Will the Purposes Underlying Illinois Criminal Prohibitions of Fornication and Adultery Survive After Lawrence v. Texas

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Introduction

There is within the law a recurring conflict between the rights of the individual to behave freely and the rights of the community to restrain individual prerogative. This conflict was of substantial importance in the United States as early as 1789, when New York and other States refused to take part in the Union without the protections of a Bill of Rights. Today the conflict is showing itself in a multitude of fields, but one particularly interesting zone of conflict is the divergence between community mores and private, consensual sexual behavior. In such quarrels, the individual, seeking to be free from restraint on his or her sexual practices, looks for release within the guarantees of the Bill of Rights and the Fourteenth Amendment to the Constitution. The dilemma for the judicial branch of the United States is determining at exactly what point community mores may not be used by government leaders to inhibit private sexuality.

This question was given a position of primary consideration when it reached the United States Supreme Court in the recent case, *Lawrence v Texas.*¹ In short, that case overturned earlier holdings allowing for the governmental condemnation of homosexual practices and went somewhat further by declaring nearly all private, consensual sexual behavior to be within the protection of the right to privacy. Thus, *Lawrence* effectively declared invalid laws aimed at criminalizing private, consensual sexual intercourse. The impact of this ruling is likely to extend beyond laws against homosexuality by also voiding laws against fornication and adultery generally. If this occurs, an important question is what affect *Lawrence* will have upon a community’s ability to preserve social mores reproving adultery and fornication? As will be shown below, evidence of direct enforcement of adultery and fornication laws is very difficult to find. Therefore, the more important question regarding preservation of community mores is
whether secondary matters, relying in some part upon the sex laws, will be impacted? These secondary matters include such things as child custody and support determinations, rental housing discrimination, and others.

In determining the effect of Lawrence with regard to those matters secondarily affected by fornication and adultery laws, it is necessary to make four analyses. First, it is essential that the holding of Lawrence be dissected so that the rules and exceptions flowing from that case may be illuminated and applied. Second, it is important to show that direct enforcement of adultery and fornication is low enough that the subject of real significance is secondary enforcement. Third, it is crucial to determine the underlying purpose of the sex laws because that is what is truly at stake. Whether or not the criminal sanctions against fornication and adultery are removed is made less significant if the purposes underlying those sanctions are still effected through secondary means. Thus, the fourth issue is to determine what impact the removal of such criminal sanctions will have in two important areas of secondary enforcement: child custody determinations and rental housing discrimination. In reducing this analytic enterprise to a helpful business model, one might say that the Lawrence case is likely to have the ‘gross effect’ or ‘inflated effect’ of entirely removing criminal sanctions against adultery and fornication. However, the ‘net effect’ or ‘real effect’ of Lawrence can be measured only by considering the extent to which the underlying purpose of such laws is defeated in the context of non-criminal, secondary enforcement.
I. Lawrence v Texas

The pivotal case in understanding the modern legal stance toward private consensual sexual activity in the United States is the United States Supreme Court case, Lawrence v Texas. In formulating its position, the Court cited three major issues to be resolved while supplying historical context for the issue, a history of criminal enforcement of homosexuality laws, and a rationale for overruling the precedent of Bowers v Hardwick. The main issue of homosexual privacy involved in Lawrence was expressed in three questions:

“1. Whether Petitioners’ criminal convictions under the Texas ‘Homosexual Conduct’ law—which criminalizes sexual intimacy by same-sex couples, but not identical behavior by different-sex couples—violate the Fourteenth Amendment guarantee of equal protection of laws?

“2. Whether Petitioners’ criminal convictions for adult consensual sexual intimacy in the home violate their vital interests in liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment?

“3. Whether Bowers v Hardwick should be overruled?”

The Court first determined that the issue is best resolved under the Fourteenth Amendment Due Process clause rather than the Equal Protection clause. The Court believed that Justice Stevens’ dissenting opinion in Bowers v Hardwick encompassed the proper analysis of the due process liberty interest at stake:

“First, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice….Second, individual decisions by married persons, concerning the intimacies of
their physical relationship, even when not intended to produce offspring, are a form of ‘liberty’ protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to the intimate choices by unmarried as well as married persons.”

Thus, the Court came to the conclusion that a liberty interest was being transgressed by the enforcement of criminal laws against homosexual sodomy.

Next the Court had to determine the appropriate test with which to judge laws infringing upon that liberty interest. Normally, government actions affecting a fundamental right or hostile to protected classes may only survive where there is some compelling government interest and the law is narrowly tailored to meet that interest. In the case of infringement on rights that are not considered fundamental or laws not hostile to protected classes, the law need only bear some rational relationship to a legitimate state interest. The test employed here was that the statute must further some legitimate state interest, but the Court found none which justified this particular infringement on personal liberty. In finding no legitimate state interest, the Court explained that “[o]ur obligation is to define the liberty of all, not to mandate our own moral code.” Furthermore, the impact of criminalization of homosexual conduct is illegitimate because it “demeans” homosexuals and creates a significant stigma through conviction and registration requirements. “The State cannot demean [homosexuals’] existence or control their destiny by making their private sexual conduct a crime.” Yet the ruling retains an outer boundary in that it does not deal with situations involving minors, coercion, public conduct, or formal government recognition of relationships. Essentially, the Court found that laws proscribing private homosexual activity failed even a rational basis type of test and could not survive regardless of contrary precedent.
On its way to reaching this decision, the Court injected some historical information regarding legislation aimed at homosexuality. Homosexual activity itself, said the Court, does not have a long history of legislative forbiddance. Legislative proscription of sodomy in the colonies was carried over from the England, which passed laws in 1533 barring sodomy between men and women as well as men and men. Into the 1800s, such laws in America were interpreted to include both same sex and different sex relationships. The term “homosexual” was not introduced until the late 1800s, so the earlier laws regarding sodomy and sexual activity were more broadly focused on all sexually active persons. Laws specifically focusing on homosexual individuals did not arise in America until the 1970s, and earlier enforcement against homosexuals often dealt with activities that occurred in public. While the Bowers concurrence of Justice Burger explained that prohibition of homosexual sodomy was accepted throughout Western history and has its roots in the Judeo-Christian tradition, the Lawrence Court found the trend toward greater freedom for sexual privacy since the 1950s to be of greater importance. Therefore, the Court bolstered its decision favoring liberty for homosexual activity by showing that sexual proscriptions were traditionally aimed at all persons and there has been a recent trend toward sexual freedom.

Beyond simply citing the history of prohibitions on homosexual behavior, the Court also underscored the lack of enforcement of prohibitions on all types of private, consensual sexual acts between adults. First, the Court points out that early American laws lacked enforcement as between “consenting adults acting in private.” Second, the Court emphasized current trends away from enforcement by pointing to the Model Penal Code which removed penalties for consensual sexual activities in private. Third, the Court used several pieces of data to show that trend in Western civilization has been substantially altered away from the enforcement of
sodomy laws generally or of laws against homosexuality. Such data includes American nonenforcement of sodomy laws, fewer American States employing sodomy laws, the British repeal of laws directed at homosexuality, and the invalidation of such laws in Northern Ireland by the European Court of Human Rights. In short, the Court outlined the lack of enforcement or the repeal of laws criminalizing private consensual sexual activity as another reason for its decision that there is no legitimate state interest in so criminalizing such activities.

Finally the Court dealt with the issue of overruling the *Bowers* precedent saying that there was no fundamental right to practice homosexual sodomy. The Court stated succinctly that *Bowers* is not correct and is overruled. In so concluding, the Court placed reliance on the development of the law in other high court decisions. The first case relied upon was *Griswold v Connecticut*, where the Court found a focus on protecting the privacy of the marital bedroom and relationship by the overturning of contraceptive prohibitions. Next the Court cites *Eisenstadt v Baird* for proposition that privacy rights must be extended to unmarried individuals to also shield them from contraceptive prohibitions. Third, the Court notes that *Roe v Wade* acknowledged a woman’s fundamental right to control her own body under the liberty protection of the Fourteenth Amendment. The Court did not find these rights to be absolute, but applicable in certain circumstances. Fourth, in *Carey v Population Services International*, the Court invalidated a law prohibiting sale of contraceptives to individuals under age 16. The Court was without a majority opinion but generally found that the rights of privacy outlined in earlier cases were not limited to married adults. Nine years later, *Bowers v Hardwick* resolved a new question within the right to privacy lineage: “The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a
very long time.”28 The Bowers court held that “[p]roscriptions against that conduct have ancient roots.”29

Although Bowers seemed to signal a limit on the use of privacy rights, the Lawrence Court cited subsequent cases in support of the continuing vitality of the right to privacy. The sixth privacy case cited by the Court, Planned Parenthood of Southeastern Pa. v Casey, held that personal dignity and autonomy protected by the Fourteenth Amendment liberty includes choices concerning “marriage, procreation, contraception, family relationships, child rearing, and education.”30 The Lawrence Court reasoned that homosexuals are allowed to pursue these autonomous choices in the same way that others may in contradiction to the effect of Bowers.31 The last in the line of cases cited by the Court was Romer v Evans. The Romer Court held that legislation “born of animosity toward the class of persons affected” fails the rational basis test.32

In summarization, the Lawrence court seemed to overcome the Bowers precedent by finding that the developing right to privacy should extend to private, consensual sexual conduct and that laws criminalizing homosexuality run contrary to Romer because they are demeaning and create a significant stigma. Furthermore, the Lawrence Court found that stare decisis could be overcome because there has been no detrimental reliance on Bowers and Bowers causes uncertainty.33 Thus, Lawrence presented multiple arguments in support of its ultimate holding that private, consensual sexual intercourse is protected by the right to privacy under the Due Process clause, and criminalization of homosexual sodomy is therefore unconstitutional.
II. State Enforcement of Adultery/Fornication Laws

In early 2004, twenty-three states and the District of Columbia still proscribed the act of adultery through criminal statutes, and at least eleven states, as well as the District of Columbia, still retained a criminal proscription of fornication. This is a large number of governments within the United States that have not followed any trend toward decriminalization of all private, consensual sexual activities. Yet, it seems that Lawrence v Texas will require these states and district to follow exactly the reverse course by making private, consensual sexual activity a protected activity under the Fourteenth Amendment guarantee of liberty. In determining what effect this expected decriminalization will have, it is important first to consider the level of enforcement these statutes have received.

Seeking statistical information concerning such enforcement is a fruitless venture. The reason for this may be that a large number of victimless sex-crimes go unreported and undetected by law enforcement. This is highly likely considering that the Albany Sourcebook, a publication relying on Department of Justice information, estimates that in 2002, fifty-eight percent of rape and sexual assault went unreported. If this large number of sex crimes actually involving a victim went unreported, then sex crimes that were without victims are even more apt to go unreported. A motivating factor behind the failure to report such incidents is that people may find such incidents to be personal matters beyond the scope of government intervention. The Albany Sourcebook reports that in 2002, the most common reason, including one-fifth of the response group, for failing to report assaults on the person was because the victim believed the issue to be a personal matter. The Federal Bureau of Justice Statistics (BJS) creates publications that further support these assertions. However, the BJS also seems to lack
compiled information on victimless sex crimes because even BJS publications dealing with sex offenses lack such information. Thus, the level of enforcement of adultery and fornication laws seems to be too low to warrant statistical attention at the national level.

On the state level, the Illinois Criminal Justice Information Authority (ICJIA) would be a natural place to seek statistical data on the enforcement of adultery and fornication laws. The ICJIA is an incident-based reporting system tied to the National Incident-Based Reporting System. However, this reporting system reveals little discussion regarding the enforcement of victimless sex crimes like adultery and fornication. Based on the lack of statistical treatment of victimless sex crimes by these and other reporting systems, like the Uniform Crime Reports, it is probably safe to assume that fornication and adultery statutes are not heavily enforced. For the purpose of this paper, it is enough to be able to conclude that the level of direct enforcement of adultery and fornication is not so high as to meaningfully distinguish it from the scope of Lawrence. It is also pertinent to recognize that in failing to require direct enforcement, society has allowed the preservation of social mores embodied in the adultery and fornication laws to be accomplished through secondary enforcement in areas of child custody, rental housing, and others.

III. Study of one State: Illinois

The purpose underlying the fornication and adultery laws shows obedience to the aphorism that the more things change, the more things stay the same. This is demonstrated by a historical examination of the laws of at least one state, Illinois. In that state, there has been little change in the judicial attitude toward sex laws between the 1850’s and 1990’s despite seemingly
dramatic changes in social mores and customs. Cases spanning that time period show that adultery and fornication laws of Illinois have been consistently used to uphold moral order and not to punish individual sexuality.

The Illinois Supreme Court first addressed the underlying purpose of sex laws in 1852. In *ASA B. Searls v The People*, the court dealt with a possibly erroneous jury instruction: “In violating the statute against living in open fornication, the crime may be proved without testimony of even one act of sexual intercourse but only by evidence of circumstances raising the presumption that unlawful intimacy has occurred.” Eventually the court held the conviction to be overturned because the jury instruction did not require a finding of unlawful cohabitation. On the way to this conclusion, the court imparted that the test to establish fornication is that the “parties must dwell together openly and notoriously, upon terms as if the conjugal relation existed between them. In other words, they must cohabit together. There must be an [sic] habitual illicit intercourse between them.” More specifically, violation of the statute is shown when it is “sufficiently proved by circumstances which raise the presumption of cohabitation and unlawful intimacy;” but this presumption must be something more than a mere suspicion. It must amount to a reasonable belief or conviction of the judgment, not only of unlawful intimacy, but also of cohabitation. Finally, the court said the crime of fornication could not be established by a single instance of illicit intercourse. So, the construction and interpretation of the sex statute in 1852 was not to regulate intimate conduct per se. Instead, “[t]he object of the statute was to prohibit the public scandal and disgrace of the living together of persons of opposite sexes notoriously in illicit intimacy, which outrages public decency, having a demoralizing and debasing influence upon society.” Thus, the purpose of such statutes was to protect societal morale, not to restrict the individual.
This purpose was again bolstered by two high court decisions near the turn of the twentieth century. In *Lyman v People*, Lyman was a person the community knew to be married who had another woman come down from Chicago to live with him who he introduced as his wife. The main issue resolved was that Lyman was guilty of adultery whether the woman was married or not because he was married at the time. Consequently, the jury verdict of guilty was affirmed. In coming to this conclusion, the court reiterated the requirement that such offenses be proven by evidence known publicly. Sufficient proof of Lyman’s marriage was evidenced and included testimony about a marriage ceremony, vows, subsequent living together, and raising of children. There was also sufficient proof of open adultery through testimony concerning sleeping arrangements, being seen in bed together, and being observed in the actual act of intercourse on one occasion. Therefore, the court confirmed the elements of adultery and that Lyman was violating the law in a manner that was apparent to the community and thus debased public decency.

The court in *People v Green*, addressed again the question of whether the prosecution was required to prove the status of Mary Williams, the mistress, in order to make a case of adultery against Green. The court relied on the *Lyman* case in ruling that it made no difference whether Williams was married or not as long as Green was married, so the conviction remained intact. The statute at the time provided that “if any man and woman shall live together in an open state of adultery or fornication, or adultery and fornication, every such person shall be fined not exceeding $500 or confined in the county jail not exceeding one year.” The defendant’s marriage was evidenced by a marriage certificate which the defendant claimed never to have seen. Green’s wife was previously allowed to testify that he was married, but this evidence was stricken because the court found the wife not competent to act as a witness in the adultery
The importance of this case and *Lyman* is that they show that the sex laws were not intended as a tool of retribution by the spouse, who was incompetent to testify, nor a vehicle by which discrete acts might be prosecuted. Instead, both cases reaffirmed the state’s commitment to prosecuting sexual indiscretion which was open and visible to the community.

The underlying purpose of Illinois adultery and fornication laws was recited in another case, *People v Potter*, that reached the appellate level in the 1940’s. Potter was 42 and married. He was discovered by a Deputy Sheriff in his underwear, hiding under Mrs. Caldwell’s bed with Caldwell standing nearby in her night clothes. Potter denied living with Caldwell but admitted having sexual intercourse with her in her home. Other testimony revealed that on one occasion, Caldwell’s husband had gone looking for her at Potter’s house and had been shot at twice. During the shooting, he saw his wife run from the back door of Potter’s house. The evidence in this case showed that the relationship was open and “brazen” such that all the neighbors knew what was occurring and as a result, the conviction was affirmed. The Appellate Court relied on *Lyman* and *Searls* for the rules regarding violation of the adultery statute. In so doing, the court revealed that neither the statute itself nor its purpose had been altered. The court relied on the language of American Jurisprudence to relay the purpose of adultery and fornication statutes. Quoting from the book, the court writes that,

In a number of jurisdictions, the legislatures have created the offense of living in adultery or fornication, founded somewhat on the common law idea that while the act of illicit intercourse should not be punishable, nevertheless, where it is accompanied by circumstances which render it otherwise objectionable, it should be prohibited by law. These statutes in other words do not attempt to control the private immoral indulgence of the individual or affix a penalty to the furtive illicit intercourse between the sexes, but
only to conserve the public morals by the prevention of indecent and evil examples
tending to debase and demoralize society and degrade the institution of marriage…. *It is
the publicity of the offense, the demoralizing and debasing influence of the example that
the law attempts to prevent.*

Quoting a Missouri case, *State v. Chandler,* the court goes on to extrapolate that,

> It is not the object of the statute to establish a censorship over the morals of the people,
nor to forbid the violation of the seventh commandment…but only to make such acts
punishable as it plainly designates,—acts which necessarily tend by their openness and
notoriety, or by their publicity, to debase and lower the standard of public morals.

The value of this opinion is that it not only reiterates the factual requirement of openness in any
prosecution of adultery or fornication, it specifically recites the purposes that have been at the
core of such laws since their inception. The intent has never been to obstruct the personal liberty
of individuals, but to restrict individuals from debasing the moral criterion established by the
community through the procedures of democratic lawmaking.

Despite the sexual revolution of the 1960’s, the intent and purpose of such laws
encountered no alteration. *People v Garcia* involved a defendant who went into a bedroom and
had intercourse with a woman while guests were in his kitchen. Officers later found the woman
in her car with the same man with her “private parts exposed.” The court relied on *Searls,
Lyman,* and *Potter,* in concluding that any conviction for fornication or adultery must be based
on open and notorious behavior such that it would tend to have a debasing and demoralizing
influence on society. The court concluded that despite being disgraceful behavior, the two
incidents on record were insufficient to show intent to continue the relationship, as was the rule
developed in *Lyman,* and the conviction was reversed. While this case was an appellate level
reversal of a fornication conviction, it was important because it repeated the historic purpose of the sex laws. This purpose was not to devalue the individual or inhibit discrete, sexual acts, but to defend public morality as set forth by democratic legislation. Where no continuing public affront was made, the courts, as demonstrated here, did not interpose their will to impede individual choice.

The historic purpose of protecting society’s moral choices against those choices of the individual continued to be upheld in Illinois even into the 1990s. In *Mister v A.R.K. Partnership*, the court considered the Illinois Human Rights Act and whether refusal of a landlord to rent to unmarried cohabiters of the opposite sex violated this act through discrimination on the basis of “sex” or “marital status.” While discussion of the particulars of this case is left to a subsequent portion of this paper, it is pertinent to note the purpose cited by the court as underlying the fornication and adultery laws. The fornication statute stated that “(a) Any person who cohabits or has sexual intercourse with another not his spouse commits fornication if the behavior is open and notorious.” The court points out that “cohabits or” was removed in a 1990 amendment to the statute so that only open and notorious sexual intercourse is prohibited. This may seem to make the law less strict then the historical version, but if one looks to the 1852 case, *ASA B. Searls v The People*, the old rule required both cohabitation and intimacy where the new rule requires only intimacy that is open and notorious. While the appellate court does not disclose that particular point, it does underscore the historic purpose of such laws as being continued despite some alteration of statutory language. In arriving at its decision, the court reaffirms that the statute does not call for prying into “purely private relationships” but seeks only to protect “public morality.” In other words, “couples who wish to live together without being married can certainly still do so, but they must find a landlord who
does not object to the arrangement.” In essence, the high court and appellate cases from 1852 until the turn of the twenty-first century show a commonality of interpreting Illinois adultery and fornication laws to be for the purpose of protecting the community’s chosen moral standards and not for the purpose of criminalizing individual sexuality.

IV. Specific types of Secondary Enforcement of Adultery/Fornication Laws

Keeping in mind that purpose, to protect community standards of decency, the next step is to examine the impact that Lawrence v Texas will have upon community morality. As was discussed previously, the level of direct enforcement against adulterers and fornicators has been low enough to elude much statistical compilation. Yet, the statutes remained in place and have been consistently used in secondary situations to protect society from the morally debasing affects of such practices. Some of the secondary situations in which sex laws have played a substantial role include family law, such as child custody and support. In the past, violations of the adultery law led to changes in custody based on harm to the child or reevaluations of support based on misuse of funds by the adulterous or fornicating prior spouse. Another area where Lawrence may be felt is in property law, particularly the rental housing market. In the past, landlords had some leeway to restrain cohabiting couples from renting based on laws against fornication, but this may now become invalid if adultery and fornication laws are void under Lawrence. Other secondary areas impacted by the proscription of criminal sex laws include tax law, where a fellow fornicator or adulterer could be claimed as a dependent; tort law, where fornicators and adulterers could not rely on the “clean hands” doctrine to defend against claims of sexually transmitted disease; civil service, where jurors could not be peremptorily challenged
based on disregard for the law as demonstrated by violation of fornication and adultery laws; and zoning laws, where restrictions on the use of private residences for the purpose of “swing clubs” might be invalid. Therefore, *Lawrence* may have a much farther reaching impact by affecting not simply those violating sex laws but also their children, their former spouses, their landlords, their fellow taxpayers, the victims of their sexually transmitted disease, the people whom they judge, and their neighborhoods.

**A. Family Law—child custody and support**

The importance of adultery and fornication laws in the area of family law was greatly magnified in 1979 with the Illinois Supreme Court decision *Jarrett v Jarrett*. Relying on sections 602 and 610 of the Illinois Marriage and Dissolution of Marriage Act, the Supreme Court found that the law required it to evaluate whether the children’s “environment endangers [their] physical, mental, moral and emotional health and to disregard any conduct of the custodian that does not affect his relationship with the child” so that the underlying focus would be upon the welfare of the child. The court found that, based on the facts of the case, the circuit court had not erred in awarding custody to the non-adulterous spouse despite a lack of tangible adverse affect on the children.

The facts of the case focus primarily upon Walter and Jacqueline Jarrett’s divorce in circuit court on the grounds of Walter’s “extreme and repeated cruelty.” Jacqueline was awarded custody of the three female children. Five months after the divorce, Jacqueline informed Walter and her children that Wayne Hammon, her boyfriend, would be moving in with her. The children were not pleased by this development and Jacqueline told Walter that she did not know
whether she would marry Hammon. At a custody and alimony modification hearing, Jacqueline explained that she did not intend to marry Hammon because she could have a relationship without a license, the marriage would be too soon after the divorce, and she did not want to sell the marital home and divide the proceeds, as was required following any remarriage. Walter believed the living environment created an immoral living condition that was an improper influence upon the children. The circuit court then modified the earlier ruling by granting custody of the girls to Walter based upon the “moral and spiritual well-being and development” of the three daughters. The appellate court reversed because it did not find any negative effects on the girls created by the cohabitation.

The Supreme Court was thus faced with the question of whether “a change of custody predicated upon the open and continuing cohabitation of the custodial parent with a member of the opposite sex is contrary to the manifest weight of the evidence in the absence of any tangible evidence of contemporaneous adverse effect upon the minor children.” In coming to its decision in favor of Walter, the court relied on the Illinois criminal statute against fornication and adultery, which reads that “any person who cohabits or has sexual intercourse with another not his spouse commits fornication if the behavior is open and notorious.” The court also repeated the Hewitt v Hewitt holding that the Illinois Marriage and Dissolution of Marriage Act was intended to “strengthen and preserve the integrity of marriage and safeguard family relationships,” and not to repeal sanctions against fornication and adultery. Hence the court’s decision was heavily swayed by the interaction of the Marriage Act and the public policy against fornication and adultery.

Jacqueline argued that public morality was not degraded because cohabitation was widely accepted, but the court rejected this for two reasons. First, the number of individuals living in
such arrangements was small compared to the total population. Secondly, allowing such an argument to prevail would essentially allow the court’s analysis of societal norms to invalidate the state’s fornication statute. The court explained that there could be no repeal by private consensus because the law governing the state is binding upon those who disagree as well as those who agree with its enactment.

However, the fornication law is not without limitation. The “open and notorious” requirement protects entirely private relationships between individuals from becoming criminalized but at the same time impedes such individuals from encouraging others to violate moral standards, and thereby debase societal morality. Therefore, although the statute was not meant to “penalize conduct which is essentially private and discreet, Jacqueline’s conduct has been neither, for she has discussed this relationship and her rationalization of it with at least her children, her former husband and her neighbors. It is, in our judgment, clear that her conduct offends prevailing public policy.” In this reasoning, the court relies on Lyman, Searls, and Potter.

In further reliance on precedent, the court also limited its holding to behavior that could be expected to continue in the future. This limitation was based on Nye v Nye, which held that custody cannot be denied a parent for moral indiscretions that cannot be shown to be likely to recur. The facts of this case show that Jacqueline did not intend to marry Hammon and that she felt she could continue a relationship without a license. Thus, the court’s focus was on the moral example that a parent is continuously demonstrating and not on isolated incidents.

An issue arising after this case with increasing intensity was whether the moral example must be shown to have an actual and present impact on the child. With regard to the tangible affect of fornication, the court stated that “we are not convinced that open cohabitation does not
also affect the mental and emotional health of the children…. [T]hey initially expected that she
would marry him. It is difficult to predict what psychological effects or problems may later
develop from their efforts to overcome the disparity between their concepts of propriety and their
mother’s conduct.”97 The fact that the neighbors and their children also knew about the
arrangement was another “imponderable” impact that the court said must be taken into account
in determining the tangible impact upon the children.98 Essentially the court found that the risk
of future psychological and emotional damage must be considered in evaluating the health of the
children because such damage would likely only manifest itself in the long-term.

Finally, the court braced its decision to protect the children’s moral and emotional health
by dealing with possible federal precedent and federal constitutional concerns. The Illinois
opinion distinguished the United States Supreme Court decision in *Stanley v Illinois* 99 by
pointing out that *Stanley* dealt with a conclusive presumption, without hearing, that an unmarried
father was unfit to parent.100 In contrast, the issue in *Jarrett* was whether a mother’s violation of
societal moral standards comports with the best welfare of the child.101 Further, there was no
presumption that the mother was unfit.102 As a result, the court found no federal opposition to its
ruling.

The basic import of the *Jarrett* decision is that child custody disputes could be affected
by violation of adultery and fornication laws. A divorcing party who acts openly and notoriously
in continuing contradiction of the fornication laws runs the risk of a court finding under the facts
that the emotional and psychological health of the children is being jeopardized. Of most
significance, this method of custody resolution is appropriate regardless of the extent to which
the community has embraced practices prohibited by law. In sum, the court found that the
welfare of the child must be served regardless of societies’ acquiescence in private contraventions of the sex laws.

Although certiorari to the United States Supreme Court was denied in the Jarrett case, the dissent to denial of certiorari made some arguments that seemed to affect the later interpretation of the case.\textsuperscript{103} The dissent framed the issue as whether a state ‘may deprive a divorced mother of the custody of her children through operation of a conclusive presumption that her cohabitation with an unmarried adult male constitutes custody not in the best interests of the children, however strong the contrary evidence.’\textsuperscript{104} The dissent emphasized that no finding was made that Jacqueline was unfit as a parent.\textsuperscript{105} Furthermore, the dissent finds the Illinois court’s concern that the mother’s behavior might cause her children to also violate the law in the future did not reveal any ‘“current actual harm.”’\textsuperscript{106} In this respect, the dissent seems to misapply Illinois’ reasoning. The state court had found that violation of fornication laws in conjunction with the risk of current emotional and psychological damage allowed for the circuit court’s custody decision. In other words, the state court was able to recognize the injurious impacts flowing out of the disparity between the children’s concepts of propriety and their mother’s conduct because state policy recognized this disparity in propriety through the fornication law. The Illinois court was not relying on the risk of future violation of fornication laws by the children as a demonstration of actual harm but was relying on the potential current infliction of psychological and emotional damage arising out of the flouting of state-recognized standards of decency.

Nevertheless, through other issues pointed out, the dissent seemed to influence later interpretation of Jarrett. First, the dissent believed Illinois’ presumptive rule that unwed mother’s who cohabit harm the best interests of the child violates the Stanley v Illinois rule that a
parent’s right to the “care, custody, and management of his or her children” cannot be undercut by conclusive presumptions. Second, the dissent raises the fact that Illinois rarely enforces its fornication law, so it would be impossible to discern whether fornication impaired the development of a child. Third, the dissent points out that twenty-five percent of unmarried cohabiting couples have at least one child in the household, so the effect of this custodial decision is far reaching. This emphasis on lack of enforcement, demographics, and such conclusive presumptions being unconstitutional seems to have a limiting impact on Jarrett in later Illinois cases interpreting it.

One case interpreting Jarrett in a limiting manner was In re Marriage of Olson, which dealt with the issues of custody and alimony where there has been no open and notorious fornication. The importance of this case is that child custody need not be resolved in favor of the plaintiff parent, and the fornicating parent should not automatically incur a reduction in alimony. More specifically, the court found that based on the child’s young age and the mother’s discretion, the lower court’s finding that the relationship did not adversely affect the child’s moral welfare was not erroneous. The test for termination of maintenance is “whether the cohabitation has materially affected the recipient spouse’s need for support because she either received support from her co-resident or used maintenance monies to support him.” In this case, the cohabiting parties remained separately housed and financially independent from one another. Thus, the facts are again critical to the application of the fornication and adultery laws.

The circumstances prompting this case are that Mrs. Olson initiated a sexual relationship with McAllister following the Olsons’ divorce, and the relationship continued through the date of the modification hearing. Evidence shows that the relationship did involve sexual relations.
On the other hand, there was no evidence that Jonathan, the child, ever slept at McAllister’s apartment, that McAllister ever stayed at Olson’s while Jonathan was there, or that Jonathan had any awareness of the fornication.116 Much like the claim in Jarrett, Mr. Olson claimed that his son Jonathan’s “mental, moral, and emotional health” was seriously endangered by the living arrangement of McAllister and Mrs. Olson such that custody should be transferred to him.117

The discussion centered mainly on the question of whether the ex-wife’s conduct was open and notorious fornication such that Jonathan has been adversely affected.118 The appellate court relies on Jarrett for the rule that in such custody decisions, the court should focus on the “moral values which the parent is actually demonstrating to the children.”119 In this instance, the defendant had not expressed immorality in the presence of her child.120 Mr. Olson countered that the relationship was open and notorious because witnesses found it to be common knowledge, but their testimony was excluded because it was based on hearsay or was irrelevant as unsubstantiated assumptions.121 Further, the court held that “mere notoriety” was not sufficient to create open and notorious fornication.122 In supplementary explication, the court says that Jarrett and the fornication statute taken together reveal that the focus should be on whether an individual intends by his behavior to make his fornication open and notorious.123 In a case where the individual employs discretion and the relationship becomes known by the actions of others, the person committing fornication cannot be said to have debased public morality or encouraged others to violate moral standards.124 Thus, any behavior by McAllister that publicizes the relationship should not be attributed to Mrs. Olson.125

Mr. Olson’s second contention was that periodic maintenance payments to Mrs. Olson should be terminated based on the conjugal cohabitation with McAllister.126 Illinois statutes on termination of maintenance for conjugal cohabitation are intended to remove support when a
person enters a common law marriage situation because Illinois does not recognize such relationships. Thus, the focus of the termination statute is on freeing a former spouse from supporting a marital-like relationship of the other spouse rather than focusing on the morality of the relationship. Once again, the cohabiting parties in this case remained separately housed and financially independent from one another.

*Olson* may have had a limiting impact upon the use of fornication laws to alter child custody, but in essence, it did not diminish the holding of *Jarrett*. Concisely stated, *Olson* held that in order to get the benefit of a *Jarrett* custody change, the fornicating parent must be in actual violation of the fornication statute so that the court may properly recognize the disparity between the state’s concept of propriety and the fornicator’s behavior. If there is no such disparity, the court does not have a firm ground in statutory policy against fornication from which to examine the potential for emotional and psychological damage to the child. One interpretive limitation exerted upon *Jarrett* is that in order to meet the open and notorious requirement of the fornication laws, the fornicating parent must have intended such a result, and the publicizing actions of others will not suffice to impute a violation to the parent.

Another supplemental limitation to *Jarrett* is that violation of the fornication and adultery statutes does not act to alter maintenance payments in the same way as child custody. This stands to reason because the court’s focus on fornication violations in child custody cases was to demonstrate a deviation from state recognized standards of propriety and to thus allow a determination of whether this affected the emotional or psychological health of the child. The end result was a determination of the welfare of the child. In the case of alimony payments, there is no ultimate decision of whether the child is being affected by the indiscretions of a parent. Therefore, alimony alteration on the basis of fornication would simply serve as a
criminal sanction against fornication. As was discussed previously, the policy behind Illinois sex laws has never been to punish the private acts of individuals, but to protect society from becoming morally debased. Hence, the court correctly concluded that a moral sanction is inappropriate, and any alteration of alimony should be based simply upon changed circumstances of the recipient.

After being limited to child custody cases where sex laws were actually violated and being restricted from use in alimony determinations, Jarrett’s application was further clarified two years later. *In re Marriage of Thompson* dealt with a situation in which the adultery laws were actually violated by the father, but the court awarded custody to the father based on a final determination that the child’s emotional and psychological health was better served by such an award. Under the facts of the case, the court was able to eradicate any interpretation of Jarrett that would assume, as did the dissent to the United States Supreme Court denial of certiorari, that there is a conclusive presumption that child custody would be away from a fornicating parent.

The case reached the Illinois high court after John Thompson initiated an action to dissolve his marriage and for temporary custody, which was awarded based on the best interests of the child, Daniel. John had previously deceived his wife Kathryn with a story that he would be away on business when, in fact, he planned to spend the night with a female business associate. Kathryn later came to know the truth and, taking their son, left Illinois and returned to her family in Michigan. Afterwards, she tried to hide her location from John. John then hired a private detective to locate the child in Michigan. Kathryn and Daniel were located in a home for battered women and John traveled to Michigan and forcibly retrieved the child from Kathryn and returned to Illinois. Two months after dissolution of the marriage, John began seeing another woman, Betty. Betty testified that John threatened her not to testify against him in any
of the custody hearings or he would expose nude pictures of her that he had taken.\textsuperscript{134} Thus, John had been involved in adultery and fornication throughout the period of child custody determination.

Kathryn argued that Jarrett stood for the proposition that John’s “moral transgressions” foreclosed the award of custody to him. The Illinois Supreme Court disagreed saying, “[t]he Jarrett case does not establish a conclusive presumption that, because a custodial parent cohabits with a member of the opposite sex, the child is harmed. No such presumption exists in this State. The court in Jarrett indicated that a custody award is not arrived at by pressing one lever and mechanically denying custody to one parent; rather all of the circumstances must be considered that affect the best interests of the child.”\textsuperscript{135} The court noted that Daniel had to receive ear surgery following the period in his mother’s custody.\textsuperscript{136} Other testimony showed that Daniel’s health was much improved while in his father’s custody and that the two had a very close and loving relationship.\textsuperscript{137} The court finally came to the conclusion that despite John’s inappropriate behavior in retrieving Daniel, the child’s positive relationship with John and Daniel’s increased health weighed in favor of John having custody. Thus the trial court had not abused its discretion in determining the best interests of the child.\textsuperscript{138}

The concurrence in Thompson agreed with the outcome of the case but not the interpretation of Jarrett. The concurrence of Justice Moran found that Jarrett did establish a conclusive presumption that cohabitation of a custodial parent with a member of the opposite sex resulted in harm to the child.\textsuperscript{139} Ostensibly, Justice Moran believed that violation of the sex laws is presumptively harmful to the child but the presumption does not extend so far as requiring a specific determination of the best interests of the child. In other words, the harm caused by the fornication is presumed, but this may be outweighed by harm the child would encounter by
residing with the other parent. Regardless of whether harm is presumed or not, Thompson added to the Jarrett legacy by revealing that violation of sex laws could be overcome when the best interests of the child are served by doing so.

The Jarrett legacy received its most significant modification in 1993, when the appellate court removed Jarrett’s consideration of the “imponderable” nature of emotional and psychological affects of adultery and fornication upon children. The court in Nolte v Nolte concluded that in order to gain an award of custody, a former spouse must show that the other’s fornication and cohabitation is adversely affecting the children. Ultimately, the court found that Tracy Nolte was not entitled to custody of his two children merely on the basis of his ex-wife, Laura’s, cohabitation.

In coming to this decision, the court traced its way from Jarrett through several subsequent appellate decisions. The court noted first that Jarrett held Laura’s actions to be a violation of Illinois public policy as laid out in the fornication statutes. However, the court quoted In re Marriage of Thompson for the understanding that Jarrett “does not establish a conclusive presumption that, because a custodial parent cohabits with a member of the opposite sex, the child is harmed. No such presumption exists in this State.” The court then cites Brandt v Brandt for the rule that “it is not the trial court’s function to approve or disapprove the parent’s conduct, but only to determine its effect [sic] upon the children.” Cooper v Cooper lent further support to the court’s line of reasoning in holding that although a mother’s behavior is immature or beyond acceptability, the father seeking custody must show that the behavior had some affect upon the child. The court acquired further evidence of the inconclusive nature of the Jarrett presumption from In re Marriage of Cripe, where the appellate court overruled a transfer of custody as against the manifest weight of the evidence since the
mother intended to marry the person with whom she was fornicating. Finally, the court reaffirmed the *In re Marriage of Fuesting* commitment to reliance upon the totality of the circumstances instead of merely focusing on cohabitation. In sum, the precedent relied upon by the court held in the aggregate that it is up to the complainant parent to show that the other parent has violated the sex laws, that the violation is not temporary, and that the violation has had an injurious affect upon the child under the totality of the circumstances.

While this array of precedent does not seem out of step with the controlling authority of *Jarrett* and *Thompson*, the appellate court’s application of precedent does express a fundamental alteration of *Jarrett*. In the present case, the court found no evidence of an adverse impact upon the child. The court cited the children’s grades, ability to socialize with all four parental figures, and lack of behavioral problems. The court apparently did not assess, or at least mention, the possibility of future manifestations of current psychological or emotional harm as did *Jarrett*. This accent upon only the present adverse impacts felt by the children harkens back to the dissent to the United States Supreme Court denial of certiorari in *Jarrett v Jarrett*, where the dissent focused on “current actual harm.” Thus, while *Nolte* seemed to abide by precedent in line with *Jarrett*, its ultimate resolution seemed to depend upon current actual harm, as emphasized by the dissent to denial of certiorari, rather than *Jarrett’s* concentration on the potential current psychological or emotional harm that might later be manifested.

While the appellate court in *Nolte* seemed to imperfectly construe the legacy of *Jarrett*, the appellate court in *Department of Public Aid ex rel. Nale v Nale* drew a very important distinction between child custody and child support cases. In reversing the trial court, the appellate court first pointed out that the fornication statute no longer prohibits cohabitation because of a 1990 amendment. Furthermore, while *Jarrett* holds that fornication validates
trial courts’ decisions about child custody in some circumstances, the same rationale cannot be made to apply to child support issues.\textsuperscript{155} Where a relationship of fornication does exist, the court held that “[i]t is not appropriate for the trial court to limit child support without any evidence or argument as to the effect of the living arrangement on the children or the appropriateness of this particular response.”\textsuperscript{156} It is proper for the trial court to determine whether the child support is being used to the benefit of the children, but any “reliance on the mere fact that such a person lived in the recipient household effectively punishes the children for living arrangements over which they have no control.”\textsuperscript{157} In this manner, the court separated the issue of child support from the issue of child custody and drew it outside the scope of Jarrett.

Beyond being important for the differentiation between custody and support payments, Nale also reveals that the sex laws have retained vitality in Illinois even into the close of the twentieth century. The case came before the court because the Illinois Department of Public Aid (IDPA) provided Antoinette Nale with child support services and filed a petition on her behalf seeking to increase support payments from Michael Nale because of his increased income and the children’s additional needs.\textsuperscript{158} Antoinette testified that Jim Forester lived with her for the past three years and that she had plans to marry him within approximately six months.\textsuperscript{159} The trial court denied the IDPA’s petition for increase of support by referring sua sponte to Antionette’s cohabitation and then citing the misdemeanor crime of fornication.\textsuperscript{160} Therefore, although law enforcement has been historically lax about directly enforcing sex laws, the trial courts and, in appropriate circumstances, higher courts still rely on these laws where they affect the decency and welfare of other members of society.
The conflict between standards of decency in society and sexual freedom of the individual is precisely the point at which the Lawrence v Texas opinion interposes itself. The Lawrence opinion cites Justice Stevens’ prior statement that just because the governing majority in a state has traditionally viewed a particular practice as immoral is not sufficient reason for upholding a law prohibiting the practice. Yet, it is exactly because of the majority’s voice, from the time of Lyman, Searls, and Potter onward, that the Illinois Supreme Court was willing to discourage the open practice of adultery and fornication; eventually discouraging it through the indirect means of determinations of child custody. The question here is whether moral arguments against fornication and adultery will hold any sway in Illinois given the expected removal, by Lawrence, of the state’s direct criminal policy against such behavior.

This question is answered in part by conjecturing about the reach of Lawrence’s policy into decisions based on morality within the family. Lawrence reiterated that Due Process protection extends to the intimate choices by unmarried as well as married persons. Also, the Lawrence Court underscored that personal dignity and autonomy protected by the Fourteenth Amendment “liberty” includes choices concerning “marriage, procreation, contraception, family relationships, child rearing, and education.” The Court also noted that “[its] obligation is to define the liberty of all, not to mandate [its] own moral code.” The Jarrett court’s focus was not on its own moral code, but on the moral example that a parent is continuously demonstrating. Likewise, Olson attended to the “moral values which the parent is actually demonstrating to the children.” However, since the Illinois courts were basing their decisions of morality in these and other cases on the public policy against fornication and adultery, removal of such policy will effectively wreck the basis of such decisions. In sum, if Illinois may
no longer maintain a direct criminal policy against adultery and fornication, its courts will not be
able to rely on the same moral policy arguments to determine custody of children.

If criminalization of moral decisions is not a legitimate legislative implement, perhaps the
exceptions mentioned within Lawrence will enable Illinois courts to continue to consider
adultery and fornication in the child custody setting. Lawrence carved out four exceptions to its
recognition of freedom in private consensual sexual behavior and two of these included
“situations involving minors” and “public conduct.” One argument might be that in a custody
setting, fornication or adultery really involves the minor because of the potential for deep
emotional and psychological distress. However, the more likely interpretation is that “situations
involving minors” refers only to minors who are physically party to the sexual conduct and the
resulting issue of capacity to consent. This is exceedingly probable in a nation that already
disassociates the impact of parental choices upon child welfare by easing dissolution of families
through “no fault” divorces. Alternatively, this is a society that still accurately associates the
impact but generally lacks the consistent moral character to resolve the problem.

As for the issue of “public conduct,” the Illinois courts might interpret this language in a
similar manner to “open and notorious” conduct. Jarrett explained that the “open and notorious”
requirement protects entirely private relationships between individuals from becoming
criminalized but at the same time impedes such individuals from encouraging others to violate
moral standards, and thereby debase societal morality. Olson goes on to relate that the focus
should be on whether an individual intends by his behavior to make his fornication open and
notorious. By intertwining these rules with Lawrence, the Illinois courts could rely on facts
where adultery and fornication were intentionally made known to the actors’ children, or any
other member of the public, and therefore elude Lawrence through the public conduct exception.
The federal response to such a line of reasoning would probably be to point out that “public behavior” denotes behavior that is public by virtue of its geographic location or because it is observable by members outside of the immediate family. Hence, the use of Lawrence exceptions dealing with minors and public conduct could be exploited by Illinois in an attempt to continue to imbue the family institution with traditional morality, but this would likely fail upon reaching the federal level.

Since reliance upon public policy criminalizing moral decisions and utilization of the Lawrence exceptions are likely not to succeed, Illinois will be able to continue its examination of extramarital relationships in the child custody setting only if such practice meets the test of Lawrence. The test employed by the Lawrence Court was that regulation of private consensual sexual activity must further some legitimate state interest. This test was supplemented by reference to the Romer rule that legislation “born of animosity toward the class of persons affected” fails the rational basis test. Because the criminal laws against fornication and adultery do not directly apply to the welfare of children, Lawrence would dispose of such laws in the same manner that the sodomy laws were disposed of. However, the affect of fornication and adultery upon the moral, psychological, and emotional development of children is a significant matter and likely a legitimate state interest under any definition of legitimacy. The conflict thus becomes the reshaping of a defunct penal statute for use in the legitimate context of protecting children.

The resolution to this conflict is legislation directed specifically to the issue of child custody. While the Lawrence Court struck down criminal sanctions for private, consensual sexual conduct, the Court did not foreclose all criminal sanctions for acts of adultery and fornication. If the court is willing to allow criminal sanctions to survive in any manner, it is
not unreasonable to expect that the Court would allow judicial consideration of such behavior in an entirely non-criminal setting. At present, the Illinois courts have relied on the fornication and adultery criminal statute to resolve some issues of child custody. Since those statutes are likely invalid under *Lawrence*, the Illinois legislature should amend the Illinois Marriage and Dissolution of Marriage Act to specifically include consideration of fornication and adultery in child custody determinations.

The outcome of such legislation would have multiple benefits. First, it would give Illinois courts statutory grounds to continue the legacy of *Jarrett* in evaluating whether children are harmed by the adultery and fornication of their parents. Secondly, it would prevent federal liberty rights from being infringed. This is because creating a statute directed entirely toward the welfare of children in a dissolving marriage or child custody conflict is fundamentally different than enforcing a statute that primarily criminalizes sexual conduct and is only used in a secondary capacity to protect children. The result of a statute aimed directly toward the welfare of children would serve a legitimate state interest of promoting the moral, mental, and emotional health of its most vulnerable citizens while protecting private, consensual sexual activity from being criminally stigmatized. This type of statute would not restrict individuals from enjoying any liberty to have sex. It would simply restrict them from morally, emotionally, or psychologically injuring their children through behavior that is at odds with a community recognized standard of propriety. In cases such as *Thompson*, it would still be feasible for an adulterous parent’s behavior to be less harmful to the child’s development than the influence of a co-parent. Essentially, a parent might have to choose between sexual behavior and the child’s welfare, or in many cases, the two choices would not be mutually exclusive.
Furthermore, a statute aimed toward the welfare of children would not contradict the current interpretation of the Illinois Marriage and Dissolution of Marriage Act or other case law. The Illinois Supreme Court pointed out twenty-five years ago that the purpose of the act is to “strengthen and preserve the integrity of marriage and safeguard family relationships.” The Jarrett court specifically relied upon the Illinois Marriage and Dissolution of Marriage Act in finding that it should determine whether the child’s environment would cause the child to suffer physically, mentally, morally, or emotionally. Cases such as Olson and Nale would not be altered in their respective holdings that neither alimony nor child support are to be affected by violation of adultery and fornication laws. Any statute directed toward the health and welfare of children in custody decisions could easily be made to exclude alimony or support issues. This is important because diminishing alimony based upon fornication or adultery would seem to be a penalty purely for private, consensual sexual behavior. This would conflict with the Lawrence holding because the state would be unable to show that it was protecting the welfare of some third party, the child, by reducing alimony. Excluding child support from such an amendment to the act is also proper because Nale points out that the child is unfairly harmed when support is removed based only upon parental decisions to fornicate. Thus, an amendment to the Illinois Marriage and Dissolution of Marriage Act allowing for consideration of fornication or adultery would not violate Illinois’ precedent.

In sum, the questions with regard to child custody determinations that follow Lawrence are whether Illinois courts can still take into account adultery and fornication of a parent, whether they would, and when they would? The answer to the first question is that the courts may only consider such behavior in a negative light if it directly serves some legitimate purpose, such as the welfare of children, and does not expose animosity against private, consensual sexual
behavior in meeting that legitimate purpose. The answer to the second question is that the courts would take note of sexual indiscretions of a parent if the Illinois legislature enacted a non-criminal measure directly allowing such consideration for the sake of the welfare of children. The third question is one that is yet unanswered even in Illinois case law. Jarrett seemed to say that there were “imponderables” that would manifest themselves later and should be taken into account to determine whether a child is presently being harmed.\(^\text{181}\) Whereas, the appellate court in Nolte interpreted Jarrett and its prodigy as only including harm that reveals a present adverse impact.\(^\text{182}\) Thus, it seems that Lawrence is by no means a complete bar to a decision by Illinois to continue to discourage sexual behavior by parents when it negatively impacts the morals, minds, and emotions of children.

B. Property Law—rental discrimination

The second area where the impact of Lawrence may be felt is in property law, especially the rental housing market. Before dealing specifically with these issues, it is important to consider Illinois’ strong policy in favor of marriage and how this affects contracts that seem to reinforce common law marriage. In Hewitt v Hewitt,\(^\text{183}\) Victoria Hewitt claimed one-half share of the property acquired during a common law marriage extending from 1960 to 1975. This claim was based on an agreement that she would devote her time to support Robert Hewitt’s efforts to become a medical professional, and he would in turn share with her his “life, his future, his earnings and his property.”\(^\text{184}\) The Illinois Supreme Court recognized that enforcing such an agreement would affect important policy considerations, especially the status of common law marriage, which had been prohibited from 1905 onward.\(^\text{185}\) The court’s decision ultimately
turned on another piece of evidence of public policy: the Illinois Marriage and Dissolution of Marriage Act. This act was intended to strengthen the integrity of marriage; the court believed that by enforcing such a contract between unmarried cohabitants, it would counter the public policy of Illinois by making marriage a less attractive alternative to contract.\textsuperscript{186} The court bolstered its determination of Illinois public policy by pointing out that Illinois did not allow “no-fault” divorces, unlike some states that were willing to enforce such pseudo-marital contracts.\textsuperscript{187} In the end, the court affirmed the circuit court ruling invalidating the agreement and emphasizing the Illinois’ policy against common law marriage and its policy of strengthening marriage.\textsuperscript{188} The importance of this case is that it shows that Illinois law holds marriage in high regard even apart from any discussion of the affects of the fornication and adultery laws.

It becomes significant that this pro-marriage policy draws strength from more than just the fornication and adultery laws when determining the outcome of cases where property-owners refuse to rent to cohabiters, fornicators, or adulterers. \textit{Mister v A.R.K. Partnership}\textsuperscript{189} dealt with the Illinois Human Rights Act\textsuperscript{190} and whether refusal of a landlord to rent to unmarried cohabiters of the opposite sex violated the act through discrimination on the basis of “sex” or “marital status.”\textsuperscript{191} Defendant landlords relied on religious freedom and property rights to defend their choice not to rent in a case of first impression on the Illinois appellate level.\textsuperscript{192} The facts basically reveal that two couples were denied the opportunity to rent apartments from defendant landlords because of the landlords’ strong policy against renting to unmarried couples of the opposite sex.\textsuperscript{193} While defendants rely on their religious beliefs, the court was forced to deal with the issue only on the privacy and property rights grounds because the record did not include evidence of defendants’ religious beliefs.\textsuperscript{194}
The litigants basically reduced the issue to a question of whether the landlords were discriminating based on protected status or unprotected behavior. Prohibited discrimination under the Human Rights Act includes “race, color, religion, sex, national origin, ancestry, age, marital status, [and] physical or mental handicap.” The statute defines marital status as “the legal status of being married, single, separated, divorced or widowed.” The landlords argue that denial of the rental application was based on the couples’ consensual relationships rather than the status of the individuals, and that the policy was not based on any of the individuals’ marital or sexual status. Plaintiffs counter that the landlords would rent to them if they were married to one another or if they were of the same sex as each other, so the discrimination is based on the individual’s marital or sexual status. This argument merely begs the question of whether discrimination was based on inappropriate behavior because, by altering the context of the relationship to a marriage or same-sex living arrangement, the behavior would not offend the landlord’s sense of propriety. In other words, an alteration of the marital status or sex of a prospective roommate is a pivotal event, but it sheds no light on whether the discrimination was based on these statuses or based on the impropriety that adheres to behavior only when the actor maintains a specific status. The dilemma thus remains as to what discrimination against “sex” or “marital status” includes.

In resolving this definitional dilemma the court looked to the intent of the legislature, especially focusing on the criminal statute prohibiting fornication. This is significant because it shows the court’s willingness to use a “whole code” approach to interpretation of ambiguities. The fornication statute says that “[a]ny person who cohabits or has sexual intercourse with another not his spouse commits fornication if the behavior is open and notorious.” However, the court pointed out that “cohabits or” was removed in a 1990 amendment to the statute so that...
only open and notorious intercourse is prohibited. Defendants urged that the Illinois Human Rights Act should be interpreted in accordance with the statutory scheme existing at the time of its adoption; thus, it should be interpreted in light of the prohibition on cohabitation effective at the time of enactment. Citing Jarrett as underscoring the continued vitality of the fornication laws and the conclusion that those laws represent the public policy of Illinois, the court held that the Human Rights Act should be construed to complement the public policy at the time of passage; including the prohibition on cohabitation. The court then found that the requirements of open and notorious cohabitation were met by the mere attempt to rent the apartments as unmarried couples. Hence, the appellate court found that the Illinois Human Rights Act should be construed consistent with statutes in force at the time of its passage.

In arriving at this construction, the court reiterates the historic purpose of the fornication and adultery laws. The purpose of the statute is not to intervene in “purely private relationships” but only to protect “public morality.” In other words, “couples who wish to live together without being married can certainly still do so, but they must find a landlord who does not object to the arrangement.” Therefore, the court had a firm grasp of the underlying reasoning behind the policy of the sex laws.

Of importance to the thesis of this paper is the fact that the court’s rationale did not end with a consideration of the sex laws. It also took into account the Hewitt decision, which held that in renouncing common law marriage, the Illinois legislature relied on a “strong public policy in favor of strengthening and preserving the integrity of marriage.” The court found that this policy of strengthening marriage, as derived from the Illinois Marriage and Dissolution of Marriage Act, would surely be contravened by increasing protection of unmarried couples seeking to live together. In sum, the continuing vitality of the fornication and adultery laws as
well as the Illinois Marriage and Dissolution of Marriage Act, upheld in two Illinois Supreme Court cases, preclude unmarried cohabitants from inclusion under the definition of either “sex” or “marital status in the Illinois Human Rights Act.  

Despite the finding of strong public policy in favor of marriage by both the Illinois Supreme Court and Appellate Court, another panel of the Appellate Court determined that unmarried cohabiters were protected from housing discrimination regardless of religious beliefs, property rights, or state policy. The case referred to is *Jasniowski v Rushing*, and in this case Rushing was denied rental of an apartment by Jasniowski because Rushing planned to live with a woman to whom he was not married. The landlords claimed that the discrimination should be protected under the right to free exercise of religion because of their Biblical belief against sex outside of marriage. However, the appellate court affirmed the circuit court decision that Jasniowski had discriminated against Rushing on the basis of marital status contrary to the requirements of the Chicago Fair Housing Regulations.

In finding a violation of the prohibition against discrimination based on marital status, the appellate court invoked multiple rationales. It found first that unmarried cohabitants were logically within the definition of “marital status” because the only difference between one couple and another for purposes of rental is whether they are married. The court further supported its definition of marital status by considering the list of protected classes within the language of the municipal ordinance. Some of the classes included race, color, sex, sexual orientation, marital status, and others. The court found that the legislative intent was to protect cohabitants especially through the inclusion of “sexual orientation,” because this implies unmarried cohabitation. The court noted that Illinois public policy, as set forth in *Mister v A.R.K. Partnership*, directs that landlords should not be required to rent to unmarried cohabitants.
because marital status should be interpreted in light of the anti-fornication statute.\textsuperscript{216} The appellate court tried to distinguish \textit{Mister} by pointing out that the fornication statute was amended in 1990 to remove criminalization of cohabitation.\textsuperscript{217} Therefore, the appellate decision that unfair discrimination had occurred was buttressed by an argument from logic, an argument of legislative intent, and an argument of legislative history.

Unfortunately for that panel of the court of appeals, the Illinois Supreme Court was opposed to the analysis. In fact, the Illinois Supreme Court, while denying certiorari, overturned the decision of the appellate court, the circuit court, and the Chicago Commission on Human Rights without comment.\textsuperscript{218} There are several possible reasons that the high court overturned the appellate decision. The argument from logic and legislative intent could have failed for the same reason. That reason is that the \textit{Rushing} court apparently lacked familiarity with the Illinois Supreme Court decision in \textit{Hewitt}, which says that enforcement of contracts supporting common law marriage conflict with the Marriage Act policy of strengthening marriage.\textsuperscript{219} By including cohabiters within the protection of marital status discrimination, the \textit{Rushing} court created an absurd result by allowing cohabiters to enforce agreements underlying a common law marriage against landlords, while being prohibited by \textit{Hewitt} to enforce similar agreements against one another. Thus, in order to reconcile public policy determined in \textit{Hewitt} with the issue here, the Illinois Supreme Court may have found that cohabitation should not be considered protected under the prohibition against marital discrimination.

Alternatively, the Supreme Court may have ignored the argument from logic and simply found that the legislative intent and purpose of the Chicago Fair Housing Commission was in conflict with the superior policy of the state. \textit{Mister} looked at the statutory definition of “marital status” under the Human Rights Act and found it to include only the status of being “married,
single, separated, divorced or widowed. Perhaps the Supreme Court overturned this appellate decision because the Chicago Housing Authority created a conflicting definition of marital status in its regulations as against the definition in the Illinois Human Rights Act. Since the definition of marital status is of statewide concern, it is not properly subject to local control even if Chicago is a home rule city. Therefore, the arguments from logic and intent may have both failed because of an incorrect interpretation of Illinois policy, or simply because the local regulation overstepped its authority.

Beyond logic and intent, the appellate court also relied on an amendment to the fornication and adultery statutes which removed sanctions against cohabitation. Unfortunately, those preparing the briefs for this case did not look carefully at the Mister appellate decision because it specifically dealt with the amended version of the fornication statute. The Mister court related that the Human Rights Act definition of “marital status” should be construed to complement the public policy at the time of passage, including the prohibition on cohabitation. Furthermore, the Mister court relied on the Illinois Supreme Court cases Jarrett and Hewitt in determining that Illinois has a robust public policy of strengthening marriage and fortifying the fornication laws. Thus, the Supreme Court might have overturned the Rushing appellate court because it incorrectly applied the fornication statute amendment to the “marital status” issue or because it construed a change in public policy based on the amendment alone and without looking to Jarrett, Hewitt, and Mister for other sources of public policy.

A final issue upon which the Supreme Court might have overturned the lower court was the freedom of religion issue. The defendant landlords in this case made it plain that it was their religious faith that precluded rental to those living in cohabitation. While the appellate court did deal with this issue extensively, the topic is outside the scope of this paper except to make one
remark. That is, if landlords are required to show governmental interference with Free Exercise of Religion in order to withhold rental opportunities, it will put an especially problematic burden of proof upon landlords with moral standards not necessarily tied to formal religious beliefs.

With the Illinois policy favoring marriage and property owners’ rights thus outlined, it is valuable to consider what impact *Lawrence* may have in altering this legal situation. *Lawrence* held that, “[t]he State cannot demean [homosexuals’] existence or control their destiny by making their private sexual conduct a crime.” In the case of regulation of private consensual sexual conduct, *Lawrence* declared that any such statute must further some legitimate state interest. Taken together, these statements relate to the conflict between landlord morals and prospective tenant fornication, adultery, or cohabitation in that any penalty Illinois prescribes based on such sexual behavior may be equated with a criminal penalty if it merely outlaws the behavior. Thus, any statute that curbs the rights of tenants to commit such behavior would probably have to pass the rational basis test. In meeting this test, the Illinois legislature could supply a rational basis by turning its attention to the fundamental rights of property owners. Such legislation might say that “a landlord has the prerogative to demy rental on the basis of a reasonable expectation of immoral sexual behavior upon his property, except where the behavior is protected by law.” This would not demean any group, and would simply empower the landowner’s privilege to exclude. Another alternative could read that “housing discrimination on the basis of adultery, fornication, cohabitation, or other sexual behaviors not protected by law shall not be prohibited.” Such a statute would escape *Lawrence* because it is not criminal in nature but simply gives landlords the opportunity to prevent immorality on their property. These models of possible legislation also seem to pass the test of *Romer*, which was relied on in
*Lawrence*, because neither language singles out a class of persons for unequal political power or treatment. Under the language of both, the landlord is the focus, and the landlord’s power extends only to sexual behaviors that are not protected.

However, proactive statutes that seem to reduce private sexual rights might run contrary to the *Romer* statement that legislation “born of animosity toward the class of persons affected” fails the rational basis test. Thus, a statute legitimately intended and crafted to protect the rights of property owners might be adjudged as a covert infringement on the liberty rights of a class of individuals to engage in private consensual sexual behavior. One possible response to this argument is that the Illinois courts might find, as they did in *Mister v A.R.K. Partnership*, that the requirements of open and notorious cohabitation were met by the mere attempt to rent the apartments as unmarried couples and that this further satisfies the public conduct exception mentioned in *Lawrence*. This exception would then circumvent any need to meet the rational basis test under *Lawrence*. As stated before, this argument would likely fail because the public conduct exception is prone to be interpreted by as including behavior that is public by virtue of its geographic location or because it is observable by members outside of the immediate family.

A different *Lawrence* exception makes available a stronger method of circumventing the rational basis required under *Lawrence* and empowered by *Romer*. The *Lawrence* exception is that Illinois need provide no formal government recognition to private consensual sexual relationships. Hence, Illinois has no federal Constitutional mandate to recognize such things as common-law marriage, contracts creating such, or relationships feigning marriage. Furthermore, this exception allows the state government to continue overrule local ordinances purporting to give formal recognition to private consensual sexual relationships, as was the case
Thus, Illinois may continue to refrain from recognizing fornicators, adulterers, or cohabiters as groups requiring any special treatment under the law.

The import of withholding such recognition, within the scope of landlord-tenant rights, is that by simply refraining from legislating, Illinois may bolster the common law power of property owners to exclude others from their premises. As long as the state does not prohibit landlords from discriminating on the basis of adultery, fornication, or cohabitation, there will be no state action involved and, consequently, no liberty claim to lodge against the government when landowners do exclude. The issue will return to a conflict only between the private rights of a property owner to exclude and an unmarried couple to perform sexual acts upon the landowner’s property. This would effectively leave landowners free to discriminate against such behavior because the right of exclusion was one of the most fundamental “sticks” in the “bundle” of common law property rights. This conclusion is further supported by the Lawrence Court’s understanding that “[o]ur obligation is to define the liberty of all, not to mandate our own moral code.” In adhering to such a statement of purpose, it would be incumbent upon the federal courts to determine that a purely private dispute over appropriate morality is outside the scope of judicial intervention, and to limit their resolution of such disputes to consideration of which party’s liberty rights are being more severely hindered. In a society where the next rental property is only a block away, this liberty interest consideration should almost certainly favor the rights of the property owner.

Therefore, Illinois may continue in allowing landlords to control the disposition of rental properties on the basis of moral convictions by two methods. The state might choose first to withhold legislative recognition of cohabiters, fornicators, and adulterers, and thereby revert to a nongovernmental struggle between competing fundamental liberties of the tenant and the
landlord. Alternatively, Illinois might tailor statutes that strengthen property owners’ abilities to exclude based on demonstrated moral commitments which do not otherwise transgress the law. By implementing statutes that protect the prerogatives of property owners, or by allowing property rights to prevail through common law, Illinois would refrain from demeaning homosexuals’ existence, and would continue to uphold a moral legislative stance favoring marriage and property owners’ moral choices over the desire of tenants to impose their own morality upon the landlord.

V. Conclusion

The end product of combining Lawrence with the community standards embodied in the fornication and adultery statutes is that Lawrence removed the criminal impact of those statutes but not the moral purpose. In fact, it was society that first removed the criminal impact of sex laws by failing to speak out against such practices except when they directly affected particular individual interests. Lawrence specifically relies upon the lack of enforcement and trends away from criminalization of sexual behaviors to uphold its final decision to place private, consensual sexual behavior within the privacy right. In short, the behaviors society has chosen to ignore are the behaviors the Supreme Court has chosen to protect. First, the Court did not protect sexual behavior that is public, involves minors, or is the product of coercion, and there is daily evidence of public protest against such forced or unwanted sexual encounters. Second, the Court did not require the government of the United States or any State to formally recognize any sexual behavior, and in cases where governments are required to formally recognize sexual relationships, like same-sex marriage, the public debate has been deafening. Third, it is this
author’s contention that the Court did not remove the ability of states to preserve the underlying purposes of fornication and adultery laws. States still seem able to preserve standards of moral decency by protecting the moral, psychological, and emotional well-being of children from sexual behaviors of one parent and by protecting the moral choices of property owners. These observations about the decision of the High Court in relationship to the public are not intended to show a causal relationship but a corollary one. It seems that the Supreme Court has chosen, or at least used, a dynamic theory of interpretation to explain what the right to privacy really encompasses. In so doing, the Court’s evaluations and conclusions must come from the environment of American society, and it is therefore important that Americans do or do not take a vocal stand on issues of sexual behavior.

Yet regardless of whether more citizens vocalize their views, the underlying purposes of the fornication and adultery laws may still be upheld in Illinois through child custody determinations. Illinois courts relied on fornication and adultery statutes as a basis from which legal harm could be recognized in a “best interests of the child” evaluation. Without such a legislative policy basis, the courts would have no reason to consider the affects of adultery and fornication as morally, psychologically, or emotionally injuring a child in any way that is not an ordinary or acceptable part of development in society. Including a non-criminal statute within the Illinois Marriage and Dissolution of Marriage Act would extend an alternate basis from which courts could continue to consider any detrimental impact, beyond normal development, that a child experiences because of parental fornication or adultery. The purpose of protecting society against demoralizing and debasing influences would be met as Illinois courts are able to continue make such considerations for the benefit of children of divided homes.
The purposes underlying fornication and adultery laws may also remain in effect through laws affecting moral choices of landlords. *Lawrence* will probably say that Illinois may not allow landlords to rely on criminal laws against fornication, adultery, or cohabitation to escape rental to persons behaving in ways the property owner considers sexually immoral. However, Illinois may provide other means allowing landlords the same moral choice in initial rental decisions. First, Illinois could formulate alternative non-criminal statutes, perhaps like the examples provided above, which would empower landlord discretion to choose tenant. Formulating some sort of positive legislation may be crucial because in Alaska, Washington, and Minnesota, the presence or absence of statutes opposing certain sexual behaviors was dispositive on the issue of whether such behaviors were protected under laws regarding “marital status” discrimination. Second, Illinois could withhold legislation prohibiting discrimination on the issue and expect that the common law would favor the property owner’s choice of morality on the owner’s property. If either alternative is successful, it would allow Illinois to preserve the sex laws’ purpose of protecting public decency. This is because at the point couples attempted to subject third parties, property owners, to their sexual practices, Illinois law would allow the property owners to choose not to accept the moral practices by refusing to initiate a tenancy relationship.

The issues of child custody and rental housing were treated in depth because of the number of people such issues are likely to affect, but there are other areas where fornication and adultery laws have been indirectly enforced. One such area is tax law, where an individual may or may not claim a dependent based on whether the state holds the relationship to be unlawful. The impact of *Lawrence* on such laws as these would be slight because state governments could probably reach the same result with non-criminal laws disallowing tax benefits to fornicative and
adulterous relationships. Tort law is also affected by the removal of adultery and fornication laws. Many defendants have been able to use the “clean hands” doctrine to show that although they did pass some sort of venereal disease, the plaintiff was participating in breaking the law and could not recover. Lawrence would have a decisive impact on these cases because the defendant could no longer claim that the plaintiff was also committing a crime, fornication or adultery, so the transmission of disease could not be brushed under the “clean hands” doctrine.

Another component of the legal structure that is indirectly impacted by the presence or absence of sex laws is civil service. In the past, lawyers had the ability to rely on violation of sex laws to show that peremptory challenges of jurors did not violate the Batson v. Kentucky prohibition of racial and gender motivation. If there is no criminal law against adultery or fornication, attorneys could not escape Batson by explaining that the individual showed a continued willingness to ignore the law. Lawrence presents an insubstantial hurdle here because attorneys will be able to find other creative and neutral reasons to strike a juror they believe is biased. Finally, the removal of sex laws may have some impact on the effectiveness of zoning ordinances. In United States v Nichols, property owners in a residential zone turned their home in to a club known as the “Happy Medium,” which was functioned as a place where hundreds of couples could gather and exchange partners in acts of fornication and adultery. While zoning laws may have been sufficient to prohibit such large scale activities in the past, Lawrence’s protection of private, consensual sexual conduct may make it exceedingly difficult to keep such “clubs” out of the neighborhood.

There may be some who look at Lawrence as a judicial bar to legislative and community morality. On its face, such a decision seems to strike at the root of important American traditions and standards. Yet the importance of any decision cannot be known without
discussing the net loss or change that has truly taken place. In the case of *Lawrence* and the sex laws, what seems to some to be a triumph of amorality can simply be considered a new requirement in meeting old purposes. This new requirement is to counteract the moral debasement of society at the point that sexually immoral behavior actually includes unwilling members of society and not prior to that point. Thus, the purpose may be preserved through indirect action rather than reliance on the indirect effects of criminal laws. If the American community honestly believes that consensual, sexual behavior and other related issues are valid subjects of community criminal control, it must be more vocal about enforcement, so that such issues are not so easily slipped into the amorphous right of privacy.

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2 Id.
4 Id.
6 Id.
7 Id. at 2483, (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).
8 Id. at 2484.
9 Id. at 2480, (quoting *Planned Parenthood of Southeastern Pa. v Casey*, 505 U.S. 833, 850 (1992)).
10 Id. at 2482.
11 Id. at 2484.
12 Id.
13 Id. at 2478.
14 Id.
15 Id.
16 Id. at 2479, (quoting Katz, *The Invention of Heterosexuality*, 10 (1995)).
17 Id. at 2479.
18 Id.
19 Id. at 2480.
20 Id. at 2479.
21 Id. at 2480.
22 Id. at 2481.
23 Id. at 2484.
24 Id. at 2477.
25 Id.
26 Id.
27 Id.
28 Id. at 2478, (quoting *Bowers*, 478 U.S. at 190).
30 Id. at 2481.
31 Id. at 2482.
32 Id.
33 Id. at 2483.


ASA B. Sears v. The People, 13 Ill. 597 (1852).

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Lyman v. People, 198 Ill. 544, 64 N.E. 974 (1902).

Id. at 545.

Id. at 547.

Id. at 550.

Id. at 548.

Id. at 549.

People v. Green, 276 Ill. 346, 114 N.E. 518 (1916).

Id. at 349.

Id. at 350.

Id. at 349.

Id.

Id. at 349, (citing Miner v People, 58 Ill. 59 (1871)).


Id. at 410.

Id. at 411.

Id. at 415.

Id. at 413.

Id. at 412.

1 Am. Jur. p. 688

Potter, 319 Ill. App. at 413 – 14.

State v. Chandler, 132 Mo. 155, 33 S.W. 797 (1896).

Potter, 319 Ill. App. at 415.


Id. at 92.

Id. at 92 – 94.

Id. at 94.


Mister, 197 Ill. App. 3d at 107.


Mister, 197 Ill. App. 3d at 113 – 14.

Id. at 115.
133 Id. at 71.
134 Id. at 72.
135 Id. at 78, (citing Jarrett v. Jarrett, 78 Ill.2d 337, 344-45 (1979)).
136 Id. at 72.
137 Id. at 73.
138 Id. at 79.
139 Id. at 80, (citing Jarrett, at 352-253).
141 Id. at 328.
142 Id. at 326.
143 Id. at 327, (citing Jarrett, at 345-46).
144 Nolte, 241 Ill. App. 3d at 327, (quoting Thompson, 96 Ill. 2d 67, 78 (1983)).
146 Nolte, 241 Ill. App. 3d at 327.
147 Id. at 327, (citing Cooper v. Cooper, 146 Ill.App.3d 943, 947 (1986)).
148 Nolte, 241 Ill. App. 3d at 328, (citing In re Marriage of Cripe, 183 Ill.App.3d 37 (1989)).
149 Nolte, 241 Ill. App. 3d at 328, (citing In re Marriage of Fuesting, 228 Ill.App.3d 339, 345 (1992)).
150 Nolte, 241 Ill. App. 3d at 328.
154 Nolte, 241 Ill. App. 3d at 753, (citing Department of Public Aid ex rel Temple v. Van Kampen, 243 Ill. App. 3d (1993)).
155 Nale, 294 Ill. App. 3d at 748 – 49.
156 Id. at 750
157 Id. at 751.
160 Lawrence, 123 S.Ct. at 2483.
161 Id. at 2480, (quoting Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 850 (1992)).
162 Jarrett, 78 Ill. 2d at 347.
164 Lawrence, 123 S.Ct. at 2484.
165 Jarrett, 78 Ill. 2d at 346.
166 Olson, 98 Ill. App. 3d at 320.
167 David Carl Minneman, What Constitutes “Public Place” Within Meaning of State Statute or Local Ordinance Prohibiting Indecency or Commission of Sexual Act in Public Place, 95 A.L.R. 5th 229 (2002) (discussing an array of state and federal cases determining what is a public place under indecency or sexual activity statutes).
168 Lawrence, 123 S.Ct. at 2484.
169 Id. at 2482.
170 Id. at 2484.
171 In re Marriage of Thompson, 96 Ill. 2d 67 (1983).
173 Id. at 344 – 45.
176 Id. at 753.
177 Jarrett, 78 Ill. 2d at 349.
180 Id. at 52 – 54.
Lawrence, 123 S.Ct. at 2480, (quoting Planned Parenthood of Southeastern Pa. v Casey, 505 U.S. 833, 850 (1992)).


Turnipseed v. Comm’r of Internal Revenue, 27 T.C. 758 (1957) (holding that dependency did not include relationships in violation of state criminal laws); See also Ensminger v. Comm’r of Internal Revenue, 610 F.2d 189 (4th cir. 1979) (interpreting tax statute, which disallowed any claim of dependency where the relationship was in violation of local law, to be beyond attack on federal privacy grounds).

Alice D. v. William M., 450 N.Y.S.2d 350 (1982) (ignored the clean hands doctrine based on lack of enforcement; plaintiff able to recover costs of abortion); See also Zysk v. Zysk, 239 Va. 32, 404 S.E.2d 721 (1990) (Virginia Supreme Court held that the clean hands doctrine bars wife’s recovery for contraction of herpes from her husband during fornication prior to marriage); See also Gabriel v Tripp, 576 So. 2d 404 (1991) (Florida appellate court held that if plaintiff was engaged in any illegal act at the time of contraction of genital herpes, then recovery would be barred); See also Allstate v. Holt, 932 F.2d 967, 1991 WL 65204 (6th Cir. 1991) (unpublished opinion) (federal appellate court held that injuries suffered through the contraction of genital herpes were not covered under an insurance contract that excepted injuries resulting from criminal conduct).


United States v Nichols, 937 F.2d 1257 (7th Cir. 1991) (federal appellate court found that peremptory challenges of black female jurors were neutral on racial and gender bases since each juror had violated adultery or fornication laws).