

Adultery Laws Unfairly Target Consensually Non-Monogamous Marriages

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Introduction

- Legal definitions of family, marriage, sexuality, and identity do not align with changes that have occurred in societal definitions.
- Current research suggests that more than 20% of the unmarried United States population has participated in some form of consensual non-monogamy in their lifetime (Hauptert, Gesselman, Moors, Fisher, & Garcia, 2016).
- Consensual non-monogamy can include dating multiple partners at the same time, committed partner swinging, open relationships, polyamory, and many other relationship forms.
- In couples who have legally married, consensual non-monogamy presents a dilemma – an action that was perfectly legal when single now becomes an illegal act, even if the marriage license or vow solemnization does not preclude extra-marital intercourse.

Laws

- According to Miller (2018), as of 2018 there were 20 states that still have adultery laws.
- Several of these states classify adultery as a felony, with penalties as high as several years in prison in addition to the felony conviction.
- Miller does note that adultery is an infrequently prosecuted crime, but the laws are still present.
- The presence of the law also allows for legal decisions to be made based on adultery occurring within a marriage, regardless of the relationship agreements of a couple.
- For example, per Florida Chapter 61 laws covering Dissolution of Marriage, the presence of adultery can be considered when determining the amount of alimony and may be cause to deny alimony in cases of divorce.

Laws (cont.)

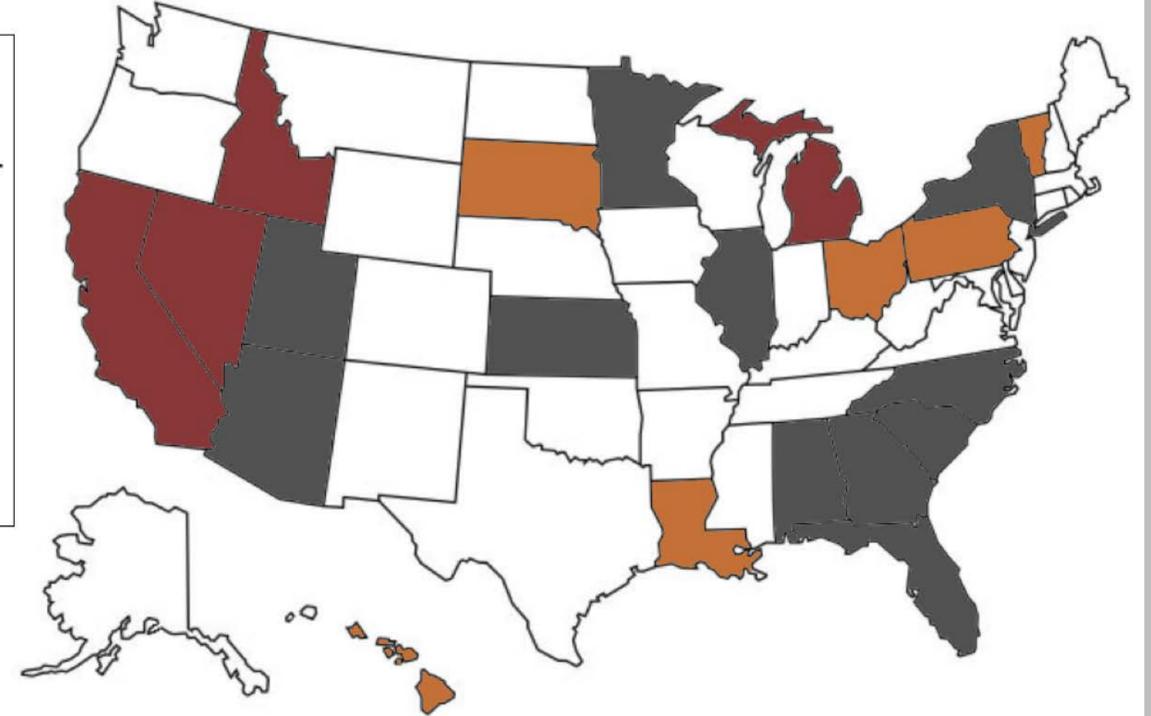
- Laws also may reflect attitudes about consensual non-monogamy. For example, Florida law addresses adultery in the same chapter as lewd and lascivious behavior (<http://www.leg.state.fl.us/>).
- The enforcement of adultery laws varies greatly by state, but it is generally done in a haphazard manner, with each state having different qualifications as to what would allow charges to be filed (Rhode, 2015).
- Even when not criminally prosecuted, the presence of extra-marital sexual activity often violates morality clauses in employment contracts and can lead to being fired for cause.
- State sodomy bans were invalidated by the *Lawrence v. Texas* ruling, which found that the sodomy law could not be justified as anything but a religious prohibition and was therefore not an acceptable secular law (Straut, 2016).
- The act of sodomy, between consenting adults, has no legal basis for restriction, and is now legal in all 50 states.
- Adultery, however, is also a sexual act between consenting adults that may be perfectly acceptable within the relationships it is impacting, and yet is still a criminal offense in 20 states.

Conclusion

- Laws against adultery serve no purpose in the criminal justice system. There is an argument to be made for adultery laws to be present within civil courts, but there is no non-religious reason for sexual intercourse outside of a legal marriage to be a criminal offense.

Legend:

- Misdemeanor
- Felony
- Significant impacts on divorce



Conclusion (cont.)

- A study in 2010 found that worldwide laws on adultery and sodomy followed a general trend of decriminalization or more defined restrictions within the laws (Frank, Camp, & Boucher).
- There is a slow decrease that can be noted within the current research, as Rhode noted 22 states with active adultery laws in 2015, and Miller noted 20 in 2018.
- With the *Lawrence v. Texas* ruling decriminalizing sodomy between consenting adults, hopefully adultery will follow the same path in the near future.

References

- Frank, D. J. Camp, B. J., & Boucher, S. A. (2010). Worldwide trends in the criminal regulation of sex, 1945 to 2005. *American Sociological Review*, 75, 867-893. doi:10.1177/0003122410388493
- Hauptert, M. L., Gesselman, A. N., Moors, A. C., Fisher, H. E., & Garcia, J. R. (2016). Prevalence of experiences with consensual nonmonogamous relationships: Findings from two national samples of single Americans. *Journal of Sex & Marital Therapy*, 43, 424-440. doi:10.1080/0092623x.2016.1178675
- Miller, A. (2018). Punishing passion: A comparative analysis of adultery laws in the United States of America and Taiwan and their effects on women. *Fordham International Law Journal*, 41, 425-471.
- Rhode, D. L. (2015). Adultery: An agenda for legal reform. *Stanford Journal of Civil Rights & Civil Liberties*, 11, 179-204.
- Straut, C. B. (2016). Due process disestablishment: Why *Lawrence v. Texas* is a first amendment case. *New York University Law Review*, 91, 1794-1820.