“Marriage is a great institution . . . but I ain’t ready for an institution yet.” – Mae West¹

In the recent federal trial challenging the constitutionality of Proposition 8,² the plaintiffs testified about the implications of their ex-

1. Nancy F. Cott, *Public Vows: A History of Marriage and the Nation* 1 (2002) [hereinafter Cott, *Public Vows*].

2. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010). Proposition 8 was the 2008 ballot initiative that amended the California Constitution to prohibit same-sex marriage, effectively overturning a California Supreme Court decision permitting same-sex marriage. See *In re Marriage Cases*, 183 P.3d 384, 433–34 (Cal. 2008) (“[W]e conclude that the right to marry, as embodied in article I, sections 1 and 7 of the California Constitution, guarantees same-sex couples the same substantive constitutional rights as opposite-sex couples to . . . [enjoy] all of the constitutionally based incidents of

clusion from civil marriage. Without exception, their testimony recounted the importance of marriage as an expression of romantic love,³ as a means of accessing a broad array of benefits and privileges and avoiding discrimination,⁴ and as a vehicle for fostering an environment conducive to rearing children.⁵ But perhaps most striking was the plaintiffs' testimony that their exclusion from marriage was an injury, affecting their opportunities for self-determination and individual growth.⁶ The ability to marry the person of their choice, they argued, was a critical aspect of human existence, without which their essential humanity was compromised and demeaned.⁷ Importantly, their exclusion from civil marriage limited their opportunities to attain autonomy and joy in their personal lives.

marriage."); see also Melissa Murray, Remark, Equal Rites and Equal Rights, 96 Calif. L. Rev. 1395, 1396–99 (2008) (discussing *In re Marriage Cases*).

3. Transcript of Proceedings at 166, *Perry*, 704 F. Supp. 2d 921 (No. C 09-2292 VRW) (testimony of Sandra Stier) (“[N]ot only were we in love, but we wanted—we realized fairly soon that we wanted to build a life together.”).

4. *Id.* at 142 (testimony of Kristin Perry) (noting being married means “when you leave your home and you go to work or you go out in the world, people know what your relationship means”).

5. *Id.* at 81 (testimony of Jeffrey Zarrillo) (“Paul and I believe that it’s—the important step in order to have children would be for us to be married.”); *id.* at 89 (testimony of Paul Katami) (“[T]he timeline for us has always been marriage first, before family.”).

6. *Id.* at 68 (opening statement of Charles Cooper) (noting same-sex couples “do not have the same right to express their love and have their love recognized by the state in order that they, too, may achieve personal fulfillment”); *id.* at 155 (testimony of Kristin Perry) (observing marriage “symbolizes maybe the most important decision you make as an adult”).

7. Plaintiffs’ Trial Memorandum at 5, *Perry*, 704 F. Supp. 2d 921 (No. C 09-2292 VRW); see also *In re Marriage Cases*, 183 P.3d at 401 (noting exclusion from civil marriage “impinges upon a same-sex couple’s fundamental interest in having their family relationship accorded the same respect and dignity enjoyed by an opposite-sex couple”); *Baker v. State*, 744 A.2d 864, 889 (Vt. 1999) (noting extension of civil-marriage benefits to same-sex couples is “recognition of our common humanity”); Carlos A. Ball, Moral Foundations for a Discourse on Same-Sex Marriage: Looking Beyond Political Liberalism, 85 Geo. L.J. 1871, 1930 (1997) (“Gays and lesbians seek not only the tangible benefits that would accompany a recognition of same-sex marriage, but also the societal acknowledgment of the humanity and normative goodness that they believe inheres in many of their relationships.”); Mary L. Bonauto, *Goodridge* in Context, 40 Harv. C.R.-C.L. L. Rev. 1, 43 (2005) (noting *Goodridge* decision, which expanded civil marriage in Massachusetts to include same-sex couples, “fully embraces the humanity of LGBT people”); Aderson Bellegarde Francois, To Go into Battle with Space and Time: Emancipated Slave Marriage, Interracial Marriage, and Same-Sex Marriage, 13 J. Gender Race & Just. 105, 147 (2009) (“[T]he opposition to same-sex marriage . . . seems to rest ultimately on a refusal to publicly recognize the humanity of the individuals who we insist . . . do not feel as we do and do not love as we do.”); R.A. Lenhardt, *Beyond Analogy: Perez v. Sharp*, Antimiscegenation Law, and the Fight for Same-Sex Marriage, 96 Calif. L. Rev. 839, 888–89 (2008) (“Opponents of same-sex marriage fear that . . . the removal of gender-based restrictions on marriage will lay bare once and for all the humanity of gay and lesbian couples . . .”).

The *Perry* plaintiffs' account of marriage is unsurprising, especially in light of our contemporary discussions of marriage and the debate over same-sex marriage. Regardless of one's position in this debate, most agree that marriage is a vehicle for expressing love, gaining access to public and private benefits, raising children, and furthering one's self-development.⁸ Accordingly, marriage's allure is clear—for same-sex couples and those who would exclude them from the institution. The prevailing mainstream discourse⁹ depicts marriage as a source of innumerable public and private benefits, happiness, companionship, financial security, and even good health (relative to unmarried people).¹⁰ Alongside this popular discourse is a legal discourse that frames the right to marry as a right of access, the exercise of which is an act of autonomy and free will.¹¹ Indeed, supporters of same-sex marriage argue that limiting

8. Both proponents and opponents of marriage equality are united in their agreement that marriage is a vitally important institution for society and for individuals. See, e.g., Nancy Polikoff, *Beyond (Straight and Gay) Marriage* 98–100 (2008) (discussing this convergence). Conservative groups have championed marriage as “the foundation of civilization, the seedbed of virtue, and the wellspring of society.” Marriage & Family, Family Research Council, <http://www.frc.org/marriage-family> (on file with the *Columbia Law Review*) (last visited Sept. 19, 2011). Those who favor same-sex marriage have been equally effusive in their regard for marriage. See, e.g., Andrew Sullivan, *Virtually Normal: An Argument About Homosexuality* 156 (1995) (describing marriage as “highest form of human happiness”); Evan Wolfson, *Why Marriage Matters* 18 (2004) (identifying marriage equality as “a precondition for [civil] rights, [legal] protections, . . . inclusion, [and] full citizenship”). Courts have also echoed these sentiments. See, e.g., *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 949 (Mass. 2003) (describing marriage as “one of our community’s most rewarding and cherished institutions”); *Hernandez v. Robles*, 855 N.E.2d 1, 22 (N.Y. 2006) (Kaye, C.J., dissenting) (“For most of us, leading a full life includes establishing a family. Indeed, most New Yorkers can look back on, or forward to, their wedding as among the most significant events of their lives.”).

9. By “mainstream discourse” I do not mean academic discourse. As I note elsewhere, there have been a number of academic voices that have been critical of marriage as an institution and that have emphasized its role as a vehicle of regulation and subordination. See *infra* note 20 and accompanying text (detailing different academic voices). These perspectives, however, largely have been absent from more popular accounts of marriage. With that in mind, I also characterize this discourse as the “popular discourse.”

10. See, e.g., Tara Parker-Pope, *Is Marriage Good for Your Health?*, *N.Y. Times Magazine*, Apr. 18, 2010, at 46 (documenting benefits of successful marriages, including good health).

11. See *infra* Part IV (discussing right-to-marry jurisprudence). Of course, the high level of divorce in contemporary society makes clear that not all marriages result in the attainment of freedom and joy. That said, the high rate of remarriage suggests that the narrative of marriage as an institution that will foster personal satisfaction, happiness, and joy is pervasive and individuals remarry (and remarry and remarry) in the hope of eventually securing a marriage that succeeds on all of these fronts. See *Remarriage Trends in the United States*, Nat’l Healthy Marriage Res. Ctr. (Jan. 1, 2009), <http://www.healthy-marriageinfo.org/download.aspx?id=310> (on file with the *Columbia Law Review*) (noting of divorced people twenty-five and older, 55% of men and 44% of women remarry).

access to marriage constitutes a traumatic injury, signaling one's exclusion from the polity.¹²

But these narratives are not the only possible views of marriage. A closer look at marriage's past suggests a more complicated narrative. Until the mid-twentieth century, marriage played an important role in the adjudication, enforcement, and even definition of the crime of seduction.¹³ Enacted in roughly forty-one U.S. jurisdictions in the mid-to-late nineteenth century, seduction statutes made it a crime to "seduce[] and ha[ve] illicit connection with an unmarried female of previous chaste character" under a "promise of marriage."¹⁴ Seduction was a felony in most jurisdictions, and the penalty was severe. Those convicted of the crime often faced between one and five years' imprisonment in a penitentiary;¹⁵ in some states, the penalty was as high as twenty years' imprisonment.¹⁶

In most jurisdictions, seduction statutes prescribed a specific defense to the offense: marriage.¹⁷ Consequently, the defendant and victim had the power to quash the prosecution and put the ugliness of the incident behind them with two simple words: "I do." When faced with the prospect of a felony conviction and imprisonment, the defendant could simply marry the victim, thereby avoiding liability for the crime.

But marriage did not function solely as a bar to prosecution for seduction. It was understood as a punishment for the crime. Although it differed from incarceration and chain-gang labor, marriage was nonetheless understood as an alternative sanction capable of remedying the harms wrought by seduction.

12. See Katherine M. Franke, *Eve Sedgwick, Civil Rights, and Perversion*, 33 *Harv. J.L. & Gender* 313, 317 (2010) (discussing litigation in which same-sex marriage advocates highlight "traumatic" and "shameful" aspects of exclusion from marriage).

13. As discussed in more detail in Part I, the crime of seduction was distinct from the tort of seduction and the breach of a promise to marry action, both of which were civil causes of action aimed at addressing some of the perceived harms of nonmarital sex. See *infra* notes 50–71 and accompanying text (discussing tort of seduction).

14. N.Y. Penal Code § 330 (Albany, Weed, Parsons & Co., 1865).

15. See, e.g., *id.* (punishing crime of seduction with "imprisonment in a state prison not exceeding five years, or by imprisonment in a county jail not exceeding one year, or by a fine not exceeding one thousand dollars, or by both").

16. See Ga. Penal Code § 378 (Foote & Davies Co., 1910) (punishing seduction with up to twenty years' imprisonment); *Mosley v. Lynn*, 157 S.E. 450, 452 (Ga. 1931) (noting penalty for seduction under Georgia law).

17. See Iowa Code § 3868 (1879) (repealed 1976) (providing that "[i]f before judgment upon an indictment, the defendant marry the woman thus seduced, it is a bar to any further prosecution for the offense"); Ky. Rev. Stat. § 436.010 (1973) (repealed 1974) (providing marriage shall serve as a bar to prosecution for seduction); N.J. Stat. § 2A:142-2 (1969) (repealed 1978) ("If the offender marries the female at any time before sentence, the sentence shall be suspended and he shall be discharged from custody; and if he marries the female after sentence, he shall be discharged from imprisonment."); N.Y. Penal Code § 331 (Weed, Parsons & Co., 1865) ("The subsequent marriage of the parties is a defense to a prosecution for [seduction].").

Today, the seduction statutes of the nineteenth century are in desuetude, if they have not been repealed entirely. For some, this might suggest that marriage's role in the enforcement of criminal seduction is merely a quirk of history, of little relevance to the present. This is not the case. In fact, the history of marriage and criminal seduction offers important insights for contemporary discussions of marriage.

This Article recounts the history of marriage as punishment and, in doing so, makes a series of descriptive and normative claims. First, the Article makes clear that the oft-used phrase "the old ball and chain" goes beyond the metaphorical, further elaborating the way in which criminal law and family law worked in tandem to forge the normative contours of intimate life. In so doing, it also brings to the fore an overlooked history in which marriage figured prominently in the operation of the criminal justice system. Second, this history suggests how divergent our contemporary views of marriage and punishment are from those held only a few generations ago. Today, our understanding of punishment is premised on physical confinement and the imposition of pain and suffering. By contrast, the nineteenth century offered a more elastic view of punishment that did not rely exclusively on imprisonment and hard labor. Similarly, the contemporary understanding of marriage diverges sharply from that held in the nineteenth century. Today, marriage is presented as an unvarnished good. However, in the not-so-distant past, marriage was a more complicated institution. Although its positive attributes were acknowledged, marriage also was understood to include gendered obligations and responsibilities that deprived spouses of certain liberties and channeled them into a disciplined way of life.

Third, in addition to demonstrating the divergence between the contemporary discourse of marriage and its more complicated history, this Article contends that the history of marriage as punishment usefully illuminates the disciplinary content that persists in modern marriage. This disciplinary content is obscured by the popular discourse of marriage, which accentuates its many tangible and intangible benefits, and the legal discourse of the right to marry, which frames access to marriage as an essential civil right. The Article maintains that this disciplinary character should be presented more transparently in both discourses, providing a more accurate depiction of the institution.

But as the Article argues, it is not enough to simply be more transparent and forthright about marriage's disciplinary character. The history of marriage as punishment also suggests the totality of state regulation of sex and sexuality. In the period when seduction prosecutions flourished, the criminal act was punished in one of two ways—it was subject either to criminal law's penalties or to marriage. Accordingly, there was little space

for sex outside the rubrics of marriage and crime, and no refuge from state regulation of sex.¹⁸

This history, the Article contends, has important implications for the current debate over same-sex marriage. In the wake of *Lawrence v. Texas*,¹⁹ there has been a vigorous drive toward expanding civil marriage to include same-sex couples. This effort has been strongly supported in some quarters and roundly denounced in others. Less present in the debate have been the dissenting voices of those who are critical of marriage *because* it is a vehicle of state discipline and regulation. Both feminists and queer theorists have emphasized marriage's role as a vehicle of state regulation and discipline, and many have been skeptical of marriage and social movements predicated on securing marriage rights for marginalized groups.²⁰ Instead of greater access to marriage, some of these critics have called for liberty and autonomy for sex, whether in marriage or not.

In underscoring marriage's disciplinary role and the totality of state regulation of sex and sexuality, the history of marriage as punishment helps to render intelligible these critiques and their concomitant calls for greater sexual liberty. Recognizing marriage as a vehicle of state-imposed discipline and regulation makes clear that expanding marriage to new constituencies does little to undermine its disciplinary force; it merely expands the state's disciplinary reach to include new subjects. Accordingly, this Article argues that the history of marriage as punishment is important, not only for making transparent the way in which marriage

18. Today, state regulation of sex persists, as this Article notes. See *infra* notes 300–320 and accompanying text. This regulation, however, is not limited to the interventions of family law and criminal law. See, e.g., Vicki Schultz, *The Sanitized Workplace*, 112 *Yale L.J.* 2061, 2088 (2003) (arguing sexual harassment law and employment law now contribute to regulation of sex and articulation of acceptable and unacceptable sexual practices).

19. 539 U.S. 558 (2003).

20. For critiques of marriage, see, for example, Emma Goldman, *Marriage and Love*, in *Red Emma Speaks: An Emma Goldman Reader* 204, 210–11 (Alix Kates Shuman ed., 1996) (“The institution of marriage makes a parasite of woman It incapacitates her for life’s struggle, annihilates her social consciousness, paralyzes her imagination, and then imposes its gracious protection, which is in reality a snare, a travesty on human character.”); Michael Warner, *The Trouble With Normal: Sex, Politics, and the Ethics of Queer Life* 82–115 (1999) (arguing marriage discriminates because it “sanctifies some couples at the expense of others”); Lauren Berlant, *Intimacy: A Special Issue*, 24 *Critical Inquiry* 281, 286 (1998) (critiquing focus on marriage on ground that it renders those outside of marriage “unimaginable, even often to themselves”); Paula L. Ettelbrick, *Since When Is Marriage a Path to Liberation?*, in *Same-Sex Marriage: The Moral and Legal Debate* 164, 165 (Robert M. Baird & Stuart E. Rosenbaum eds., 1997) (“Marriage runs contrary to two of the primary goals of the lesbian and gay movement: the affirmation of gay identity and culture and the validation of many forms of relationships.”); Carl Wittman, *A Gay Manifesto*, in *Out of the Closets: Voices of Gay Liberation* 330, 333 (Karla Jay & Allen Young eds., 1972) (“Traditional marriage is a rotten, oppressive institution.”); Judith Butler, *Is Kinship Always Already Heterosexual?*, *Differences: J. Feminist Cultural Stud.*, Spring 2002, at 14, 18 (arguing focus on marriage renders illegible and untenable “sexual practices and relationships that fall outside the purview of the sanctifying law”).

continues to be a tool of state discipline and regulation, but also because it suggests the importance of—and need for—a place for sex and sexuality beyond the disciplinary domain of the state.

This Article proceeds in five parts. Parts I and II provide a history of criminal seduction laws and their operation, including the use of marriage as a bar to prosecution for the crime of seduction. Part III argues that marriage operated as more than just a bar to prosecution for seduction; it could also be seen as an alternative punishment for seduction—one that could, as effectively as the penitentiary, achieve the goals of punishment and remedy the harms caused by seduction.

Part IV turns to the present and notes the divergence between past understandings of marriage and punishment and contemporary understandings of these institutions. Despite the divergence, vestiges of marriage's punitive past persist in that marriage continues to be a disciplinary institution today. Accordingly, Part I explains that evidence of marriage's disciplinary qualities can be glimpsed in the legal discourse concerning the right to marry. To illustrate this, it revisits key cases from the right to marry jurisprudence for the purpose of recovering the disciplinary currents that undergird them.

Part V locates marriage within a broader theoretical discussion of state-sanctioned discipline. This section argues that marriage—like more conventional forms of discipline—produces in, and imposes upon, the individual a disciplined identity that is internalized, performed, and replicated. Recognizing that marriage continues to be a disciplinary practice complicates both the popular discourse of marriage and the legal discourse surrounding the right to marry and makes clear the importance of greater transparency in our depiction of marriage and the right to marry.

Offering a more accurate view of marriage and of the right to marry will allow individuals to make an informed choice about whether or not to participate in marriage. However, such accuracy will also highlight the fact that there are few options for those who wish to have an intimate life outside of marriage, but do not want to be labeled as criminals or deviants. Accordingly, Part V argues that transparency in our depiction of marriage and the right to marry is insufficient. Our jurisprudence should not only be clear about what is entailed in the marriage right, it should also identify and protect a space for sex and sexuality beyond the disciplinary domain of the state.

I. CRIMINALIZING SEDUCTION

On October 31, 1843, Amelia Norman, a sixteen-year-old servant girl, approached Henry Ballard, a New York City merchant, in his store and broke her parasol over his head.²¹ This was no ordinary assault. Norman and Ballard had a history. Upon meeting Norman three years earlier, Ballard plied her with love notes and fancy meals and, ultimately, tricked her

21. Ann Jones, *Women Who Kill* 147 (1980).

into accompanying him to a brothel, where he seduced her by promising to make her his wife.²² Upon discovering that Norman was pregnant, Ballard encouraged her to leave her job and pose as his wife.²³ When the child was born, Ballard lodged Norman and the baby in a brothel and promptly abandoned her to take up with another young, unmarried woman.²⁴

Norman found a job ironing shirts, a respectable, though poorly paid, occupation.²⁵ Requiring additional financial support for herself and her child, Norman tracked Ballard down on October 31.²⁶ Her pleas for assistance were unavailing. Ballard instructed her to “go and get her living as other prostitutes did.”²⁷ He then called the police to have Norman charged with vagrancy and prostitution (it was at this point that Norman struck Ballard with her parasol). One night later, as Ballard emerged from Astor House, Norman plunged a knife into his chest in an unsuccessful murder attempt.²⁸

The criminal trial that followed should have been straightforward. As the district attorney observed, Norman had “committed a premeditated assault upon Mr. Ballard, with intent to take his life—for which the Jury were bound to find her guilty.”²⁹ Yet the jury did no such thing. Despite the overwhelming evidence of Norman’s guilt, the jury deliberated for only eight minutes and returned an acquittal.³⁰ It was, in the words of Lydia Maria Child, a prominent essayist, a “triumph of the moral sentiments over legal technicalities.”³¹

Amelia Norman’s trial for attempted murder was a cause célèbre because it evinced the broad social anxiety over the problem of seduction and its perceived consequences. Nearly ten years before Amelia Norman violently confronted Henry Ballard, reformers and politicians were growing concerned about the increasing visibility of prostitution in the urban

22. Trial of Amelia Norman, N.Y. Evening Post, Jan. 17, 1844, at 2 (drawing from defense counsel’s summary of facts).

23. *Id.*

24. *Id.*

25. Jones, *supra* note 21, at 147.

26. Andrea L. Hibbard & John T. Parry, Law, Seduction, and the Sentimental Heroine: The Case of Amelia Norman, 78 *Am. Literature* 325, 333 (2006); Trial of Amelia Norman, *supra* note 22, at 2.

27. Acquittal of Amelia Norman!, N.Y. Daily Trib., Jan. 20, 1844, at 2.

28. Trial of Amelia Norman, *supra* note 22, at 2.

29. Jones, *supra* note 21, at 147–48.

30. *Id.* at 148.

31. Hibbard & Parry, *supra* note 26, at 333 (quoting Lydia Maria Child, Letter from New York, No. V, Boston Courier, Feb. 6, 1844, at 2).

landscape. When efforts to rehabilitate prostitutes proved unsuccessful,³² reformers focused on eliminating the causes of prostitution.³³

Of course, as William Sanger observed, women entered prostitution for different reasons. Sanger, the resident physician at the state prison in New York City, was the author of *The History of Prostitution*,³⁴ a comprehensive study of prostitution in various societies, including New York City. For his study, Sanger surveyed 2,000 prostitutes on a number of topics.³⁵ A majority of Sanger's respondents claimed that they became prostitutes because of external pressures, like a lack of employment or a need to provide for children or other dependents.³⁶ Still, 513 of Sanger's respondents claimed that they had entered prostitution because they were "[i]nclin[ed]" to do so,³⁷ citing no external pressures at all. Sanger, however, was skeptical; his opinion reflected prevailing views that women were sexually passive, morally fit, and therefore not intrinsically inclined to prostitution.³⁸ In Sanger's view, any inclination had to be the product of "some . . . stimulating cause,"³⁹ rather than an expression of actual desire.

But what could entice a right-thinking woman from the path of virtue? The responses provided by 258 of Sanger's subjects suggested an answer: They found their way to prostitution after being seduced and abandoned by an unscrupulous man.⁴⁰ Sanger, however, believed that this

32. Cf. Rodney Hessinger, *Seduced, Abandoned, and Reborn: Visions of Youth in Middle-Class America, 1780–1850*, at 48–50 (2005) (noting "the Magdalen Society's asylum was able to attract only small numbers to its doors").

33. Larry Whiteaker, *Seduction, Prostitution, and Moral Reform in New York, 1830–1860*, at 86 (1997) (discussing shift from prostitute reclamation to prevention).

34. William W. Sanger, *The History of Prostitution: Its Extent, Causes, and Effects Throughout the World* (N.Y., Harper & Bros. 1858) [hereinafter Sanger, *History*].

35. *Id.* at 452.

36. *Id.* at 523 (noting 1,698 of 2,000 prostitutes surveyed were "[d]ependent solely upon prostitution" as means of support); *id.* at 508–09 (documenting one respondent who claimed "[m]y boys are now living in the city, and I support them with what I earn by prostitution"); *id.* at 509 (documenting one respondent who claimed that after becoming pregnant by her husband, whom she later discovered was married to another woman, she "had no other way to live than by prostitution").

37. *Id.* at 488.

38. *Id.* at 489. Sanger's understanding of sexual desire was strongly gendered. Desire—sexual and otherwise—was an essential attribute of masculinity; women, by contrast, were created with "the beneficent design of repressing those evils" to which men were privy. *Id.* Put differently, only men were made for sex and for the expression of sexual desire. However, their innate proclivities toward sex were potentially dangerous and destabilizing, and therefore had to be channeled into more productive venues. Through marriage—and the moralizing influence of a wife—the male proclivity toward licentiousness and vice could be channeled into the domesticated sexuality of the marital family. See Rebecca M. Ryan, *The Sex Right: A Legal History of the Marital Rape Exemption*, 20 *Law & Soc. Inquiry* 941, 947 (1995) (noting men were perceived as owning "a natural sexual authority over wom[e]n" that could be "morally set free in marriage").

39. Sanger, *History*, *supra* note 34, at 489.

40. *Id.* at 488.

sizable number actually understated seduction's role as a contributing factor to prostitution:

It has already been shown that under the answer "Inclination" are comprised the responses of many who were the victims of seduction before such inclination existed, and there can be no question that among those who assign "Drink, and the desire to drink" as the cause of their becoming prostitutes, may be found many whose first departure from the rules of sobriety was actuated by a desire to drive from their memories all recollections of their seducers' falsehoods. Of the number who were persuaded by women, themselves already fallen, to become public courtesans, it is but reasonable to conclude that many had previously yielded their honor to some lover under false protestations of attachment and fidelity.⁴¹

Sanger, like many of his contemporaries, believed the decision to become a prostitute originated with a single event: seduction at the hands of a duplicitous man. And even if a woman later credited other factors with her entrance into prostitution, it was that initial moment of seduction that set her on the path to vice. Once seduced and debauched, a woman's prospects for marriage and long-term economic security were negligible.⁴² If she had become pregnant by her seducer, her economic situation was even more complicated—and dire. Few professions welcomed women, and those that did—the needle trades and domestic work—were too ill-paid to support a single woman living alone or a single mother and her children.⁴³ If destitution was a cause of prostitution, then it was seduction that caused destitution, and indirectly, prostitution. If inclination was a cause of prostitution, then it was seduction—the "stimulating cause"⁴⁴—that overrode women's sexual passivity and propelled them towards prostitution. Accordingly, it was the problem of seduction that garnered the attention of nineteenth-century moral reformers.

Critically, the threat of seduction as a social problem went beyond the increasing visibility of prostitution. First, the growing prevalence of seduction—and the permissive attitude towards it—underscored the sexual double standard that condemned women's sexuality outside of marriage while permitting men broad sexual license, in and outside of marriage.⁴⁵ Tolerating the seducer (who in all likelihood was also a consumer of commercial sex) and permitting him access to polite society, while

41. *Id.* at 492.

42. See *id.* at 495 ("Beyond the fact that she is . . . ruined, the victim has endured an attack upon her principles which must materially affect her future life."); Nancy F. Cott, *Passionlessness: An Interpretation of Victorian Sexual Ideology, 1790–1850*, 4 *Signs* 219, 229 (1978) (indicating marriage was "principal means women had of supporting themselves").

43. Sanger, *History*, *supra* note 34, at 525–28 (discussing economic prospects for women working as domestics or in needle trades).

44. *Id.* at 489.

45. Barbara Meil Hobson, *Uneasy Virtue: The Politics of Prostitution and the American Reform Tradition* 49 (1987) (discussing sexual double standard); Jane E.

shunning his victim, seemed to many reformers a gross injustice.⁴⁶ It provided no incentive for men to reform their behavior by limiting their sexual activities to marriage, and instead tacitly condoned their sexual proclivities outside of marriage.⁴⁷ Such broad license created the conditions for the growing incidence of prostitution, while also cultivating a class of sexual predators free to prey upon unwitting young women.⁴⁸ It created an atmosphere of sexual danger for young women, while also threatening the solidity of the marital family and a social system that cordoned off marriage as the licensed locus of sexual expression.⁴⁹

Reformers insisted that the legal system was uniquely suited for extirpating seduction and its consequences. But there already existed legal means for addressing seduction. A vestige of the common law tradition, the tort of seduction permitted fathers a cause of action against those who seduced their daughters.⁵⁰ The tort was predicated on the ground that the seducer had deprived the father of his daughter's "services" or household labor.⁵¹ Although it was often used in the nineteenth century,

Larson, "Women Understand So Little, They Call My Good Nature 'Deceit': A Feminist Rethinking of Seduction, 93 *Colum. L. Rev.* 374, 377, 388 (1993) (same).

46. See Hobson, *supra* note 45, at 50 ("The world contains women who punish the faults of their own sex with unrelenting severity, and yet value a man in proportion to the number of women whom he has destroyed."); Hibbard & Parry, *supra* note 26, at 348 (discussing literary opposition to sexual double standard).

47. See Mary Frances Berry, *Judging Morality: Sexual Behavior and Legal Consequences in the Late Nineteenth-Century South*, 78 *J. Am. Hist.* 835, 848–55 (1991) (describing general reluctance to punish men harshly for sexual indiscretions).

48. See Hobson, *supra* note 45, at 55 (explaining how female reformers cast men who engaged in extramarital sex as "predators, wolves in the streets, monsters, and vultures").

49. See John D'Emilio & Estelle B. Freedman, *Intimate Matters: A History of Sexuality in America* 16 (2d ed. 1997) (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"); Lawrence M. Friedman, *Crime and Punishment in American History* 127 (1993) [hereinafter Friedman, *Crime and Punishment*] (discussing marriage's place as approved site for sexual activity); Morris Ploscowe, *Sex and the Law* 1 (1951) ("Only in marriage is sex expression socially and legally acceptable. The jailer and the social censor cast their shadow across non-marital and extra-marital sexual behavior."); Ariela R. Dubler, *Immoral Purposes: Marriage and the Genus of Illicit Sex*, 115 *Yale L.J.* 756, 777 (2006) [hereinafter Dubler, *Immoral Purposes*] ("Marriage, in other words, was the core legal site for licit sex."); Melissa Murray, *Strange Bedfellows: Criminal Law, Family Law, and the Legal Construction of Intimate Life*, 94 *Iowa L. Rev.* 1253, 1268 (2009) [hereinafter Murray, *Strange Bedfellows*] (discussing marriage's place as "licensed locus for sexual activity").

50. See Larson, *supra* note 45, at 382–83 (discussing common law framing of tort as father's right); Lea VanderVelde, *The Legal Ways of Seduction*, 48 *Stan. L. Rev.* 817, 838–40 (1996) (same).

51. For seduction lawsuits brought by fathers for loss of a daughter's services, see, for example, *Wooten v. Wilkens*, 39 *Ga.* 223, 223 (1869) (involving father's claims of lost services of daughter, who died in childbirth); *Bartlett v. Kochel*, 88 *Ind.* 425, 425 (1882) (addressing father's claim of lost services of his daughter); *Pruitt v. Cox*, 21 *Ind.* 15, 15 (1863) (same).

industrialization and concomitant changes in the nature of family life limited the tort's usefulness.⁵²

One limiting factor was its common law origins as a means of paternal control. The shift from an agrarian society to a more industrialized one meant that some daughters would leave their fathers' households to work and live apart from their families.⁵³ Their removal from the household not only exposed them to new encounters with the opposite sex (whether wanted or unwanted); it also removed them from their fathers' legal protection.⁵⁴ In order to prevail on a cause of action for the tort of seduction, a father had to establish his mastery over his daughter.⁵⁵ Although many courts recognized that difficult economic circumstances might prompt a father to allow his daughter to leave the household to work,⁵⁶ if the daughter exhibited *too* much independence—*too* much control over her labor and wages—she was presumed to be emancipated and no longer under her father's protection.⁵⁷ In such circumstances, a

52. Larson, *supra* note 45, at 384 (noting industrialization and urbanization prompted changes in "relationship between fathers and daughters" that undermined tort's effectiveness).

53. *Id.* (noting urbanization and work opportunities took daughters out of their family homes and beyond their fathers' control); VanderVelde, *supra* note 50, at 820 (describing increase in women leaving their fathers' homes for work).

54. VanderVelde, *supra* note 50, at 825 (explaining that women were required to "remain in a subordinate status" to their fathers for purposes of seduction actions).

55. See, e.g., *Anthony v. Norton*, 56 P. 529, 531 (Kan. 1899) (noting that, at common law, father-daughter relation was not sufficient to sustain action for seduction absent evidence of daughter's service to father); *Mercer v. Walmsley*, 5 H. & J. 27, 31 (Md. 1820) (noting law will imply master-servant relationship when daughter is minor unless father takes action to destroy that relationship); *Kennedy v. Shea*, 110 Mass. 147, 149–50 (1872) (holding that father must show actual or constructive master-servant relationship to prevail on action for daughter's seduction); *Nickleson v. Stryker*, 10 Johns. 115, 117 (N.Y. Sup. Ct. 1813) (denying recovery to father whose adult daughter was not actually in his service); see also VanderVelde, *supra* note 50, at 871 (noting if father relinquished control over daughter, he could not prevail on seduction action).

56. See, e.g., *Zerfing v. Mourer*, 2 Greene 520, 521 (Iowa 1850) (allowing father to recover for seduction because his "destitute situation require[d] the absence of his child from [his] vigilance" and thus did not constitute "careless indifference" of her debauchery); *Anthony*, 56 P. at 530 (suggesting requirement that father establish his daughter's service would leave "without redress the poor man, whose child is sent unprotected to earn her bread amongst strangers").

57. See, e.g., *Mercer*, 5 H. & J. at 36 (noting that where seduced daughter "is her own mistress, and works for herself," her father cannot maintain seduction claim); *Nickleson*, 10 Johns. at 117 (holding father could not recover for seduction of his adult daughter who was not in fact his servant); *Lee v. Hodges*, 54 Va. (13 Gratt.) 726, 729 (1857) (refusing claim for seduction where daughter "was of full age, living away from her father's house, under a contract made by her and for her own exclusive benefit, after she had attained her majority, when she had a right to make her own contracts"). It is worth noting that the withdrawal of legal protection for independent women likely provided strong incentives for women to remain under their fathers' control.

father was no longer entitled to recover for the loss of a daughter's services via the tort of seduction.⁵⁸

Additionally, the tort of seduction was an action initially reserved for fathers.⁵⁹ A seduced woman could not bring an action against her seducer, nor could her mother or any other guardian sue on her behalf.⁶⁰ Although efforts were later made to expand the tort of seduction to encompass suits brought by victims and by other guardians,⁶¹ many believed that a civil cause of action, even with these modifications, was inadequate

58. See, e.g., *Anthony*, 56 P. at 529 (“[A]n action for the seduction of a daughter, brought in the parental capacity alone, is not maintainable, except as allowed by statute.”); *Lamb v. Taylor*, 8 A. 760, 761 (Md. 1887) (“[A] father may maintain an action for the seduction of an adult daughter, provided she is living with him, and rendering him any service, however slight.”); *Mercer*, 5 H. & J. at 31–32 (“[W]hen a daughter is over the age of 21, and not in the actual service of her father when the injury is done, he cannot sustain the action [for seduction].”); *Kennedy*, 110 Mass. at 149–50 (“In order to maintain an action [for seduction], the plaintiff is required to prove that the relation of master and servant between himself and his daughter existed”); *Stiles v. Tilford*, 10 Wend. 338, 340 (N.Y. Sup. Ct. 1833) (“[L]oss of service must be shown”); *Ingerson v. Miller*, 47 Barb. 47, 50 (N.Y. App. Div. 1866) (“The action of seduction has its foundation in the relation of master and servant, and loss of service or actual injury to the plaintiff’s rights as master must be averred and proved.”); *McDaniel v. Edwards*, 29 N.C. (7 Ired.) 408, 410 (1847) (“[T]he action will not lie, when the daughter is of full age, and not living in the father’s family, but in the actual employment of another person.”); *Hornketh v. Barr*, 8 Serg. & Rawle 36, 39–40 (Pa. 1822) (holding father may recover for seduction of minor child or adult child living with him because of master and servant relationship); *Davidson v. Abbott*, 52 Vt. 570, 574 (1880) (“[T]rifling acts of service will enable the parent to sustain the action; and if such relation exists *de facto*; it is sufficient.”); *Lee*, 54 Va. (13 Gratt.) at 729 (holding father may not recover for seduction where daughter was of age and did not live with parents). For cases that raise different circumstances under which a daughter would be considered out of her father’s control, see, for example, *Bolton v. Miller*, 6 Ind. 262 (1855); *Emery v. Gowen*, 4 Me. 33 (1826); *Mulvehall v. Millward*, 11 N.Y. 343 (1854); *Martin v. Payne*, 9 Johns. 387 (N.Y. Sup. Ct. 1812); *Mohry v. Hoffman*, 86 Pa. 358 (1878).

59. *VanderVelde*, supra note 50, at 868 (noting tort of seduction failed to recognize injuries to fatherless daughters).

60. But see *Mosley v. Lynn*, 157 S.E. 450, 452 (Ga. 1931) (permitting, in statutory departure from common law tradition, a mother to sue for seduction of her daughter); *Gimbel v. Smidth*, 7 Ind. 627, 630 (1856) (allowing mother to recover for the seduction of her daughter); *Abbott v. Hancock*, 31 S.E. 268, 269 (N.C. 1898) (allowing a mother to bring suit); *Davidson*, 52 Vt. at 570–71 (allowing mother’s seduction action where father abandoned family when daughter was one year old); see also *VanderVelde*, supra note 50, at 882–83 (arguing shift towards allowing mothers to recover for seduction was animated by concerns that fatherless daughters would swell charitable rolls). Reforms of code pleading in the 1850s also modified the procedures in place for seduction suits, allowing young women to bring suits in their own right. However, this change was animated by concerns that seduction victims, bereft of legal remedies for the loss of their virtue and, in many cases, pregnancies, would resort to abortion or infanticide in order to conceal their injuries. *Id.* at 891–92.

61. See *VanderVelde*, supra note 50, at 882 (discussing reforms to tort that permitted other guardians to bring seduction actions).

to address the significant social problems wrought by seduction.⁶² Tort actions merely articulated the harm done by one private actor to another; they were insufficient to name and address the social harm that society suffered as a result of the defendant's actions.⁶³ This posed a particular concern for moral reformers who understood seduction to encompass a broader harm to society, as well as an individual injury to the victim.⁶⁴

Further, while a tort action could result in a significant damages award against the seducer, many feared that such measures were inadequate as redress for the harm caused.⁶⁵ A monetary award had little deterrent effect on those with means.⁶⁶ Wealthy men would simply pay the sum awarded and move on to their next unwitting victim.⁶⁷ Such an outcome merely nurtured the sexual double standard that excused male sexual license while condemning similar license in women.⁶⁸ Others questioned the propriety of money damages as redress for seduction. For these skeptics, money damages for the loss of a young woman's virtue veered uncomfortably close to prostitution while doing too little to condemn the act and the responsible actors.⁶⁹ Still others objected to the legal fiction inherent in the tort—the injury done to a young woman was only redressable because she and her services were considered another's

62. Stephen Robertson, *Seduction, Sexual Violence, and Marriage in New York City, 1886–1955*, 24 *Law & Hist. Rev.* 331, 344 (2006) [hereinafter Robertson, *Seduction*] (suggesting tort of seduction was seen as insufficient to address moral consequences of act).

63. *Id.* at 345 (noting seduction was believed to “damage[] institutions central to the emerging middle-class vision of society”).

64. This understanding of seduction accords with the views of Emile Durkheim who understood criminal acts to be an attack on the community at large. See Emile Durkheim, *Division of Labor in Society* 80–81 (George Simpson trans., MacMillan Co. 1933) (1893) (describing crime as “particular immorality which society reproves by means of organized punishment”).

65. Robertson, *Seduction*, *supra* note 62, at 345 (noting seducer was perceived to have “systematically attacked the building blocks of middle-class identity—the female purity[,] . . . the young[,] . . . the marriage that provided the intimacy that sustained a middle-class couple, and the family whose support allowed males to succeed in the public sphere”).

66. See Hobson, *supra* note 45, at 68 (“[T]he most important feature of the proposed bill [which imposed a prison sentence as well as a fine] was that it was a deterrent for the upper class man, who would no longer be able to make a cash settlement . . . [but would] end up behind bars”); Robertson, *Seduction*, *supra* note 62, at 346 (explaining why reformers believed criminal punishment, rather than money damages, was necessary to deter wealthy men).

67. Hobson, *supra* note 45, at 58, 68.

68. D’Emilio & Freedman, *supra* note 49, at 132–38 (discussing sexual double standard in nineteenth century). See generally Keith Thomas, *The Double Standard*, 20 *J. Hist. Ideas* 195 (1959).

69. Robertson, *Seduction*, *supra* note 62, at 345–46 (suggesting civil actions for seduction placed cash value on female chastity and commercialized young women’s sexuality).

property.⁷⁰ A legal remedy that regarded the victim as chattel seemed to many female reformers no remedy at all.⁷¹

If existing civil actions were ill suited to address the harms of seduction, then the existing body of criminal law dealing with sexual impropriety was also inapt. Although many forms of nonmarital sex were criminally prohibited in most jurisdictions, enforcement was unpredictable and penalties were quite light.⁷² Fornication and adultery often were prosecuted as misdemeanor offenses, punishable by minimal jail time or a fine.⁷³ Although rape was a felony offense in all jurisdictions, rape victims faced many obstacles to successfully prosecuting the crime.⁷⁴ Further, the legal requirements to establish rape were more consistent with an account of stranger rape. They were less compatible with the classic case of seduction, in which the victim either was acquainted with the offender, or finally had yielded to the offender's entreaties after much cajoling.⁷⁵

70. Hobson, *supra* note 45, at 67.

71. As one reformer mused:

What is the redress for a broken heart, blighted reputation, the desertion of friends, the loss of respectable employment, the scorn and hissing of the world? Why, the woman must acknowledge herself the servant of somebody, who may claim wages for her lost time! With indignation and scorn, I appeal to common sense and common justice, against this miserable legal fiction—this impudent assumption that I am a chattel personal. It is a standing insult to woman kind . . .

Lydia Maria Child, Letter from New York, No. V, *Bos. Courier*, Feb. 6, 1844, at 2, reprinted in 9 *The Universalist Union* 218, 219 (P. Price ed., Albany Universalist Union Press 1844). The tort of seduction was later reformed to permit women to bring seduction claims in their own right. Code of Civil Procedure of the State of New York 245 (Albany, Weed, Parsons & Co. 1850).

72. See Friedman, *Crime and Punishment*, *supra* note 49, at 128–31 (noting fornication and adultery were crimes but that they were generally ignored by law enforcement unless practiced publicly); Hobson, *supra* note 45, at 31–33 (discussing lenient approach for punishment of certain sexual offenses); Ploscowe, *supra* note 49, at 143–44 (discussing use of fines as punishment for fornication and adultery in colonial America).

73. The exceptions to this lenient approach were sodomy (the infamous crime against nature), bestiality, and pederasty, which were usually felony offenses in most jurisdictions. William N. Eskridge, Jr., *Dishonorable Passions: Sodomy Laws in America 1861–2003*, at 17, 19–20, 53–54 (2008).

74. See, e.g., *State v. Patrick*, 17 S.W. 666, 674 (Mo. 1891) (emphasizing victim's presentation of "all tokens of a rape" in order to successfully prove rape); *Johnson v. State*, 17 Ohio 593, 595 (1848) (noting difficulty of securing rape conviction); *Rhea v. State*, 17 S.W. 931, 932 (Tex. Ct. App. 1891) (reversing rape conviction and noting victim's failure to cry out and to immediately report alleged crime diminished her credibility); see also Robertson, *Seduction*, *supra* note 62, at 347 (noting difficulty of satisfying corroboration requirement for rape); *VanderVelde*, *supra* note 50, at 857 (discussing legal obstacles to rape conviction).

75. See, e.g., *People v. Gibbs*, 38 N.W. 257, 258 (Mich. 1888) (noting defendant gave prosecutrix gifts to seduce her); *Rickey v. State*, 126 P.2d 753, 754 (Okla. Crim. App. 1942) (noting prosecutrix and defendant "kept company" for three years before alleged seduction); *Spangler v. Commonwealth*, 50 S.E.2d 265, 266 (Va. 1948) (noting prosecutrix and defendant exchanged love letters before alleged seduction); *Judd v. Commonwealth*,

Instead of reforming the tort of seduction or trying to shoehorn seduction into the existing complement of sexual crimes, reformers took a different tack: creating a new statutory crime specifically designed to address seduction and its attendant consequences.⁷⁶ Criminalizing seduction, reformers argued, would do more than the available civil actions by addressing the moral, rather than material, consequences of seduction.⁷⁷

Beginning in the 1830s, the New York Female Moral Reform Society, in conjunction with its rural auxiliary societies, initiated a petition drive to persuade the New York state legislature to enact an antiseduction criminal statute.⁷⁸ Reformers undertook similar efforts throughout the Northeast.⁷⁹ Although their efforts were initially unavailing, in time the reformers succeeded in stoking the flames of a moral panic with seduction at its center.⁸⁰ In addition to lobbying state legislators personally for reform, reform societies published personal accounts of seduction and its

135 S.E. 710, 711 (Va. 1926) (noting prosecutrix and defendant dated before alleged seduction); see also Robertson, *Seduction*, supra note 62, at 343, 356 (observing seduction actions in which “judges were unwilling to see rape” because parties appeared to be courting).

76. See Marilyn Wood Hill, *Their Sisters’ Keepers: Prostitution in New York City, 1830–1870*, at 140–43 (1993) (describing effort to criminalize seduction in New York); Hobson, supra note 45, at 66–67 (describing Massachusetts campaign for a criminal antiseduction statute); Hibbard & Parry, supra note 26, at 338–40 (discussing perceived inadequacy of existing civil remedies and corresponding push for criminalization); Larson, supra note 45, at 391 (discussing female reformers’ successful efforts to pass antiseduction statutes in New York and Massachusetts); Robertson, *Seduction*, supra note 62, at 340–41 (describing New York campaign for criminal antiseduction statute).

77. See Hobson, supra note 45, at 67 (discussing reformers’ belief that criminal sanctions would address moral wrong by stigmatizing and ostracizing offenders); Hibbard & Parry, supra note 26, at 338 (“The seduction tort, in sum, was not about the woman as person but the woman as valuable commodity.”); Robertson, *Seduction*, supra note 62, at 344 (noting tort of seduction was “concerned with the material, not the moral, consequences of sexual activity outside marriage”).

78. As a result, the New York legislature received thousands of petitions by 1840. See, e.g., *S. Journal*, 69th Sess., at 194 (N.Y. 1846) (reporting “petition of numerous inhabitants of the State, praying for the passage of a law to punish seduction . . . as [a] felon[y]”); *Assemb. J.*, 65th Sess., at 721 (N.Y. 1842) (reporting “petition of two thousand ladies of the city of Troy, praying for the passage of a law to punish seduction”); Hill, supra note 76, at 140–41 (noting 20,000 petitions were sent to New York legislature); Whiteaker, supra note 33, at 142 (noting campaign generated “some 40,000 petitions”); Larson, supra note 45, at 391 (discussing “influential” petition drive of the 1830s, which resulted in “thousands of signatures” and the “support of powerful male reformers”).

79. See, e.g., Michael Grossberg, *Governing the Hearth: Law and the Family in Nineteenth-Century America* 47–48 (1985) (discussing antiseduction campaign in Massachusetts).

80. For a discussion of the dynamics of moral panics, see generally Stanley Cohen, *Folk Devils and Moral Panics: The Creation of the Mods and Rockers* (3d ed. 2002) (introducing concept and analysis); Erich Goode & Nachman Ben-Yehuda, *Moral Panics: The Social Construction of Deviance* (1994) (investigating apparently irrational fears); Carol Sanger, *Infant Safe Haven Laws: Legislating in the Culture of Life*, 106 *Colum. L. Rev.* 753, 781–82 (2006) (summarizing framework and critiques).

consequences in their own magazines, *The Advocate of Moral Reform*⁸¹ and *The Friend of Virtue*.⁸² A series of well-publicized cases, like Amelia Norman's trial, underscored these efforts by putting a very public face on the problem of seduction.

By 1843, Pennsylvania enacted a law criminalizing seduction.⁸³ By 1848, New York had followed suit,⁸⁴ characterizing seduction as a "crime against society."⁸⁵ By the mid-twentieth century, seduction laws were well established in forty-one American jurisdictions.⁸⁶

The emergence of criminal seduction laws marked a new era instituting punishment in a manner that recognized women as individuals, rather than as property, and that did not require a sexual injury to rise to the level of rape in order to be punishable. These changes were largely driven by context—the changes wrought by industrialization expanded the opportunities for out-of-wedlock sexuality while simultaneously rendering informal community policing of sexual transgressions inadequate.⁸⁷ But if the turn toward the criminalization of seduction was driven by the demands of the new industrialism, it also was undergirded by a deeply rooted faith in older institutions—marriage and family.

II. MARRIAGE AND SEDUCTION

Although seduction statutes varied slightly in their language, the basic contours of the crime were consistent across jurisdictions. In most jurisdictions, the elements of the crime were: (1) an illicit connection (sexual intercourse); (2) with a young woman of previously chaste character

81. See Patricia Cline Cohen, *The Murder of Helen Jewett: The Life and Death of a Prostitute in Nineteenth-Century New York* 312–13 (1999) [hereinafter Cohen, *Murder*] (discussing *Advocate's* content); Whiteaker, *supra* note 33, at 123–37 (same).

82. See Brian Donovan, *Gender Inequality and Criminal Seduction: Prosecuting Sexual Coercion in the Early-20th Century*, 30 *Law & Soc. Inquiry* 61, 65 (2005) (discussing *Friend of Virtue's* content); Stephanie Wahab, "For Their Own Good?": Sex Work, Social Control, and Social Workers, a Historical Perspective, 29 *J. Soc. & Soc. Welfare*, Dec. 2002, at 39, 41 ("[T]he *Friend of Virtue* admonished women to watch out for libertine men cloaked in respectability.").

83. Act of Apr. 19, 1843, No. 165, § 1, 1843 Pa. Laws 348 ("The seduction of any female of good repute, under twenty-one years of age, with illicit connexion under promise of marriage, is hereby declared to be an indictable offence."); see also *Commonwealth v. Eichar*, 4 Clark 326 (Pa. 1850) (referring to new Pennsylvania seduction statute); *Commonwealth v. McCarty*, 2 Clark 351 (Pa. 1844) (same).

84. Act of Mar. 22, 1848, ch. 111, 1848 N.Y. Laws 148 ("Any man, who shall under promise of marriage, seduce and have illicit connexion with any unmarried female of previous chaste character, shall be guilty of a misdemeanor.").

85. Robertson, *Seduction*, *supra* note 62, at 345.

86. See Walter Wadlington, *Shotgun Marriage by Operation of Law*, 1 *Ga. L. Rev.* 183, 193 n.66 (1967) (documenting number of jurisdictions that criminalized seduction); see also *People ex rel. Scharff v. Frost*, 91 N.E. 376, 377 (N.Y. 1910) (noting criminal seduction statutes were "very common throughout the Union").

87. See *supra* notes 52–53 and accompanying text (describing how tort of seduction was increasingly ineffective due to industrialization).

(in fact or by reputation); and (3) under a promise to marry.⁸⁸ The Indiana statute aimed “to prevent the obtaining of the female’s consent to sexual intercourse” by “the arts of designing and unprincipled men, in whom she may repose trust and confidence, and to whose solicitations she may yield, believing that their promises of marriage are made in good faith, and will be fulfilled.”⁸⁹

The fact that the offending act occurred by virtue of a promise to marry was critical in the minds of legislators and the general public.⁹⁰ The crime of seduction did not apply to just *any* out-of-wedlock sex. Fornication statutes continued to apply to out-of-wedlock sex between willing parties, and importantly, the crime of rape, defined at common law as “carnal knowledge of a woman forcibly and against her will,”⁹¹ addressed nonconsensual sex. Seduction applied to a category of sex that was neither entirely consensual, nor as overtly coercive as rape.⁹² Indeed, seduction combined elements of consent *and* coercion.⁹³

88. See, e.g., Ohio Crim. Code § 7022 (Clarke 1900) (“A male person over eighteen years of age who, under promise of marriage, has sexual intercourse with any female person under eighteen years of age, and of good repute for chastity, shall be imprisoned in the penitentiary not more than three years, or in the county jail not more than six months.”); Texas Penal Code, art. 814 (1879) (“If any person, by promise to marry, shall seduce an unmarried female under the age of twenty-five years, and shall have carnal knowledge of such female, he shall be punished by imprisonment in the penitentiary not less than two nor more than five years, or by fine”); see also Thomas Welburn Hughes, *A Treatise on Criminal Law and Procedure* § 447 (1919) (noting most seduction statutes “require that the female be chaste in fact” and that “the inducement be a promise of marriage”).

89. *Callahan v. State*, 63 Ind. 198, 204 (1878).

90. See William L. Clark, Jr., *Hand-book of Criminal Law* § 87, at 196 (1894) (explaining “[t]o seduce . . . implies the use of promises and persuasions” and that in all cases, there must be “some sufficient promise or inducement, and the woman must yield because of the promises”); Hughes, *supra* note 88, at § 458 (observing “[m]ere fornication is not seduction,” and to constitute seduction, “there must be an adequate inducement to influence the female to part with her virtue”); Daniel S. Wright, “The First of Causes to Our Sex”: The Female Moral Reform Movement in the Antebellum Northeast, 1834–1848, at 151 (2006) (explaining campaign for antis seduction laws was predicated on “construing the woman as the victim of male crime, seduced by false promises” and antis seduction laws “all had this assumption written into them”).

91. 2 William Blackstone, *Commentaries* *210.

92. See Pamela Haag, *Consent: Sexual Rights and the Transformation of American Liberalism* 3 (1999) (describing seduction as “neither fully ‘chosen’ nor demonstrably ‘forced’”); Robertson, *Seduction*, *supra* note 62, at 343 (“Consent was not an issue in seduction law, so in terms of the logic of rape, seduction was positioned between consent and coercion.”).

93. See, e.g., *Tex. Crim. Code*, art. 1448 (1911) (specifying “[t]he promise of marriage is an essential element in the crime, and the concession must have been alone upon that consideration” and explaining that juries must be instructed that the term “seduce” was not “used in its ordinary sense,” but referred to circumstances where women consented by virtue of defendant’s promise); Robertson, *Seduction*, *supra* note 62, at 358 (noting, in contrast to rape laws, criminal seduction laws were designed to “accommodate relationships that mixed elements of consent and coercion”).

The promise to marry was the critical element in striking the balance between consent and coercion. The seduction statutes recognized that the illicit connection between the defendant and the prosecutrix had occurred with her consent, but the emphasis on consent by virtue of a promise to marry suggested that a woman's consent might be coerced. As a Georgia court noted:

The coyness, shyness, and modesty which actuate a virtuous woman on such an occasion naturally find expression in the manifestation of some degree of unwillingness, or of an endeavor, feeble though it may be, to shield herself from that to which she is averse, but to which she really consents only for the sake of the man she loves and trusts. It would be mere mawkishness to affect ignorance of these well-known traits of the female character.⁹⁴

Sexual mores and extant gender norms dictated that a chaste woman would not surrender her virtue easily.⁹⁵ Nevertheless, they also recognized the inherent weaknesses of the female sex, especially when pitted against the will and power of determined men.

By criminalizing those circumstances that were nominally consensual, but, through the promise to marry, evinced an aspect of coercion, the seduction statutes bridged the space between fornication and rape. More importantly, they signaled the evolution of social norms regarding sex and marriage. By requiring that consent to sexual intercourse be predicated on the defendant's promise to marry, the statutes recognized the fact of premarital sex, but made clear that such conduct would be tolerated only if the parties intended to, and in fact did, marry. In this way, seduction statutes distinguished between sex for sex's sake, and sex undertaken with the expectation of marriage, however unilateral.⁹⁶ Unlike fornication, which recognized a woman's sexual agency by holding her criminally liable for consensual sex outside of marriage, the seduction statutes acknowledged that context was important in understanding the nature of a woman's consent. The seduction victim had submitted to sex not because she was loose or amoral, but because of the defendant's flattery, cajoling, and promise that their transgression was a precursor to licit, marital sex.⁹⁷

94. *Jones v. State*, 16 S.E. 380, 383 (Ga. 1892).

95. This thinking certainly animated the force and resistance requirements in the law of rape. See *People v. Barnes*, 721 P.2d 110, 117 (Cal. 1986) ("The law demanded some measure of resistance, for it remained a tenet that a virtuous woman would by nature resist a sexual attack."); *State v. Rusk*, 424 A.2d 720, 733 (Md. 1981) (Cole, J., dissenting) ("She must follow the natural instinct of every proud female to resist, by more than mere words, the violation of her person . . . She must make it plain that she regards such sexual acts as abhorrent . . .").

96. *Hughes*, supra note 88, at § 458 (observing "[m]ere fornication is not seduction," and that to constitute seduction, "there must be an adequate inducement to influence the female to part with her virtue").

97. *Haag*, supra note 92, at 33.

Importantly, the requirement that the illicit connection occur in conjunction with a promise to marry not only distinguished seduction from other categories of criminal sex, it also laid bare the nature of the victim's injury. "The evil which led to the enactment of [the seduction statute] was not that females were seduced . . . but that after the ends of the seducer were accomplished his victim was abandoned to her disgrace."⁹⁸ Recognizing that the defendant's promise to marry was the gravamen of the offense, most jurisdictions allowed the defendant to avoid prosecution and punishment by marrying the prosecutrix.⁹⁹

The availability of marriage as a bar to criminal liability made for lively prosecutions. Unlike burglary, murder, and other crimes, the underlying offense to a charge of seduction was fundamentally private behavior—sex. To enlist the state in prosecuting the offender, victims or their families had to bring the crime to the attention of the authorities. For many victims, the prospect of publicly airing their dirty linen and revealing their lack of chastity was no doubt a deterrent to prosecution.¹⁰⁰ But for many, the marriage bar made the risk of public revelation worthwhile.¹⁰¹ For the defendant, marriage's allure was obvious—he

98. *State v. Otis*, 34 N.E. 954, 955 (Ind. 1893).

99. See, e.g., 2 Ga. Crim. Code, art. 5, § 379 (1910) (providing that seduction prosecution "may be stopped at any time before arraignment and pleading . . . by the marriage of the parties"); Ill. Crim. Code § 110 (1917) (providing "the subsequent intermarriage of the parties shall be a bar to the prosecution of [the] offense"); N.C. Crim. Code Digest, ch. 248, § 1 (Edwards, Broughton & Co. 1885) (providing that "marriage between the parties shall be a bar to further prosecution"). In some jurisdictions, marriage was not an absolute bar to prosecution. For example, in Arkansas, the defendant's subsequent marriage to the prosecutrix was grounds for suspending the prosecution. If the defendant abandoned, separated from, or divorced the prosecutrix, the prosecution could be reinstated. See *Burnett v. State*, 81 S.W. 382, 383 (Ark. 1904) (suspending prosecution upon marriage of defendant and prosecutrix unless defendant "desert[s] and abandon[s]" prosecutrix, in which case "prosecution shall be continued and proceed as though no marriage had taken place"). Likewise, to avail himself of the marriage bar under Georgia's seduction statute, the defendant was required to "give a good and sufficient bond . . . for the maintenance and support of the female and her child or children." 2 Ga. Crim. Code, art. 5, § 379 (1910). If the defendant failed to provide the bond, "the prosecution shall not be at an end until he shall live with the female, in good faith, for five years." *Id.*

100. This was likely true for women of the middle and upper classes, who could rely on extralegal methods to deal with the consequences of seduction. Indeed, scholars agree that the crime of seduction was most frequently enforced to vindicate the interests of working and lower class women. See Robertson, *Seduction*, *supra* note 62, at 336–37 & n.16 ("The New Yorkers who appeared in seduction cases . . . were almost without exception members of the working class.").

101. See *id.* at 363 ("In most seduction cases . . . it appears that marriage was the outcome women sought."). Although most of the extant cases on seduction appear to be cases where the relationship between the defendant and the prosecutrix was nominally consensual, making marriage between the two something that would be desirable for the prosecutrix, in a significant minority of cases, the circumstances of the underlying "connection" seem more like coerced sex, or more precisely, sexual assault. In such instances, marriage might seem less desirable, but some women nevertheless chose to marry the defendant. Stephen Robertson, *Crimes Against Children: Sexual Violence and Legal Culture in New York City, 1880–1960*, at 102 (2005).

could stand trial and attempt a successful defense to the charges, or he could simply marry the prosecutrix and watch the charges disappear. For defendants and victims alike, marriage seemed the best way to resolve the problem, and courts often were transformed from criminal tribunals into wedding sites.¹⁰²

This is not to say that marriage could obviate *all* of the harms with which seduction was associated. Indeed, as one court opined, “[t]he keeping of the promise of marriage is a partial reparation for the wrong done.”¹⁰³ But marriage could correct the broad harms to society done by those who had violated clear social norms denouncing sex outside of marriage.¹⁰⁴ A subsequent marriage—even one compelled by the threat of criminal prosecution—could serve as a “refuge from the shame into which [the victim] had fallen.”¹⁰⁵ And, as important, marriage would absolve the state of the responsibility for supporting those ruined by seduction and any illegitimate offspring resulting from such liaisons.¹⁰⁶ With this in mind, few courts lost sleep enforcing a statute that made marriage an express bar to prosecution for the crime. As one court reasoned:

It is true that in this case the appellee may have agreed to the marriage in order to escape merited punishment; but we should not for that reason remove an inducement which may lead another wrongdoer to atone for his fault by making the injured party an honored wife and mother.¹⁰⁷

Marriage’s role as a bar to prosecution might suggest that defendants could simply “get away” with the crime by marrying the prosecutrix. But, as the following Part discusses, this was not so. Those enforcing criminal seduction statutes recognized that marriage could be an appropriate al-

102. See, e.g., *Married in Court*, N.Y. Times, Oct. 12, 1884, at 7 (noting that upon being charged with seduction under promise of marriage, defendant “said he was willing to marry” prosecutrix, and “Father Cole was called in and tied the nuptial knot”).

103. *Otis*, 34 N.E. at 955.

104. *Dubler, Immoral Purposes*, supra note 49, at 777 (“Marriage, in other words, was the core legal site for licit sex.”); *Murray, Strange Bedfellows*, supra note 49, at 1268–69 (discussing marriage as the licensed locus for sexual activity); Charles E. Rosenberg, *Sexuality, Class and Role in 19th-Century America*, 25 *Am. Q.* 131, 142 (1973) (noting nineteenth-century physicians conceded that there should be an outlet for sex, but that “morality and social policy demanded that [sex] be limited until marriage”).

105. *Otis*, 34 N.E. at 955; see also *People ex rel. Scharff v. Frost*, 91 N.E. 376, 377 (N.Y. 1910) (“In popular estimation the shame of the seduction is lessened to some extent by the fact of marriage . . .”).

106. See *Morris v. State*, 81 S.E. 257, 257 (Ga. Ct. App. 1914) (noting seduction statute “was primarily designed in the interest of the injured female and of helpless and hapless offspring”); *Robertson, Seduction*, supra note 62, at 338 (“[A] marriage would free the state of the burden of supporting children borne as a result of seduction.”). The understanding of marriage as a means of privatizing the dependency of women and children—and absolving the public of such responsibility—animated Georgia’s seduction statute, which required the defendant to post bond for the maintenance of the victim and her children, or in the alternative, to live with her in “good faith” for five years, in order to avail himself of the marriage bar. See 2 Ga. Crim. Code, art. 5, § 379 (1910).

107. *Otis*, 34 N.E. at 955.

ternative to imprisonment for defendants charged with seduction. Thus, marriage was not only a bar to prosecution for seduction; it served as a punishment for the crime.

III. MARRIAGE AS PUNISHMENT FOR SEDUCTION

“The criminal law stands to the passion of revenge in much the same relation as marriage to the sexual appetite.” – James Fitzjames Stephen¹⁰⁸

This Part argues that, in the enforcement of criminal seduction statutes, marriage did not simply function as a bar to prosecution, it also might be seen as a punishment for the crime. To lay a foundation for this claim, the sections that follow address the nature of the harm involved in criminal seduction, the changing nature of criminal punishment in the nineteenth century to involve the cultivation of discipline and order, and the role that marriage was understood to play in the cultivation of a disciplined citizenry.

A. *The Harms of Seduction*

One of the reasons that the notion of marriage as punishment seems discordant to the modern ear is that our intuitions tell us that punishment involves the imposition of physical pain and discomfort as redress for a particular wrongful act.¹⁰⁹ Marriage seems at odds with this depiction of punishment in part because, in the context of seduction, marriage seems a desirable alternative for all involved. However, a closer look at the harms associated with seduction complicates this notion, suggesting that while marriage was a desirable alternative to incarceration and the social stigma of nonchastity, it also had a more coercive—indeed, punitive—cast. Accordingly, this section argues that while marriage was likely the preferred resolution to seduction for the defendant, victim, and the state, it was one that, in the manner of more conventional punishments, spoke directly to the harms of the offense. Further, it was a resolution that involved the coercive imposition of state discipline, and in so doing, bore many of the indicia associated with punishment.

The structure of criminal seduction statutes was consistent with the criminal law’s aim of imposing punishment as redress for wrongful acts. The structure and text of the statutes all identified the harmful act—sex by virtue of a promise to marry—and specified two alternatives for redress—marriage or the penitentiary. As discussed earlier, criminal seduction statutes were enacted with the understanding that seduction led to deleterious social consequences.¹¹⁰ Seduction contributed to a culture of

108. James Fitzjames Stephen, *A General View of the Criminal Law of England* 99 (London, Macmillan and Co. 1863).

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

110. See *supra* Part I (detailing development of criminal seduction laws).

sexual license, where men were free to engage in illicit sex outside of marriage, thereby compromising marriage's role as the locus for sexual activity.¹¹¹ And, of course, for the victim, the stigma and disgrace of being sexually compromised would have disastrous consequences. A respectable marriage would be unlikely, limiting her long-term economic prospects. Unmarriageable and limited in employment opportunities, she could succumb to the allure of vice and prostitution, or depend on her family or community for support.¹¹²

Importantly, many of the concerns that seduction statutes sought to address centered on the perceived dangers of nonmarriage. If marriage served as the licensed site for sexual expression, then the space outside of marriage was one stained with the taint of deviance, criminality, and danger.¹¹³ If the harmful act with which seduction was associated was one that would inevitably lead the defendant and victim further into the dangerous demimonde of nonmarriage, then marriage, as much as the penitentiary, was a means of curtailing this inevitable slide.

But the social, sexual, and economic dangers of nonmarriage were only the most obvious harms with which seduction was associated. As the text of most criminal seduction statutes made clear, the criminal act hinged on the defendant's use of a promise to marry to secure the "illicit connection" with the victim.¹¹⁴ Thus, the gravamen of the offense was the defendant's instrumental use of marriage itself. And indeed, one could argue that it was this harm, as much as those previously identified, that seduction statutes sought to address. In promising marriage as a means to entice the victim into sex, the defendant invoked marriage's discipline and respectability to engage in conduct that was neither disciplined nor respectable. Indeed, it was conduct that was clearly inimical to marriage—an affront to the institution and its role in promoting sexual disci-

111. See Friedman, *Crime and Punishment*, *supra* note 49, at 127 (discussing marriage's place as approved site for sexual activity); Dubler, *Immoral Purposes*, *supra* note 49, at 777 ("Marriage, in other words, was the core legal site for licit sex."); Murray, *Strange Bedfellows*, *supra* note 49, at 1268 (discussing marriage's place as "licensed locus for sexual activity").

112. See *supra* notes 42–43 and accompanying text (noting seduction's consequences for women's long-term economic security).

113. The criminal law clarified the sexual danger inherent in nonmarriage by criminalizing various forms of nonmarital sex. See Friedman, *Crime and Punishment*, *supra* note 49, at 127 (explaining sex outside of marriage "was not only a sin, it was a crime").

114. See, e.g., Miss. Code Ann. § 97-29-55 (2010) (stating "[i]f any person shall obtain carnal knowledge of any woman . . . by virtue of any feigned or pretended marriage or . . . promise of marriage," he is guilty of seduction); Okla. Stat. tit. 21 § 1120 (2010) (stating "[a]ny person who, under promise of marriage, seduces and has illicit connection with any unmarried female of previous chaste character shall be guilty" of seduction); S.C. Code Ann. § 16-15-50 (1976) (stating "[a] male . . . who by means of deception and promise of marriage seduces an unmarried woman" is guilty of seduction).

pline and social order.¹¹⁵ As such, the crime of seduction did not result in an injury to the victim alone. It constituted an injury to the institution of marriage and to an entire social system undergirded by marriage's place as the locus for licit sex and a means of privatizing dependency. Through the defendant's act, marriage, the foundation of civil society, was perverted and transformed into an agent of social corrosion and decline.¹¹⁶ Though a civil action in tort or contract could remedy the private injuries to the victim, it was inadequate to address the public harms inflicted upon marriage and society more generally.

Viewed through this lens, the reform effort's appeal to criminalization makes sense, and the idea of marriage as an alternative sanction to the penitentiary seems less farfetched. But one must also resolve the dissonance that results from the fact that defendants elected marriage over the penitentiary. On their face, the seduction statutes provided the defendant with the semblance of a choice—he could choose to marry the victim or choose incarceration.¹¹⁷ And while courts were unambiguous that this was an act of agency,¹¹⁸ it was one obviously constrained by the threat of the penitentiary.¹¹⁹ This is perhaps unsurprising. The twinning of agency and constraint pervaded the legal understanding of seduction. Just as the crime itself acknowledged that, in some circumstances, sex could embody elements of coercion and consent,¹²⁰ the defendant's choice between marriage and the penitentiary was one marked by state coercion.¹²¹

Critically, this element of state coercion was inextricably tied to the perceived harms of seduction. Though marriage could redeem the victim's reputation and dignity and curb the proliferation of a culture of

115. See Robertson, *Seduction*, supra note 62, at 345 (noting seduction was believed to “attack[] the building blocks of middle-class identity,” including marriage and privatized family); supra notes 65–71 and accompanying text (describing tort of seduction's limitations, including that damages remedy was inadequate to redress damage done to society by seduction).

116. Robertson, *Seduction*, supra note 62, at 345 (explaining seduction threatened sanctity of institutions like marriage which were seen as “central to the emerging middle-class vision of society”).

117. And of course, the victim had the “choice” of accepting the defendant's proposal or suffering social disgrace. Indeed, her initial decision to submit to sex with the defendant might be viewed as a product of a social order in which marriage was the most effective means for securing a woman's economic security. See supra notes 42–43 and accompanying text (noting women's decreased economic opportunities after they became victims of seduction).

118. See *infra* note 156 (discussing agency in annulment cases).

119. In this way, the “choice” to marry was decidedly coercive and shaped largely by external factors. See generally Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 *Pol. Sci. Q.* 470, 470 (1923) (discussing way in which individual choice is shaped by coercive bargaining endowments imposed, at some level, by state).

120. See supra notes 92–94 and accompanying text (discussing crime of seduction as embodying notions of both consent and coercion).

121. See supra notes 102–107 and accompanying text (discussing defendant's choice between marriage and penitentiary).

sexual license, it could not necessarily erase the harmful act that had transpired. Though a marriage had followed, there was still the fact that the defendant had deployed marriage instrumentally to obtain illicit sex. These harms were distinct from the victim's injuries. They involved the stain of illicit sex that could not simply be papered over with a marriage certificate, as well as an injury to the institution of marriage itself. They were harms to society that required punishment. In this way, marriage's role as a bar to prosecution was not an absolution. It was a subtly coercive state move that forced the defendant to live within the boundaries of the institution he had once cavalierly invoked for his own perverse ends.

The following sections elaborate this insight, explaining the emphasis on the imposition of discipline as part of punishment that emerged in the nineteenth century, and the role of marriage and the family in imposing discipline and cultivating a disciplined citizenry.

B. *The Changing Nature of Criminal Punishment*

Though the nature of the harms associated with seduction helps explain how nineteenth-century legal actors came to understand marriage as a punishment for the crime of seduction, it is also imperative to recognize the way in which changes in the conception of punishment contributed to this phenomenon. As many scholars have documented, the nineteenth century marked a shift from punishment as a localized practice to an enterprise that focused less on public spectacle and more on the internalization of discipline, order, and law-abidingness.¹²²

A principal component of this shift was the emergence of the penitentiary as a site of criminal punishment.¹²³ In stark contrast to the public shame of the pillory and the stocks, the penitentiary was conceived as a place where a miscreant would be confined in order to reflect on his wrongdoing, repent, and be rehabilitated along more socially productive lines.¹²⁴ Critically, the rehabilitative purposes of the penitentiary were ex-

122. See Michel Foucault, *Discipline and Punish: The Birth of the Prison* 15–16 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977) [hereinafter Foucault, *Discipline and Punish*] (discussing changing focus of criminal punishment from body to soul); *id.* at 55–56 (noting condemnation of public torture at time of Enlightenment); Friedman, *Crime and Punishment*, *supra* note 49, at 75 (discussing rejection of public punishment in favor of incarceration).

123. Mark Colvin, *Penitentiaries, Reformatories, and Chain Gangs: Social Theory and the History of Punishment in Nineteenth-Century America* 120 (1997) (“Penitentiaries were meant to be places in which self-discipline was to be instilled . . .”); Friedman, *Crime and Punishment*, *supra* note 49, at 76 (noting penitentiary was “new path of punishment” and place for inculcation of republican ideals of “self-discipline, moderation, [and] sobriety”). See generally Michael Ignatieff, *A Just Measure of Pain: The Penitentiary in the Industrial Revolution, 1750–1850* (1978) (documenting rise of penitentiary, and arguing it represented pure form of industrial capitalist order).

124. David J. Rothman, *Perfecting the Prison: United States, 1789–1865*, in *The Oxford History of the Prison: The Practice of Punishment in Western Society* 100, 111 (Norval Morris & David J. Rothman eds., 1998) [hereinafter Rothman, *Perfecting the Prison*] (discussing penitentiary's rehabilitative aims); Carol S. Steiker, *Punishment and*

PLICITLY linked to its model of internalized discipline. In keeping with Jeremy Bentham's Panopticon,¹²⁵ penitentiaries were structured to promote the near-constant surveillance of inmates.¹²⁶ The primary effect of this surveillance was "to induce in the inmate a state of conscious and permanent visibility,"¹²⁷ and in so doing prompted inmates to internalize the disciplined norms of penal life.¹²⁸ In this way, the penitentiary departed from public practices of punishment, with their emphasis on publicity and shame, and instead promoted a vision of state control that centered largely on the imposition of a new disciplined identity.

The penitentiary's emphasis on the internalization of discipline and order was premised on changes in social behavior and social institutions.¹²⁹ As society became more mobile and production moved out of the household into the workplace, many worried that the family could no longer effectively perform its role in inculcating discipline and deterring deviancy.¹³⁰ Accordingly, the penitentiary system was created, in part, to serve as a substitute for familial discipline. Indeed, though the penitentiary system was premised on incarceration, hard labor, and isolation as a means for prompting reflection and rehabilitation,¹³¹ other aspects of the penitentiary were explicitly modeled on the family. For example, the

Procedure: Punishment Theory and the Criminal-Civil Procedural Divide, 85 Geo. L.J. 775, 788 (1997) (noting proponents of penitentiary "presumed that the highly regimented and isolated world" could cure criminality); David J. Rothman, *The Crime of Punishment*, N.Y. Rev. Books, Feb. 17, 1994, at 34 ("The prison . . . would reform the deviant and eradicate crime from the society.").

125. See Jeremy Bentham, *Panopticon*, in *The Panopticon Writings* 29, 45 (Miran Bozovic ed., 1995) (1787) (describing elaborate design for circular, windowed prison in which inmates would always be visible to guards in order to evoke constant sense of surveillance); Foucault, *Discipline and Punish*, supra note 122, at 200–01 (discussing Bentham's Panopticon).

126. Bentham, supra note 125, at 45 (attributing Panopticon's effectiveness to "*apparent omnipresence* of the inspector").

127. Foucault, *Discipline and Punish*, supra note 122, at 201 ("Hence the major effect of the Panopticon: to induce in the inmate a state of conscious and permanent visibility that assures the automatic functioning of power."); Mark Fenster, *Seeing the State: Transparency as Metaphor*, 62 Admin. L. Rev. 617, 669 (2010) (discussing architecture of Panopticon and its role in "creat[ing] the conditions of feeling under constant surveillance").

128. See Foucault, *Discipline and Punish*, supra note 122, at 172 ("The principle was one of 'embedding' ('*encastremens*').").

129. David J. Rothman, *The Discovery of the Asylum* 57–59 (1971) [hereinafter Rothman, *Discovery*] (discussing social and demographic changes that came with increasing American population, urbanization, and newfound mobility).

130. *Id.* at 67–72 (noting officials attributed rise in criminal activity to lack of family discipline over children, who were then increasingly susceptible to corrupting vices).

131. Calvert R. Dodge, *A Nation Without Prisons* 4–5 (1975) (noting penitentiaries were conceived as spaces where wrongdoers might be disciplined through hard work and careful reflection of acts that prompted incarceration); Edward L. Rubin, *The Inevitability of Rehabilitation*, 19 Law & Inequality 343, 347 (2001) ("From its outset, the penitentiary was conceived as a means of rehabilitation.").

warden's role was analogized to that of a parent.¹³² He was responsible for the administration of the penitentiary, and importantly, he had the discretion to impose individualized discipline on an inmate, just as a father or mother might discipline an errant child.¹³³ The emphasis on discipline was not confined to the vertical relationship between warden and inmate. Inmates were expected to interact with each other in the ordered, respectable fashion of family members.¹³⁴ In this way, the penitentiary provided a substitute for familial discipline when the family failed.¹³⁵

Moreover, the penitentiary system, like the family, was expected to have salutary effects on society as well. "By demonstrating how regularity and discipline transformed the most corrupt persons,"¹³⁶ the penitentiary's "firm family discipline"¹³⁷ would reawaken the public to these virtues¹³⁸ and contribute to social stability.¹³⁹

Together, the evolution of criminal punishment and the rise of the penitentiary and a penal practice of internalized discipline underscore two points. First, in the period during which seduction statutes were enacted, the family's place as a cornerstone of society was directly linked to its role as a crucible for cultivating discipline and order.¹⁴⁰ In the extreme cases where familial discipline was lacking or otherwise inadequate, the criminal law, through the penitentiary, intervened to provide a suitable substitute for inculcating the disciplined identity required of productive citizens.¹⁴¹ This penal history suggests that a critical dimension of nineteenth-century punishment was the inculcation and internalization of discipline and order as rehabilitative tools. Punishment was not simply about the imposition of physical pain and discomfort, but about compelling the miscreant to submit to state-imposed discipline so that he might function as a productive citizen.¹⁴² But importantly, the penitentiary was not the *only* means of cultivating discipline. Indeed, it was expressly un-

132. Mark E. Kann, *Punishments, Prisons, and Patriarchy: Liberty and Power in the Early American Republic 160–62* (2005) (describing prison officials' discretionary authority over inmates).

133. *Id.*

134. *Id.*

135. This is not to say that the penitentiary resembled the family in all respects. The emphasis on dealing with the most extreme cases of failed discipline meant that the penitentiary employed a harsher, and more routinized, process for inculcating discipline, one that often borrowed from military practices. Rothman, *Discovery*, *supra* note 129, at 104–06.

136. Rothman, *Perfecting the Prison*, *supra* note 124, at 107.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* (linking family discipline to orderly, crime-free society); Alice Ristroph & Melissa Murray, *Disestablishing the Family*, 119 *Yale L.J.* 1236, 1258–59 (2010) (discussing family as site of discipline and domestication).

141. Rothman, *Discovery*, *supra* note 129, at 107 (noting penitentiary proponents "looked first" to family for inculcation of discipline).

142. Friedman, *Crime and Punishment*, *supra* note 49, at 80 ("The prison . . . provided the missing training, the missing backbone [and] was a caricature of the

derstood as a last resort alternative to the institution seen as the principal source of discipline and order—the *family*.

This history further contextualizes the drive for criminal seduction statutes. During the period in which the criminalization campaign flourished, there was a broadly held fear that the family—the engine for disciplining and ordering society—was under siege from the twin threats of urbanization and sexual license.¹⁴³ Criminal intervention was needed to ensure that the harms associated with illicit sex did not destroy the marital family and its crucial social function in cultivating disciplined citizens.¹⁴⁴

This history also clarifies marriage's appeal as an alternative for punishing seduction. Nineteenth-century legal actors understood punishment to include the internalization of discipline and order and, more importantly, they recognized both the penitentiary and the family (and concomitantly, marriage) as sites where this internalization of discipline could—and should—occur.¹⁴⁵ In cases of criminal seduction, where the wrongful act involved both illicit sex (with its litany of undesirable social consequences) and the instrumental use of marriage, the idea of marriage as punishment was not disjunctive. Marriage allowed the defendant to avoid criminal prosecution, but more importantly, it ensured that he could no longer avail himself of sex without consequences—sex outside of the sexual discipline imposed by the marital family. Instead, through the criminal seduction statutes, the state coerced the defendant to choose between two modes of discipline: marriage and the family, or the penitentiary.

C. *Marriage and the Internalization of Discipline*

The shift in the understanding of punishment to include the internalization of discipline helps explain the history of marriage as punishment for seduction. Equally important to this project, however, was marriage's role in imposing a disciplined identity on men and women.

Although marriage allowed the defendant to avoid criminal prosecution, the obligations and duties of the marital status—which were legally enshrined and part of the social understanding of marriage—ensured that the defendant was not getting off scot-free. He simply had been relieved of one obligation to take up another. Put differently, he was forgo-

unyielding, disciplined, incorruptible family that the prisoners had never had for themselves.”); Rothman, *Discovery*, supra note 129, at 103.

143. See supra notes 129–130 and accompanying text (discussing society's fear that fewer people would marry due to increasing mobility and economic opportunities outside home).

144. See infra Part III.C (discussing marriage's role as disciplinary force).

145. See supra notes 123–135 and accompanying text (describing penitentiary's origin as site for instilling discipline, modeled on and substituting for family's disciplinary role).

ing the discipline of the penitentiary to have discipline imposed on him in another context: marriage.

Nineteenth-century legal actors were amenable to the idea of marriage as punishment because they recognized that marriage, as both a contract and a legal status, entailed the deprivation of certain liberties and freedoms and a healthy dose of social discipline. Husbands and wives were not free to do as they liked.¹⁴⁶ They were required to conform to the social and legal obligations expected of spouses.¹⁴⁷ Husbands, for example, were expected to provide financial and economic sustenance to their families.¹⁴⁸ To do so, they had to be steadily employed wage-earners engaged in the sorts of sober, diligent pursuits that allowed them to meet these obligations.

Importantly, wage-earning did not necessarily offer men unfettered freedom, as the fruits of their industry were already earmarked for the upkeep of a wife and family. In this way, married men lacked the economic and sexual freedom enjoyed by bachelors.¹⁴⁹ The socio-legal expectations ascribed to husbands meant that married men were deprived of the liberty of deploying their economic power and sexual proclivities in the manner of their choosing. Instead, their economic productivity and sexuality were channeled into marriage, where any deviant proclivities could be redirected and disciplined in the crucible of domesticity.

This view of marriage as imposing a set of nonnegotiable duties and obligations was evident in situations where defendants who had availed themselves of seduction's marriage bar later attempted to have the marriages annulled.¹⁵⁰ Absent evidence that the seduction prosecution had been pursued in bad faith, courts refused to credit a defendant's claim to void the marriage as executed under duress.¹⁵¹ In *Sherman v. Sherman*, the

146. See Cott, *Public Vows*, supra note 1, at 37 (discussing responsibilities and obligations of marriage for spouses).

147. *Id.* at 40 (noting legally recognized marriage "drew [the couple] into a set of obligations set by state law"); Hendrik Hartog, *Man and Wife in America: A History* 98–100 (2002) (describing how marriage transforms men and women into husbands and wives with obligatory legal personalities); Katherine M. Franke, *Becoming a Citizen: Reconstruction Era Regulation of African American Marriages*, 11 *Yale J.L. & Human.* 251, 300 (1999) ("To be a husband necessarily entailed the status of head of household, while to be a wife rendered one structurally dependent upon the husband's support.").

148. Cott, *Public Vows*, supra note 1, at 12 ("By consenting to marry, the husband pledged to protect and support his wife . . .").

149. See John Gilbert McCurdy, *Citizen Bachelors: Manhood and the Creation of the United States* 3 (2009) (discussing perception of bachelors as unfettered by responsibilities).

150. Defendants often sought to annul marriages executed to avoid criminal liability for seduction. See, e.g., *Hawkins v. Hawkins*, 38 So. 640, 640 (Ala. 1905); *Marvin v. Marvin*, 12 S.W. 875, 875 (Ark. 1890); *Griffin v. Griffin*, 61 S.E. 16, 16 (Ga. 1908); *Blankenmiester v. Blankenmiester*, 80 S.W. 706, 706 (Mo. Ct. App. 1904); *Copeland v. Copeland*, 21 S.E. 241, 242 (Va. 1895); *Thorne v. Farrar*, 107 P. 347, 348 (Wash. 1910).

151. *Sherman v. Sherman*, 156 N.W. 301, 302 (Iowa 1916) (noting that unless seduction charge was "falsely and maliciously made, and without probable cause, it cannot be said that the marriage in a legal sense was under duress").

plaintiff, eager to avoid prosecution and the penitentiary, agreed to marry the young woman with whom he had “‘kept company’ and corresponded.”¹⁵² Four months later, he sought to have the marriage annulled on the ground that he consented under duress.¹⁵³ The court rejected the claim, noting that in those jurisdictions that permitted marriage to serve as a bar to prosecution for seduction, the subsequent marriage “is not regarded as made under duress.”¹⁵⁴ Instead, the defendant *chose* marriage to avoid prosecution in much the same way modern-day defendants accept plea bargains for lesser charges and penalties, or agree to community service to avoid prison. He could not now shirk the bargain as being too onerous or coercive. As the *Sherman* court opined, “[h]e who advantages himself of such a statute must incur all the burdens which it imposes.”¹⁵⁵ Though marriage did not require the physical deprivations of incarceration, it nonetheless deprived the defendant (and the victim) of other liberties by imposing upon him a particular set of burdens and responsibilities—fidelity, sobriety, responsibility, wage-earning—that he could not cast off lightly.¹⁵⁶ Marriage, as much as the penitentiary, was the punishment for the crime.¹⁵⁷

In *Commonwealth v. Wright*, the reviewing court was more explicit in its view that marriage, with all of its attendant responsibilities, could serve as a punishment for seduction. There, the defendant was charged with seduction and proposed marriage to the victim in open court.¹⁵⁸ Per the marriage bar, the court dismissed the criminal charges, concluding that

152. *Id.* at 301.

153. *Id.*

154. *Id.* at 302.

155. *Id.*

156. Other courts reviewing petitions for annulments of marriages executed to avoid seduction prosecutions echoed the view that in choosing marriage to avoid criminal prosecution and punishment, the defendant was obliged to see the marriage through. See *Griffin v. Griffin*, 61 S.E. 16, 18 (Ga. 1908) (“It would be a travesty of law for a man to be able to avoid a criminal prosecution for seduction by virtue of a statute allowing him to do so, and then be permitted immediately thereafter in a court of equity to set aside the marriage”); *Blankenmiester v. Blankenmiester*, 80 S.W. 706, 706 (Mo. Ct. App. 1904) (concluding that “[w]hether [the plaintiff] married to extricate himself from his trouble or from preference, his action was voluntary in a legal sense” and would not be put aside as void).

157. Marriage’s role as punishment was amplified by the fact that during the period in which seduction laws were enacted, divorce was rare. Lawrence M. Friedman, *A History of American Law* 144 (3d ed. 2005) (describing nineteenth-century divorce rate as “the merest trickle”); Grossberg, *supra* note 79, at 104 (referring to “[common] law’s commitment to marital permanency”); Lawrence M. Friedman, *A Dead Language: Divorce Law and Practice Before No-Fault*, 86 Va. L. Rev. 1497, 1501 (2000) (“[Divorce] was a rare legal event in the early nineteenth century.”); Walter Wadlington, *Divorce Without Fault Without Perjury*, 52 Va. L. Rev. 32, 36 (1966) (attributing low rate of divorce in nineteenth century to popular belief in “indissolubility of marriage”); Frank F. Furstenberg, Jr., *History and Current Status of Divorce in the United States*, *Future Child.*, Spring 1994, at 29, 30 (discussing infrequency of divorce in antebellum United States).

158. *Commonwealth v. Wright*, 27 S.W. 815, 816 (Ky. 1894).

the statute's "primary object is to compel the seducer to marry his victim," as "[t]he marriage of the parties is the purpose, intent, hope, and spirit of the statute."¹⁵⁹ But in denominating marriage the appropriate remedy, the court explicitly noted that the seduction statute did not abandon its concern for punishing the crime. To the contrary, the court insisted, the seduction statute "cares not for the man, *except to punish him*; and the punishment prescribed is to force him to keep his promise, rather than go to the penitentiary."¹⁶⁰ The court's meaning was clear: Forcing the defendant to keep his promise—to perform all of the obligations and responsibilities of marriage and live within its disciplined structure—was a punishment in itself.

Marriage's role as an alternative sanction for seduction was further underscored in cases where the defendant married the victim to avoid prosecution, and then abandoned her. In these cases, the absconding defendant would be apprehended and brought to court to answer for criminal charges related to his failure to support his family—charges that typically referenced his earlier charge for criminal seduction. Such was the case in *State v. English*, where the South Carolina Supreme Court upheld a defendant's conviction for abandonment and failure to support his wife.¹⁶¹ To do otherwise, the court reasoned, would allow the defendant to "completely evade" two criminal statutes—the seduction statute and the statute criminalizing abandonment and failure to support.¹⁶² Marriage, in the court's view, was not merely a convenient way to avoid the seduction prosecution—it was a mitigated penalty that relieved the defendant of a criminal conviction and imprisonment so that he might undertake a husband's obligations to support his wife and family. Marriage did not absolve his initial crime; it merely transferred responsibility for disciplining the defendant from the penitentiary to the marital family.¹⁶³

Importantly, though seduction statutes focused on the male defendant, marriage as an alternative sanction allowed the law to discipline female victims as well. Although the seduction statutes treated women as

159. *Id.*

160. *Id.* (emphasis added).

161. 85 S.E. 721 (S.C. 1915).

162. *Id.* at 722.

163. Other jurisdictions took a different approach—one that did not allow marriage to eliminate entirely the threat of prosecution, but rather made marriage akin to probation. Texas, for example, criminalized seduction and provided that a subsequent marriage would suspend the defendant's prosecution. See *Waldon v. State*, 98 S.W. 848, 848–49 (Tex. Crim. App. 1906). If the defendant lived with his wife for two years thereafter, the prosecution would be dismissed entirely. *Id.* However, if the defendant deserted his wife within two years, or otherwise failed to uphold his husbandly obligations, the prosecution would be revived and marriage would provide no defense. *Id.* In some jurisdictions, the law required some assurance that the defendant would uphold the responsibilities of a husband. Georgia, for example, allowed a seducer to avoid prosecution by marriage only if he posted bond for his wife's support. *Duke v. Brown*, 38 S.E. 764, 765 (Ga. 1901). If he could not post bond, the seducer's prosecution would not be dismissed until he had cohabited with, and supported, his wife for five years. *Id.*

victims, victimhood was complicated.¹⁶⁴ The illicit connection between defendant and victim was conceptualized as an elaborate minuet of resistance and submission that ultimately ended in the woman acquiescing to the defendant's cajoling, pleas, and promise of marriage. As such, the statutes made allowances for the victim's consent to sex. But for the promise of marriage, and the trust and esteem in which she held her suitor, she would have continued to resist his advances. But even as the law made allowances for her lapse in judgment, it was a lapse nonetheless, requiring correction. Tainted with unchastity, the victim was corrupted and was now especially susceptible to the allure of vice and the prospect of future lapses.¹⁶⁵ Like male defendants, victims too required the deprivation of liberty and the imposition of discipline. Marriage was well-suited to accomplish these tasks, as the institution stripped women of certain liberties and imposed upon them the disciplined identity of "wife." Although the nineteenth century witnessed the slow unraveling of cover-

164. This point is underscored by Anne Coughlin's work on rape law. See generally Anne M. Coughlin, *Sex and Guilt*, 84 Va. L. Rev. 1 (1998) (arguing legal indicia for rape reflected nineteenth-century norms condemning nonmarital sex). In the nineteenth and early twentieth centuries, rape laws did not simply criminalize nonconsensual sex outside of marriage. They also served as a defense for women found to have engaged in out-of-wedlock sex (fornication). *Id.* at 27 (noting when out of wedlock sex was prohibited, "the task was to decide whether the encounter involved a rape, for which the man was solely to blame; fornication or adultery, for which both the man and the woman shared criminal responsibility; or marital intercourse, for which neither participant would be punished"). By labeling sex as rape, and establishing the legal indicia for rape (resistance, force, and nonconsent), women defended themselves against the criminal charge of fornication. *Id.* at 8. Coughlin's account makes clear that the prosecution of sexual crime did not simply implicate the accused defendant; it also challenged the sexual propriety of the victim, who was assumed, unless proven otherwise, to be *particeps criminis* in the act. *Id.*; see also Blackstone, *supra* note 91, at *211 ("[Our] law does not entertain quite such sublime ideas of the honour of either sex, as to lay the blame of a mutual fault upon one of the transgressors only."). Similarly, seduction, which explicitly acknowledged that sexual encounters could embody elements of coercion and consent, called into question the sexual propriety of the defendant and victim alike. Coughlin, *supra*, at 7 (discussing "category of [sexual] offenses . . . in which the man and the woman were accomplices").

165. Robertson, *Seduction*, *supra* note 62, at 339–40 (discussing view of seduction as entryway to prostitution and vice). The seduction narratives of the day, which articulated an inevitable slide from seduction to prostitution, disease, and even murder, no doubt exacerbated the fears that seduced women were unusually prone to a wide array of socially unacceptable behavior. Cohen, *Murder*, *supra* note 81, at 24–31 (discussing lurid seduction narratives published in penny presses); Mary E. Odem, *Delinquent Daughters: Protecting and Policing Adolescent Female Sexuality in the United States, 1885–1920*, at 16–20 (1995) (describing seduction narratives employed by reformers). Also pressing was the reality that many women involved in seduction cases had been impregnated by their seducers and had few reliable, lawful options for supporting their illegitimate offspring. See *supra* notes 36, 42–44 and accompanying text (offering and discussing evidence of economic pressures resulting from seduction and pregnancy leading women into prostitution). Accordingly, the availability of marriage as an alternative to the penitentiary was not just an effort to compel the defendant to make good on his promise. It also privatized the dependency of the victim and any illegitimate offspring, while redirecting the victim from vice towards the path of virtue.

ture, vestigial remnants of this legal regime persisted,¹⁶⁶ demanding the divestment or curtailment of married women's rights and liberties. For example, although legal reforms of property laws allowed married women to hold property and retain control of earned wages,¹⁶⁷ most married women remained "virtually represented" by their husbands at the ballot box¹⁶⁸ and were deemed legally incapable of making and enforcing contracts.¹⁶⁹ A woman's legal identity followed that of her husband, and immigration laws divested American women who married foreign nationals of their citizenship.¹⁷⁰

Just as the residue of coverture shaped women's place in the public sphere and their status as citizens, it also had important consequences for the private sphere. There, marriage imposed on women the obligations and responsibilities of wifery. Married women were expected to run the household and care for husbands and children.¹⁷¹ These domestic duties required women to abandon the frivolities of girlhood and devote themselves single-mindedly to their husbands and families.¹⁷²

166. Ariela R. Dubler, *In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State*, 112 *Yale L.J.* 1641, 1655 (2003) [hereinafter *Dubler, Shadow of Marriage*] ("Long after the passage of married women's property acts . . . and the passage of married women's earnings statutes later in the nineteenth century, married women's legal and political identities continued to be defined and limited by their marital status."); Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 *Harv. L. Rev.* 947, 983 (2002) [hereinafter *Siegel, She the People*] (explaining "core concepts of coverture were a vibrant part of American legal culture well into the twentieth century").

167. See Hartog, *supra* note 147, at 110–11 (noting debate over marital property reform); Richard H. Chused, *Late Nineteenth Century Married Women's Property Law: Reception of the Early Married Women's Property Acts by Courts and Legislatures*, 29 *Am. J. Legal Hist.* 3, 3 (1985) ("Beginning around 1835, states began to alter . . . rules granting husbands management and control of their wives' real estate and ownership of their personal property.").

168. Siegel, *She the People*, *supra* note 166, at 981–87 (discussing theory of women's virtual representation).

169. E.g., *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring).

170. See *Mackenzie v. Hare*, 239 U.S. 299, 311–12 (1915) (upholding Expatriation Act of 1907, ch. 2534, § 3, 34 Stat. 1228, 1228–29 (repealed 1922), which divested American women of citizenship upon marriage to foreign national); Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship Through Marriage*, 53 *UCLA L. Rev.* 405, 425 (2005) (discussing Expatriation Act of 1907).

171. Cott, *Public Vows*, *supra* note 1, at 12 ("By consenting to marry, . . . the wife [pledged] to serve and obey her husband.").

172. The law made clear that married women were to be exclusively devoted to their husbands and families. For example, if a married woman took in laundry or performed other domestic services for payment, her husband was legally entitled to her wages. Such a system strongly communicated that women's domestic labor was undertaken for the benefit of her husband and family, rather than herself. See Reva B. Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850–1880*, 103 *Yale L.J.* 1073, 1183 (1994) ("Wives' labor in the household, even if compensated by third parties, would for years be construed as a husband's common law right.").

In this way, marriage and its status obligations deprived men and women of important liberties, while simultaneously imposing upon them the discipline required for the discharge of family responsibilities. Upon marriage, both parties surrendered some degree of freedom and autonomy in order to assume the disciplined identity and rigid gender roles that the institution imposed. Certainly, the social expectations of marriage did not require physical confinement or the imposition of pain in the manner of incarceration. Nevertheless, the recognition that marriage required individuals to surrender a degree of economic, sexual, and social freedom—to be deprived of certain liberties enjoyed by the unmarried and to assume particular obligations and burdens—made clear that marriage was not solely a means of avoiding punishment for seduction. It was understood to *be* a type of punishment—perhaps less stringent and harsh than the penitentiary, but a punishment nonetheless.

For defendants and victims alike, marriage accorded well with the familiar retributive and utilitarian justifications for punishment.¹⁷³ Marriage as punishment for seduction was consistent with retributive principles in that it was viewed as something that the defendant deserved. He had seduced his victim by preying on her trusting nature and invoking marriage (and the discipline and respectability that it entailed), only to renege on the promise. As such, it was only fitting that he be compelled to honor his promise by marrying her and assuming the disciplined structure he had once invoked instrumentally.¹⁷⁴ Marriage as punishment for seduction also strongly communicated the social importance of marriage and familial discipline, while simultaneously expressing society's disfavor for undisciplined nonmarital sex.¹⁷⁵

Marriage also served many of the utilitarian ends of punishment. In theory, it incapacitated the defendant and victim's transgressive impulses. By law a monogamous, lifelong institution, marriage limited the parties' sexual partners and cabined their sexual activity within a lawful union.¹⁷⁶ Further, marriage's role in the administration of the seduction statutes powerfully supported the legal and social prohibitions on out-of-wedlock

173. See Sanford H. Kadish et al., *Criminal Law and Its Processes: Cases and Materials* 79–105 (8th ed. 2007) (discussing these theories and their eighteenth- and nineteenth-century antecedents).

174. See generally Michael S. Moore, *The Moral Worth of Retribution*, in *Responsibility, Character and the Emotions: New Essays in Moral Psychology* 182 (Ferdinand Schoeman ed., 1987) (“For a retributivist, the moral culpability of an offender . . . gives society the *duty* to punish.”).

175. See Durkheim, *supra* note 64, at 80–81 (arguing criminal law reflects social norms and punishment expresses hatred for those who violate them); 2 James Fitzjames Stephen, *A History of the Criminal Law of England* 81–82 (London, MacMillan & Co. 1883) (“[T]he infliction of punishment by law gives definite expression and a solemn ratification and justification to the hatred which is excited by the commission of the offence . . .”).

176. See Murray, *Strange Bedfellows*, *supra* note 49, at 1286 (discussing these aspects of marriage); Ristroph & Murray, *supra* note 140, at 1258–59 (discussing marriage's disciplinary effects).

sex, serving as a general deterrent to nonmarital sex. The availability of marriage as an alternative sanction for seduction signaled to the rest of society that similar breaches of sexual norms would be tolerated only if they ultimately resulted in marriage.¹⁷⁷

And while marriage served the ends of incapacitation and general deterrence, it was perhaps best understood to accord with a central underpinning of nineteenth-century penal theory: rehabilitation. According to one Indiana court, “[t]he chief object to be attained by our criminal [seduction] statutes is the betterment of the condition of society, and the reform . . . of the criminal.”¹⁷⁸ Some historical context is necessary to clarify this point. Although some have argued that rehabilitation no longer exists as a goal of the modern criminal justice system,¹⁷⁹ in the nineteenth and twentieth centuries, when seduction statutes were actively enforced and the penitentiary emerged as a dominant mode of punishment, rehabilitation was expressly understood as an important function of the penal system.¹⁸⁰ Once married and subject to marriage’s duties and obligations, the defendant was transformed from a deviant into a husband responsible for providing for his wife and family. As in the context of the penitentiary, consistent hard work and the imposition of certain behavioral norms were understood to provide discipline and structure, diverting the defendant from any latent deviant tendencies and allowing him to rejoin society as a productive citizen.¹⁸¹

The obligations and responsibilities of marriage also proved disciplinary and redemptive for the victim, whose own moral character was compromised by nonmarital sex. The consistent labor and work associated with wifely domesticity diverted her from less worthy pursuits and re-

177. See, e.g., *People v. Gould*, 38 N.W. 232, 234 (Mich. 1888) (“[I]t will be conceded that public morals and public decency would be much better subserved by the marriage of the parties in this class of cases”); *People ex rel. Scharff v. Frost*, 91 N.E. 376, 377 (N.Y. 1910) (concluding “the shame of the seduction is lessened to some extent by the fact of marriage”); *Thorp v. State*, 129 S.W. 607, 608 (Tex. Crim. App. 1910) (“[Defendant has] committed a crime for which [he] should be punished, but we are willing to obliterate that crime in order that the name and character of the female whom [he has] injured and outraged may be preserved.”).

178. *State v. Otis*, 34 N.E. 954, 955 (Ind. 1893).

179. See Austin Sarat, *Memorializing Miscarriages of Justice: Clemency Petitions in the Killing State*, 42 *Law & Soc’y Rev.* 183, 187 (2008) (noting “rejection of rehabilitation as the guiding philosophy of criminal sentencing and . . . the increasing politicization of issues of crime and punishment since the 1960s”).

180. See *Otis*, 34 N.E. at 955 (noting Indiana Constitution provided “the Penal Code shall be founded on the principles of reformation, and not of vindictive justice”). Indeed, the penitentiary’s name alone belied its rehabilitative purposes. See Dodge, *supra* note 131, at 4–5 (documenting penitentiary’s rehabilitative origins); Rubin, *supra* note 131, at 347 (same).

181. See Ristroph & Murray, *supra* note 140, at 1258 (“In the traditional family recognized in . . . American law, men were disciplined by their obligations to support wives and children”).

formed her errant ways.¹⁸² Like the defendant, marriage's discipline allowed her to be reformed and to rejoin society under the mantle of respectability and stability associated with matronhood.

Accordingly, marriage's role in the administration of criminal seduction statutes supported the criminal law's interest in punishment. Though marriage might appear an unusual sanction to modern readers, for nineteenth- and twentieth-century legal actors it was understood to be a potent means of punishment, discipline, and redress. For both parties, the obligations of marriage imposed deprivations of liberty and freedom, as much as it offered the possibility of love and commitment. And importantly, it did so for life. In this way, the vision of marriage promoted by criminal seduction statutes was not a misty-eyed, storybook ideal of companionate marriage. Instead, marriage was a more nuanced and complicated institution that came with positive attributes as well as an onerous set of sociolegal obligations.

From the state's perspective, marriage addressed the consequences of seduction by privatizing the dependency of women and children, while also clearly expressing and reinforcing extant sexual mores denominating marriage as the licensed site for sex. And while marriage spared the defendant and victim the governance of criminal law and criminal punishment, it brought them within the aegis of another system of state governance: family law.¹⁸³ Though family law did not rely on incarceration and fines to induce compliance, through the power of marriage's expectations and obligations, it reformed and disciplined the transgressive bodies involved in the crime of seduction. In this sense, marriage, as much as the penitentiary, was part of a state project of punishing seduction and cultivating a disciplined citizenry.

D. *Seduction's Demise*

By the turn of the century, the dynamics of seduction prosecutions began to shift, reflecting changing demographics and new social mores.¹⁸⁴ By the 1940s, seduction prosecutions were waning as the new understanding of women as "economically independent, socially equal, sex-

182. *Id.* (noting "women were disciplined by their caregiving obligations and their financial dependence on their husbands"). For the woman, marriage's force as an agency-constraining institution was visible from multiple vantage points. Not only was she channeled into marriage by criminal seduction laws that allowed her seducer to avoid prosecution by marrying her, she was channeled into marriage by the force of a legal system that restricted sex to marriage and made marriage the only viable option for her long-term economic security.

183. See Murray, *Strange Bedfellows*, *supra* note 49, at 1296 (making this observation in context of *Loving v. Virginia*).

184. For a discussion of seduction prosecutions in this period, see generally Odem, *supra* note 165 (discussing various legal vehicles used to police adolescent female sexuality in late nineteenth and early twentieth centuries); Robertson, *Seduction*, *supra* note 62, at 348–63 (discussing seduction prosecutions in New York City in late nineteenth and early twentieth centuries).

ual beings”¹⁸⁵ called into question the need for legal remedies, whether civil or criminal, for their protection.¹⁸⁶ Indeed, for many critics, it appeared that those most in need of law’s protection were men, who, because of civil and criminal seduction laws, could be tricked and duped by scheming women.¹⁸⁷

Other factors in criminal seduction’s demise included changing sexual mores. For a new generation of women, the idea of sexual ruin was less weighty than it had been a generation earlier. Though premarital sex was not celebrated, for the working class women who were likely to be at the center of seduction prosecutions, it was not necessarily a catastrophic blow.¹⁸⁸ Indeed, by the 1930s, seduction was likely to be prosecuted only when it resulted in pregnancy.¹⁸⁹ Intuitions about marriage also had changed. Likely influenced by popular magazines like *True Story*, young women regarded love and companionship as the “only valid basis for marriage.”¹⁹⁰ A marriage compelled by the threat of criminal prosecution could not compete with these romantic expectations.

Although seduction statutes were in desuetude by the 1950s, their history is illuminating for a number of reasons. First, this history makes clear the surprising interaction between criminal law and family law in the nineteenth century. This history stands in stark contrast to the traditional narrative that posited the home, and those who occupied it, as im-

185. Robertson, *Seduction*, supra note 62, at 368.

186. The demise of criminal seduction coincided with the effort to abolish the civil heartbalm actions. See Kyle Graham, *Why Torts Die*, 35 Fla. St. U. L. Rev. 359, 415–17 (2008) (noting how “criticisms and snickers” of spurious heartbalm claims “gained just enough volume and attention in the mid-1930s to propel proposals to mend or end these heartbalm torts . . . toward the top of the legislative agenda”); Robertson, *Seduction*, supra note 62, at 367 (“The atrophy of the crime of seduction occurred at the same time as American legislatures repudiated the civil actions of seduction and breach of promise . . .”). The view of women as economically independent no doubt drew strength from the dramatic influx of women into the labor force during World War II. See Melissa E. Murray, *Whatever Happened to G.I. Jane?: Citizenship, Gender, and Social Policy in the Postwar Era*, 9 Mich. J. Gender & L. 91, 108 (2002) (noting “the number of women employed in the labor force swelled from 10.8 million in March 1941 to 18 million in August 1944”). But see *id.* at 109–11 (contending women’s wartime participation in labor force was framed to comport with traditional gender roles).

187. See Act of June 27, 1935, 1935 N.J. Laws 896, 896 (codified as amended at N.J. Stat. Ann. §§ 2A:23-1 to -7 (West 2010)) (noting such remedies have “been exercised by unscrupulous persons for their unjust enrichment” and have “furnished vehicles for the commission or attempted commission of crime and in many cases have resulted in the perpetration of frauds”); Graham, supra note 186, at 415–17 & n.360 (documenting several critics’ arguments that suits targeted men).

188. Robertson, *Seduction*, supra note 62, at 368 (“[T]he concept of ruin held less sway in working-class communities.”).

189. See *id.* at 368–69 (noting after 1930s, parents and girls “turned to the courts only when [the girl] became pregnant”).

190. Robert Lynd & Helen Lynd, *Middletown: A Study in Modern American Culture* 114, 242 (1956).

pervious to criminal regulation.¹⁹¹ More importantly for the purposes of this Article, it makes clear that, historically, marriage was a more complicated institution than the popular discourse would allow. This history of marriage as punishment reveals that marriage was not solely an institution replete with benefits and the power to render illicit sex licit.¹⁹² It also was an institution with coercive potential and punitive possibilities. The following Part acknowledges that marriage is not viewed as punishment today, but it maintains that vestiges of this punitive past can be glimpsed in the disciplinary character that continues to pervade marriage and that undergirds the jurisprudence discussing the right to marry.

IV. MARRIAGE AS DISCIPLINE: REREADING THE RIGHT TO MARRY

Since the waxing and waning of the crime of seduction, our notions of marriage and punishment have diverged in certain respects. Today, the popular discourse of marriage accentuates the institution's positive aspects, rather than its coercive elements.¹⁹³ Similarly, the extant jurisprudence concerning the right to marry, which developed in the twentieth century, figures marriage as a "basic civil right[],"¹⁹⁴ to be exercised by the individual as an expression of freedom, agency, and liberty, not as something to be imposed or coerced by the state (like a prison sentence).

Our intuitions about punishment also have shifted. As the Supreme Court announced in the 1963 case *Kennedy v. Mendoza-Martinez*, punishment involves, inter alia, the imposition of physical confinement and a deprivation of liberty imposed by the state.¹⁹⁵ This rigid, categorical view of punishment does not encompass more expansive notions of deprivation, discipline, and confinement¹⁹⁶—it is about incarceration or those things that we have *always* regarded as punishment.¹⁹⁷ On this contempo-

191. See Murray, *Strange Bedfellows*, supra note 49, at 1258–63 (“Historically, domestic violence was understood to be beyond criminal law’s reach because it involved actors . . . who were firmly rooted within the institution of the family . . . [and] impervious to public regulation.”).

192. See Kristin A. Collins, *Administering Marriage: Marriage-Based Entitlements, Bureaucracy, and the Legal Construction of the Family*, 62 *Vand. L. Rev.* 1085, 1088 (2009) [hereinafter Collins, *Administering Marriage*] (discussing use of marriage “as a cure for women’s poverty”); Dubler, *Immoral Purposes*, supra note 49, at 776–77 (discussing marriage’s curative potential).

193. See supra note 9 and accompanying text (detailing how prevailing mainstream discourse depicts marriage).

194. *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (quoting *Skinner v. Oklahoma ex rel. Williamson*, 16 U.S. 535, 541 (1942)).

195. 372 U.S. 144, 168–69 (1963) (discussing indicia of criminal punishment).

196. 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 . . . are simply not punishments” (footnotes and internal quotation marks omitted)).

197. See Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 *U. Chi. L. Rev.* 591, 591 (1996) (“Imprisonment is the punishment of choice in American jurisdictions.”); Erin Murphy, *Paradigms of Restraint*, 57 *Duke L.J.* 1321, 1411 (2008) (noting incarceration is

rary account of punishment, there is little room for thinking about marriage as punishment.

However, the divergence of our conceptions of marriage and punishment do not render the history of criminal seduction laws and their enforcement irrelevant. Indeed, this history helps us to see that while marriage is not considered punishment today, it continues to be a *disciplining* institution of critical importance to the state's project of constructing a disciplined citizenry.¹⁹⁸

The history of marriage as punishment for criminal seduction helps render visible this disciplinary content—the residue of marriage's punitive past. Let me be clear about this point: This is not to say that modern marriage is a punitive institution. Nor does it conflate discipline with punishment; they are obviously distinct. Instead, it merely suggests that modern marriage retains elements of its punitive past in that it continues to be a vehicle of state-sanctioned discipline.

The following sections revisit a series of familiar cases—*Skinner v. Oklahoma*, *Zablocki v. Redhail*, and *Turner v. Safley*—all of which have elaborated the nature and scope of the right to marry. However, in the foregoing sections, I contend that these cases go beyond simply sketching the parameters of the right to marry. Instead, they gesture toward an essential, but unarticulated, aspect of the marriage right—the disciplinary nature of marriage. As these sections explain, although this disciplinary aspect is often overlooked, it nonetheless undergirds the legal discourse of the right to marry.

A. *Skinner v. Oklahoma*

The right to marry traditionally has been credited to the U.S. Supreme Court's decision in *Loving v. Virginia*.¹⁹⁹ Although *Loving* struck down Virginia's ban on interracial marriage on equal protection grounds,²⁰⁰ the Court nonetheless acknowledged that the challenged

paradigmatic form of punishment). But see Ristroph, *supra* note 196, at 167–69 (challenging this account of punishment as unduly narrow and historically inaccurate).

198. See Ristroph & Murray, *supra* note 140, at 1258–59 (discussing this disciplinary project).

199. 388 U.S. at 1; see also *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978) (“The leading decision of this Court on the right to marry is *Loving v. Virginia* . . .”). It is worth noting, however, that *Loving* was not the first Supreme Court case to explore the importance of marriage in the social order. See *Maynard v. Hill*, 125 U.S. 190, 205 (1888) (describing marriage as “the most important relation in life” and observing it “ha[d] more to do with the morals and civilization of a people than any other institution”); *Reynolds v. United States*, 98 U.S. 145, 165 (1878) (“Upon . . . [marriage] society may be said to be built, and out of its fruits spring social relations and social obligations and duties . . .”). Importantly, the Court, in *Meyer v. Nebraska*, noted that the Due Process Clause protected, *inter alia*, “the right . . . to marry, establish a home and bring up children,” though it did nothing to distinguish the right to marry from any of the other rights enumerated in this list of protected freedoms. 262 U.S. 390, 399 (1923).

200. 388 U.S. at 11.

laws “deprive[d] the Lovings of liberty without due process of law.”²⁰¹ “Marriage,” the Court continued, “is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival.”²⁰² For this critical proposition, the Court referred to an earlier case, *Skinner v. Oklahoma ex rel. Williamson*.²⁰³ This was, by itself, interesting. Though *Loving* was very definitely a case about marriage, *Skinner* was not remotely a case about marriage. Instead, *Skinner* involved a challenge to Oklahoma’s Habitual Criminal Sterilization Act (“the Act”), which required compulsory sterilization of those thrice convicted of crimes of “moral turpitude.”²⁰⁴ The Act was animated by prevailing eugenics theories, which claimed that undesirable social traits, like criminality, could be passed on to successive generations.²⁰⁵

In 1934, Jack Skinner received his third felony conviction for a crime of moral turpitude. Pursuant to the Act, the Attorney General of Oklahoma instituted involuntary sterilization proceedings against Skinner, who challenged the Act’s constitutionality.²⁰⁶ On appeal, the Supreme Court struck down the Act as an unconstitutional violation of the Equal Protection Clause.²⁰⁷ In particular, the Court was concerned with inequalities inherent in the Act’s scope and application.²⁰⁸ However, in striking down the Act, it further noted that the law “involve[d] one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race.”²⁰⁹

The Court’s discussion of marriage and procreation was puzzling, as *Skinner* was not a case about marriage and the Court displayed little concern for Jack Skinner’s marital prospects. Indeed, the discussion of marriage was even more curious given the Court’s preoccupation with the Act’s implications for eugenics practice.²¹⁰

Indeed, the *Skinner* Court’s concern with the confluence of sterilization and eugenics, and its abrupt about-face from an earlier decision up-

201. Id. at 12.

202. Id. (quoting *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942)).

203. 316 U.S. at 535.

204. Id. at 536.

205. *Skinner v. State ex rel. Williamson*, 115 P.2d 123, 127 (Okla. 1941) (“[T]he sterilization of criminals as well as mental defectives as a eugenic measure may be effected under the police power of the state . . .”).

206. *Skinner*, 316 U.S. at 537–38.

207. Id. at 541.

208. For example, the Court noted that while grand larceny and embezzlement were both considered felonies, only a third conviction for grand larceny warranted forced sterilization under the Act. Id. at 538–39.

209. Id. at 541.

210. The Court was especially concerned with vesting “[t]he power to sterilize . . . [i]n evil or reckless hands,” which would produce “farreaching and devastating effects,” including the elimination of those “races and types” deemed “inimical to the dominant group.” Id.

holding a similar sterilization law,²¹¹ has dominated scholarly discussions of the case.²¹² More recently, however, legal historian Ariela Dubler has argued that the concern with eugenics provides only one frame for reading *Skinner* and its discussion of marriage and procreation.²¹³ Also of likely concern to the *Skinner* Court, she maintains, was the deep-seated fear that compulsory sterilization would offer the possibility of sex solely for pleasure and without the deterrent of pregnancy.²¹⁴ While eugenics advocates claimed sterilization would preserve the social order by preventing recidivists from passing on criminal proclivities to their offspring, others feared that sterilization would cultivate the conditions for unrestrained sexuality untethered to the order imposed by the marital family.²¹⁵

As Dubler elaborates, the prospect of unrestrained sexuality was not only a threat to society generally, but to marriage's place in the social order.²¹⁶ The ability to have sex without the deterrent of pregnancy would, it was feared, encourage promiscuity and adultery, undermining marriage, the marital family, and their roles in maintaining sexual order.²¹⁷ "[F]ar from imposing social order . . . [sterilization] actually could bring about sexual chaos."²¹⁸ Thus, Oklahoma's sterilization law was threatening not only because it could be deployed by "reckless hands"²¹⁹ bent on racial purification but for many of the reasons that animated the push for criminal reform of seduction a generation before: It invited the prospect of sex without the responsibilities, accountability, and structure

211. In *Buck v. Bell*, 274 U.S. 200 (1927), the Court upheld a statute requiring the compulsory sterilization of the developmentally disabled. Writing for the Court, Justice Oliver Wendell Holmes infamously justified the statute on the ground that "[t]hree generations of imbeciles are enough." *Id.* at 207.

212. See Carl N. Degler, In Search of Human Nature: The Decline and Revival of Darwinism in American Social Thought 203–05 (1991) (discussing shift in English and American attitudes toward eugenics as result of brutal example of eugenics as genocide in Nazi Germany); Victoria F. Nourse, In Reckless Hands: *Skinner v. Oklahoma* and the Near Triumph of American Eugenics 126–32 (2008) (describing conflation of eugenics with totalitarianism and specifically Nazism); Mary Ziegler, Reinventing Eugenics: Reproductive Choice and Law Reform After World War II, 14 *Cardozo J.L. & Gender* 319, 319–21 (2008) (noting scholars attribute shift in post-war eugenics rhetoric to "widespread revulsion" to Nazi sterilization policies).

213. Ariela R. Dubler, Sexing *Skinner*: History and the Politics of the Right to Marry, 110 *Colum. L. Rev.* 1348, 1351 (2010) [hereinafter Dubler, Sexing *Skinner*] (arguing *Skinner* should be understood "within the context of early twentieth-century discussions about birth control and sexual freedom").

214. *Id.* at 1361 ("Even if, as eugenics advocates claimed, sterilization stanch[ed] the passing on of certain undesirable inheritable traits, it did so at the cost of empowering people—in particular, under the terms of eugenics statutes, socially "undesirable" people—to engage in sex free of deterrent consequences.").

215. *Id.* at 1367–68 (discussing fear that sterilization would encourage promiscuity in and outside of marriage, undermining social order imposed by framework of marriage).

216. *Id.* at 1360.

217. *Id.*

218. *Id.* at 1361.

219. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942).

imposed by marriage and the marital family. And in doing so, it could undermine the marital family as a disciplinary force in society.

Dubler's counter-history of *Skinner* suggests the degree to which the origins of the right to marry were, in part, linked to the traditional understanding of marriage's role as an agent of sexual discipline and order and the fear that sex, decoupled from this disciplining structure, would lead to disorder.²²⁰ Accordingly, the Court's defense of Jack Skinner's right to marry and beget children can be read as more than just an attempt to secure these rights against the specter of totalitarianism; it can also be read as an attempt to bolster and solidify the state's interest in marriage and the marital family as a site of discipline and order, and a bulwark against the threat of fraying sexual mores.

B. *Zablocki v. Redhail*

The threat of sex and procreation outside of marriage also was present in the 1978 case *Zablocki v. Redhail*.²²¹ There, the Court elaborated the right to marry, and in so doing, linked the right to marry to the need to impose sexual order in society and the privatization of dependency. At issue was a Wisconsin statute prohibiting any "Wisconsin resident having minor issue not in his custody and which he is under obligation to support by any court order or judgment" from marrying without first obtaining a court order.²²² The statute was intended to "establish a mechanism whereby persons with support obligations to children from prior marriages could be counseled before they entered into new marital relationships and incurred further support obligations."²²³

In 1974, Roger Redhail, who earlier fathered a daughter out of wedlock, applied for a license to marry his girlfriend, who was pregnant with their child.²²⁴ He was denied the license because he failed to obtain the required court order.²²⁵ For Redhail, seeking the court's approval for his marriage was a futile endeavor. He had been ordered to pay \$109 per month for his daughter's support until she turned eighteen.²²⁶ However,

220. Dubler, Sexing *Skinner*, supra note 213, at 1367 (arguing prospect of sex decoupled from disciplined environs of marriage and procreation portended "a particular form of libertine social chaos").

221. 434 U.S. 374 (1978).

222. Wis. Stat. § 245.10(1) (1973) (repealed 1978); *Zablocki*, 434 U.S. at 375.

223. *Zablocki*, 434 U.S. at 388. Critically, as some members of the Court noted, such concerns were entirely consistent with a traditional view of marriage, its expectations of financial independence from the state, and its gendered division of labor. *Id.* at 394–95 (Stewart, J., concurring) (discussing statute's expectation that married couples will be financially self-sufficient); see also *id.* at 405–06 (Stevens, J., concurring) (noting statute was predicated on gendered division of labor whereby men were family breadwinners). In this way, the principles animating the challenged statute were, by themselves, consonant with the understanding of marriage as a disciplining institution.

224. *Id.* at 378–79 (majority opinion).

225. *Id.*

226. *Id.* at 377–78.

he failed to pay any monthly payments and the girl became a public charge.²²⁷ (Even if he had met his support obligations, the amount of the payments was so low that his daughter would still require public aid.)²²⁸ So long as Redhail maintained his indigent status, his daughter would be considered a public charge, and thus he would not be permitted to marry under the statute.²²⁹

On appeal, the Supreme Court invalidated the statute on equal protection grounds, though the substance of its opinion focused on the right to marry and thus sounded in the tenor of due process.²³⁰ Quoting *Loving* (which quoted *Skinner*), the Court reiterated that “[m]arriage is one of the ‘basic civil rights’ of man, fundamental to our very existence and survival.”²³¹ Although it conceded that states were free to impose “reasonable regulations” on the right to marry, the Court concluded that Wisconsin statute went too far by “directly and substantially” interfering with this fundamental right.²³² Those who could not meet their support obligations and those who could not prove that their children would not become public charges were “*absolutely prevented* from getting married.”²³³

Zablocki has come to stand for the proposition that the state may not erect absolute or insurmountable bars to marriage.²³⁴ While the Court’s

227. *Id.* at 378. Importantly, it was stipulated at trial that “the child’s benefits payments were such that she would have been a public charge even if [Redhail] had been current in his support payments.” *Id.*

228. *Id.*

229. *Id.*

230. See William Cohen, *Is Equal Protection Like Oakland? Equality as a Surrogate for Other Rights*, 59 *Tul. L. Rev.* 884, 894–95 (1985) (explaining *Zablocki*, like *Skinner*, used “equal protection theory to resolve a constitutional problem that was, at bottom, one of substantive due process”); Aaron J. Shuler, *From Immutable to Existential: Protecting Who We Are and Who We Want to Be with the “Equalerty” of the Substantive Due Process Clause*, 12 *J.L. & Soc. Challenges* 220, 280 (2010) (describing reasoning in *Zablocki* as “inversion of substantive due process with an equal protection component”); Nelson Tebbe & Deborah A. Widiss, *Equal Access and the Right to Marry*, 158 *U. Pa. L. Rev.* 1375, 1389 (2010) (noting that while *Zablocki* “was grounded squarely in equal protection, it nevertheless referred liberally to the full range of precedents articulating a ‘right to marry,’ including those that understood the right as a matter of liberty protected by due process”). Indeed, at least one member of the Court suggested as much. *Zablocki*, 434 U.S. at 395 (Stewart, J., concurring) (“[T]he doctrine is no more than substantive due process by another name.”). As Justice Stewart intimated in his concurrence, the Court may have been reluctant to advert directly to substantive due process doctrine in the wake of *Roe v. Wade*, 410 U.S. 113 (1973), a controversial substantive due process decision decided five years earlier.

231. *Zablocki*, 434 U.S. at 383 (quoting *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942)).

232. *Id.* at 386–87.

233. *Id.* at 387 (emphasis added).

234. Donald R. Collins, *A Legal Doctrine for the Starter Marriage*, 33 *Okla. City U. L. Rev.* 793, 801 (2008) (“The central holding of *Zablocki* is that the state may not place unreasonable barriers on marriage”); Ann Laquer Estin, *Golden Anniversary Reflections: Changes in Marriage After Fifty Years*, 42 *Fam. L.Q.* 333, 339 (2009) (noting *Zablocki* invalidated laws imposing barriers to marriage).

defense of the right to marry suggests an interest in maintaining access to the institution in the face of state encroachment, it gestures toward something more. Specifically, the *Zablocki* Court's interest in maintaining access to marriage was not solely about marriage qua marriage but about ensuring access to marriage as a tool for socializing and disciplining individuals. The challenged statute itself belies this impulse. By its terms, the statute was intended to advise individuals of the importance of meeting their parental support obligations and, if they were unable to meet their existing familial obligations, to prevent them from incurring new dependents and obligations through marriage.²³⁵ In doing so, it underscored the importance of certain marital norms—namely, the norms of procreation within marriage, the privatization of dependency through marriage, and financial independence from the state. Though it was invalidated because it went too far in restricting marriage, the Wisconsin statute made clear what was expected of married people in terms of their ability to provide for themselves and their dependents. In this way, *Zablocki* clarifies marriage's role in the privatization of dependency and cultivating the norm of financial independence from the state.²³⁶ And importantly, even as the Court invalidated the Wisconsin statute because it went too far in restricting marriage, it too credited the marital norms that the statute was intended to uphold. This can be glimpsed in the Court's response to the statute itself. Critically, the *Zablocki* Court objected to the Wisconsin statute because the statute did not account for the way in which marriage, and its norms of spousal interdependence and shared assets, could actually *help* the individual to meet existing and future support obligations.²³⁷ Put differently, the statute overlooked the way in which marriage privatized dependency by encouraging spouses to merge their resources in order to discharge their familial responsibilities and remain financially independent of the state. By barring marriage entirely, the statute denied

235. *Zablocki*, 434 U.S. at 390.

236. For a discussion of marriage's role in privatizing dependency, see Martha Albertson Fineman, *The Autonomy Myth* 35–40 (2004) (discussing family's role in absorbing "inevitable dependency"); Martha Albertson Fineman, *The Neutered Mother, the Sexual Family and Other Twentieth Century Tragedies* 226 (1995) ("In our individualistic society, the state relies on the family—allocating to it the care and protection of society's weaker members"); Collins, *Administering Marriage*, *supra* note 192 at 1088 (discussing "how marriage is employed . . . as a substitute for social provision"); Dubler, *Shadow of Marriage*, *supra* note 166 at 1684 (2003) (characterizing marriage as means for women to "privatize successfully their economic dependency"); Martha Albertson Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, 8 *Am. U. J. Gender Soc. Pol'y & L.* 13, 14 (2000) ("The assumed family is a specific ideological construct with a particular population and a gendered form that allows us to privatize individual dependency and pretend that it is not a public problem."); Laura A. Rosenbury, *Friends with Benefits?*, 106 *Mich. L. Rev.* 189, 193 (2007) (describing marriage "as a means to privatize the dependency of both women and children").

237. *Zablocki*, 434 U.S. at 390 (noting marriage could "actually better the applicant's financial situation").

Redhail not only the possibility of an additional income stream, but also the disciplining power of an institution that cultivated a norm of spousal interdependence and independence from the state. In this way, *Zablocki* reveals a crucial aspect of marriage's disciplinary character—its role in privatizing dependency within the marital family.²³⁸ But *Zablocki*, like *Skinner*, also demonstrates marriage's role as a vehicle of sexual discipline. Consider the Court's discussion of the relationship between marriage and procreation. The "decision to marry," the Court observed, "has been placed on the same level of importance as decisions relating to procreation, childbirth, childrearing, and family relationships."²³⁹ Indeed, if the right to procreate meant "anything at all, it must imply some right to enter the only relationship in which the State of Wisconsin allows sexual relations legally to take place."²⁴⁰ If marriage was the site in which lust could be "transformed into virtue,"²⁴¹ then the state could not foreclose marriage entirely. Doing so would mean barring sexually active individuals from the very site that would socialize them in the practice and habits of disciplined, socially productive citizens.

Further, the facts of *Zablocki* suggest that the Court understood marriage to promote the norms of disciplined sexuality and fiscal responsibility. While the *Zablocki* Court spoke of the right to marry primarily in abstract terms, the particular circumstances of Roger Redhail's circuitous path to the altar informed its understanding of the case. Redhail had been down the paternal path before and had declined to observe most of the expectations of fatherhood—he had not married the mother of his daughter, nor had he contributed financially to the girl's upkeep.²⁴² Now, Redhail was about to be a father for the second time, and this time, he wanted to observe the expectations of fatherhood. He wanted to marry his girlfriend, raise their child in wedlock, and in so doing function as a husband, father, and economic provider.²⁴³

Thus, it was not just that Redhail sought access to marriage and was denied. It was that he was denied access to an institution that imposed the disciplined norms of responsible procreation, familial interdependence, and financial independence from the state.²⁴⁴ By prohibiting him from

238. This view of marriage has persisted and is especially visible in the recent efforts to promote marriage as an alternative to public dependence. See Angela Onwuachi-Willig, *The Return of the Ring: Welfare Reform's Marriage Cure as the Revival of Post-Bellum Control*, 93 Calif. L. Rev. 1647, 1650 (2005) (discussing 1996 welfare reforms and efforts to promote marriage among poor).

239. *Zablocki*, 434 U.S. at 386.

240. *Id.*

241. *Dubler, Immoral Purposes*, supra note 49, at 763.

242. *Zablocki*, 434 U.S. at 377–78. For a discussion of the intersection of marital responsibilities and paternal responsibilities, see *Ristroph & Murray*, supra note 140, at 1252–55 (discussing Supreme Court's jurisprudence on rights of unmarried fathers).

243. *Zablocki*, 434 U.S. at 379.

244. *Ristroph & Murray*, supra note 140, at 1252–55 (noting, in context of unmarried fathers, that paternal expectations frequently align with husbandly expectations).

marrying his girlfriend and raising their child in “a traditional family setting,”²⁴⁵ Wisconsin was not only depriving Redhail of *access* to marriage, it was denying him the opportunity to be socialized and channeled into the established norms of the marital family.

C. *Turner v. Safley*

Although *Zablocki* and *Skinner* emphasized the link between marriage, procreation, sex, responsibility, and discipline, the right to marry has not been limited to those couples that are able to procreate or to consummate their relationships; and importantly, the Court’s preservation of the marriage right outside of these contexts further clarifies marriage’s disciplinary function and content. In the 1987 case *Turner v. Safley*, prisoners at the Renz Correctional Institution in Cedar City, Missouri challenged prison regulations limiting prisoner correspondence and prohibiting prisoner marriages absent “compelling reasons.”²⁴⁶ Prison officials defended the measures claiming that prisoners did not retain the same constitutional protections as civilians,²⁴⁷ and even if they did, the challenged regulations were reasonably related to penological interests. Specifically, the prison officials contended that prisoner marriages were likely to foster love triangles that “might lead to violent confrontations between inmates.”²⁴⁸ Additionally, prison officials feared that marriage, with its traditional gender roles, would compromise the rehabilitation of female prisoners, whose “dependen[ce] on male figures”²⁴⁹ contributed to their criminality,²⁵⁰ and who “needed to concentrate on developing skills of self-reliance.”²⁵¹

On appeal, the Supreme Court disagreed. According to the majority, the right to marry persisted and was protected even in the context of incarceration, where opportunities for sexual intercourse and procreation were limited.²⁵² Although incarceration could restrict—or even impede—the physical attributes of married life, “[m]any important attributes of marriage” were available to the incarcerated.²⁵³ Marriage was an “expression[] of emotional support and public commitment,”²⁵⁴ as well as an “exercise of religious faith [and] an expression of personal dedication.”²⁵⁵ And though they could not consummate their relationships

245. *Zablocki*, 434 U.S. at 386.

246. 482 U.S. 78, 81–82 (1987).

247. Brief for Petitioners at 9, *Turner*, 482 U.S. 78 (No. 85-1384) (noting protections for certain core rights are “necessarily more limited” in prison context).

248. *Turner*, 482 U.S. at 97. See also Brief for Petitioners at 13, *Turner*, 482 U.S. 78 (No. 85-1384) (discussing prospect of “love triangles” serving as catalysts for violence).

249. *Turner*, 482 U.S. at 97.

250. *Id.*

251. *Id.*

252. *Id.* at 95–96 (cataloguing marital benefits that remained, even in prison).

253. *Id.* at 95.

254. *Id.*

255. *Id.* at 96.

while in prison, many inmates married with the expectation that their unions “ultimately will be fully consummated” upon release.²⁵⁶

The Court also identified the importance of marriage for those who had been released from prison.²⁵⁷ Once released, marriage could be an essential aspect of reintegrating the prisoner back into the fabric of civilian life. In civil society, marriage’s intangible emotional and spiritual benefits were complemented by the plethora of public and private benefits available to married couples.²⁵⁸ According to the Court, the many benefits that marriage afforded, in and outside of prison, all marshaled in favor of recognizing and protecting prisoners’ right to marry.²⁵⁹

Turner’s place in the legal canon is linked, in part, to its firm defense of the right to marry, even in the carceral context.²⁶⁰ But *Turner*, like *Skinner* and *Zablocki*, also gestures towards marriage’s disciplinary force. Recall that the *Turner* plaintiffs challenged both the regulations restricting prisoner marriages and the regulations restricting prisoner correspondence. Critically, the Court agreed that prisoners’ First Amendment rights to correspondence could be limited or curtailed within the carceral context, but it balked at extending the argument to uphold broad restrictions on prisoner marriages.²⁶¹

The difference in the Court’s treatment of these two fundamental rights claims can be explained by reference to marriage’s disciplinary force. In the 1980s, when *Turner* was litigated, an extant penological liter-

256. *Id.*

257. *Id.* (recognizing “most inmates eventually will be released by parole or commutation” and identifying many public and private benefits available through marriage). In stark contrast to the view of marriage that had prevailed a century earlier, the *Turner* petitioners, who sought to uphold the challenged regulations, argued that marriage would impede the rehabilitation of female prisoners. Brief for Petitioners at 31, *Turner*, 482 U.S. 78 (No. 85-1384). Importantly, in making this argument, the petitioners did not discount the degree to which marriage imposed particular identities upon spouses. Instead, they argued that marriage (and the gender roles with which it was associated) would cultivate women prisoners’ dependence on men, precluding successful rehabilitation and encouraging future criminal activity. *Id.* at 35–36. The prisoners countered that marriage could cultivate more positive behavior, reporting that in cases where prisoner marriages were permitted, the marriages were successful and contributed to “an improvement” in the prisoner’s attitude. Brief for Respondents at 45, *Turner*, 482 U.S. 78 (No. 85-1384). The Court, like the respondents, focused on marriage’s positive attributes, perhaps recognizing that because the majority of prisoners at Renz (and elsewhere) were men, the social roles cultivated by marriage were more apt to produce industriousness, responsibility, and sobriety than dependence and criminality.

258. *Turner*, 482 U.S. at 96.

259. *Id.*

260. See *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 970 (Mass. 2003) (Greaney, J., concurring) (citing *Turner* for proposition that marriage is fundamental right); *Andersen v. King Cnty.*, 138 P.3d 963, 1020 (Wash. 2006) (Fairhurst, J., dissenting) (reasoning that under *Turner*, “[i]t is indisputable that marriage is a fundamental right”).

261. *Turner*, 482 U.S. at 95–100 (conceding right to marry “is subject to substantial restrictions as a result of incarceration” but rejecting regulation’s “almost complete ban on the decision to marry”).

ature maintained that marriage and family ties could play a salutary role in the rehabilitation and socialization of prisoners (and male prisoners especially) during and after their period of incarceration.²⁶² Spouses and family members, scholars argued, provided crucial support to prisoners during incarceration, allowing them to maintain ties with the world that they had left behind and reminding them of their inherent humanity.²⁶³ During this period, some states permitted limited conjugal visits to married prisoners (often in male prisons) on the ground that such opportunities reduced disciplinary problems and curbed the likelihood of homosexuality within the prison community.²⁶⁴

While the *Turner* Court did not advert directly to the corrections scholarship identifying the salutary benefits of marriage and family ties in reducing disciplinary problems and fostering an atmosphere conducive to prisoner rehabilitation *during* incarceration, it nonetheless recognized that marriage's benefits went beyond the physical acts of sex and procreation.²⁶⁵ But importantly, the Court's emphasis on the nonphysical benefits of marriage was not limited to the receipt of public or private benefits or the emotional and spiritual rewards of matrimony. Instead, it is likely that the Court was well aware of the body of literature claiming marriage's benefits for prison administration and prisoner behavior, and accordingly, recognized that marriage could support, rather than detract from, penological goals.²⁶⁶ Moreover, the Court certainly understood the

262. See Bonnie E. Carlson & Neil Cervera, *Inmates and their Families: Conjugal Visits, Family Contact, and Family Functioning*, 18 *Crim. Just. & Behav.* 318, 330 (1991) ("Correctional systems should do much more to support and maintain family ties, since such relationships have been so clearly shown to inhibit recidivism."); Susan S. Cobean & Paul W. Power, *The Role of the Family in the Rehabilitation of the Offender*, 22 *Int'l J. Offender Therapy & Comp. Criminology* 29, 29 (1978) (finding "[s]atisfactory family functioning during the period of incarceration enhances the offender's own rehabilitation"); Kathleen J. Ferraro et al., *Problems of Prisoners' Families: The Hidden Costs of Imprisonment*, 4 *J. Fam. Issues* 575, 589 (1983) (suggesting "the nature of an individual[prisoner's] family ties . . . are bound to have an impact on how individual prisoners assess their incarceration"); Creasia Finney Hairston, *Family Ties During Imprisonment: Important to Whom and For What?*, *J. Soc. & Soc. Welfare*, Mar. 1991, at 87, 88 ("Family ties during imprisonment serve three important functions including . . . the facilitation of the prisoner's post-release success.").

263. See Cobean & Power, *supra* note 262, at 37 (advocating counseling to help improve family ties during incarceration as mode of support and eventual rehabilitation for prisoners); Eva Lee Homer, *Inmate-Family Ties: Desirable but Difficult*, *Fed. Probation*, Mar. 1979, at 47, 48 (1979) (suggesting strong social ties to family and friends help to reduce the influence of parole failures).

264. See Note, *Conjugal Visitation Rights and the Appropriate Standard of Judicial Review for Prison Regulations*, 73 *Mich. L. Rev.* 398, 398 (1974) (detailing arguments in support of conjugal visits for prisoners, including potential to reduce homosexual behavior in prison). Some scholarship suggested that depriving a prisoner of the opportunity for sex "evokes latent homosexual tendencies." *Id.* at 417. Relatedly, same-sex relationships in prison were thought to create an atmosphere of violence. *Id.* at 418.

265. *Turner*, 482 U.S. at 95–96.

266. The oral arguments in *Turner* suggests that this was the case. See Transcript of Oral Argument at *53, *Turner*, 482 U.S. 78 (No. 85-1384) (discussing putative rehabilitative

value of marriage upon release from prison. In addition to the emotional and spiritual benefits associated with marriage, the Court identified a litany of tangible public and private benefits that accrued to spouses, like Social Security and property rights.²⁶⁷ What the Court did not say was that marriage did more than offer these reciprocal benefits to spouses, it also fostered the conditions under which spouses earned such benefits. The social expectations of marriage required mutual support and financial independence, and fulfilling these expectations required married people to be engaged in productive pursuits—to maintain steady employment, to provide for a family, to avoid criminality.²⁶⁸ In short, marriage socialized and disciplined individuals, requiring them to think in terms of the collective good of the marital family unit. And in so doing, it created conditions conducive to the rehabilitation and reintegration of the prisoner, while also suppressing recidivist impulses.²⁶⁹

With this counter-narrative in mind, it seems inadequate to identify *Turner* as a case that merely reiterates the fundamental nature of the right to marry. Indeed, *Turner* concedes that even fundamental rights, like those associated with the First Amendment, may be abridged in the carceral context.²⁷⁰ What likely distinguished marriage from First Amendment liberties was not the fundamental nature of the marriage right but the fact that precluding prisoner marriages actually subverted the disciplinary and rehabilitative goals of the criminal justice system. Striking down regulations that impeded prisoners' freedom to marry was

effect of marriage and asserting inmates who married “ended up becoming better prisoners”); *id.* at *52 (observing that marriage’s benefits comprise the “better life” that prisoners are entitled to seek upon release). The briefs in *Turner* also speak to marriage’s role in prisoner rehabilitation. See Brief for Respondents at 19, *Turner*, 482 U.S. 78 (No. 85-1384) (discussing salutary effect of marriage on inmate, and noting “[t]he Watson-Safley marriage was beneficial to Ms. Watson and improved her attitude toward incarceration”); *id.* at 45 (discussing marriage’s positive effects on one of named plaintiffs in suit).

267. *Turner*, 482 U.S. at 96.

268. See John H. Laub et al., Trajectories of Change in Criminal Offending: Good Marriages and the Desistance Process, 63 *Am. Soc. Rev.* 225, 237 (1998) (concluding stable marriages often inhibit crime); Christy A. Visher & Jeremy Travis, Transitions from Prison to Community: Understanding Individual Pathways, 29 *Ann. Rev. Soc.* 89, 101 (2003) (cataloguing studies from 1980s showing married inmates enjoyed greater success upon reentry into society).

269. See Carlson & Cervera, *supra* note 262, at 329–30 (suggesting correctional institutions focus on maintaining prisoners’ bonds to their families as method for preventing recidivism); Homer, *supra* note 263, at 48–49 (discussing rehabilitative potential of strong family ties during imprisonment); John H. Laub & Robert J. Sampson, Understanding Desistance from Crime, 28 *Crime & Just.* 1, 20 (2001) (concluding “desistance from crime [is] facilitated by the development of quality marital bonds”); Robert J. Sampson & John H. Laub, Crime and Deviance over the Life Course: The Salience of Adult Social Bonds, 55 *Am. Soc. Rev.* 609, 625 (1990) (finding marriage, strong ties to family, and work are associated with reduced criminality in adults).

270. *Turner*, 482 U.S. at 91–93 (upholding prison’s ban on correspondence between prisoners).

not solely about providing *access* to marriage, but rather about providing access to an additional, but no less potent, means of social discipline and control.

Taken together, *Skinner*, *Zablocki*, and *Turner* go beyond simply identifying the contours of the right to marry. Instead, they all gesture toward an acknowledgment that the right to marry encompasses more than mere access to an institution. They suggest that part of the substantive content of marriage—the institution to which so many have sought access—involves the state’s interest in cultivating disciplined sexual citizens.

But is this vision of marriage as a mode of discipline viable in an age when state regulation of sexuality has eroded and sex outside of marriage is commonplace? Does marriage continue to play a disciplining role at a time when, as a legal matter, sex and procreation are unmoored from marriage and the state has ceded regulatory control over most forms of consensual, adult sex?

The following Part locates marriage in a broader, theoretical discussion of technologies of discipline, and in doing so, answers this question affirmatively. It shows that despite the legal changes of the last forty years, marriage continues to play a forceful role in disciplining sex and sexuality.

V. THE TWO PANOPTICONS

In *Discipline and Punish: The Birth of the Prison*, philosopher Michel Foucault attributed the birth of the prison system to the state’s need to create “docile bodies” well-suited to the work of the new industrial age.²⁷¹ Because it inculcated in prisoners the mental habits of discipline, order, and subservience, incarceration was considered a more effective deterrent to wrongdoing, and thus deemed superior to public executions.²⁷²

Importantly, Foucault noted that the prison system was not the only example of the state’s interest in disciplining its subjects and coercing them to behave in particular ways.²⁷³ While Foucault did not mention marriage explicitly in *Discipline and Punish*, in *The History of Sexuality: An Introduction*, he identified the connections between state-imposed discipline and the institution of marriage.²⁷⁴ There, Foucault discussed the development of an “anatomy-politics” of the individual body that emphasized health and hygiene, work, efficiency, morality, and productivity.²⁷⁵ This anatomy-politics worked in tandem with “bio-power,” which

271. Foucault, *Discipline and Punish*, supra note 122, at 138.

272. *Id.* at 227–28 (viewing incarceration as “natural extension of a justice imbued with disciplinary methods and examination procedures”).

273. *Id.* at 228. According to Foucault, it was no accident “that prisons resemble factories, schools, barracks, hospitals,” as all were vehicles for imposing discipline and inculcating state-endorsed values. *Id.*

274. Michel Foucault, *The History of Sexuality: An Introduction* (Robert Hurley trans., Pantheon Books 1978) (1976).

275. *Id.* at 139–41.

Foucault described as the demographic regulation of the social body through the registration of births, marriages, deaths, and the development of institutions like public schools and prisons.²⁷⁶ Together, anatomo-politics and bio-power provided the normalizing judgment necessary to produce self-disciplined “obedient subjects.”²⁷⁷

Foucault’s understanding of marriage, and other vehicles for state imposition of discipline, recalls Jeremy Bentham’s Panopticon.²⁷⁸ A circular edifice with a cylindrical tower in the center, the Panopticon allowed prison officials to observe all of the prisoners without the prisoners being able to tell whether they were being watched.²⁷⁹ “[T]he major effect of the Panopticon” was “to induce in the inmate a state of conscious and permanent visibility” that rendered the actual exercise of state power “unnecessary.”²⁸⁰ Put differently, the Panopticon normalized and embedded the experience of state-imposed discipline and surveillance so that even when the prisoners were not being watched, they continued to behave as though they were. They internalized the disciplining presence of the state.

Although Bentham’s Panopticon referred to the physical edifice of the prison, the criminal law itself functions with panoptic force. The criminal law identifies behavior that is subject to punishment, and in so doing, makes clear a broad standard for acceptable conduct. And importantly, through the threat of punishment, it secures compliance with this broad standard. For the most part, we observe this standard of conduct, regardless of whether the state is actually watching.

But the criminal law is not the only institution that functions as a Panopticon in the regulation of sex and sexuality. The idea of an institution that communicates and internalizes modes of discipline has long been a part of the understanding of marriage, as the history of criminal seduction laws suggests.²⁸¹ Although the criminal law provided strong incentives for seduction defendants to marry their victims, there were few mechanisms in place to ensure that these erstwhile husbands and wives comported their lives in the manner expected of spouses.²⁸² Instead, the idea of marriage as a punishment for seduction depended in large part on an abiding faith in marriage’s ability to communicate and embed particular norms of behavior and to cultivate the assumption of particular social roles and identities.²⁸³

276. *Id.*

277. *Id.* at 244.

278. See Foucault, *Discipline and Punish*, *supra* note 122, at 200–01 (referencing Bentham).

279. Bentham, *supra* note 125, at 29–95.

280. Foucault, *Discipline and Punish*, *supra* note 122, at 201.

281. See *supra* Part I (discussing history of criminal seduction laws).

282. See *supra* Part III.C (noting existence of incentives but lack of enforcement mechanisms).

283. This project, of course, was assisted by the fact that nineteenth-century marriage was an odd *mélange* of contract and status. See Kerry Abrams, *Marriage Fraud*, 100 *Calif.*

But criminal law and marriage did not simply function as independent panoptic forces; they did so in tandem with one another. As I have argued elsewhere, historically, both criminal law and marriage law worked cooperatively to regulate sex and sexuality.²⁸⁴ Laws regulating entry to marriage laid out “the normative parameters for intimate life by articulating what marriage is and should be,” and by constructing a boundary separating legitimate sexual behavior (marriage) from that which was unworthy and illegitimate (behavior ineligible for, or inimical to, marriage).²⁸⁵ Importantly, in doing so, family law relied on criminal law to reinforce this boundary by criminalizing illegitimate conduct.²⁸⁶ In this way, these two panopticons have operated as a kind of binary, cooperatively defining and regulating the boundaries of intimate life, all while communicating and embedding the norms of disciplined sexuality with which we are expected to comport.²⁸⁷

Today, it is clear that these two domains do not regulate sex and sexuality as robustly as they did in the past.²⁸⁸ Evidence of the fraying of these regulatory moorings can be seen in Supreme Court cases like *Eisenstadt v. Baird*²⁸⁹ and *Roe v. Wade*,²⁹⁰ as well as in state-level constitutional decisions like California’s *Marvin v. Marvin*,²⁹¹ all of which (however indirectly) concede the growing acceptance of noncriminal, nonmarital sex. But it is the Supreme Court’s 2003 decision in *Lawrence v. Texas* that most forcefully illustrates the unraveling of this regulatory project.²⁹²

L. Rev. (manuscript at 1) (forthcoming Feb. 2012) (deeming nineteenth-century marriage “a hybrid institution that encompassed aspects of both status and contract”); Ariela R. Dubler, Note, Governing Through Contract: Common Law Marriage in the Nineteenth Century, 107 Yale L.J. 1885, 1907 (1998) [hereinafter Dubler, Governing] (noting marriage “existed as a hybrid of the two categories: a ‘status contract’” (citing Robert J. Steinfeld, *The Invention of Free Labor: The Employment Relation in English and American Law and Culture, 1350–1870*, at 56 (1991))). That is, marriage was a contract that came with attendant status obligations—including modes of behavior—that could not be negotiated or discarded by the parties. Dubler, *Governing*, supra, at 1907–08. These status obligations communicated marital expectations and ensured that those entering marriage understood how they were to behave, even if the state was not at the bedroom door mandating compliance. In so doing, marriage, no less than the threat of criminal punishment, cultivated disciplined sexual actors.

284. Murray, *Strange Bedfellows*, supra note 49, at 1268 (“At every turn, criminal law’s prohibitions reinforce family law’s substantive restrictions.”).

285. *Id.* at 1266.

286. *Id.* at 1267–68 (describing criminal law’s role).

287. *Id.* at 1292–93 (identifying and discussing marriage-crime binary).

288. *Id.* at 1293 (noting erosion of state regulation of sex).

289. 405 U.S. 438 (1972) (striking down state law criminalizing contraceptive use by unmarried people).

290. 410 U.S. 113 (1973) (finding unconstitutional state law criminalizing abortion).

291. 557 P.2d 106 (Cal. 1976) (enforcing implied contract between unmarried cohabitants).

292. 539 U.S. 558 (2003).

In *Lawrence*, the Court struck down a Texas statute criminalizing same-sex sodomy.²⁹³ 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 “involve [the question of] whether the government must give formal recognition to any relationship that homosexual persons seek to enter.”²⁹⁴

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. In stark contrast to the seduction cases where transgressive sex and sexual impulses were either subject to marriage’s discipline or rooted out by the force of criminal punishment, *Lawrence* offered another possibility. Same-sex sodomy was no longer subject to criminal law’s regulation, but neither was it subject to marriage’s regulation. Instead, *Lawrence* interposed a space between marriage and crime that, in the relative absence of legal regulation, offered the possibility of sexual liberty untethered to the disciplinary domains of the state.

In the years since *Lawrence* was decided, the space between marriage and crime—the geography of sexual liberty—has narrowed considerably, and the regulatory project of cultivating disciplined sexual actors has continued, even in the absence of robust legal regulation. As Brenda Cossman has observed, in the wake of the decriminalization of certain sexual practices and greater acceptance of nonmarital sexuality, individuals have demonstrated their internalization of marriage’s disciplined norms by filling the governance void created by the state’s exit with self-regulation.²⁹⁵ To illustrate this point, Cossman points to the example of adultery.²⁹⁶ In *Lawrence*’s wake, the continued validity of criminal prohibitions on adultery has been called into question²⁹⁷ (and if these laws con-

293. *Id.* at 578.

294. *Id.*

295. Brenda Cossman, *Sexual Citizens: The Legal and Cultural Regulation of Sex and Belonging* 71–74 (2007) [hereinafter Cossman, *Sexual Citizens*].

296. *Id.* at 83–95.

297. *Lawrence*, 539 U.S. at 590 (Scalia, J., dissenting) (observing *Lawrence* “called into question” continued vitality of adultery prohibitions and other morals legislation); *Hobbs v. Smith*, No. 05 CVS 267, 2006 WL 3103008, at *1 (N.C. Super. Ct. Aug. 25, 2006) (striking down law criminalizing fornication and adultery on ground that it violated substantive due process rights); see also Ristroph & Murray, *supra* note 140, at 1270 n.159 (noting that though adultery statutes remain on books in many states, *Lawrence* makes likelihood of prosecution more remote). However, *Lawrence* has not foreclosed the criminal prosecution of adultery in the context of the military. See *United States v. Orellana*, 62 M.J. 595, 598 (N-M. Ct. Crim. App. 2005) (concluding “*Lawrence* does not shield the appellant’s [adulterous] actions in this case”); *United States v. Bart*, 61 M.J. 578, 582 (N-M. Ct. Crim. App. 2005) (finding “appellant’s sodomy outside the protected liberty interests recognized in *Lawrence*” (internal quotation marks omitted)).

tinue to be constitutional, they are unlikely to be prosecuted).²⁹⁸ Additionally, in no-fault divorce states, adultery does not impede one's ability to exit marriage and may have little effect on the disposition of marital assets.²⁹⁹ Accordingly, the practice of adultery might be seen as occupying the space between marriage and crime, in that it is neither marital behavior, nor criminal behavior.

But as Cossman demonstrates, adultery has not rested comfortably in this interstitial space. Though society no longer relies exclusively "on legal regulation to promote marriage as a monogamous relationship,"³⁰⁰ the norm of monogamy is still robustly cultivated and enforced. Today, the new harms of adultery are not legal penalties, but self-imposed penalties that flow from norms that were once legally imposed, but now are generated and refined through culture. The mandate for monogamous marriage is not issued by the state, but rather, by Dr. Phil and Oprah.³⁰¹ Instead of the threat of criminal punishment, cultural referents, such as books, television shows, and films³⁰²—rather than law—make explicit the consequences of adultery.³⁰³

Though adultery regulation often involves self-imposed norms produced through culture rather than state regulation, it would be naïve to say that this self-regulation is completely detached from the state and its

298. Brenda Cossman, *The New Politics of Adultery*, 15 *Colum. J. Gender & L.* 274, 275 (2006) (discussing uneven prosecution of adultery statutes); Gabrielle Viator, Note, *The Validity of Criminal Adultery Prohibitions After Lawrence v. Texas*, 39 *Suffolk U. L. Rev.* 837, 845 (2006) (explaining "states infrequently prosecute adultery").

299. Susan Frelich Appleton, *Toward a "Culturally Cliterate" Family Law?*, 23 *Berkeley J. Gender L. & Just.* 267, 294–95 (2008) (discussing implications of adultery).

300. Cossman, *Sexual Citizens*, supra note 295, at 83.

301. *Id.* at 19. Indeed, Dr. Phil's website counsels spouses to draft a "marriage covenant"—a "mission statement for [the] relationship." *A Marriage Covenant*, Dr.Phil.com, <http://www.drphil.com/articles/article/354> (on file with the *Columbia Law Review*) (last visited Oct. 24, 2011). Such a covenant, though obviously not legally binding, nonetheless attests to the force of the cultural mandate to self-govern one's intimate relationships.

302. Cossman, *Sexual Citizens*, supra note 295, at 84 (noting dangers of infidelity are "now produced culturally more than legally").

303. Anyone contemplating the possibility of an extramarital affair needs only to turn on the television or go to the movies to understand the consequences of adultery. Popular culture makes clear that straying from one's marriage invites the possibility of community condemnation and ridicule (*Desperate Housewives*), the destruction of relationships and friendships (*Closer* and *We Don't Live Here Anymore*), the wrath of psychotic former lovers (*Fatal Attraction*), and even murder (*Unfaithful*). Cossman, *Sexual Citizens*, supra note 295, at 91, 95–104. There are also powerful nonfiction examples of adultery's consequences. In 2008, New York governor Eliot Spitzer resigned his post upon admitting committing adultery with prostitutes. David Kocieniewski & Danny Hakim, *Felled by Sex Scandal, He Says His Focus Is on Family*, *N.Y. Times*, Mar. 13, 2008, at A1. In 2011, former California governor Arnold Schwarzenegger set aside plans to return to acting after admitting that he had committed adultery and fathered a child with a former household worker. Jennifer Medina, *California: Schwarzenegger Postpones Return to Film*, *N.Y. Times*, May 20, 2011, at A16. Schwarzenegger's wife, Maria Shriver, subsequently filed for divorce. Jennifer Medina, *Shriver Files for Divorce From Schwarzenegger*, *N.Y. Times*, July 2, 2011, at A11.

institutions. Though self-imposed and culturally produced, these expectations operate in the law's shadow, reflecting earlier, legally-imposed understandings of marriage, an institution that historically has borne the imprimatur of state recognition and underscored the importance of certain state-endorsed values and identities.

This does not mean that there is no difference between legally imposed monogamy and monogamous self-governance. What makes this culturally derived self-regulation distinct from direct legal regulation is that the referents on which it draws can be pluralistic. Rather than drawing from a single legal discourse or doctrine, the self-regulation and self-governance of adultery depends on input from a variety of cultural referents. Thus, while culture may generate norms and expectations that are internalized and performed, the norms produced and the behavior dictated, though likely consistent with extant norms about marriage, may be more varied than those generated by law. And the rationales that justify the imposition and performance of those norms may be more diverse than those that undergird legal regulation.

What it *does* mean is that this interstitial space is vulnerable to being reclaimed by regulatory forces. To understand this point, consider the majority opinion's depiction of the *Lawrence* plaintiffs. The Court's opinion clearly relocates John Geddes Lawrence and Tyron Garner from the rubric of crime to the space between marriage and crime—they are no longer criminals, but they are not eligible for marriage. But the opinion's language does not treat the two plaintiffs as though they occupy an undefined space outside of marriage. Although there was scant evidence for it,³⁰⁴ the opinion paints Tyron Garner and John Geddes Lawrence with the brush of marital domesticity, suggesting that the pair were a long-term couple.³⁰⁵ Even as *Lawrence* creates a new geography for sex, the opinion cannot relinquish the idea that sex must be subject to state discipline, whether through criminal punishment or marriage. Removed from criminal law's discipline, but ineligible for marriage's discipline, same-sex

304. Dale Carpenter, *The Unknown Past of Lawrence v. Texas*, 102 Mich. L. Rev. 1464, 1478 (2004) (discussing evidence suggesting pair were "occasional sexual partners, but were not in long-term, committed relationship when they were arrested").

305. The opinion does not refer explicitly to Lawrence and Garner as married, but it makes extensive references to the home—long associated with marriage—and the presumed relationship between the defendants. *Lawrence v. Texas*, 539 U.S. 558, 562, 567, 574 (2003); see also *id.* at 580 (O'Connor, J., concurring) (stating challenged legislation inhibits "personal relationships"). The opinion also purports to protect a right to engage in "intimate conduct with another person" that "can be but one element in a personal bond that is more enduring." *Id.* at 567 (majority opinion). For further discussion of *Lawrence's* depiction of the defendants, see Katherine M. Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 Colum. L. Rev. 1399, 1407 (2004) ("Justice Kennedy takes it as a given that the sex between John Lawrence and Tyron Garner took place within the context of a relationship."); Murray, *Strange Bedfellows*, *supra* note 49, at 1305 ("Kennedy's opinion speaks of Lawrence and Garner as though they are long-term partners sharing a life in common.").

sodomy is recast as relational and marriage-like, rather than as a full-throated expression of sexual liberty.

This transformation of same-sex sodomy into marriage-like intimacy not only reflects marriage's disciplinary force, but also underwrites an effort to impose *some* kind of discipline in the interstitial space between marriage and crime. The opinion speaks of liberty, autonomy, and dignity—and the possibility of sex that is not subject to the state's disciplinary project.³⁰⁶ But it soon makes clear that its protection is contingent and cabined.³⁰⁷ Though *Lawrence* offers the promise of a space for sex without legal regulation, it ultimately reneges. The constitutional protection afforded in the space between marriage and crime is available to certain types of sex: private consensual sex between two adults.³⁰⁸ Obviously, there is a wide range of sexual practices that might comport with these indicia—everything from ordinary sex between cohabiting adults to sadomasochism (“S&M”). But importantly, *Lawrence's* language makes clear that the decision is not about protecting sex for sex's sake.³⁰⁹ Instead, *Lawrence's* protections are most robust when private, consensual sex occurs between two adults in the context of a monogamous relationship.³¹⁰ Consider the post-*Lawrence* legal landscape. Though some courts

306. See *Lawrence*, 539 U.S. at 567 (“[Anti-sodomy laws] touch[] upon the most private human conduct, sexual behavior, and in the most private of places, the home. . . . [They] seek to control a personal relationship that . . . is within the liberty of persons to choose without being punished as criminals.”).

307. The extent of *Lawrence's* protections for same-sex sex is also unclear. Though the opinion speaks of sexual liberty in the florid tones of substantive due process, it is not clear that the right protected is fundamental in nature. See *id.* at 572 (providing “substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex”); *id.* at 586 (Scalia, J., dissenting) (“[N]owhere does the Court’s opinion declare that homosexual sodomy is a ‘fundamental right’ . . . nor does it subject the Texas law to the standard of review that would be appropriate (strict scrutiny) if homosexual sodomy were a ‘fundamental right.’”); *Lofton v. Sec’y of Dep’t of Children & Family Servs.*, 358 F.3d 804, 816 (11th Cir. 2004) (noting *Lawrence* Court did not characterize right at issue as “fundamental”).

308. See *Lawrence*, 539 U.S. at 578 (“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.”).

309. Indeed, the *Lawrence* majority criticized *Bowers v. Hardwick*, an earlier case upholding Georgia’s anti-sodomy criminal law, because it framed the issue as involving only a particular sex act. *Id.* at 566–67 (“To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse.”).

310. Indeed, *Lawrence* does not protect same-sex sex on its own terms but rather protects it where it occurs in furtherance of an intimate relationship. *Id.* at 567 (concluding laws criminalizing sodomy “seek to control a *personal relationship* that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals” (emphasis added)); see also *id.* (“When sexuality finds overt expression in *intimate* conduct with another person, the conduct can be but one element in a *personal bond that is more enduring*. The liberty protected by the Constitution allows homosexual persons the right to make this choice.” (emphasis added)). As Jennifer

have interpreted *Lawrence* broadly to protect consensual, private sex between adults,³¹¹ others have focused on *Lawrence*'s apparent emphasis on sex in the context of intimate relationships.³¹²

Lawrence's emphasis on sex in furtherance of a relationship is meaningful for establishing the parameters and contents of the space between marriage and crime. Though there is a wide spectrum of private, consensual adult sexual acts—sex with a prostitute in a private home, sex with a long-term partner in a park or in a theater, bondage with another adult, masturbation with sex toys—constitutional protection is assured only where the sex is marriage-like sex. That is, sex that occurs between two consenting adults in a private setting, preferably in the context of a monogamous relationship. The emphasis on marriage-like sex means that the interstitial space between marriage and crime is not a space of sexual liberty where a wide range of sexual acts might comfortably be accommodated. Instead, the preference for sex in the service of relationship means that this space has been rendered disciplinary and regulatory because its protections are reserved primarily to those who are willing to live their lives in the disciplined manner of married people.

Of course, the sex protected in *Lawrence* is not necessarily subject to *state-imposed* discipline. Indeed, *Lawrence* makes clear that the relationships it contemplates are those that *do not* seek formal state recognition;

Rothman and Laura Rosenbury have observed, the reference to an “enduring bond” evokes *Griswold v. Connecticut*, which extended substantial constitutional protections to sexual choices and acts made in the context of marriage. Laura A. Rosenbury & Jennifer E. Rothman, *Sex In and Out of Intimacy*, 59 *Emory L.J.* 809, 827 n.102 (2010); see also *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (“Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life Yet it is an association for as noble a purpose as any involved in our prior decisions.”).

311. See *Anderson v. Morrow*, 371 F.3d 1027, 1032–33 (9th Cir. 2004) (suggesting *Lawrence* established “the right of two individuals to engage in fully and mutually consensual private sexual conduct”); *People v. Knox*, 903 N.E.2d 1149, 1153 (N.Y. 2009) (stating *Lawrence* established fundamental “right to engage in private consensual sexual activity”).

312. See *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738, 742–44 (5th Cir. 2008) (holding criminal ban on distribution of sex toys unconstitutional under *Lawrence* and noting that sex toys may be used to enhance intimate relationships); *Muth v. Frank*, 412 F.3d 808, 817 (7th Cir. 2005) (holding *Lawrence* did not establish fundamental right “for adults to engage in all manner of consensual sexual conduct”); *Williams v. Pryor*, 240 F.3d 944, 949 (11th Cir. 2001) (upholding Alabama statute banning distribution and possession of sex toys because they promote “prurient interests in autonomous sex” and “the pursuit of orgasms by artificial means for their own sake”), *aff’d sub nom. Williams v. Attorney Gen. of Ala.*, 378 F.3d 1232, 1234–38 (11th Cir. 2004); *832 Corp. v. Gloucester Twp.*, 404 F. Supp. 2d 614, 623 (D.N.J. 2005) (describing *Lawrence* as “protecting *relationships* from governmental intrusion” (emphasis added)); *State v. Romano*, 155 P.3d 1102, 1111 (Haw. 2007) (describing *Lawrence*, in context of challenge to prostitution prohibitions, as primarily protecting conduct of “persons engaged in homosexual *relationships*” (emphasis added)).

they are not marriages.³¹³ But it would be reductive to say that the disciplined, marriage-like sex that *Lawrence* protects is not part of the state's disciplinary project. Indeed, this marriage-like sex represents the internalization and performance of marriage-like norms—norms that often are imposed by culture, rather than the state, but are nonetheless shaped by direct state regulation that occurs elsewhere.

Consider, for example, the marriage equality effort and the plaintiffs selected to front the various lawsuits challenging state marriage laws. These “perfect plaintiffs” have proven themselves to be self-regulating and self-disciplining in their performance of marriage's norms.³¹⁴ They are monogamous, long-term couples. Unlike Jack Skinner, Roger Redhail, and the *Turner* inmates, they are industrious, employed, tax-paying citizens. Many of them are raising children together. Their bid for marriage's legal recognition is predicated in large part on the fact that they have already adopted marriage's norms—and have rejected more transgressive behavior. They behave in the disciplined manner of married couples. They need only state recognition of their disciplined status.³¹⁵

Post-*Lawrence*, these “perfect plaintiffs” occupy the interstitial space between marriage and crime. They are no longer criminals, but they are not eligible for legal recognition through marriage. However, their occupancy of this interstitial space suggests the way in which this space has ceased to be a refuge from the discipline exerted by marriage and criminal law. Instead, this space has been transformed from a space that might accommodate nondeviant, nonmarriage into one that is merely a way station for those who have adopted marriage's norms and wait patiently for state recognition of their disciplined status. The self-regulating, disciplined plaintiffs identified by the marriage equality movement suggest the interstitial space's transformation from a potential respite from state regulation of sex and sexuality into an annexation of that regulatory project. Relocated from criminal law's domain to the space between marriage and crime, the impulse has not been to explore this space and its

313. *Lawrence*, 539 U.S. at 578 (noting case “does not involve whether the government must give formal recognition to any relationship”).

314. Katherine M. Franke, *The Politics of Same-Sex Marriage Politics*, 15 *Colum. J. Gender & L.* 236, 239 (2006) (discussing selection of “perfect plaintiffs”); Nancy Levit, *Theorizing and Litigating the Rights of Sexual Minorities*, 19 *Colum. J. Gender & L.* 21, 33 (2010) (“[T]he successful same-sex marriage cases were carefully orchestrated to select plaintiffs in long-term, committed, marriage-like relationships, whose personal narratives appealed to middle America.”). Indeed, these model plaintiffs underscore that, despite the possible inclusion of this new constituency, the core values of marriage will be unaltered. See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 965 (Mass. 2003) (“That same-sex couples are willing to embrace marriage's solemn obligations of exclusivity, mutual support, and commitment to one another is a testament to the enduring place of marriage in our laws and in the human spirit.”).

315. And indeed, this move signals the injustice of their situation. They have submitted to the discipline expected of married people, yet they are foreclosed from reaping the benefits that typically accrue to married people.

possibilities for sexual liberty.³¹⁶ Instead, as these “perfect plaintiffs” suggest, there has been a move to impose marriage’s discipline on the occupants of this space and to press for legal recognition through marriage. Consider the effects of the introduction of marriage equality in various U.S. jurisdictions. For example, the 2010 legalization of same-sex marriage in Connecticut also required the automatic conversion of existing civil unions into marriages.³¹⁷ In Massachusetts, which began recognizing same-sex marriages in 2004, public and private employers required domestic partners to marry in order to maintain their benefits.³¹⁸ In many cases, the introduction of marriage equality has prompted the demise of alternative statuses and the possibility of a “menu” of diverse options for relationship recognition.³¹⁹

These observations are not intended to denigrate the effort to secure marriage equality, nor is it meant to minimize the claims of those who have been excluded from marriage. It is merely to say that it is not enough to simply be transparent and forthright about marriage’s role as a vehicle of state discipline. Greater transparency will certainly provide a more accurate description of what marriage is and what it does. But this, by itself, is insufficient.

We cannot discount the fact that many people want to be married, and some of those eager to marry may simply ignore or overlook the institution’s disciplinary content. Others may recognize the disciplinary aspect of marriage, but may find its salutary benefits to be a worthy tradeoff for submitting to the institution’s disciplined norms. But what about those who recognize marriage’s discipline and regulation and long for an alternative? For these individuals, regardless of how transparent we are about what marriage is as an institution, there may be no circumstance that would make subjecting themselves to the state’s disciplinary power a palatable undertaking. They may want to engage in sex, and perhaps relationships, but they do not want to do so in the context of state-imposed or state-approved regulation. For these people, the challenge is not simply to be more accurate in our popular and legal discourses of marriage, but to affirmatively make space for nondeviant, nonmarital sex, to offer an alternative that allows individuals to live their intimate lives beyond the disciplinary domains of the state.

316. Again, this impulse might vary among demographic groups, particularly those organized by age. See *infra* note 324 (discussing flourishing “hook up culture” among college students).

317. See Gay & Lesbian Advocates & Defenders (GLAD), Connecticut Civil Unions 4 (2010), available at www.glad.org/uploads/docs/publications/ct-civil-union.pdf (on file with the *Columbia Law Review*) (stating that those in civil unions will be “deemed to be married” upon effective date of law).

318. Katherine M. Franke, *Marriage Is a Mixed Blessing*, N.Y. Times, June 24, 2011, at A25.

319. *Id.*

Today, *Lawrence v. Texas* is understood by many to be a “stepping stone” towards constitutional protection for same-sex marriage.³²⁰ And given its privileging of marriage-like sex, it is not hard to see why it has been interpreted in this manner. But *Lawrence* could do more than simply point the way to the expansion of an already vast regulatory project. *Lawrence’s* language of liberty, autonomy, and dignity, and its initial impulse to decriminalize sex without making it eligible for formal state recognition through marriage, suggest (at least initially) the importance of alternatives to the state’s project of sexual discipline.

What has occurred in *Lawrence’s* wake reveals the power of legal and extra-legal forces in bolstering and reinforcing a project of state discipline. Though *Lawrence* identified an interstitial space between marriage and crime that could be a haven for sexual liberty, this space has been colonized by marriage and its norms. In essence, norms shaped by extant legal regulation, but disseminated through culture rather than law, have swallowed up the space between marriage and crime. In doing so, these forces narrow the space available for those seeking sexual liberty, rather than marriage and its analogues.

But *Lawrence* suggests that law, perhaps paradoxically, can be an important tool for articulating and preserving a space for sexual liberty. If culture and the residue of legal norms have stepped in to fill the void created by law’s exit, and in doing so, have instantiated marriage-like norms in the space between marriage and crime, perhaps law is needed to affirmatively reclaim that space as one secluded from—and distinct from—marriage and crime.

With this in mind, I return to the marriage equality movement. It is widely speculated that the U.S. Supreme Court will soon grapple with the question of whether the right to marry includes the right to marry a person of the same sex. Indeed, some have suggested that *Perry v. Schwarzenegger*,³²¹ the recent federal lawsuit challenging California’s Proposition 8, will be the case in which the Court decides once and for all the question of marriage equality.³²² If the Court does take up this issue, the history of marriage as punishment will be instructive. As an initial matter, this history will help clarify and make transparent the nature of the marriage right, revealing that the right to marry is not solely a question of *access*, but rather, a question of access to a vehicle of state discipline.

But critically, this history of marriage as punishment also reveals the totality of the state’s project of sexual discipline and suggests the importance of alternatives that promote sexual liberty outside of marriage and crime. Accordingly, if and when the Court does take up the question of marriage equality, the history of marriage as punishment makes clear that

320. Ariela R. Dubler, From *McLaughlin v. Florida* to *Lawrence v. Texas*: Sexual Freedom and the Road to Marriage, 106 Colum. L. Rev. 1165, 1187 (2006).

321. 704 F. Supp. 2d 921 (N.D. Cal. 2010).

322. Margaret Talbot, A Risky Proposal, *New Yorker*, Jan. 18, 2010, at 40.

there is more at stake than just the right to marry. Indeed, determining the scope and nature of the marriage right may only expand the marriage's regulatory terrain to include new constituents. Instead, what is needed is for the Court to observe and protect a right to sexual liberty that coexists alongside an expanded right to marry. What is needed is for law to step into the space between marriage and crime created by *Lawrence* and reclaim it as a refuge from the disciplinary domains of the state.

Upon reclaiming a right to sexual liberty, the space between marriage and crime could be a place for relationships that mimic marriage but do not seek formal recognition as marriages. But it also could be a place for a wider range of sexual acts and actors, including group sex, polyamory, or “hooking up”—acts that do not model marriage's exclusivity or longevity and are commonly dismissed as promiscuous or immature.³²³ It might include acts that are now regulated as criminal, but that do not pose the same clear harms as acts like rape or domestic violence.³²⁴ It could be a space for sexual liberty that embraces the prospect of nondeviant, nonmarital sex.

Some might argue that sexual liberty of this sort is untenable. Just as Justice Kennedy was inclined to read John Geddes Lawrence and Tyron Garner through marriage's lens, it is possible that either marital or criminal norms will continue to shape the behavior contained in the space between marriage and crime.³²⁵ This prospect is perhaps more likely given the role that culture and self-governance have come to play in those spaces where legal regulation has receded.

It is true that marital or criminal norms may continue to hold sway in the space between marriage and crime. Indeed, one might argue that this is an inevitability—that there is no “outside” of law.³²⁶ But what is promis-

323. See generally Rosenbury & Rothman, *supra* note 310, at 811 (challenging model of marital intimacy and exclusivity). For challenges to monogamy, see generally Elizabeth F. Emens, *Monogamy's Law: Compulsory Monogamy and Polyamorous Existence*, 29 N.Y.U. Rev. L. & Soc. Change 277 (2004). For discussions of “hook up” culture, see generally Kathleen A. Bogle, *Hooking Up: Sex, Dating, and Relationships on Campus* (2008) and Paula England et al., *Hooking Up and Forming Romantic Relationships on Today's College Campuses*, in *The Gendered Society Reader* 531, 535–38 (Michael S. Kimmel & Amy Aronson eds., 3d ed. 2008).

324. Such acts might include sex in quasi-public spaces like sex clubs or other venues that are understood to be spaces where individuals engage in public sex. See *Commonwealth v. Can-Port Amusement Corp.*, No. 050295, 2005 WL 2009672, at *1 (Mass. Super. Ct. June 29, 2005) (describing movie theater that displayed adult films, sold explicit materials, and in which customers routinely engaged in consensual sex acts).

325. See *supra* notes 301–303 and accompanying text (discussing culture's role in enforcing (and reinforcing) marriage-like norms).

326. Katherine M. Franke, *Longing for Loving*, 76 Fordham L. Rev. 2685, 2688 (2008) (noting there are no longer “social locations that stand fully outside of law—whether in law's shadow, in social fields constituted by Weberian legal orders that in complex ways mimic state legal regulation, in spaces constituted by a Foucauldian sense of law's circulatory power, or in legally pluralistic domains”).

ing about this interstitial space is not necessarily the complete absence of law—indeed, law is *required* to create and maintain this space.³²⁷ Instead, what is promising about this space is the prospect of *less thick* legal regulation.³²⁸ Though created by law and existing in the shadows cast by two domains of legal regulation,³²⁹ this space may be subject to some of the norms that law produces. But the regulation that occurs in this shadowed space will necessarily be thinner than that which would exist in either of the domains where law is fully present.

And while it is also true that culture, rather than law, may be a significant player in generating and embedding norms,³³⁰ this interaction may prove useful for realizing this interstitial space's potential as an arena for greater sexual liberty. The interaction of law and culture may allow each to serve as a check on the other's regulatory force.³³¹ By this I mean that law, perhaps paradoxically, could mute the effect of cultural norms, which have been shaped by extant legal rules and thus reflect an earlier legal regime that valued sex based on its proximity to marriage and distance from crime. On this account, law's affirmative presence in identifying and preserving the space between marriage and crime as one of less thick regulation may mute culture's ability to swallow up this interstitial space with cultural norms that mirror earlier legal rules venerating marriage as the model for acceptable sex and sexuality.

Similarly, culture's impact as an engine for norm production may help lessen the effect of law's long shadow. The cultural referents that guide the self-governance that has followed the erosion of state-imposed regulation are varied and pluralistic. Though they have emphasized the importance of marriage and domesticity in the lives of individuals, no one set of cultural references dominates as a purveyor of norms. Dr. Phil

327. After all, this interstitial space between marriage and crime was created—or at least affirmatively acknowledged—by a judicial opinion. And, as this Article contends, law (perhaps paradoxically) is required to realize its full potential as a haven for sexual liberty. See *supra* text accompanying notes 321–323.

328. The idea of “thicker” and “thinner” modes of regulation imagines the state's regulatory presence as a sort of spectrum. “Thick” regulation imagines the state in an aggressive regulatory posture—one that demands conformity with the state's preferred norms and permits no deviation from these norms. See Ristroph & Murray, *supra* note 140, at 1259–63 (discussing “thick” regulation in context of *Reynolds v. United States* and criminal ban on polygamy). “Thinner” regulation imagines a more permissive brand of state regulation—one that clearly articulates a preference for conformance with particular norms but permits deviations from these norms where it serves the state's ends. See *id.* at 1263–70 (discussing thinner forms of legal regulation).

329. See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 *Yale L.J.* 950, 968 (1979) (discussing decisionmaking in shadow of law).

330. See Robert C. Ellickson, *Order Without Law* 141–42 (1991) (discussing importance of norms in regulating property entitlements in Shasta County).

331. As the title of Ellickson's book suggests, in the absence of law, social norms may step in to fill a regulatory void and impose order. *Id.* at 4–6. It stands to reason, then, that in circumstances where law coexists with norms that each may serve as a regulatory check on the other.

competes with Oprah, who in turn must compete with *Desperate Housewives* and myriad other referents to shape the norms that become embedded and performed.³³²

The acts and actors, whether married-like or decidedly unmarried-like, that may come to occupy this interstitial space will also bring with them cultural referents that will continue to diversify the norm-generating influences. In this way, this interstitial space does not necessarily signal the total absence of discipline and regulation. But it does contemplate the possibility of less forceful state-imposed discipline and more pluralistic forms of self-governance. With this in mind, a right to sexual liberty rooted in the space between marriage and crime need not signal sexual chaos and disorder. Instead, it could encompass a pluralistic range of sexual practices, intimate acts, and modes of kinship and belonging.

CONCLUSION

In January 2010, Theodore Olson, one of the lawyers litigating *Perry v. Schwarzenegger*, outlined *The Conservative Case for Gay Marriage*.³³³ Speaking to social conservatives who have resisted efforts to expand civil marriage to LGBT individuals and those who are undecided about marriage equality, Olson argued that “same-sex unions promote the values conservatives prize,”³³⁴ including accountability, social stability, and economic partnership. For Olson, the allure of marriage equality is obvious: Marriage is a disciplinary institution and its expansion to include same-sex couples would necessarily include more people within the ambit of the state’s disciplinary reach.³³⁵

Olson’s account of marriage’s disciplinary possibilities accords with marriage’s history. As this Article recounts, from the mid-nineteenth century to the mid-twentieth century, marriage played an integral role in the enforcement and administration of criminal seduction statutes. Recovering this history of marriage and seduction not only reveals the complicated relationship between criminal law and family law, it also makes clear that family law, through the institution of marriage, was, no less than criminal law, an important disciplinary force in the lives of men and women.

332. See generally Cossman, *Sexual Citizens*, supra note 295 (discussing myriad of cultural referents working in tandem to produce modern view of ideal sexual citizen). Other scholars have discussed the media’s role in producing culture. See Russell K. Robinson, *Racing the Closet*, 61 *Stan. L. Rev.* 1463, 1470–76 (2009) (discussing media’s role in producing “DL culture”); Russell K. Robinson, *Uncovering Covering*, 101 *Nw. U. L. Rev.* 1809, 1822–23 (2007) (identifying various sources responsible for production of gay culture).

333. Theodore B. Olson, *The Conservative Case for Gay Marriage*, *Newsweek*, Jan. 18, 2010, at 48.

334. *Id.*

335. Arguments like Olson’s have begun to move into the mainstream discourse of marriage, but they have yet to displace or challenge the prevailing view of marriage that accentuates the institution’s positive attributes.

The history of criminal seduction offers useful lessons for the contemporary practice of marriage. Though the popular discourse of marriage focuses on the institution's many salutary benefits, it elides more substantive discussion of its disciplinary content and punitive history. As this Article argues, marriage, like the criminal law, continues to be one of the technologies of discipline that is deployed by the state in the project of constructing and replicating a disciplined citizenry.

Recognizing and acknowledging marriage's disciplinary qualities complicates the extant jurisprudence of rights that, most recently, has focused on the right to marry. As this Article has argued, marriage's role as a technology of discipline requires us to reconsider the marriage right as more than simply a right of access, but rather a right of access to the disciplinary force of the state.

Reframing the right to marry and the institution of marriage along these lines would allow a more accurate depiction of marriage—one that is transparent and forthright about marriage's disciplinary character. Greater transparency and accuracy in our discourses of marriage is important for those who seek marriage, and for those who would avoid it. Transparency not only helps illuminate what marriage is—it prompts us to think seriously about alternatives for those who would prefer to live their lives outside of the state's disciplinary domains. Accordingly, this Article strives not only toward a more accurate understanding of marriage, but toward the possibility of sexual liberty untethered to marriage.