

2017

Adultery: Trust and Children

Margaret F. Brinig

Notre Dame Law School, mbrinig@nd.edu

Follow this and additional works at: https://scholarship.law.nd.edu/law_faculty_scholarship



Part of the [Family Law Commons](#)

Recommended Citation

Margaret F. Brinig, *Adultery: Trust and Children*, 95 *Tex. L. Rev.* 611 (2017) (book review).

Available at: https://scholarship.law.nd.edu/law_faculty_scholarship/1280

This Book Review is brought to you for free and open access by the Publications at NDLScholarship. It has been accepted for inclusion in Journal Articles by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

Adultery: Trust and Children

ADULTERY: INFIDELITY AND THE LAW. By Deborah L. Rhode. Cambridge, Massachusetts: Harvard University Press, 2016. 272 pages.

Margaret F. Brinig*

Deborah Rhode writes that, while adultery is admittedly not good, it should not be criminal.¹ She argues that it should not generate a tort action either, because the original purposes for the torts of alienation of affection and criminal conversation come from a time with quite different views about marriage and gender,² while no-fault and speedy divorce today give adequate remedies to the wronged spouse.³ Further, she argues that adultery should not affect employment—as a politician or in the military—unless it directly impacts job performance.⁴

The materials she uses to make her case for removing all but social punishments for adultery are varied, and the authority with which she wields them is quite convincing. The historical section (Chapter 2) is particularly well done as a scholarly matter; her anecdotes (especially in Chapter 3, which discusses contemporary American law, and in Chapter 4, which deals with adultery in the military) are vivid and ample; and the constitutional law—more her field than family law—is carefully employed. Chapter 5 deals with alternative lifestyles like polygamy (“polyamorous relationships”) and suggests decriminalizing them to allow those involved to become less isolated, actually giving more visibility to the possible associated harms like “underage marriage, tax fraud, and domestic violence.”⁵ Chapter 6, like Chapter 4, deals with politicians—where infidelity may not have any direct

* Fritz Duda Family Professor of Law, Notre Dame Law School. The author acknowledges the financial assistance in acquiring data given her by the Law School.

1. DEBORAH L. RHODE, *ADULTERY: INFIDELITY AND THE LAW* 23 (2016) (stating that she is against adultery, but “also against making it illegal or a factor in employment, military, custody, immigration, and related contexts”).

2. *See id.* at 80–81 (approving of the abolition of tort remedies for adultery because these legal actions are outdated and may be used in a vexatious or extortionate manner and the injuries are “inherently speculative”).

3. *See id.* at 10 (noting that the shift from punitive laws to no-fault divorce laws, coupled with the growing independence of women make women less vulnerable and more self-sufficient in cases of adultery and divorce).

4. *See id.* at 104, 127–28 (arguing that in the military and political contexts, adultery itself should not be punished; instead, any sanctions or discipline should consider the context and circumstances that actually affect job performance).

5. *Id.* at 5.

application to job performance, but where context really matters.⁶ Chapter 7 discusses the international scene, where some countries tolerate extramarital affairs as completely routine,⁷ while others allow “honor killings” to go unpunished, causing “serious human rights abuses.”⁸ Again, Rhode suggests decriminalizing adultery,⁹ and perhaps her point is that the United States should join the more tolerant Western European nations rather than seeming to follow the more repressive societies that outlaw it.¹⁰ At the end though, I was left wondering whether social disapproval, really all that is left after criminal and civil penalties are removed, would be enough to curb what she admits is a troubling practice.

My own reluctance to disengage adultery and law stems from the seriousness of adultery. First, the destruction of trust that adultery both signals and produces does considerable damage. Second, though she certainly notes that the injured spouse has a beef against the adulterous one, and does briefly consider the harms done to children under various adultery scenarios, Rhode underplays the direct (through their own tendencies to trust or be faithful as adults) and indirect (through the likely divorce to follow and its particular nastiness) damage done to the children of adulterous marriages.

I begin with a flash tour through Rhode’s very interesting and well-written book. While I present some comments from a family law or law-and-economics viewpoint, these are mostly minor quibbles. The very first page of Chapter 1 presents her argument: “[T]he United States should repeal its civil and criminal penalties for adultery.”¹¹ She reasons that the penalties are now “infrequently and inconsistently enforced” and “ill serve societal values.”¹² Rhode maintains that the criminal law is inappropriate because “[d]isapproval of marital infidelity has increased,” obviously revealing societal values, while “support for criminal prohibitions . . . has declined” (as she later demonstrates by recent state statutory changes), and even “intermittent enforcement” is out of sync with international trends.¹³ Rhode then notes that “many talented leaders have paid an undue price for conduct . . . [unrelated] to their job performance.”¹⁴ These summary

6. *Id.* at 6.

7. *Id.*

8. *Id.* at 6–7.

9. *Id.*

10. See Richard Wike, *French More Accepting of Infidelity than People in Other Countries*, PEW RES. CTR. (Jan. 14, 2014), <http://www.pewresearch.org/fact-tank/2014/01/14/french-more-accepting-of-infidelity-than-people-in-other-countries/> [<https://perma.cc/7N7C-63FD>] (examining attitudes among different countries towards infidelity; finding that France is the most liberal towards adultery of the countries surveyed, while Muslim countries such as Egypt, Jordan, and Turkey are the least accepting of adultery).

11. RHODE, *supra* note 1, at 1.

12. *Id.*

13. *Id.* at 2.

14. *Id.*

paragraphs seem to conflate the criminal penalties twenty-one states still maintain¹⁵ and the much less frequently allowed “heartbalm” tort actions for “alienation of affection” or “criminal conversation.”¹⁶ Allowing injured spouses tort remedies for the suffering caused by adulterous spouses is legally and practically quite different from the societal stance taken by maintaining criminal penalties for adultery.

Chapter 2, the legal history chapter, is one of the more memorable in the book. I learned a great deal from it, enough so that I purchased and read one of the books she frequently cited.¹⁷ This chapter was filled with particularly useful descriptions of the role of adultery in divorce, including some reports of colonial cases, and it inspired me to think systematically about the way the laws have developed, and, particularly, those laws’ impact on women.¹⁸

While Rhode begins with ancient law, she discusses Biblical law extremely briefly¹⁹ despite its later impact on Western rules; I will therefore include a few examples. In the book of 2 *Samuel*, King David’s adultery with and impregnation of Bathsheba, attempted deception of Bathsheba’s husband, Uriah,²⁰ and later virtual murder of Uriah,²¹ led to David’s falling away from God²² and a whole series of later tragedies. The entire prophetic book of *Hosea* analogizes the religious unfaithfulness of the Jewish people to a husband’s experience with an adulterous wife.²³ God, illustrating unconditional love, takes back the Jewish people.²⁴ Adultery also plays a role in the Christmas story, according to which Mary was discovered pregnant while she and Joseph were betrothed.²⁵ Mary would have been subject to stoning for adultery—since at the time betrothal legally transferred the interests from Mary’s father to her soon-to-be husband—were it not for,

15. *Id.*

16. “Breach of promise to marry,” which has moved into disfavor, was another “heartbalm” action. See Margaret F. Brinig, *Rings and Promises*, 6 J. L. ECON. & ORG. 203, 204 (1990) (discussing the demise of the action for the breach of promise to marry and relating it to the growth in sales of diamond engagement rings).

17. JOANNA L. GROSSMAN & LAWRENCE M. FRIEDMAN, *INSIDE THE CASTLE: LAW AND THE FAMILY IN 20TH CENTURY AMERICA* (2011).

18. For another article that discusses the historical link of adultery to the British kingship, see Erin Sheley, *Adultery, Criminality, and the Myth of English Sovereignty*, L. CULTURE & HUMAN. (forthcoming) <http://journals.sagepub.com/doi/pdf/10.1177/1743872115570421> [<https://perma.cc/DRP2-YZSD>]. This piece was not available at the time of Rhode’s writing, but it effectively illustrates this link.

19. RHODE, *supra* note 1, at 25 (mentioning the Ten Commandments and noting that the Biblical definition of adultery influenced English common law).

20. 2 *Samuel* 11:2–11.

21. David had Uriah placed on the front lines in a skirmish and abandoned there to die. *Id.* at 11:15–17.

22. *Id.* at 11:27.

23. See generally *Hosea*.

24. *Id.* at 2:23.

25. *Matthew* 1:18.

initially, Joseph's resolve to "divorce her quietly"²⁶ and, subsequently, the angelic intervention directing him to "take Mary as [his] wife."²⁷ In another familiar story, Jesus carries on his most lengthy discussion of redemption and discipleship with an adulterous Samaritan woman.²⁸

Many states followed the Biblical traditions condemning adultery²⁹ and, as Rhode notes, this led to the eventual use of adultery as a divorce ground.³⁰ In some ways the connection was obvious because adultery is arguably the least likely marital offense to be forgiven,³¹ it is more likely than anything else to break up a marriage.³² Because of its criminal nature, it requires a high degree of proof in divorce cases.³³ Also, as Rhode notes, it frequently triggers domestic violence.³⁴

26. *Id.* at 1:19.

27. *Id.* at 1:20.

28. *John* 4:1–26.

29. See RHODE, *supra* note 1, at 25–39 (observing that English common law "followed Biblical definitions of adultery" and that "the Puritans imported English prohibitions on adultery into the colonies").

30. See *id.* at 39 (noting that adultery was recognized as a ground for divorce in all of the colonies).

31. See, e.g., *Coe v. Coe*, 303 S.E.2d 923, 924, 927 (Va. 1983) (affirming the grant of a divorce to plaintiff and the denial of spousal support to defendant on the basis of defendant's adultery). In *Coe*, the husband was able to prove sexual relations nine months after the separation through the testimony of a private detective. *Id.* at 926. The one-year separation period required for no-fault divorce had not expired at that time and the court reasoned, "[t]he commission of adultery during that period by either party to a marriage in trouble is the one act most likely to frustrate and prevent a reconciliation." *Id.* at 925–26.

32. See, e.g., RHODE, *supra* note 1, at 195 n.96 (citing Alfred DeMaris, *Burning the Candle at Both Ends: Extramarital Sex as a Precursor of Marital Disruption*, 34 J. FAM. ISSUES 1474, 1477–78 (2013)) (indicating that study respondents gave infidelity as the most common reason for divorce).

33. See *Haskins v. Haskins*, 50 S.E.2d 437, 439 (Va. 1948) (requiring more than suspicious circumstantial evidence and reiterating the most frequent test as requiring proof that "lead[s] the guarded discretion of a reasonable and just man to the conclusion of guilt" for the charge of adultery).

34. RHODE, *supra* note 1, at 18. See also Julianna M. Nemeth et al., *Sexual Infidelity as Trigger for Intimate Partner Violence*, 21 J. WOMEN'S HEALTH 942, 947 (2012) (examining concerns of infidelity as a consistent relationship stressor and immediate "trigger for . . . acute violent episode[s]"). For a more recent analysis, see generally Jennifer E. Copp et al., *Gender Mistrust and Intimate Partner Violence during Adolescence and Young Adulthood* (Bowling Green State Univ. Working Paper, 2015), <https://www.bgsu.edu/content/dam/BGSU/college-of-arts-and-sciences/center-for-family-and-demographic-research/documents/working-papers/2015/WP-2015-04-Copp-Gender-Mistrust-and-IPV.pdf> [<https://perma.cc/P657-8MHJ>] (finding that higher levels of mistrust correspond to heightened odds of intimate partner violence). See also Peggy C. Giordano et al., *Anger, Control, and Intimate Partner Violence in Young Adulthood*, 31 J. FAM. VIOLENCE 1, 10 (2016) (suggesting that emotional control and processes are a factor in intimate partner violence).

Adultery law has necessarily changed over the last two centuries because of changes in the way property is held,³⁵ in the technology developed that can identify biological fathers,³⁶ and in the accompanying developing constitutional law regarding individual privacy and liberty rights.³⁷ Of course, changes in law are moved by sociological and economic changes.³⁸ And Rhode takes the not-uncommon approach of focusing primarily on the adult interests involved.³⁹

35. For important examinations of these changes in property law, see generally MARY ANN GLENDON, *THE NEW FAMILY AND THE NEW PROPERTY* (1981), and John H. Langbein, *The Twentieth-Century Revolution in Family Wealth Transmission*, 86 MICH. L. REV. 722 (1988).

36. The problem of “adulterat[ing]” the bloodline is mentioned as the original reason for the sexual double standard disadvantaging women, RHODE, *supra* note 1, at 24; though she notes that in the English ecclesiastical courts, the problem was more the breach of marital vows. *Id.* at 26. See also Exodus 20:14 (prohibiting adultery in the Ten Commandments). And for the New Testament position on adultery functioning as the sole ground for divorce because of the Israelites’ hardness of heart, see Matthew 19:8–9. For academic commentary, see June Carbone & Naomi Cahn, *Which Ties Bind? Redefining the Parent-Child Relationship in an Age of Genetic Certainty*, 11 WM. & MARY BILL RTS. J. 1011, 1012 (2003) (urging DNA testing at birth). See also Mary R. Anderlik & Mark A. Rothstein, *DNA-Based Identity Testing and the Future of the Family: A Research Agenda*, 28 AM. J.L. & MED. 215, 230–32 (2002) (discussing genetic identity testing and setting out a research agenda suggesting that children’s interests be considered as well as the parents’).

37. This is very well discussed in RHODE, *supra* note 1, at 67–72.

38. See, e.g., Richard L. Griswold, *Law, Sex, Cruelty, and Divorce in Victorian America, 1840-1900*, 38 AM. Q. 721, 724 (1986) (observing that American courts began to acknowledge husbands’ false adultery allegations as a justification for divorce “[a]gainst the backdrop of . . . moral and ideological changes in family life and womanhood”). Most recently, the Supreme Court discussed such changes in the same-sex marriage case of Obergefell v. Hodges, 135 S. Ct. 2584, 2595–98 (2015) (describing the history of marriage as “one of both continuity and change” and subject to developments in law and society). For a discussion of the changes in marriage and divorce, see, for example, the slightly more law-and-economics approach to the topic in Margaret F. Brinig & June Carbone, *The Reliance Interest in Marriage and Divorce*, 62 TUL. L. REV. 855 (1988), and June Carbone & Margaret F. Brinig, *Rethinking Marriage: Feminist Ideology, Economic Change, and Divorce Reform*, 65 TUL. L. REV. 953 (1991). For others’ discussions of similar topics, see Rick Geddes et al., *Human Capital Accumulation and the Expansion of Women’s Economic Rights*, 55 J.L. & ECON. 839, 862–63 (2012) (finding that changes in women’s economic rights are connected to the rates of investment of women’s human capital outside of the home), and Rick Geddes & Dean Lueck, *The Gains from Self-Ownership and the Expansion of Women’s Rights*, 92 AM. ECON. REV. 1079, 1091 (2002) (finding that men gain from increases in women’s rights, and finding a correlation between the increased wealth and growth of cities and the expansion of women’s rights). The most recent of these changes in marriage are detailed in Alexandra Killewald, *Money, Work, and Marital Stability: Assessing Change in the Gendered Determinants of Divorce*, 81 AM. SOC. REV. 696, 716–17 (2016) (arguing that men’s sociological role of provider has not changed, while women’s as homemaker has diminished; finding that men’s unemployment predicts divorce, while women’s lower provision of household labor does not; and concluding that egalitarianism in household labor division may increase marriage stability). Predicted legal changes might include reforms to spur continued full-time employment.

39. See also Jennifer M. Collins et al., *Punishing Family Status*, 88 B.U. L. REV. 1327, 1411–13 (2008) (considering the impact of adultery laws on adult interests, with limited focus on child interests). *But see* GROSSMAN & FRIEDMAN, *supra* note 17, at 289–90 (discussing DNA testing and the impact of the better identification of genetic fathers in connection with changing rights of both the children and the fathers involved). Grossman and Friedman also make note of two Supreme Court cases: *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), in which the Court upheld California’s

I will return to Chapter 3, to which I will add an empirical discussion, after considering Rhode's chapters on various employment contexts in which adultery continues to play a negative role, one that Rhode finds inappropriate, unless directly affecting job performance, given other safeguards. Her Chapter 4 on Sex in the Military and Chapter 6 on Sex and Politics were novel to me since they are outside my field and persuaded me that the adulterous nature of the sexual contact is probably unimportant. Most of her exceptions to her argument that adultery alone shouldn't matter include forms of sexual harassment,⁴⁰ in which both of us agree that adultery is particularly distasteful.⁴¹ In the cases dealing with military personnel, she also argues that "[e]xisting sanctions for fraternization and conduct unbecoming an officer" pose a conflict of interest or "a demonstrable threat to morale and

former irrebuttable presumption that children born to married parents were legitimate (i.e., the children of the husband) unless he timely objected, *id.* at 131–32, and *Stanley v. Illinois*, 405 U.S. 645 (1972), in which the Court held that the Constitution requires hearings on the fitness of fathers before the parental rights of unwed fathers can be terminated. *Id.* at 658. *Michael H.* involved adultery, and Justice Scalia, writing for the plurality, was unwilling to recognize the adulterous relationship plus child as a family unit. 491 U.S. at 123–24. The plurality opinion discounted the possible competing interests of children as less important than those of their parents and their existing marriage. *See id.* at 130–32 (rejecting the argument that a child should be allowed to rebut the presumption of her paternity and upholding the law that allows for only the married parents to contest the legitimacy of the child). The Court mentions considerable legal history, again involving adultery, in the course of the opinion. *Id.* at 125–26. For a detailed discussion of the case as a paradigm for the channeling function of family law, see Carl E. Schneider, *The Channeling Function in Family Law*, 20 HOFSTRA L. REV. 495, 524–29 (1992) (discussing family law's role in "shaping and promoting the social institutions of family life," and analyzing *Michael H.* within this context). Parenthetically, this focus on adults has been criticized by other members of the Court. *See Troxel v. Granville*, 530 U.S. 57, 86 (2000) (Stevens, J., dissenting) (acknowledging the implication of the child's interests in cases dealing with parental visitation rights). Scholars critical of this country's (lone) stance in failing to ratify the UN Convention on the Rights of the Child echo Justice Stevens's criticisms. *See, e.g.*, Barbara Bennett Woodhouse, *Re-Visioning Rights for Children*, in *RETHINKING CHILDHOOD* 229, 240 (Peter B. Pufall & Richard P. Unsworth eds., 2004) (lamenting the underappreciation of the Children's Rights Convention); Susan Kilbourne, *U.S. Failure to Ratify the U.N. Convention on the Rights of the Child: Playing Politics with Children's Rights*, 6 TRANSNAT'L L. & CONTEMP. PROBS. 437, 461 (1996) (criticizing opposition to the Convention on the Child as detrimental to children and families).

40. Rhode refers to sexual coercion and damage to the unit as situations in which adultery should be punished in the context of employment in the military. RHODE, *supra* note 1, at 104–05.

41. I'd add here adultery by professionals who are supposed to sort out marital problems but end up sleeping with their patients or clients. The professionals—lawyers, doctors, psychiatrists, clergy—are sometimes reached in tort because of their outrageous and unethical behavior. *See, e.g.*, *Corgan v. Muehling*, 574 N.E.2d 602, 603 (Ill. 1991) (sexual relations "under the guise of therapy"); *Destefano v. Grabrian*, 763 P.2d 275, 278–79 (Colo. 1988) (sexual relations between a clergyman acting as marriage counselor and the wife of the couple seeking counseling). More often, and justly so, these professionals are subject to professional discipline as well as public notoriety. *See, e.g.*, *Doe v. Zwelling*, 620 S.E.2d 750, 751, 753 (Va. 2005) (refusing to revive the tort of alienation of affection in action for social worker's misconduct where an action for professional misconduct would suffice); *Jacqueline R. v. Household of Faith Family Church, Inc.*, 118 Cal. Rptr. 2d 264, 265–66, 271 (Cal. Ct. App. 2002) (affirming summary judgment in favor of pastor who engaged in a sexual relationship with church member and denying the existence of any duty of pastor not to engage in morally inappropriate but consensual relationship).

good order.”⁴² In cases of politicians, she writes that “[c]ontext is critical in shaping moral behavior, and there is often little correlation between seemingly similar character traits such as lying and cheating.”⁴³ It matters, therefore, whether the affair included other illegal conduct, abuse of office, or other reckless behavior.⁴⁴ She also notes that because of the media frenzy, “[s]ociety also suffers when its choices for leadership narrow to those willing to put their entire sexual histories on public display.”⁴⁵ It also matters when the position necessarily entails moral leadership, but only when balanced against other characteristics that might make an adulterer, say, a great president.⁴⁶

Chapter 5 considers lifestyles such as polygamy and polyamory, which, though they would be banned by criminal statutes, differ from the way we normally conceive adultery because they are, at least theoretically, consensual among all parties. Rhode notes conventional arguments against polygamy⁴⁷—that they tend to involve much older men marrying younger women—but argues that making the behavior legal will allow polygamous families to live outside the current hidden communities, where much more actual damage can be done.⁴⁸ She expresses no problems with consensual polyamorous relationships. I find them troubling for reasons similar to those that bother me about adulterous relationships—while they may be rewarding for adults, they probably have negative effects on children.⁴⁹ There may be

42. RHODE, *supra* note 1, at 104.

43. *Id.* at 156.

44. *Id.* at 157.

45. *Id.*

46. *See id.* at 156–57 (arguing that adultery is not an effective indicator of a president’s ethics or effectiveness, and comparing President Nixon, who was faithful to his wife but deceitful in office, and presidents who have had affairs but who were honest and ethical leaders).

47. *See id.* at 121–22 (recognizing the arguments against polygamy, including the likelihood of harms such as domestic abuse, abuse and neglect of children, marriage of young girls, and social isolation, among others).

48. *Id.* at 123–24.

49. This is contrary to one of Rhode’s other claims: “Although research on polyamory’s impact on children is fragmentary, some studies find that polyamorous parenting increases resources and adds flexibility to parent-child relationships.” *Id.* at 117. Her one citation of a study supporting this assertion points to Maura I. Strassberg, *The Challenge of Post-modern Polygamy: Considering Polyamory*, 31 CAP. U. L. REV. 439, 524, 464 n.172 (2003), where the citations seem largely to come from studies done by members of the communities themselves. *See id.* at 497 nn.317–21, 498 nn.323 & 325–27, 499 nn.328–34 & 337 (quoting members of a polyamorous community). Strassberg mentions a 1986 survey to support her claim that the couples were equally stable. *Id.* at 464 n.172 (referring to Arline M. Rubin & James R. Adams, *Outcomes of Sexually Open Marriages*, 22 J. SEX RES. 311, 312–14 (1986) (finding 68% of the sexually open couples stayed together for five years compared to 82% of the sexually exclusive couples; data came from 34 sexually open couples and 39 sexually exclusive couples)). More recent work also has empirical issues (selection problems as well as threats to the integrity of the sample; using 22 children interviewed and observed with polyamorists), but shows resilience among the children despite a high breakup-reformation rate among polyamorous couples. Mark Goldfeder & Elisabeth Sheff, *Children of*

no harm while the polyamorous relationship continues, but evidence involving what is called “multipartnered fertility” (evidence admittedly not coming from the more affluent and well-educated communities Rhode discusses, but involving some of the same family structures) has been found to harm children in a variety of ways.⁵⁰

Chapter 7 considers international perspectives on adultery. As I noted, Rhode cites examples from European nations, particularly France,⁵¹ that have abolished criminal penalties and generally view adultery as less likely to be wrong than does the United States.⁵² As she notes, the harshest treatment of adultery, which sometimes allows punishment by stoning, occurs in nations governed by Sharia law,⁵³ and prosecutions tend to be of women rather than men.⁵⁴ Rhode found only spotty evidence in Latin America and Africa, so I describe those regions here, recognizing that several nations have decriminalized adultery in recent years.⁵⁵ There apparently still is a double standard regarding adultery in Caribbean society.⁵⁶ Similarly, one African anthropological account suggests that in southeast Nigeria, while both men

Polyamorous Families: A First Empirical Look, 5 J.L. & SOC. DEVIANCE 150, 190–98, 241–42 (2013).

50. See, e.g., Marcia J. Carlson & Frank F. Furstenberg Jr., *The Prevalence and Correlates of Multipartnered Fertility Among Urban U.S. Parents*, 68 J. MARRIAGE & FAM. 718, 727 (2006) (finding that “in all likelihood,” parents raising children across multiple households dilutes the level of parental investment each child will receive); Kristen Harknett & Jean Knab, *More Kin, Less Support: Multipartnered Fertility and Perceived Support Among Mothers*, 69 J. MARRIAGE & FAM. 237, 250 (2007) (suggesting that multipartnered fertility leads to children “losing access to valuable resources from social networks”); Lorraine V. Klerman, *Multipartnered Fertility: Can It Be Reduced?*, 39 PERSP. ON SEXUAL & REPROD. HEALTH 56, 56–57 (2007) (hypothesizing that multipartnered fertility may negatively affect children by decreasing the likelihood of marriage of their parents as well as the amount of financial and other support they receive); Kristin Turney & Marcia J. Carlson, *Multipartnered Fertility and Depression Among Fragile Families*, 73 J. MARRIAGE & FAM. 570, 584–85 (2011) (examining the link between multipartnered fertility and depression in parents and indicating multipartnered fertility may be another way parents “transmit disadvantages to their children”); Cassandra Dorius & Karen Benjamin Guzzo, *The Long Arm of Maternal Multipartnered Fertility and Adolescent Well-being* 29 (Nat’l Ctr. for Family & Marriage Research Working Paper Series, WP-13-04, 2013) (finding that adolescents with half-siblings were more likely to have had sex and used drugs by age fifteen).

51. At François Mitterrand’s state funeral, his long-time mistress appeared alongside his wife and their two sons. RHODE, *supra* note 1, at 159.

52. RHODE, *supra* note 1, at 160–61 (noting that among industrialized countries, only the Philippines and Northern Ireland had higher rates than the United States of respondents viewing adultery as always wrong); see also Eric D. Widmer et al., *Attitudes Toward Nonmarital Sex in 24 Countries*, 35 J. SEX RES. 349, 351 tbl.1(1998) (same).

53. RHODE, *supra* note 1, at 179.

54. *Id.* at 179–80.

55. *Id.* at 177–79.

56. This was clearly true forty years ago, according to Frances Henry & Pamela Wilson, *The Status of Women in Caribbean Societies: An Overview of their Social, Economic and Sexual Roles*, 24 SOC. & ECON. STUDS. 165, 165 (1975). See also Gabriela Sagebin Bordini & Tania Mara Sperb, *Sexual Double Standard: A Review of Literature Between 2001 and 2010*, 17 SEXUALITY & CULTURE 686, 687–88 (2013) (tracing the continued existence of the sexual double standard among men and women).

and women enjoy premarital intercourse, women, but not men, are constrained by marriage to be monogamous.⁵⁷ Older married men commonly have “sugar daddy” relationships with younger, unmarried women;⁵⁸ this philandering behavior for material gain is “tacitly tolerated” by the wives.⁵⁹

Rhode seems to be pointing out that the United States’ relative intolerance of adultery (including criminalization and adultery’s negative impact on employment) more closely resembles attitudes in less industrialized and more repressive societies than in its more commonly associated Western industrialized peer group.⁶⁰ In fact, in addition to the insistence on parental rights discussed later in this Review,⁶¹ the United States stands out from this Western group of nations with liberal attitudes toward adultery for another reason. Despite trends towards less religious attendance, the United States continues to view religious and spiritual matters as important influences on life much more prevalently than, say, does France or other European countries.⁶² This suggests that reliance on religious condemnation may still be effective here.

While Rhode’s account of current American law in Chapter 3 begins with general effects of the criminalization of adultery and its effects on employment, she notes, correctly, that historically, penalties for adultery have had the effect of penalizing women.⁶³ Through the doctrine of recrimination, adultery may still keep a plaintiff spouse from obtaining a fault

57. Daniel Jordan Smith, *Promiscuous Girls, Good Wives, and Cheating Husbands: Gender Inequality, Transitions to Marriage, and Infidelity in Southeastern Nigeria*, 83 *ANTHROPOLOGICAL Q.* 123, 132, 145–46 (2010).

58. *Id.* at 128.

59. *Id.* at 129. Smith explains how this is reflected in the difference between the revealing clothes of the unmarried women and the far more modest apparel (“minimization of sexuality”) worn by married women. *Id.* at 139–40. “For married men, the situation is completely different. Extramarital sex is socially tolerated and, in many respects, even socially rewarded. The prevalence of married men’s participation in extramarital sex in Nigeria is well documented.” *Id.* at 146. Smith explains that this dichotomy can be explained by the different power and expectations of women during courtship, when they can refuse sex or exit the relationship, and marriage, when sexual availability is expected and divorce still highly stigmatized. *Id.* at 147.

60. See RHODE, *supra* note 1, at 160, 183 (noting that adults in the United States are more likely to view adultery as wrong compared to adults in other industrialized countries and suggesting that the United States should join those industrialized countries and decriminalize adultery).

61. See *infra* notes 107–12 and accompanying text.

62. See, e.g., Rick Noack, *Map: These Are the World’s Least Religious Countries*, WASH. POST (Apr. 14, 2015), <https://www.washingtonpost.com/news/worldviews/wp/2015/04/14/map-these-are-the-worlds-least-religious-countries/> [<https://perma.cc/VU23-UJDW>] (citing *Losing Our Religion? Two Thirds of People Still Claim to Be Religious*, WIN/GALLUP INT’L (Apr. 13, 2015), <http://www.wingia.com/web/files/news/290/file/290.pdf> [<https://perma.cc/U2TF-N43N>] (finding the percentage of Americans who consider themselves to be religious is higher than that of Western Europeans)).

63. See, e.g., RHODE, *supra* note 1, at 64 (both the husband and wife were accused of committing adultery, but only the wife was penalized); *id.* at 76 (woman was disciplined for committing adultery because her affair allegedly interfered with her work).

divorce.⁶⁴ While uncondoned adultery remains a bar to alimony in only one state,⁶⁵ in those states where it is legally considered at all, infidelity will be a factor considered with all others.⁶⁶ How does this residue of the old doctrines penalize women? First, though alimony is not often awarded (and perhaps was never awarded as often as attention to it would merit), it is most often awarded to women.⁶⁷ Second, while women file for divorces more often than men,⁶⁸ they are less apt to do so when concepts of fault are retained in grounds or as factors in alimony or property-division awards.⁶⁹ I test this again for adultery in the analysis below,⁷⁰ and, again, find that women are less likely to file.⁷¹ Yet in recent studies based on survey data using hypothetical

64. New York disallows divorce on grounds of adultery “[w]here the plaintiff has also been guilty of adultery under such circumstances that the defendant would have been entitled, if innocent, to a divorce.” N.Y. DOM. REL. LAW § 171 (McKinney 2010). This means that there cannot have been connivance, collusion, or expiration of the five-year statute of limitations. Divorce could still be obtained on another ground, and frequently would be, under the no-fault irretrievable break ground enacted in N.Y. DOM. REL. LAW § 170(7).

65. N.C. GEN. STAT. § 50-16.3A(a) (2015) provides in part:

If the court finds that the dependent spouse participated in an act of illicit sexual behavior, as defined in G.S. 50-16.1A(3)a., during the marriage and prior to or on the date of separation, the court shall not award alimony. If the court finds that the supporting spouse participated in an act of illicit sexual behavior, as defined in G.S. 50-16.1A(3)a., during the marriage and prior to or on the date of separation, then the court shall order that alimony be paid to a dependent spouse. If the court finds that the dependent and the supporting spouse each participated in an act of illicit sexual behavior during the marriage and prior to or on the date of separation, then alimony shall be denied or awarded in the discretion of the court after consideration of all of the circumstances. Any act of illicit sexual behavior by either party that has been condoned by the other party shall not be considered by the court.

N.C. GEN. STAT. § 50-16.3A(a).

66. See, e.g., FLA. STAT. ANN. § 61.08 (West 2016) (listing factors to be considered in addition to adultery when granting alimony). Thus, adultery that was immaterial to the breakup of a marriage would not be considered in granting alimony, according to *Smith v. Smith*, 378 So. 2d 11, 15 (Fla. Dist. Ct. App. 1979). In *Smith*, Mr. Smith had left the home to live with his girlfriend, and, after a period of separation, Mrs. Smith engaged in sexual relations with another man. *Id.* at 13–15. The court held that Mrs. Smith’s adultery could not be considered in light of Mr. Smith’s conduct, which was the cause of the separation and subsequent divorce. *Id.* at 15. The court reasoned that “it would be manifestly unfair for one spouse to be allowed to defend against an alimony claim by charging the other spouse with adultery when the spouse not seeking alimony may be equally guilty of the same misconduct.” *Id.* (quoting *Williamson v. Williamson*, 367 So. 2d 1016, 1018 (Fla. 1979)).

67. In the empirical section to follow there were no cases awarding support to husbands. See *infra* notes 63–65 and accompanying text.

68. Margaret F. Brinig & Douglas W. Allen, “*These Boots Are Made for Walking*”: *Why Most Divorce Filers Are Women*, 2 AM. L. & ECON. REV. 126, 128 tbl.1 (2000).

69. See *id.* at 128, 139, 149–50 (2000) (analyzing why women tend to file for divorce more than men, as well as the effect of no-fault laws on divorce rates).

70. The cases studied for this analysis are on file with the author.

71. In adultery cases, it is much less likely that women will file in Arizona (.469 to .628, $p < .07$). In Indiana, the difference (.600 to .661) is not statistically significant ($p < .628$), though the direction is the same.

spousal-support scenarios, the general population still feels that adultery should be taken into account in property division and child custody.⁷²

Nearly all of the studies of adultery dating back to the post-World War II Kinsey Reports, and including those mentioned by Rhode, base their numbers upon survey data.⁷³ As Rhode (and all the studies themselves) acknowledges,⁷⁴ this reporting may not be entirely accurate, and surveys are particularly susceptible to untruthful answers when sexual behavior by married participants is the stated topic.⁷⁵ Twenty years ago Douglas Allen and I examined adultery based on 1992 divorce records from Fairfax County, Virginia.⁷⁶ There, in about 8% of the cases (39) either husband or wife mentioned adultery somewhere in the file.⁷⁷

For the purposes of this Review, I sought to use a similar sort of data: that appearing in court documents involving divorces with children.⁷⁸ This data—which collects all documents filed in divorces with children from two counties in Arizona and five in Indiana that began in the months of January, April, or September 2008⁷⁹—allows adultery to be inferred from two sources (though legally it is not relevant in either state, and every one of the divorces was no-fault).⁸⁰ Adultery may be inferred from the pleadings relating to

72. In Sanford L. Braver & Ira Mark Ellman's *Citizen's Views About Fault in Property Division*, lay respondents to vignettes were more apt to award women than men lower shares of property if they committed adultery during the marriage, though most respondents continued to award equal amounts. Sanford L. Braver & Ira Mark Ellman, *Citizen's Views About Fault in Property Division*, 47 FAM. L.Q. 419, 428–30, 429 tbls. 3 & 4 (2013); see also Ashley M. Votruba et al., *Moral Intuitions About Fault, Parenting, and Child Custody After Divorce*, 20 PSYCHOL., PUB. POL'Y, & L. 251, 258–60 (2014) (indicating that citizens adjust custody slightly away from adulterous parents, as well as from those who divorced simply because they got tired of their spouses).

73. RHODE, *supra* note 1, at 8–10.

74. *Id.* at 8.

75. The recent book about children of adulterous parents is equally susceptible to untruthful answers. ANA NOGALES, PARENTS WHO CHEAT: HOW CHILDREN AND ADULTS ARE AFFECTED WHEN THEIR PARENTS ARE UNFAITHFUL app. at 239–40 (2009) (stating that the survey does not claim to be scientifically randomized but that it does report conversations of the children studied). A more reliable account, since it collects peer-reviewed papers on the topic, is Sesen Negash & Martha L. Morgan, *A Family Affair: Examining the Impact of Parental Infidelity on Children Using a Structural Family Therapy Framework*, 38 CONTEMP. FAM. THERAPY 198 (2016). Similarly, harm to children from adultery is explicitly the topic of Lynn D. Wardle, *Parental Infidelity and the "No-Harm" Rule in Custody Litigation*, 52 CATH. U. L. REV. 81 (2002).

76. Douglas W. Allen & Margaret Brinig, *Sex, Property Rights, and Divorce*, 5 EUR. J.L. & ECON. 211, 226–27 (1998). While some adultery would go unnoticed by the "innocent" spouse because it was and continues to be a ground for divorce, and may affect property settlements and alimony, known adultery might be expected to be raised.

77. *Id.* at 227 tbl.6.

78. This data set is on file with author.

79. Data collection methods and descriptive statistics, as well as other results, are reported in Margaret F. Brinig, *Result Inequality in Family Law*, 49 AKRON L. REV. 471, 484–94, 493 tbl.3 (2016) [hereinafter Brinig, *Result Inequality*].

80. While divorce of a covenant marriage can be for adultery in Arizona, ARIZ. REV. STAT. ANN. § 25-903 (2016), all divorces of couples in the dataset were filed on the grounds of

custody and child support. For example, one father in each state wanted genetic testing of one of the children born during the marriage, alleging that it was not his. In another instance, an Indiana mother asked that the temporary order (in other words, one sought while the marriage was still in effect) include a prohibition against overnight visitation by the children while the husband's girlfriend was in residence. More commonly, however, the child support worksheet indicated that a child with a birthdate during the marriage was not owed support by both parents.⁸¹ While there was not much adultery of this kind in either state (thirty-two of 685 Arizona cases involving children and nine of 310 in Indiana), these cases turn out to be very distinctive.⁸² While there was very little spousal support of any amount for any length of time in either state (eleven cases in Indiana and less than 15% of the cases in Arizona), there was no difference in the likelihood of an award or in its amount based on whether there was adultery.⁸³ There was also no effect at all on parenting time (visitation), nor were the averages of the parents' incomes significantly different in the two kinds of cases.⁸⁴ There was a difference in each state in the litigiousness of the parties. I present these statistically significant results below.

irretrievable breakdown of the marriage. *See id.* § 25-312 (listing the requirements for dissolving marriages). Indiana divorces were all alleged and granted on the basis of "irretrievable breakdown" under IND. CODE § 31-15-1-2 (2016) (though additional grounds exist for a post-marriage felony conviction, impotence existing at the time of the marriage, and incurable insanity). *Id.* Alimony in Arizona is awarded "without regard to marital misconduct," under ARIZ. REV. STAT. ANN. § 25-319(B) (2016), though adultery remains a Class 3 misdemeanor under ARIZ. REV. STAT. ANN. § 13-1408 (2016). In Indiana, adultery or other marital misconduct is not listed among the factors for the granting of spousal support under IND. CODE § 31-15-7-2 (2016) or for departing from an equal division of property under IND. CODE § 31-15-7-5 (2016), unless it affects the dissipation or acquisition of the property. *Id.* § 31-15-7-5(4) (listing the "conduct of the parties during the marriage" as a factor).

81. *See* Brinig, *Result Inequality*, *supra* note 73, at 486 (showing the type of information included in complaints and child support worksheets). Other children of only one parent will not be owed support by the payor but will affect the total duty of support owed by each parent. If children are owed money by a court order, this amount will be subtracted from the available income of the parent. If they are living with a parent, some fraction of that income will be unavailable for the new support order.

82. *See infra* Table 1.

83. *See infra* Table 1.

84. *See infra* Table 1. In a general-population-survey study done in one of the two Arizona counties included in this dataset, Ira Ellman and coauthors found that lay people were apt to slightly (though statistically significantly) lower the amount of custody they would award to an adulterous parent. Votruba et al., *supra* note 72, at 253, 258.

Table 1. Significant Comparisons of Means in Divorces Involving Adultery or None

| State | Variable | Adultery in file | No adultery in file | F (significance) |
|---------|---|------------------|---------------------|--------------------------|
| Arizona | Pre-decree motion for protective order | .406 | .176 | 10.770 ($p < .001$) |
| Arizona | Dissolution after trial | .313 | .133 | 8.137 ($p < .004$) |
| Arizona | Post-decree motion for increased custody | .250 | .112 | 5.681 ($p < .018$) |
| Arizona | Post-decree motion for less custody | .219 | .092 | 5.593 ($p < .018$) |
| Arizona | Post-decree motion for less child support | .344 | .185 | 4.944 ($p < .027$) |
| Indiana | Post-decree motion for increased custody | .467 | .153 | 10.361 ($p < .001$) |
| Indiana | Pre-decree request for protective order | .333 | .108 | 6.977 ($p < .009$) |
| Indiana | Post-decree request for protective order | .133 | .031 | 4.444 ($p < .036$) |

What do these numbers mean? In Arizona, it is more than twice as likely in the adultery cases that couples will be unable to resolve their marital disputes before resorting to trial and similarly more likely that a spouse will allege domestic violence. As painful and expensive as this litigation might be for parties, it is also twice as likely that there will be subsequent requests by one of the parties to decrease or increase custody and twice as likely that the payor parent will attempt to decrease the amount of child support that parent must pay.⁸⁵ In Indiana, post-decree motions for increased custody were three times more likely, and post-divorce protective orders were more than four times as likely in the adultery-indicated cases.

Despite the lack of legal consequences,⁸⁶ adultery cases are particularly costly in terms of increased litigation, especially custody litigation, and are

85. While fathers had primary custody some of the time and shared custody equally in about a quarter of the cases, they paid child support about two-thirds of the time.

86. Cf. Lynn D. Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 B.Y.U. L. REV. 79, 81 (arguing that the abolition of fault-divorce grounds shifted hostility and perjury to other parts of the process).

associated with pre-divorce allegations of domestic violence in both states and post-decree allegations of domestic violence in Indiana.⁸⁷

Trust matters. Deep into presidential-election season, American voters were skeptical that they could trust the candidate nominated by either major political party.⁸⁸ Perhaps this is not surprising, given that Americans don't trust the government,⁸⁹ Congress, banks, or even organized religion these days.⁹⁰ If institutions cannot be trusted, how important is it that we maintain trust in individuals, especially those with whom we have committed personal relationships?⁹¹

Marriage, as opposed to cohabitation, can be characterized by its relative permanence, its unconditional love, and its status as an institution (receiving of public and private support).⁹² In addition to the equality that gay and lesbian couples sought and received from the Supreme Court in *Obergefell*,⁹³

87. Not surprisingly, pre- and post-order domestic violence is correlated (.198, $p < .01$).

88. See, e.g., Amy Chozick & Megan Thee-Brenan, *Poll Finds Voters in Both Parties Unhappy with Their Candidates*, N.Y. TIMES (July 14, 2016), http://www.nytimes.com/2016/07/15/us/politics/hillary-clinton-donald-trump-poll.html?_r=1 [https://perma.cc/AW9D-2PKZ] (reporting that large majorities of American voters view neither Hillary Clinton nor Donald Trump as being honest or trustworthy).

89. See *Beyond Distrust: How Americans View their Government*, PEW RES. CTR. 18 (Nov. 23, 2015), <http://www.people-press.org/files/2015/11/11-23-2015-Governance-release.pdf> [https://perma.cc/SXL8-ZBGZ] (reporting that Americans' trust in the government is at historically low levels, with just 19% of Americans reporting that they trust the federal government "to do what is right 'just about always' . . . or . . . 'most of the time'").

90. See, e.g., Kenneth T. Walsh, *Americans Have Lost Confidence . . . In Everything*, U.S. NEWS & WORLD REP. (June 17, 2015), <http://www.usnews.com/news/blogs/ken-walshs-washington/2015/06/17/americans-have-lost-confidence-in-everything> [https://perma.cc/3RCJ-8EYC] (citing Jeffrey M. Jones, *Confidence in U.S. Institutions Still Below Historical Norms*, GALLUP (June 15, 2015), <http://www.gallup.com/poll/183593/confidence-institutions-below-historical-norms.aspx> [https://perma.cc/N2JN-KZCJ]) (reporting that Americans' confidence in Congress is at 8%, in banks is at 28%, and in church or organized religion is at 42%).

91. Jane Larson wrote years ago that:

[I]t surprised me to learn in researching this Article that higher standards of honesty and fair dealing apply in commercial than in personal relationships. . . . One response to the dilemma of intimate responsibility has been to silence and devalue individuals who make stifling personal claims on the independence and mobility of those who possess privilege and power. Because of the gendered history of romantic and sexual relationships, it has tended to be men in our society who have sought relational freedom, and women whose interests have been compromised by reliance on intimate relationships.

Jane E. Larson, "*Women Understand So Little, They Call My Good Nature 'Deceit'*": *A Feminist Rethinking of Seduction*, 93 COLUM. L. REV. 374, 471–72 (1993). For a discussion of the problems with efficient breach in contract, which pose similar threats to trust, see Gregory Klass, *Efficient Breach*, in PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW 362, 369 & 367 n.14 (Gregory Klass et al. eds., 2014).

92. MARGARET F. BRINIG, FROM CONTRACT TO COVENANT: BEYOND THE LAW AND ECONOMICS OF THE FAMILY 6–7 (2000).

93. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2593, 2608 (2015).

and to the numerous statutory benefits marriage grants,⁹⁴ married couples gain the commitment to sexual monogamy and permanence of marriage that, in turn, promotes trust. It is that trust that catalyzes the many fruits of marriage because, in a word, it signifies the production of social capital.

Robert Putnam, most famous for his *Bowling Alone*,⁹⁵ bemoans the lack of Americans' involvement in various institutions because of people's need for social capital.⁹⁶ And many writers have noted that Western societies have increasingly placed heavy burdens on marriage to supply all the emotional and psychological supports that once also came from extended families and institutions such as religious and social organizations.⁹⁷

Arguably, it is with the failing of trust that marriages begin to crumble.⁹⁸ Instead of believing that over very long time horizons all will even out between them,⁹⁹ spouses revert to "doing the minimum" to satisfy their marital obligations and increasingly expect to be rewarded over the short term for whatever effort they put in.¹⁰⁰ Adultery breaches that trust.

The question of how to encourage the kind of trust people want (and need) in marriage is a difficult one. It is far easier to be critical of the faults posed by existing laws—as Rhode does, and does well, in this book—than to figure out how society would best function without those laws. This isn't a

94. *E.g.*, I.R.C. § 24 (2012) (The Child Tax Credit); *see also Obergefell*, 135 S. Ct. at 2601 (listing the benefits of marriage, including tax benefits, property rights, adoption rights, hospital access, and medical authority, among others).

95. ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000).

96. *Id.* at 15–26 (discussing the decline in organizational and institutional involvement and the benefits of social capital that can be gained from such involvement).

97. *See, e.g.*, FRANCES K. GOLDSCHIEDER & LINDA J. WAITE, *NEW FAMILIES, NO FAMILIES?: THE TRANSFORMATION OF THE AMERICAN HOME* 7–12 (1991) (discussing modern trends and changes in the family structure and traditional gender roles between husbands and wives); JESSICA WEISS, *TO HAVE AND TO HOLD: MARRIAGE, THE BABY BOOM, AND SOCIAL CHANGE* 127–39 (2000) (discussing the shifting emphasis in middle-class marriages from the married couple themselves, in the several decades leading up to World War II to the family as a whole in the 1950s).

98. Margaret F. Brinig & Steven L. Nock, "I Only Want Trust": *Norms, Trust, and Autonomy*, 32 J. SOCIO-ECON. 471, 473 (2003). *See also* Liana C. Sayer & Susanne M. Bianchi, *Women's Economic Independence and the Probability of Divorce: A Review and Reexamination*, 27 J. FAM. ISSUES 906, 929 tbl.3, 932 (2000) (focusing on women's emotional dissatisfaction with the marriage as a predictor of divorce).

99. Steven L. Nock, *Time and Gender in Marriage*, 86 VA. L. REV. 1971, 1981 (2000) (correlating a higher likelihood of divorce with knowledge of how much housework one partner does, because partners that are unable to accurately estimate their respective shares of housework can satisfactorily assume that the distribution will even out in the long run); *see also* Wardle, *supra* note 70, at 122 ("Marriage requires a long view—eternal is the word that lovers like to use—a view that looks beyond the dull daily duties and sometimes-difficult periods of family life.")

100. Shelly Lundberg & Robert A. Pollak, *Separate Spheres Bargaining and the Marriage Market*, 101 J. POL. ECON. 988, 1007–08 (1993) (suggesting that marriage is better thought of as a cooperative game, rather than a noncooperative alternating-offer game).

new problem—the Hart/Devlin debate in the 1960s¹⁰¹ highlighted contemporaneous competing positions on whether or not homosexual conduct should remain a crime and spurred a tremendous body of literature. One recent articulation of a no-crime-unless-direct-harm-to-another principle is Cass Sunstein's recent paper,¹⁰² finding, as Rhode notes,¹⁰³ that of all the “morals offenses,” adultery poses the most difficult problem for continued constitutional viability.¹⁰⁴ With many morals offenses, it is hard to find a victim, though, as in the case of commercial sex, there may be real questions about consent. With uncondoned adultery, there is not only the “innocent” spouse, but also, many times, children who lose by it.

Adultery harms children. Should their parents divorce, they will fare, as do the majority of children of divorce, less well than children of families whose parents remain together,¹⁰⁵ and almost certainly will suffer greater

101. See PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* 22 (1965) (suggesting that criminal law is also for the protection of society, “the institutions and the community of ideas, political and moral, without which people cannot live together”); H.L.A. HART, *LAW, LIBERTY AND MORALITY* 1–13 (1963) (collecting lectures delivered at Stanford that argued, based on John Stuart Mill's *On Liberty*, only direct harm to others should be criminalized). The debate was discussed in Peter Cane, *Taking Law Seriously: Starting Points of the Hart/Devlin Debate*, 10 J. ETHICS 21 (2006).

102. See generally Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. 27. For an argument that morals-based laws should retain some validity when tied to demonstrable facts, see Suzanne B. Goldberg, *Morals-Based Justifications for Lawmaking: Before and After Lawrence v. Texas*, 88 MINN. L. REV. 1233, 1305 (2004). Goldberg specifically considers the Hart/Devlin debate. *Id.* at 1235 n.9.

103. RHODE, *supra* note 1, at 70.

104. See Sunstein, *supra* note 104, at 35 (noting that the court has been unwilling to expand heightened scrutiny to certain groups in the past and that the court ruling to expand the scope of heightened scrutiny in the future would be a seemingly unlikely innovation).

105. See, e.g., Paul R. Amato & Jacob Cheadle, *The Long Reach of Divorce: Divorce and Child Well-Being Across Three Generations*, 67 J. MARRIAGE & FAM. 191, 198–99 (2005) (finding lower education, more marital discord, and weaker ties with both mothers and fathers among the grandchildren of divorced couples). For a discussion of the intergenerational impact of divorce, see also Valarie King, *The Legacy of a Grandparent's Divorce: Consequences for Ties Between Grandparents and Grandchildren*, 65 J. MARRIAGE & FAM. 170, 170 (2003). For specific discussions on the impact of divorce on trust, see Stacy Glaser Johnston & Amanda McCombs Thomas, *Divorce Versus Intact Parental Marriage and Perceived Risk and Dyadic Trust in Present Heterosexual Relationships*, 78 PSYCHOL. REP. 387, 389 (1996) (reporting a fear of being rejected and a lack of trust in children of divorce); Valarie King, *Parental Divorce and Interpersonal Trust in Adult Offspring*, 64 J. MARRIAGE & FAM. 642, 648, 650 (2002) (indicating that divorce affects the child's trust of fathers more than mothers once the quality of parent-child relationships is taken into account); Daniel J. Weigel, *Parental Divorce and the Types of Commitment-Related Messages People Gain from Their Families of Origin*, J. DIVORCE & REMARRIAGE, no.1/2, 2007, at 15, 20, 28, 22 tbl.1 (revealing that college students of divorced parents were more likely to show lack of trust and fidelity and less commitment to their current relationships, as messages learned from their parents). Similarly, considering the effect of their parents' divorce on children's commitment are Renée Peltz Dennison & Susan Silverberg Koerner, *A Look at Hopes and Worries About Marriage: The Views of Adolescents Following a Parental Divorce*, J. DIVORCE & REMARRIAGE, no.3/4, 2007–2008, at 91, 103 (describing children's anxiety about their own marital future as mirroring their own parents' marital troubles) and Susan E. Jacquet & Catherine A. Surra, *Parental Divorce and Premarital Couples: Commitment and Other Relationship Characteristics*, 63 J. MARRIAGE &

financial strains because of the division into two households.¹⁰⁶ Additionally, in nearly all cases children of adultery will be disadvantaged by increased money spent by their parents litigating child custody and child support, as seen above.¹⁰⁷ These children will be further harmed in those cases involving abuse,¹⁰⁸ whether directed at them or at the adulterous spouse, and, as seen above, there seems to be more violence involved when there is adultery.¹⁰⁹

While the evidence is not as conclusive, there are certainly correlations between being a child of adulterous parents and suffering short- and long-term psychological and relationship consequences regardless of what happens to the parental marriage.¹¹⁰ Therefore, the remedies I suggest would benefit the children, if any, rather than the wronged spouse.¹¹¹ Many states allow an adjustment to be made to guidelines-required child support for “extraordinary” expenses,¹¹² and I would allow such an adjustment to benefit

FAM. 627, 632 tbl.2, 63435 (2001) (highlighting the pessimism of women from divorced families about their ability to trust a future spouse’s benevolence). For a report that children in stepfamilies are particularly likely to leave home early and not return, see Frances K. Goldscheider & Calvin Goldscheider, *The Effects of Childhood Family Structure on Leaving and Returning Home*, 60 J. MARRIAGE & FAM. 745, 751 (1998).

106. See generally Greg J. Duncan & Saul D. Hoffman, *A Reconsideration of the Economic Consequences of Marital Dissolution*, 22 DEMOGRAPHY 485 (1985) (examining longitudinal data and concluding that although divorce tends to yield adverse economic consequences for those involved, the economic status of women who remarry is favorable as compared to women who remain married).

107. Litigation itself is painful. “[T]he burden of litigating . . . can itself be, ‘so disruptive of the parent–child relationship that the constitutional right of a custodial parent to make certain basic determinations for the child’s welfare becomes implicated.’” *Troxel v. Granville*, 530 U.S. 57, 75 (2000) (quoting 530 U.S. at 101 (Kennedy, J., dissenting)).

108. See generally Margaret F. Brinig et al., *Perspectives on Joint Custody Presumptions as Applied to Domestic Violence Cases*, 52 FAM. CT. REV. 271 (2014) (summarizing the relevant literature on intimate partner violence as it relates to custody proceedings).

109. See *supra* note 87 and accompanying text.

110. See *supra* note 85–87 and accompanying text. Cf. William G. Axinn & Arland Thornton, *The Influence of Parents’ Marital Dissolutions on Children’s Attitudes Toward Family Formation*, 33 DEMOGRAPHY 66, 73–74 & tbl.3 (1996) (suggesting that children of divorce are more likely to prefer cohabitation than marriage); Andrew J. Cherlin et al., *Parental Divorce in Childhood and Demographic Outcomes in Young Adulthood*, 32 DEMOGRAPHY 299, 310 (1995) (same); Judith Treas & Deirdre Giesen, *Sexual Infidelity Among Married and Cohabiting Americans*, 62 J. MARRIAGE & FAM. 48, 51 (2000) (concluding that infidelity is more likely among cohabitating partners than married partners).

111. This adjustment will only work when the adulterous parent has enough income to pay child support. Some research indicates, however, that adultery is positively correlated with income. Adrian J. Blow & Kelley Hartnett, *Infidelity in Committed Relationships II: A Substantive Review*, 31 J. MARITAL & FAM. THERAPY 217, 225 (2005). Some research also suggests that there is more likely to be infidelity in couples with children. Amy M. Burdette et al., *Are There Religious Variations in Marital Infidelity?*, 28 J. FAM. ISSUES 1553, 1565–66 & tbl.2 (2007). Generally about 50% of divorcing couples have minor children. See, e.g., OHIO DEP’T OF HEALTH, MARRIAGE AND DIVORCE STATISTICS (2011), <http://www.odh.ohio.gov/healthstats/vitalstats/mrdvstat.aspx> [<https://perma.cc/Q2Q3-SBM5>] (showing that 47.2% of divorces involved minor children).

112. See, e.g., ARIZ. DEP’T OF ECON. SEC., ARIZONA CHILD SUPPORT GUIDELINES 9 (2015), <https://des.az.gov/sites/default/files/2015CSGuidelinesRED.pdf> [<https://perma.cc/E9TZ-GHJ3>] (adopted by the Arizona Supreme Court). It is typically made today for camps, disabled children’s

the children of adultery to pay for such things as counseling that the adulterous parent's conduct may well necessitate.¹¹³ Further, in those states where tuition for college education may be ordered at divorce to be split between parents and children,¹¹⁴ I would have the adulterous parent pick up the child's portion, if financially feasible.

Old custody rules favoring innocent spouses¹¹⁵ might have had a point here. As the Supreme Court has written, parents are presumed to act in the best interests of their children because powerful ties of affection lead them to do so.¹¹⁶ While their judgments dealing with childrearing are not to be second-guessed lightly,¹¹⁷ there may be times when parents will put their own self-interested desires first.¹¹⁸ Historically, fault grounds for divorce have disproportionately penalized women, as Rhode implies,¹¹⁹ especially since they have been primary custodians the vast majority of the time under the "best interests" standard.¹²⁰ But engaging in adultery, almost by definition, puts one's own interests first. In a time when both parents increasingly have

medical treatment, and sometimes private schools or sports activities for exceptionally talented children. See, e.g., JUDICIAL BRANCH OF IND., INDIANA CHILD SUPPORT RULES AND GUIDELINES § 8 (2016), http://www.in.gov/judiciary/rules/child_support/ [<https://perma.cc/KCV5-KUL4>].

113. Such adjustment is arguably made by states that require college education to be paid for by divorcing parents when it is not a requirement for parents that remain together. See, e.g., *In re. Marriage of Crocker*, 971 P.2d 469, 476 (Or. Ct. App. 1998), *aff'd*, 22 P.3d 759 (Or. 2001) (upholding such a statute despite an equal protection challenge).

114. See JUDICIAL BRANCH OF IND., *supra* note 104, § 8 cmt.b ("The authority of the court to award post-secondary educational expenses is derived from IND. CODE § 31-16-6-2. It is discretionary with the court to award post-secondary educational expenses and in what amount."). See IND. CODE § 31-16-6-2(1) (2016) (stating that a support order "may also include" the listed support). In making such a decision, the court should consider postsecondary education to be a group effort, and weigh the ability of each parent to contribute to payment of the expense, as well as the ability of the student to pay a portion of the expense. See IOWA CODE § 598.1(8) (2016) (stating that either party may be required to contribute to a child's postsecondary education).

115. RHODE, *supra* note 1, at 44–46.

116. *Parham v. J.R.*, 442 U.S. 584, 602 (1979).

117. *Troxel v. Granville*, 530 U.S. 57, 72–73 (2000) (recognizing a parent's "fundamental right to make decisions regarding children's care, custody, and control," on which a court may not infringe simply because it believes a better decision could be made).

118. See *Prince v. Massachusetts*, 321 U.S. 158, 165–70 (1944) (discussing the tension between the protection of parents' rights and children's rights to be protected and provided opportunities for growth, and noting the state's right to interfere with parents' rights where necessary to protect such rights of children).

119. See RHODE, *supra* note 1, at 41–42, 46 (describing historical manifestations of the so-called double standard between men and women in divorce proceedings).

120. See, e.g., Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, LAW & CONTEMP. PROBS., Summer 1975, at 226, 235 (stating that statutes that place parents on "equal footing" tend to yield a "substantial preference" for the mother); Suzanne Reynolds et al., *Back to the Future: An Empirical Study of Child Custody Outcomes*, 85 N.C. L. REV. 1629, 1632, 1637, 1667 (2007) (stating that female plaintiffs are more likely than male plaintiffs to gain child custody in a no-fault system).

postdivorce claims to equal parenting time,¹²¹ adultery, particularly when the children find out about it during the course of the marriage, may be an indication that parenting isn't the first priority of the adulterer.

Criminalizing conduct is the strongest way of expressing social disapproval for behavior. Of course keeping an offense criminal bears its own costs in terms of enforcement and expenditure on the court and corrections systems.¹²² In the case of same-sex relationships, stigmatizing those who engaged in them because it was criminal had lasting and unfortunate effects.¹²³ But as a society, do we want to continue to stigmatize adulterers? A related question is whether criminal law does deter¹²⁴—the subject of a whole literature in law and economics, and one where academics wonder particularly whether criminal law deters “crimes of passion.”¹²⁵ Like Sunstein, I believe the case is a hard one, though I am not at all a fan of retaining “heartbalm” actions¹²⁶ and I realize that retaining some role for fault in divorce, contrary to what I thought twenty years ago, disadvantages women. I can therefore understand the reluctance of states to abolish their

121. See, e.g., Jana B. Singer, *Dispute Resolution and the Postdivorce Family: Implications of a Paradigm Shift*, 47 FAM. CT. REV. 363, 365–66 (2009) (stating that joint custody arrangements, which entail equal legal parenting authority, have increasingly become the norm).

122. It also forces participants underground into black markets, which have additional costs. See generally PETER REUTER, U.S. DEP'T OF JUSTICE, THE ORGANIZATION OF ILLEGAL MARKETS: AN ECONOMIC ANALYSIS (1985) (exploring the formation, function, and costs of black markets).

123. In fact, legalization of same-sex marriage has worked to enhance well-being for gays and lesbians regardless of whether they in fact marry. See generally Ellen D.B. Riggle et al., *Impact of Civil Marriage Recognition for Long-Term Same-Sex Couples*, SEXUALITY RES. & SOC. POL'Y, <http://link.springer.com/article/10.1007/s13178-016-0243-z> [<https://perma.cc/L9SB-FQQB>] (discussing a study that indicates an increase in the perceived well-being of gays and lesbians following the legalization of same-sex marriage); cf. Ryan Goodman, *Beyond the Enforcement Principle: Sodomy Laws, Social Norms, and Social Panoptics*, 89 CALIF. L. REV. 643, 662, 671 (2001) (discussing how the criminalization of sodomy fueled negative social norms regarding homosexuality in South Africa).

124. See generally Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968) (discussing, among other things, the varying effectiveness of punishment as a means to deter).

125. See, e.g., Brian Forst, *Prosecution and Sentencing*, in CRIME 363, 376 (James Q. Wilson & Joan Petersilia eds., 1995) (discussing, generally, the mechanics of deterrence as well as the three purposes underlying deterrence: special deterrence, incapacitation, and retribution); see also Xuemei Liu, *An Effective Punishment Scheme to Reduce Extramarital Affairs: An Economic Approach*, 25 EUR. J. L. & ECON. 167, 174 (2008) (suggesting that prohibition of adultery is not a deterrent); Eric Rasmusen, *An Economic Approach to Adultery Law*, in THE LAW AND ECONOMICS OF MARRIAGE AND DIVORCE 70, 84 (Antony W. Dnes & Robert Rowthorn eds., 2002) (suggesting restoring the legal effect of adultery in divorce settlements and restoring its applications in tort law (citing LINDA R. HIRSHMAN & JANE E. LARSON, HARD BARGAINS: THE POLITICS OF SEX 283–86 (1998))).

126. See Brinig, *supra* note 13, at 204–05 (discussing the theory behind breach of promise to marry). I also have noted in passing that the status of lawyers increases as they become less involved with “sordid” affairs, something that helped fuel the no-fault divorce and collaborative divorce movements. BRINIG, *supra* note 92, at 213–14.

criminal statutes,¹²⁷ and why, consistent with my argument of the importance of fidelity to religious groups and in religious texts, both religious affiliation and attendance seem to reduce adultery.¹²⁸ Arguably, policing should be up to these communities, and for childless couples that would be my solution.

127. Deborah L. Rhode, *Adultery: An Agenda for Legal Reform*, 11 STAN. J.C.R. & C.L. 179, 184–85 (2015) (listing arguments why one would not want to rock the legislative boat by decriminalizing adultery). See generally JoAnne Sweeny, *Undead Statutes: The Rise, Fall, and Continuing Uses of Adultery and Fornication Criminal Laws*, 46 LOY. U. CHI. L.J. 127 (2014) (discussing the decriminalization of adultery and the persistence of adultery statutes in some states).

128. See Burdette et al., *supra* note 111, at 1555, 1565 tbl.2, 1571–72 (showing correlations using the General Social Survey).