

# Bryant Case Tosses a Lifeline to the Laws Against Adultery

By MARTIN J. SIEGEL

**H**e's guilty. I know it. How? Easy, he admitted it in a national press conference. Not of rape — it looks as if we'll never know the answer to that. Kobe Bryant is guilty of another crime and, what's more, he's never bothered to hide it: How often does a megastar appear on live television and just confess?

The crime is adultery, which Colorado's penal code defines as "any sexual intercourse by a married person other than with that person's spouse." Now that prosecutors have moved for an indefinite postponement of Bryant's rape trial, they may soon begin doing what prosecutors often do at times like these — casting around for something else to charge that's easier to prove.

In roughly half the states, adultery is a crime. The laws, inherited from the ecclesiastical courts of England, vary greatly.

Some states make criminal a single adulterous act; others require cohabitation or adultery that is "open and notorious." In some states, the consent of a private party — the wronged spouse — is required to file charges. Only a married person can commit the offense in Colorado and a handful of other places; in most states, unmarried partners of adulterers are equally guilty.

Though Colorado's law is somewhat unclear, Bryant would appear to face a year in county jail, a \$1,000 fine or both.

True, adultery is rarely prosecuted these days. If they're looking for precedent, Bryant's prosecutors will have to reach back 70 years to the case of William Bright. Then, Colorado's adultery statute prohibited only "living together in an open state of adultery," not simply the act itself, so the district attorney focused his case on what Bright and his partner did in public. They were spotted at several rooming houses, on the street

and at a circus.

"Statutes such as ours," Colorado's Supreme Court observed, "are designed to prohibit and punish the disgraceful and scandalous conduct of those who would, by their evil and immoral example, debase and demoralize society."

But therein lies a constitutional rub. Now, as then, adultery and similar statutes are intended to protect society's moral fiber, but Bryant's lawyers would undoubtedly argue that his fundamental right of privacy protects his freedom to have consensual sex with whomever he chooses, trumping Colorado's larger interest in public morality.

In support of the argument, Bryant's attorneys would look to the U.S. Supreme Court's decision last year invalidating a Texas' law criminalizing homosexual sodomy. In that decision, Justice Anthony M. Kennedy cited "an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their

private lives in matters pertaining to sex."

In dissent, Justice Antonin Scalia inveighed that laws prohibiting adultery, bigamy, adult incest, bestiality and obscenity were now doomed. If "the promotion of majoritarian sexual morality" could not save Texas' sodomy law, he wrote, the court had effectively "decree[d] the end of all morals legislation."

But dissenters often overstate a majority's decision in order to sound more reasonable themselves — or to sound the alarm for future cases. In reality, all criminal law is based on society's moral choices, and much of what composes our criminal codes can be traced to ancient or biblical proscriptions.

Unlike gay sex between consenting adults, adultery often is not a "victimless crime" — or at least states like Colorado are allowed to presume it isn't. The people in Bryant's hotel room may have been consenting adults — assuming no rape is proved — but what about the

others affected, like Bryant's wife?

States sanction and regulate the institution of marriage in a variety of ways and can constitutionally act to promote and protect it. Thus, most courts that have heard challenges to state adultery laws based on constitutional privacy have upheld them.

Colorado's anti-adultery law may be safe from constitutional attack, but is there any chance prosecutors will dust it off? Supreme Court Justice Felix Frankfurter once wrote of unenforced laws that "deeply embedded traditional ways of carrying out state policy — or not carrying it out — are often tougher and truer law than the dead words of the written text."

There is no public clamor to revive the era of adultery prosecutions, but, curiously, no dead statute was ever thrown a surer lifeline than Colorado's adultery law.

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