

UNTYING THE CHEATER’S KNOT: ENFORCING ADULTERY-BASED CLAIMS IN A MODERN WORLD

HALEY N. MENDOLA*

I. INTRODUCTION

“Rising from the most basic human needs, marriage is essential to our most profound hopes and aspirations.”¹ Marriage is the ultimate commitment to another person. Not only is marriage the start of a new life together, but it could be the start of generations to come. With marriage being such an integral part of our culture and lifestyle, we see lavish celebrations with outlandish expenses invested into weddings.² In romantic genre films, a couple finally gets their happy ending at the altar and runs away in a horse-drawn carriage.³ Yet, despite the positivity that has been illustrated surrounding marriage, paradoxically, through the same media outlet, adultery has also been romanticized. Films have glorified love triangles,⁴ or depicted victims of adultery as being able to quickly recover from heartbreak and lead a successful career.⁵ However, in real life, adultery has serious repercussions for victims and family members, including children. Yet, the protection of marriage, as well as the welfare and rights of victims, has unraveled into a lifeless, distorted ball of yarn, without any sort of interference by our courts.

Adultery has long been overlooked by our courts as an actionable offense. Many spouses who have been affected by the pains of an adulterous spouse

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1. *Obergefell v. Hodges*, 576 U.S. 644, 657 (2015).

2. The average amount of expenses for a wedding in 2026 so far was approximately \$36,000. *How Much Does the Average Wedding Cost in 2025?*, ZOLA (Mar. 6, 2026), <https://www.zola.com/expert-advice/whats-the-average-cost-of-a-wedding> [<https://perma.cc/NSV4-DFXY>].

3. *CINDERELLA*, Disney+ (Walt Disney Productions 1950).

4. *THE NOTEBOOK*, Amazon Prime (Gran Via Productions 2004).

5. *THE OTHER WOMAN*, Disney+ (LBI Productions 2014).

often seek remedies from courts but are ultimately turned away. Studies show that the effects of adultery include post-traumatic stress disorder, anxiety, depression, and more. To address these injuries suffered by the victims and inflicted upon them by the adulterers, courts essentially offer zero paths of recovery. Criminal courts across the country are abolishing adultery statutes.⁶ Family law courts do not often consider adultery in divorce proceedings,⁷ and they typically only consider the “needs” of the spouse versus who was at fault for alimony.⁸ Civil courts have struck down viable causes of action against adulterers,⁹ and because men are more likely to cheat than women,¹⁰ women have been disproportionately affected as a result of the courts’ rejections. This inequitable result is further evidenced by the fact that men used to be able to bring tort actions against third parties for interfering with their marriage.¹¹ Due to the courts’ indifference to these injuries, victims are left with no redress and have taken it upon themselves to remedy harms via social media platforms,¹² which creates the potential for future defamation claims.

Adultery is causing more harm than even initially thought, and courts are not paying attention. This article analyzes the current state of adultery in our modern court system and offers suggestions on potential legal avenues of

6. See N.Y. PENAL LAW § 255.17 (McKinney 2024) (repealed 2024).

7. See *Adultery and Divorce in PA*, PETRELLI PREVITERA, LLC (Feb. 6, 2026), <https://www.petrellilaw.com/adultery-and-divorce-in-pa/> [<https://perma.cc/H85V-VYKS>] (“Whether you choose fault or no-fault divorce, if your husband or wife cheated, that fact will not play a role in the general divorce process . . . Exposing your spouse as an adulterer will not have an effect on the outcome of that division.”); Misty Muter, *How Adultery Affects Divorce Proceedings*, MUTER L. (Oct. 14, 2025), <https://www.muterlaw.com/how-adultery-affects-divorce-proceedings/> [<https://perma.cc/FRT6-JJVA>] (discussing Wisconsin no-fault divorce status: “. . . the court doesn’t require evidence of cheating or misconduct to grant a divorce. Because of this, adultery rarely plays a central role in the legal process.”); Dina Haddad, *10 Misconceptions About Adultery And Divorce—Addressed*, FAMS. FIRST MEDIATION: BLOG, <https://ffmediation.com/misconceptions-about-adultery-and-divorce/> [<https://perma.cc/U6TL-GL6V>] (last visited Dec. 1, 2025) (discussing California no-fault divorce status, “California courts are not interested in why unless there is direct harm to the spouse or children. As a result, cheating as a concept Adultery [sic] does not legally impact divorce.”)

8. Deborah J. Morris, Note, “*Breaking Up Is Hard To Do*”: *Proposing Legislative Action In Order to Address the Problems Surrounding Alimony and Related Divorce Matters in South Dakota*, 61 S.D. L. REV. 81, 85, 89–90 (2016).

9. See *Doe v. Doe*, 747 A.2d 617, 623 (Md. 2000).

10. Wendy Wang, *Who Cheats More? The Demographics of Infidelity in America*, INST. FOR FAM. STUDS. (Jan. 10, 2018), <https://ifstudies.org/blog/who-cheats-more-the-demographics-of-cheating-in-america> [<https://perma.cc/MPX8-FZUC>] (“In general, men are more likely than women to cheat, but the gender gap in infidelity varies by age.”).

11. See *Kline v. Ansell*, 414 A.2d 929 (Md. 1980).

12. Amber Haque, *The Secret Facebook Groups Where Women Shame Their Exes*, BBC NEWS (Aug. 21, 2019), <https://www.bbc.com/news/uk-49082550> [<https://perma.cc/2RYM-YSBV>]; see Eva Wiseman, “*The Guy I’m Seeing Has Popped Up In An ‘Are We Dating The Same Guy?’ Group...What Do I Do?*”, BRITISH VOGUE: ASK EVA (Jan. 11, 2025), <https://www.vogue.co.uk/article/are-we-dating-the-same-guy> [<https://perma.cc/P89U-TLFT>].

reform for adultery in the court, so those who have suffered can rightfully recover for their injuries. Courts can no longer ignore these intentional, pain-inflicting actions. It is the responsibility of our courts to rectify these wrongs when presented before them.

II. ADULTERY GENERALLY AND MODERN DATING CULTURE

Perplexingly, one of the more puzzling questions to answer in today's day and age is: What is adultery? By legal standards, states normally recognize adultery as sexual intercourse during the marriage with a third party.¹³ In family law proceedings, courts have generally found that adultery can be proven by direct or circumstantial evidence¹⁴ on a clear and convincing burden of proof or a preponderance of the evidence.¹⁵ Adultery was typically proven by various factors, including, but not limited to: evidence of children born from affairs, transmitted diseases, opportunities to engage in intercourse, and testimony by involved parties or private investigators.¹⁶

The expansion of technology has impacted the way some spouses commit, and others prove, adultery. Today, more people are experiencing dating through online dating apps. With the rise of these newfound dating apps, such as Tinder, Hinge, Grindr, and Bumble, these technologies theoretically make it easier to meet other singles.¹⁷ Tinder, for example, has approximately 60 million active

13. See S.C. CODE ANN. § 16-15-70 (1976) (“‘Adultery’ is the living together and carnal intercourse with each other or habitual carnal intercourse with each other without living together of a man and woman when either is lawfully married to some other person.”); MICH. COMP. LAWS ANN. § 750.29 (West 2024) (“Adultery is the sexual intercourse of 2 persons, either of whom is married to a third person.”); OKLA. STAT. ANN. tit. 21, § 871 (West 2024) (“Adultery is the unlawful voluntary sexual intercourse of a married person with one of the opposite sex; and when the crime is between persons, only one of whom is married, both are guilty of adultery.”); 720 ILL. COMP. STAT. ANN. § 5/11-35 (West 2023) (“A person commits adultery when he or she has sexual intercourse with another not his or her spouse, if the behavior is open and notorious, and (1) the person is married and knows the other person involved in such intercourse is not his spouse; or (2) the person is not married and knows that the other person involved in such intercourse is married.”).

14. See *Ayala v. Ayala*, 387 S.W.3d 721, 733 (Tex. App. 2011).

15. See *Dykes v. Dykes*, 191 So. 3d 1287, 1290 (Miss. Ct. App. 2016) (citing *Mitchell v. Mitchell*, 767 So. 2d 1037, 1039–1040 (Miss. Ct. App. 2001)); Susan L. Thomas, *Proof of Adultery As Grounds for Dissolution of Marriage*, 49 AM. JURIS. PROOF OF FACTS 3D 277, §§ 9–17 (1998).

16. Thomas, *supra* note 15, § 31.

17. The referenced dating apps provide free services for their basic package. Users can upgrade and pay for a premium package. *Subscription Tiers*, TINDER, <https://tinder.com/feature/subscription-tiers> [<https://perma.cc/TKD2-EQ5B>] (last visited July 22, 2025); *Is Hinge Free?*, HINGE, <https://help.hinge.co/hc/en-us/articles/360010947994-Is-Hinge-free> [<https://perma.cc/X6XX-59UQ>] (updated Dec. 23, 2025); *Subscriptions*, GRINDR, <https://help.grindr.com/hc/en-us/categories/14914948593043-Subscriptions> [<https://perma.cc/NCX8-ZL8F>] (last visited July 22, 2025); *Signing Up & Getting Started: Is Bumble Free to Use?*, BUMBLE, <https://bumble.com/en-us/help/do-i-have-to-pay-for-bumble-or-is-it-free-2> [<https://perma.cc/U4S7-2U8X>] (last visited July 22, 2025).

users and 8.9 million subscribers, as of 2025,¹⁸ and has “been downloaded more than 340 million times and is available in 190 countries and 40+ languages.”¹⁹ Tinder can filter its users’ dating preferences by location, gender, orientation, and others.²⁰ With this algorithm, there are potentially endless opportunities to meet new people and start a relationship. Users would only have to download the app to their phone, create a profile, and start liking others’ profiles while accepting requests from those who want to match with them.²¹

Though the use of dating apps sounds like an easy way to start a new relationship, there are limitless numbers of people on the apps, which encourages users to engage in “hook-up culture.” Hook-up culture can be defined as a social acceptance of non-committed sexual encounters, which forego the traditional style of dating.²² The dating apps indirectly encourage these non-committed sexual encounters, because it is extremely easy to “swipe right” (meaning liking someone), connect with a person, and then move on due to the endless number of people available.²³ Certainly, hook-up culture and its activities, such as one-night stands, may occur without dating apps or websites.²⁴ However, according to a 2023 Pew Research study, approximately thirty percent of U.S. adults utilize dating apps, and about twenty-four percent of users utilize the apps and websites to facilitate casual sex.²⁵ Thus, dating

18. Nayden Tafradzhyski, *Tinder Revenue and Usage Statistics (2026)*, BUS. OF APPS, (May 21, 2026), <https://www.businessofapps.com/data/tinder-statistics/> [<https://perma.cc/NXX7-TXQ9>].

19. *Subscription Tiers—What is Tinder?*, TINDER, <https://tinder.com/feature/subscription-tiers> [<https://perma.cc/TDK2-EQ5B>] (last visited July 22, 2025).

20. *Frequently Asked Questions*, TINDER, <https://tinder.com/faq> [<https://perma.cc/9EP3-BJYJ>] (last visited July 22, 2025).

21. This is generally how most dating apps work. Some might have slight variations on what is included in the profile and who initiates conversation, like Bumble, where women initiate communication in heterosexual matches, or if a same-sex match, then either can initiate, but the foundational premise of the apps still operates the same. *How Does Bumble Work?*, BUMBLE, <https://thebeehive.bumble.com/how-does-bumble-work> [<https://perma.cc/NVV9-C2XG>] (last visited Sept. 7, 2025).

22. Justin R. Garcia et al., *Sexual Hookup Culture: A Review*, 16 REV. GEN. PSYCH. 161, 161–62 (2012).

23. See Mark Travers, *A Psychologist’s Guide to Finding True Love in ‘Hookup Culture’*, FORBES (Oct. 12, 2023) (citing Garcia et al., *supra* note 22), <https://www.forbes.com/sites/traversmark/2023/10/11/a-psychologists-guide-to-finding-true-love-in-hookup-culture/> [<https://perma.cc/27CD-NU6L>] (“According to a study published in the *Review of General Psychology*, hookups have become a ubiquitous part of the contemporary dating scene. Dating apps offer convenience and access to a vast pool of potential partners, but their emphasis on quick and superficial connections often leads to prioritizing quantity over quality.”); Erica Komisar, *Confronting the Toll of Hookup Culture*, INST. FOR FAM. STUDS., (Apr. 23, 2024), <https://ifstudies.org/blog/confronting-the-toll-of-hookup-culture> [<https://perma.cc/TEP2-PDYU>].

24. Garcia et al., *supra* note 22, at 162–63.

25. Emily A. Vogels & Colleen McClain, *Key Findings About Online Dating in the U.S.*, PEW RSCH. CTR. (Feb. 2, 2023), <https://www.pewresearch.org/short-reads/2023/02/02/key-findings-about-online-dating-in-the-u-s/> [<https://perma.cc/DFV3-SSUX>].

websites and apps have certainly enabled casual sexual encounters in the modern dating hook-up era.

While unmarried individuals are free to engage in hook-up culture, society has seen married individuals engaging in hook-up culture through the use of dating apps and other social media platforms.²⁶ One of the logical consequences of the encouragement of hook-up culture in modern-day society has been that people might use dating apps and social media platforms to commit adultery.²⁷ Legal scholars have proposed that online infidelity should be incorporated in the definition of adultery, as many marriages are negatively affected by the adulterous spouse's actions.²⁸ Advances in technology expand opportunities even further, making the act of adultery more accessible. Adultery is not a recent development, but it has evolved for the worse and become more accessible through the means of dating apps and the infectious parasite that is hook-up culture.

III. PHYSICAL AND MENTAL INJURIES SUFFERED BY VICTIMS OF ADULTERY

"There are plenty of fish in the sea" is a common, albeit generic, response to when someone hears that another was cheated. A victim is expected to move on and get over the relationship. Family and friends attempting to provide comfort will say the cheating partner "does not deserve you." Because there has been little to nothing done to remedy adultery, some people assume the only thing that can be done is to simply accept betrayal. However, the effects adultery has on its victims are much greater than understood and should not just be accepted. Experiencing anything from weight fluctuations to a neurological diagnosis, a victim of adultery cannot simply "move on" from life-altering effects.

In a study published in 2023, researchers examined the "causes and consequences" of romantic infidelity.²⁹ Under the scope of "attachment theory," the researchers discuss how a victim of adultery might experience emotional attachment and, as a result of the adultery, could suffer from "lower self-esteem, self-confidence, a lack of trust in others, and a strong fear of abandonment in future romantic relationships."³⁰ The study further concludes that adultery

26. Bruna S. Nascimento et al., *Pathways to Online Infidelity: The Roles of Perceived Online Dating Success, Perceived Availability of Alternative Partners, and Mate Value Discrepancy*, 43 *CURRENT PSYCH.* 12782, 12782 (2024) ("Among individuals in committed relationships, the use of dating applications has been found to facilitate sexual infidelity and may lead to reduced commitment and pursuit of extra-dyadic partners among those individuals who are successful at online dating." (citations omitted)).

27. Ami Rokach & Sybil H. Chan, *Love and Infidelity: Causes and Consequences*, 20 *INT'L J. ENV'T RSCH. & PUB. HEALTH (SPECIAL ISSUE)* 1, 11 (2023) (Speaking specifically of "[t]he Effect of Infidelity in Cyberspace" and social media, authors find that "[t]hese popular platforms contribute to increased opportunities for infidelity.").

28. See Sandi S. Varnado, *Avatars, Scarlett "A"s, and Adultery in the Technological Age*, 55 *ARIZ. L. REV.* 371, 415–16 (2013).

29. Rokach & Chan, *supra* note 27, at 1.

30. *Id.* at 4 (citing Israel W. Charny & Sivan Parnass, *The Impact of Extramarital Relationships on the Continuation of Marriages*, 21 *J. SEX & MARITAL THERAPY* 100–115 (1995)).

victims can suffer from a disorder called “adjustment disorder,” which is a direct result of trauma caused by stressful factors, such as a divorce.³¹ Researchers compared adjustment disorder to post-traumatic stress disorder (“PTSD”), finding that while both are traumas, they are “critically distinct” given the criteria to diagnose PTSD.³² Though, the researchers made note that “[b]oth disorders share similar psychophysiological symptoms that are typically demonstrated in cases of infidelity, including feelings of elevated anxiety, hyperarousal, rumination, intrusive flashbacks, emotional dissociation, and depression.”³³ The study chillingly cites that jealousy and other “intense feelings” associated with infidelity are the “leading cause[s] of homicide.”³⁴ Additionally, couples involved in adulterous affairs have been known to succumb to suicidal ideation.³⁵ Referencing research performed on a sample of 100 decedents from the U.S. Air Force, “[a]mong this sample, 9% of suicide completers were found to have experienced the infidelity of a spouse within 24 h[ours] prior to their passing 5% of decedents had committed infidelity within this time frame as well.”³⁶ Thus, adultery can significantly impact the mental and emotional health of an individual.

Adultery can also affect a spouse’s physical health.³⁷ An immediate worry of the victim that the adulterer puts at risk is the transmission of a sexually transmitted disease (“STD”).³⁸ Other physical risks reveal themselves later,

31. *Id.* at 7 (first citing Michelle Lonergan et al., *Is Romantic Partner Betrayal a Form of Traumatic Experience? A Qualitative Study*, 37 STRESS HEALTH 19, 19–31 (2021); and then citing AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-5 (5th ed. 2013)).

32. *Id.* (“These findings suggest that victims of romantic betrayal do experience significant psychological and emotional distress, but not due to trauma of direct or threatened exposure to deadly circumstances, as needed to fulfill Criterion A for PTSD.” (citing AM. PSYCHIATRIC ASS’N, *supra* note 31)).

33. *Id.* (first citing Don-David Lusteran, *Marital Infidelity: The Effects of Delayed Traumatic Reaction*, 4 J. COUPLE RELATIONSHIP THERAPY 71, 71–81 (2005); and then citing Donald H. Baucom et al., *Treating Affair Couples: Clinical Considerations and Initial Findings*, 20 J. COGNITIVE PSYCHOTHERAPY 375, 375–392 (2006)).

34. *Id.* at 5 (citing Olivia Leeker & Al Carlozzi, *Effects of Sex, Sexual Orientation, Infidelity Expectations, and Love on Distress Related to Emotional and Sexual Infidelity*, 40 J. MARITAL & FAM. THERAPY 68, 68–91 (2014)).

35. *Id.* at 7 (first citing Boon-Hock Chia et al., *Suicide Letters in Singapore*, 12 ARCHIVES SUICIDE RSCH. 74, 74–81 (2008); and then citing Dominique Kazan et al., *The Impact of Intimate Partner Relationships on Suicidal Thoughts and Behaviours: A Systematic Review*, 190 J. AFFECTIVE DISORDERS 585, 585–598 (2016)).

36. *Id.* at 8 (citing Jeffery S. Martin et al., *Marital Status, Life Stressor Precipitants, and Communications of Distress and Suicide Intent in a Sample of United States Air Force Suicide Decedents*, 17 ARCHIVE SUICIDE RSCH. 148, 148–160 (2013)).

37. Kara Grant, *How Infidelity Hurts the Body as Much as the Mind*, WEBMD (Dec. 3, 2024), <https://web.archive.org/web/20250318223628/https://www.webmd.com/sex-relationships/news/20241203/how-infidelity-hurts-the-body-as-much-as-the-mind>.

38. See Angelica Stabile, *More Than Half of Americans with STDs Were Infected by Cheating Partners, Survey Finds*, FOX NEWS (Sept. 26, 2024),

such as chronic health issues or weight change.³⁹ For example, after a wife discovered her husband's affair, she suffered from a decrease in weight, psoriasis, and "multiple blood clots" to which the doctors, "could only say that [her] central nervous system was so shaken up because [she] went through a traumatic event."⁴⁰ In sum, as a result of their emotional distress, victims of adultery may physically manifest symptoms.

IV. LACK OF ADULTERY ENFORCEMENT IN STATE COURTS

After a person experiences infidelity and suffers detrimental effects, which could quite possibly change the course of their life, they might seek relief from civil or family law courts or attempt to pursue prosecution as a criminal matter. However, the likelihood of success in redressing the adulterous wrongs is very low in any of the courts.

A. Criminal Courts

Adultery has historically been recognized as a moral offense, as it stems from religious ideals. In many religions, adultery is considered a sin that is punished and/or requires repentance.⁴¹ Originally including adultery as a crime to be punished, Western culture implemented religious doctrine into its criminal justice system when it first established its courts.⁴² In the mid-1600s, the Puritans in American colonies implemented and prosecuted adultery as a crime.⁴³ One of the more notable and earliest recorded instances of adultery during that time, specifically in 1644, was committed by Mary Latham ("Latham") and her lover, John Britton ("Britton"). Latham, the married spouse, and Britton, the paramour, were both hanged by the neck as punishment for their crime.⁴⁴ Later, however, courts viewed capital punishment for adultery as

<https://www.foxnews.com/health/more-half-americans-stds-infected-cheating-partners-survey-finds> [<https://perma.cc/7QMY-LA83>].

39. Grant, *supra* note 37.

40. *Id.*

41. See Exodus 20:14; *Adultery*, NEW ADVENT: THE CATHOLIC ENCYCLOPEDIA, <https://www.newadvent.org/cathen/01163a.htm> [<https://perma.cc/U9BL-FKTN>] (last visited July 22, 2025); *Adultery Islam*, ADVOCATE KHOJ, <https://www.advocatekhoj.com/library/lawareas/divadultery/6.php> [<https://perma.cc/4LF7-KPMN>] (last visited July 22, 2025); *Adultery in Judaism*, MY JEWISH LEARNING, <https://www.myjewishlearning.com/article/adultery/> [<https://perma.cc/V77P-4Y4F>] (last visited July 22, 2025).

42. See John Witte Jr., *Law and Theology in the Western Legal Tradition*, UNIV. OF ST. ANDREWS ENCYCLOPEDIA OF THEOLOGY (Dec. 1, 2022), <https://www.saet.ac.uk/Christianity/LawandTheologyintheWesternLegalTradition> [<https://perma.cc/TY8K-KG8V>] (explaining the history of the development of Western laws and Christian influence).

43. Jeremy D. Weinstein, Note, *Adultery, Law, and the State: A History*, 38 HASTINGS L.J. 195, 225 (1986).

44. See Carolyn B. Ramsey, *Sex and Social Order: The Selective Enforcement of Colonial American Adultery Laws in the English Context*, 10 YALE J.L. & HUMANITIES 191, 226 (1998); *Mary Latham Marries an Older Man—And Regrets It*, NEW ENG. HIST. SOC'Y (last updated 2024),

severe and stopped executions for adultery altogether.⁴⁵ Since then, most states have abolished adultery as a crime, or have been relatively lax in their prosecution of it if they have not.

1. Adultery as a Stand-Alone Crime

In the United States' criminal justice system, fourteen states recognize adultery as a criminal offense.⁴⁶ While most of those states punish adulterers under a misdemeanor offense, Oklahoma, Wisconsin, and Michigan prosecute and sentence adultery as a felony.⁴⁷

Michigan has also recently proposed legislation to repeal its criminal adultery statutes.⁴⁸ Senator Jeff Irwin has sponsored the Bill to abolish adultery, which was reported favorably without amendment by the Civil Rights, Judiciary, and Public Safety Committees, and placed on second reading, as of December 10, 2024.⁴⁹ Supporters of the abolition reason that keeping the crime on the books, "perpetuates stigma and discrimination" while simultaneously "cleaning up outdated, unenforced statutes" without endorsing adulterous acts.⁵⁰ Prosecutor for Washtenaw County, Michigan, Eli Savit, publicly stated on his X account, "Don't think any prosecutor actually enforces [adultery laws]. But times change, & zombie laws spring back up. Time to get rid of these laws for good."⁵¹

<https://newenglandhistoricalsociety.com/mary-latham-marries-and-older-man-and-regrets-it/>
[<https://perma.cc/7X2Y-8BXB>].

45. Alex MacLennan, *Adultery Laws: 19th Cheat Code for the 21st Century?*, BERKELEY J. CRIM. L. BLOG (May 2, 2023), <https://www.bjcl.org/blog/adultery-laws-19th-cheat-code-for-the-21st-century> [<https://perma.cc/PD66-5DGS>].

46. ALA. CODE § 13A-13-2 (2025); ARIZ. REV. STAT. ANN. § 13-1408 (2025); FLA. STAT. ANN. § 798.01 (West 2025); GA. CODE ANN. § 16-6-19 (West 2025); 720 ILL. COMP. STAT. ANN. 5/11-35 (West 2025); KAN. STAT. ANN. § 21-5511 (West 2025); MD. CODE ANN., CRIM. LAW § 10-501 (West 2025); MICH. COMP. LAWS ANN. § 750.30 (West 2025); N.D. CENT. CODE ANN. § 12.1-20-09 (West 2025); OKLA. STAT. ANN. tit. 21, § 872 (West 2025); 11 R.I. GEN. LAWS ANN. § 11-6-2 (West 2025); S.C. CODE ANN. § 16-15-60 (2025); VA. CODE ANN. § 18.2-365 (West 2025); WIS. STAT. ANN. § 944.16 (West 2025).

47. MICH. COMP. LAWS ANN. § 750.30 (West 2025); OKLA. STAT. ANN. tit. 21, § 872 (West 2025); WIS. STAT. ANN. § 944.16 (West 2025).

48. S.B. 1085, 102d Leg., Reg. Sess. (Mich. 2024).

49. S.B. 96, 102d Leg., Reg. Sess. (Mich. 2024); *see* S.B. 102, 102d Leg., Reg. Sess. (Mich. 2024); H.B. 83, 102d Leg., Reg. Sess. (Mich. 2024).

50. Lauren Gibbons, *Sodomy, Adultery Bans Latest 'Zombie' Laws Under Scrutiny in Michigan*, BRIDGE MICH. (Dec. 3, 2024), <https://www.bridgemi.com/michigan-government/sodomy-adultery-bans-latest-zombie-laws-under-scrutiny-michigan> [<https://perma.cc/PW3V-RJSH>]. "Kyle Zawacki, legislative director of the ACLU of Michigan, called the adultery ban a 'relic of a bygone era' that 'perpetuates stigma and discrimination' and undermines government transparency by clogging up the state's penal code with unenforced crimes. 'Support of this package is by no means endorsement of adultery, but rather support for cleaning up outdated, unenforced statutes,' Zawacki told lawmakers." *Id.*

51. Eli Savit (@EliNSavit), X (Dec. 3, 2024, at 01:47 ET), <https://x.com/EliNSavit/status/1864018596604817856?s=20> [<https://perma.cc/9KAY-4CFZ>].

New York has recently abolished adultery from their criminal statutes.⁵² New York legislators have (presumably) reasoned that the abolition of the crime is warranted because it is an outdated law and does not deter adulterous behavior between private parties.⁵³ Specifically, Governor Kathy Hochul has been quoted stating, “[l]et’s take this silly, outdated statute off the books, once and for all.”⁵⁴ State Assemblymember Charles Lavine also supported the abolition finding: “Laws are meant to protect our community and to serve as a deterrent to anti-social behavior. New York’s adultery law advanced neither purpose.”⁵⁵

New York’s most recent instance of prosecuted adultery was in *People v. Lucas*, in 2023, where the court analyzed text messages between spouses after the husband admitted, over text, to sexually assaulting a minor, and simultaneously, also admitting to committing adultery.⁵⁶ The defendant and the minor-victim, who was also the defendant’s nephew, were both males.⁵⁷ To avoid conviction under adultery, the defendant relied on New York’s Penal Law Section 130.00, where sexual intercourse was defined as “any penetration, however slight, of the penis into the vaginal opening.”⁵⁸ After review, the court adopted the Webster’s Dictionary definition of sexual intercourse as, “either ‘involving penetration of the vagina by the penis’ or ‘involving genital contact between individuals other than penetration of the vagina by the penis,’” and also found adultery laws could apply to same-sex couples.⁵⁹ The court ultimately found the defendant had committed adultery and even acknowledged the defendant’s wife’s spousal privilege does not apply since she is the victim of the crime of adultery.⁶⁰

Before the *Lucas* case, a woman was charged with adultery, but never officially prosecuted.⁶¹ Specifically, during 2010, in Genesee County, New York, prosecutors charged a woman with adultery after being caught having sex in a public park with her paramour.⁶² The adultery charges were eventually

52. N.Y. PENAL LAW § 255.17 (McKinney 2024) (repealed 2024).

53. Anthony Izaguirre, *Cheating on Your Spouse Is No Longer a Crime in New York, with the Repeal of a Little-Known 1907 Law*, AP NEWS (Nov. 22, 2024, at 06:28 EDT), <https://apnews.com/article/new-york-adultery-law-repealed-81509fdbff222cd3c71765f400b74d2c> [<https://perma.cc/EJJ6-L2XJ>]; S.B. S8744, 205th Gen. Assemb., Reg. Sess. (N.Y. 2024).

54. Izaguirre, *supra* note 53.

55. *Id.*

56. *People v. Lucas*, 194 N.Y.S.3d 913, 919 (N.Y. App. Div. 2023).

57. *Id.* at 916.

58. *Id.* at 919.

59. *Id.* at 919–20.

60. *Id.* at 920 (“As a victim of the crime, [the wife] need not remain silent about [the defendant’s confession to her]. Rather, since [the defendant’s] text messages announced ‘criminal activity aimed at the other spouse,’ the spousal privilege is extinguished.”).

61. Carlin Miller, *Suzanne Corona: Public Sex Turns into Rare Adultery Charge*, CBS NEWS (June 9, 2010, at 12:58 ET), <https://www.cbsnews.com/news/suzanne-corona-public-sex-turns-into-rare-adultery-charge/> [<https://perma.cc/KX8S-KWP3>].

62. *Id.*

dropped, and the woman pleaded guilty to public lewdness.⁶³ Although adultery charges were brought, it can be argued that the prosecutors were never going to prosecute the adultery offense seriously and, instead, only use it as a form of bargaining for a plea deal.⁶⁴

Despite states having adultery statutes, adultery as a basis for a prosecuted crime is extremely limited in its application, as it was in New York and is more than likely in Michigan.⁶⁵ The Supreme Court of the United States decided in *Lawrence v. Texas* that “private, consensual sexual act[s]” between two individuals could not be criminalized.⁶⁶ Legal scholars have reasoned that adultery, as a stand-alone crime, would likely face challenges and questions in its survival, as the statute may violate an individual’s right to sexual privacy, as decided in *Lawrence*.⁶⁷ Other considerations include the practicality of the state pursuing adultery charges and how it might affect the privilege against self-incrimination, potentially arguing that:

[T]he dilemma is more imagined than real due to the paucity of adultery prosecution in the criminal courts, and that the adultery, if true, should simply be admitted, secure in the knowledge that the prosecutors have more pressing matters of concern than the state of marital infidelity in the community.⁶⁸

2. Adultery as Motivation or a Mitigating Factor for a Crime: Heat of Passion Manslaughter

Heat of passion voluntary manslaughter is the intentional killing of another in the heat of the moment, mitigating the circumstances of the crime.⁶⁹ A defendant attempting to mitigate their homicide to heat of passion manslaughter must prove there is no time for the defendant to “cool off” and that they killed on impulse from the act that reasonably provoked them.⁷⁰ The courts have typically considered adultery to be a provocative event justifying the mitigation of what might have been a first-degree murder down to a heat of passion manslaughter.⁷¹ Accepting adultery as a mitigating factor has essentially been the court’s form of mercy on defendants in situations that

63. Caroline Black, *Suzanne Corona, Alleged Adulterer, Pleads to Public Lewdness*, CBS NEWS (Aug. 13, 2010, at 14:53 ET), <https://www.cbsnews.com/news/suzanne-corona-alleged-adulterer-pleads-to-public-lewdness/> [<https://perma.cc/R6VV-Y7EP>].

64. See Izaguirre, *supra* note 53.

65. Andrew D. Cohen, Note, *How the Establishment Clause Can Influence Substantive Due Process: Adultery Bans After Lawrence*, 79 FORDHAM L. REV. 605, 614 (2011).

66. *Lawrence v. Texas*, 539 U.S. 558, 564 (2003). In this case, the Supreme Court analyzed whether two individuals engaging in private homosexual acts could be criminalized.

67. Cohen, *supra* note 65, at 646–47.

68. See Timothy Tippins, 2 N.Y. Matrimonial Law and Practice § 18:35 Privileges—Self-incrimination (last updated Oct. 2024).

69. WAYNE R. LAFAVE, 2 SUBSTANTIVE CRIMINAL LAW § 15.2 (3d ed. 2024).

70. Laurie J. Taylor, Comment, *Provoked Reason in Men and Women: Heat-of-Passion Manslaughter and Imperfect Self-Defense*, 33 UCLA L. REV. 1679, 1683–84 (1986).

71. *Id.* at 1685–86.

showcase “human frailty.”⁷² While adultery itself is not an affirmative defense for murder, there are courts that hold, depending on the facts of the case, that people are exposed to situations in which they cannot control themselves.⁷³

Critics of courts’ rationale for supporting heat of passion manslaughter find that spouses can control themselves, and if they do not, their crime should not be reduced to manslaughter, but instead be prosecuted under murder.⁷⁴ Distinctions have been made between self-defense and heat of passion manslaughter, finding that self-defense requires an act of retaliation, where heat of passion manslaughter does not, which is why some think mitigation is unreasonable.⁷⁵

B. Family Law

1. At-Fault vs. No-Fault Divorce

Depending on the jurisdiction, married couples seeking to obtain a divorce must file either through at-fault or no-fault grounds. The United States is witnessing a decline in the number of states that offer at-fault divorces.⁷⁶ There are currently thirty-one states that offer the option of an at-fault divorce.⁷⁷ In an

72. See Susan D. Rozelle, *Controlling Passion: Adultery and the Provocation Defense*, 37 RUTGERS L.J. 197, 208 (2005) (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *191); Joshua Dressler, *Why Keep the Provocation Defense?: Some Reflections on a Difficult Subject*, 86 MINN. L. REV. 959, 973 (2002) (“We must remember that the provocation defense is based to a considerable extent on the law’s concession to ordinary human frailty; the ultimate question, therefore, is whether we (or the jury) consider the provoked party’s anger within the range of expected human responses to the provocative situation.”); Robert B. Mison, Comment, *Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation*, 80 CALIF L. REV. 133, 133 (1992).

73. See *Smith v. State*, 3 So. 551, 552 (Ala. 1888) (holding “[a] transport of passion, which deprives of the power of self-control, is in a modified or restricted sense a dethronement of the reasoning faculty,-a divestment of its sovereign power; but an *entire* dethronement is a deprivation of the intellect for the time being”).

74. Rozelle, *supra* note 72, at 232–33.

75. *Id.* (Professor Rozelle illustrates “[a] wife committing adultery is in no danger from her paramour, nor is the paramour in danger from her. There is no dangerous felony that must be prevented, no attack on the cuckold he must deflect to save his own life . . . [I]n these cases there is no deduction to be made from the defendant’s culpability for the entire, deadly amount of force used. Presuming he does not qualify for an insanity defense, he should be found guilty of murder.”)

76. The most recent state, Maryland, as of October 1, 2023, became a pure no-fault divorce state, instead of providing the option for an at-fault divorce. H.B. 14, 445th Gen. Assemb., Reg. Sess. (Md. 2023).

77. ALA. CODE § 30-2-1 (2024); ALASKA STAT. ANN. § 25.24.050 (West 2024); ARIZ. REV. STAT. ANN. § 25-903 (2024); ARK. CODE ANN. § 9-12-301 (West 2024); CONN. GEN. STAT. ANN. § 46b-40 (West 2024); DEL. CODE ANN. tit. 13, § 1505 (West 2024); GA. CODE ANN. § 19-5-3 (West 2024); IDAHO CODE ANN. § 32-603 (West 2024); IND. CODE ANN. § 31-15-2-3 (West 2024); LA. CIV. CODE ANN. art. 103 (2024); ME. STAT. tit. 19, § 902 (2024); MASS. GEN. LAWS ANN. ch. 208, § 1A (West 2024); MISS. CODE ANN. § 93-5-1 (West 2024); N.H. REV. STAT. ANN. § 458:7 (2024); N.J. STAT. ANN. § 2A:34-2 (West 2024); N.M. STAT. ANN. § 40-4-1 (West 2024); N.Y. DOM. REL. LAW § 170 (McKinney 2024); N.C. GEN. STAT. ANN. § 50-7 (West 2024); N.D. CENT.

at-fault divorce, the filing spouse must plead specific grounds, such as adultery, for the divorce to be granted by the state.⁷⁸ If a spouse were to seek a divorce on the grounds of adultery, that spouse would have to prove through clear and convincing evidence that the adultery was the proximate cause of the divorce.⁷⁹ If proven, the plaintiff must also be free from having condoned the adulterous act.⁸⁰ Adultery is one of the leading causes of divorce in the United States.⁸¹

Every state provides the option of a no-fault divorce. In no-fault divorces, parties do not plead grounds other than “irreconcilable differences,” or a similar showings, nor do courts make findings of fault for the end of the marriage.⁸² California paved the way for no-fault divorces through the Family Law Act in 1969, effective in 1970.⁸³ Constructing what was intended to be a smoother terrain for divorce proceedings, including the prevention of perjury in the courtroom, “[t]he principal goal of the reformers was not to encourage ‘revolving door’ marriages or easy divorces but to preserve judicial integrity.”⁸⁴ Other states followed California’s approach, reasoning that no-fault divorces avoided the procedure of finding fault in parties and exposing “sordid and ugly details of conduct” in court.⁸⁵ Public policy and property division also played major roles in the introduction of no-fault divorce in states.⁸⁶ Another attractive

CODE ANN. § 14-05-03 (West 2024); OHIO REV. CODE ANN. § 3105.01 (West 2024); OKLA. STAT. ANN. tit. 43, § 101 (West 2024); 23 PA. STAT. AND CONS. STAT. ANN. § 3301 (West 2024); 15 R.I. GEN. LAWS ANN. § 15-5-2 (West 2024); S.C. CODE ANN. § 20-3-10 (2024); S.D. CODIFIED LAWS § 25-4-2 (2024); TENN. CODE ANN. § 36-4-101 (West 2024); TEX. FAM. CODE ANN. §§ 6.001–008 (West 2024); UTAH CODE ANN. § 81-4-405 (West 2024); VT. STAT. ANN. tit. 15, § 551 (West 2024); VA. CODE ANN. § 20-91 (West 2024); W. VA. CODE ANN. §§ 48-5-201 to 209 (West 2024).

78. See 24 AM. JUR. 2D *Divorce and Separation* § 19 (2025).

79. *Id.* § 56.

80. *Id.* § 137.

81. See Shelby B. Scott et al., *Reasons for Divorce and Recollections of Premarital Intervention: Implications for Improving Relationship Education*, 2 COUPLE & FAM. PSYCH.: RSCH. & PRAC. 131 (2013); Adam Sacks, *Digging into the Data: The Top 10 Reasons for Divorce*, SACKS & SACKS L. (July 12, 2023), <https://sacksandsackslaw.com/digging-into-the-data-the-top-10-reasons-for-divorce/> [<https://perma.cc/65UT-A7FH>].

82. AM. JUR. 2D, *supra* note 78, § 22.

83. Herma Hill Kay, *An Appraisal of California’s No-Fault Divorce Law*, 75 CALIF. L. REV. 291, 291 (1987).

84. Sharilyn R. Payne, *A Comparative Study of the Divorce Laws of California and the Mexican Federal District*, 21 HASTINGS INT’L & COMPAR. L. REV. 979, 985 (1998).

85. AM. JUR. 2D, *supra* note 78, § 2 (“A primary purpose of such a statute is to remove from domestic relations litigation the issue of marital fault as a determining factor, to abolish the necessity of presenting sordid and ugly details of conduct by either party to obtain a dissolution of marriage, and to replace the concept of ‘fault’ by substituting marriage failure or ‘irretrievable breakdown’ as a basis for a decree dissolving a marriage.”).

86. Kay, *supra* note 83, at 293–94; see 15 SUMM. PA. JUR. 2D *Family Law* § 4:64 (2d ed.) (2024) (“A purpose of the legislature’s enactment of no-fault provisions in divorce, in addition to the traditional fault provisions, is to provide for dissolution of marriage in a manner that would keep pace with contemporary social realities and not to advance the vindication of private rights or the punishment of matrimonial wrongs. In addition, the no-fault divorce laws are intended to effect a clean break between spouses and encourage a one-time division of marital property.”).

aspect to no-fault divorces is the cost of litigation, which can become high due to the longer time it would take to litigate an at-fault divorce.⁸⁷

Regardless of the various reasons for states adopting a no-fault grounds divorce, there are still many opponents to abolishing the at-fault grounds divorce. In 1997, the Assembly Judiciary Committee of the State of California analyzed the effects of the no-fault divorce and whether states, particularly California, should revert to an at-fault state.⁸⁸ California Assembly members found that there was a drastic increase in divorce rates after the implementation of no-fault divorce.⁸⁹ While the Assembly could not definitively say that no-fault divorces were the cause of the higher divorce rates, they did note that “[o]ne analysis finds that three factors have generally been used to explain the increase: ‘... easier access to divorce, married women’s employment, and changes in social values.’”⁹⁰ Expanding upon the arguments made against no-fault divorces, “it has been argued that the availability of pure no-fault divorce has resulted in more frequent initiation of divorce by husbands, less frequent alimony awards, reduced child support amounts, reduced awards of family assets to the wife, and increased responsibility of wives for household debts upon divorce.”⁹¹ In sum, while there might have been good intentions for the implementation of no-fault divorce, the reported negative effects add doubt to the viability of no-fault grounds divorces.

Abolishing fault-based grounds for divorce has received bipartisan criticism. Current Speaker of the House, Mike Johnson, has previously criticized no-fault divorce, blaming it for causing a “completely amoral society”

87. 2 NY LAW OF DOMESTIC VIOLENCE § 6:8 (4th ed. 2024) (quoting *Testimony of Alan B. Schneickman, Report of Senate Majority Task Force on Domestic Violence*, Hearing Before the Senate Comm. on the Judiciary (NY 2010) (“A physically or emotionally abused spouse, especially an economically dependent spouse, may be deterred from seeking redress because of the high and difficult to control cost of litigation, and the anxiety of an unpredictable result.”)).

88. DONNA S. HERSHKOWITZ & DREW R. LIEBERT, *THE DIRECTION OF DIVORCE REFORM IN CALIFORNIA: FROM FAULT TO NO-FAULT . . . AND BACK AGAIN?*, CAL. STATE ASSEMBLY JUDICIARY COMM. (1997); see Austin Caster, *Why Same-Sex Marriage Will Not Repeat the Errors of No-Fault Divorce*, 38 W. ST. U. L. REV. 43, 48–49 (2010) (Mr. Caster highlights how the divorce rate went up from 4.14 to 4.93 per 1,000 individuals after no-fault divorce’s entrance, and that “the number of additional divorces in America overall would have been at least 161,000 and maybe as great as 178,000”).

89. HERSHKOWITZ & LIEBERT, *supra* note 88, at 7 (quoting Elizabeth Schoenfeld, *Drumbeats for Divorce Reform*, 77 POL’Y REV. 8, 8 (1996), <https://www.hoover.org/research/home-front-2> [<https://perma.cc/A3MN-ZYL3>]) (“In 1960 16% of first marriages ended in divorce; today, the figure is closer to 50 percent. In the five years following the enactment of no-fault in California, the national divorce rate increased almost 40%.”).

90. *Id.* at 3 (quoting RODERICK PHILLIPS, *PUTTING ASUNDER: A HISTORY OF DIVORCE IN WESTERN SOCIETY* 620 (1988)).

91. Adriaen M. Morse Jr., Comment, *Fault: A Viable Means of Re-Injecting Responsibility in Marital Relations*, 30 U. RICH. L. REV. 605, 606 (1996) (citing Harvey L. Golden & J. Michael Taylor, *Fault Enforces Accountability*, 10 FAM. ADVOC. (SPECIAL ISSUE) 11, 13 (1987)).

in the United States.⁹² Moreover, specifically speaking of how “children bear the brunt of failed marriages,” in her January 27–28, 1996, *Creators Syndicate* column, Former United States Secretary of State Hillary Clinton disapproved of the current divorce laws, finding “[d]ivorce has become too easy because of our permissive laws and attitudes. Just look at our culture today: Good marriages are seldom celebrated, while every tiff or spat in a celebrity marriage becomes tabloid fodder.”⁹³

Thus, even though infidelity is one of the leading causes of divorce,⁹⁴ the effect of the no-fault divorces has inhibited victims of adultery from being afforded a course of action for their injuries in a divorce proceeding. Today, most family law attorneys recommend that their clients proceed with a no-fault divorce rather than an at-fault divorce.⁹⁵ Therefore, victims of adultery are backed into the corner of the no-fault divorce and will likely never have their adultery issues addressed by the court.

2. Spousal Support

With divorces usually comes the question of whether alimony will be awarded to a spouse. The purpose of alimony has evolved throughout the years, and as shown above, courts interpret its purpose differently. Prior to no-fault divorces, alimony served as a “remedy for wives who were not at fault in the termination of a marriage and who, it was believed, retained a continuing entitlement to marital support.”⁹⁶ At the time, courts considered fault in their determinations of alimony, whereas now the general process primarily considers whether a spouse requires support.⁹⁷ Those who oppose alimony as a punitive measure find that it would blur the lines between causation and morality.⁹⁸

92. AJ Willingham, *What is No-Fault Divorce, and Why Do Some Conservatives Want to Get Rid of it?*, CNN (Nov. 27, 2023, at 10:49 ET), <https://www.cnn.com/2023/11/27/us/no-fault-divorce-explained-history-wellness-cec/index.html> [<https://perma.cc/389G-XLFV>].

93. Hillary Rodham Clinton, Opinion, *Talking It Over*, *Creators Syndicate, Inc.* (Jan. 27–28, 1996), in CLINTON PRESIDENTIAL RECORDS, at 1–2, <https://clinton.presidentiallibraries.us/items/show/567580> [<https://perma.cc/V8ZB-T82G>].

94. See Scott, *supra* note 81; Sacks, *supra* note 81.

95. Joseph E. Cordell, *Infidelity and Divorce: How Cheating Impacts Settlements*, CORDELL CORDELL (March 18, 2022), <https://cordellcordell.com/blog/the-effect-or-lack-thereof-of-infidelity-on-divorce> [<https://perma.cc/4ASS-4MKG>]. “As difficult as it will be, your best option is to put all those negative feelings aside and simply negotiate a settlement. You may feel that it’s unfair, but you aren’t going to get any more sympathy from dragging things out in court. Your best bet for moving past such a betrayal is to get things over with as quickly as possible, and move on with your life.” *Id.*

96. Morse, *supra* note 91, at 615 (citing Marsha Garrison, *Good Intentions Gone Awry: The Impact of New York’s Equitable Distribution Law on Divorce Outcomes*, 57 BROOK. L. REV. 621, 627–28 (1991)).

97. *Id.*; see BARTH H. GOLDBERG, VALUATION OF DIVORCE ASSETS §1:39.50 (2025).

98. See Ira Mark Ellman, *The Place of Fault in a Modern Divorce Law*, 28 ARIZ. ST. L.J. 773, 788–89 (1996).

Each state has its criteria for considering whether alimony should be awarded, and if so, how much. When adultery plays a part in the divorce, state legislatures incorporate the fault-based act differently in their spousal support calculations, if at all. Few states provide that adultery is an absolute bar to alimony.⁹⁹ For states that reference adultery, marital misconduct, or conduct of the parties during the marriage as a factor for consideration of alimony in their spousal support statutes, the decision of whether to award alimony to an adulterous spouse is left up to the discretion of the judge.¹⁰⁰ Other states do not incorporate marital misconduct language, or the like, in their spousal support statutes, or they specifically state that it cannot be considered in their spousal support calculations.¹⁰¹

State judiciaries have discussed whether adultery or fault is a consideration in spousal support decisions. In *Bartrom v. Adjustment Bureau, Inc.*, the Indiana Supreme Court held that Indiana's no-fault state status does not preclude the courts from considering marital misconduct in alimony determinations.¹⁰² On the other hand, the Kansas Supreme Court in *In re Marriage of Sommers* held that unless there is an "extremely gross and rare

99. GA. CODE ANN. § 19-6-1 (West 2024); L.A. CIV. CODE ANN. art. 111 (2024); N.C. GEN. STAT. ANN. § 50-16.3A (West 2024); S.C. CODE ANN. § 20-3-130 (2024).

100. ALA. CODE § 30-2-52 (2025); ALASKA STAT. ANN. § 25.24.160 (West 2024); CONN. GEN. STAT. ANN. § 46b-82 (West 2024); FLA. STAT. ANN. § 61.08 (West 2023); IDAHO CODE ANN. § 32-705 (West 2024); MD. CODE ANN., FAM. LAW § 11-106 (West 2024); MO. ANN. STAT. § 452.335 (West 2024); N.D. CENT. CODE ANN. § 14-05-24.1 (West 2023); N.H. REV. STAT. ANN. § 458:19-a (2024); OHIO REV. CODE ANN. § 3105.18 (West 2024); OR. REV. STAT. ANN. § 107.105 (West 2024); 23 PA. STAT. AND CONS. STAT. ANN. § 3701 (West 2024); 15 R.I. GEN. LAWS ANN. § 15-5-16 (West 2024); TENN. CODE ANN. § 36-5-121 (West 2022); TEX. FAM. CODE ANN. § 8.052 (West 2024); UTAH CODE ANN. § 81-4-502 (West 2024); VA. CODE ANN. § 20-107.1 (West 2024); W. VA. CODE ANN. § 48-5-104 (West 2024).

101. ARIZ. REV. STAT. ANN. § 25-319 (2022); ARK. CODE ANN. § 9-12-312 (West 2024); COLO. REV. STAT. ANN. § 14-10-114 (West 2024); DEL. CODE ANN. tit. 13, § 1512 (West 2023); HAW. REV. STAT. ANN. § 580-47 (West 2024); 750 ILL. COMP. STAT. ANN. 5/504 (West 2025); MASS. GEN. LAWS ANN. ch. 208, § 53 (West 2024); ME. REV. STAT. ANN. tit. 19, § 951-A (2024); MINN. STAT. ANN. § 518.552 (West 2024); MONT. CODE ANN. § 40-4-203 (West 2024); NEB. REV. STAT. ANN. § 42-365 (West 2025); N.M. STAT. ANN. § 40-4-7 (West 2024); VT. STAT. ANN. tit. 15, § 752 (West 2024); WASH. REV. CODE ANN. § 26.09.090 (West 2024).

102. See *Bartrom v. Adjustment Bureau, Inc.*, 618 N.E.2d 1, 9–10 (Ind. 1993) (finding that Indiana's statute does not specifically reference adultery as a bar to or factor for consideration of alimony); *In re Marriage of Schu*, 211 Cal. Rptr. 3d 413 (Cal. Ct. App. 2016) (considering fault of the alimony seeking spouse, who abused minors); *Olson v. Olson*, 671 N.W.2d 64, 71 (Mich. Ct. App. 2003) ("The award of alimony is in the trial court's discretion Among the factors that should be considered are: (1) the past relations and conduct of the parties"); *Armstrong v. Armstrong*, 618 So. 2d 1278, 1280 (Miss. 1993) (specifying "[f]ault or misconduct" as a factor for deciding alimony claims); *Mani v. Mani*, 869 A.2d 904, 915 (N.J. 2005) (finding that the legislature intended for fault to be considered in their calculations); *Zimmie v. Zimmie*, 464 N.E.2d 142, 145 (Ohio 1984) (finding marital misconduct may be relevant for alimony); *Cole v. Cole*, 384 N.W.2d 312, 316 (S.D. 1986) (considering fault in alimony determinations); *Grosskopf v. Grosskopf*, 677 P.2d 814, 819–20 (Wyo. 1984) (holding that judges could consider fault for alimony, despite Wyoming being a no-fault state).

situation[.],” the court would not consider fault in alimony determinations.¹⁰³ The *In re Marriage of Sommers* court briefly touched on adultery, dictating that considering adultery for alimony would only punish conduct rather than address finances.¹⁰⁴ While New York’s statute, Domestic Relations Law Section 236(B)(6)(e), provides a “catch-all” of “any other factor which the court shall expressly find to be just and proper,” their courts have stated that adultery usually does not rise to a level of “egregious[ness]” that would affect alimony.¹⁰⁵

Kentucky took a middle-ground approach in *Chapman v. Chapman*, where the court found fault can only be a factor in determining the amount of spousal support one may receive, but not the initial question of whether the aggrieved spouse may receive support.¹⁰⁶ Oklahoma also proceeded with a middle-ground approach in *Smith v. Smith* by finding that alimony could not be used as a form of punishment for marital misconduct, but could be used to determine the amount of alimony, and if “the ‘need’ for alimony arose out of, or was aggravated by, the misconduct,” then it could affect the right to alimony.¹⁰⁷ The Court of Appeals of Oklahoma provided the example of a spouse’s emotional or physical health being damaged by the marital misconduct as an appropriate circumstance warranting the misconduct’s consideration in alimony determinations.¹⁰⁸ Louisiana, in *Hermes v. Hermes*, denied a wife permanent alimony after the divorce was granted based on her adultery, dictating that, “[i]t would be strange indeed if the law rewarded an adulterous wife with the right to obtain permanent alimony.”¹⁰⁹ Thus, alimony is vastly interpreted among state legislators and courts.

C. Civil Court

Civil court is meant to be an outlet for parties to resolve private disputes, as well as provide remedies for plaintiffs who have suffered a physical injury

103. See *In re Marriage of Sommers*, 792 P.2d 1005, 1010 (Kan. 1990); *In re Williams’ Marriage*, 199 N.W.2d 339, 345 (Iowa 1972) (abandoning the “guilty party” concept in determining alimony); *Kogod v. Cioffi-Kogod*, 439 P.3d 397, 401 (Nev. 2019) (specifying marital fault or misconduct is not a consideration for alimony); *Jenike v. Jenike*, 857 A.2d 798, 801 (Vt. 2004) (finding the court could not consider fault in spousal support); *Dixon v. Dixon*, 319 N.W.2d 846, 853 (Wis. 1982) (“[T]he legislature did not intend to allow the circuit court to consider marital misconduct a relevant factor in granting maintenance payments . . .”).

104. See *In re Marriage of Sommers*, 792 P.2d at 1010.

105. See *Corsel v. Corsel*, 613 N.Y.S.2d 82 (N.Y. App. Div. 1994); *Howard S. v. Lillian S.*, 928 N.E.2d 399, 401–02 (N.Y. 2010) (where the court discusses adultery not meeting the egregious exception of the “just and proper” factor for equitable distribution); N.Y. DOM. REL. LAW § 236(B)(6)(e) (McKinney 2024).

106. See *Chapman v. Chapman*, 498 S.W.2d 134, 138 (Ky. Ct. App. 1973). The court said this was plainly written in the Kentucky maintenance statute. *Id.*

107. *Smith v. Smith*, 847 P.2d 827, 829–30 (Okla. Civ. App. 1993); see *In re Marriage of Koch*, 648 P.2d 406, 408 (Or. Ct. App. 1982) (finding that fault generally will not be taken into consideration for spousal support, unless the needs of the spouse are affected).

108. *Smith*, 847 P.2d at 830.

109. *Hermes v. Hermes*, 327 So. 2d 639, 641 (La. Ct. App. 1976).

or financial loss. Adultery has often been at the forefront of these private civil disputes, all in different contexts, but to no avail. Under the umbrella of heartbalm offenses, intentional infliction of emotional distress, and breach of contract actions, the forecast for success on adultery actions has been bleak. A majority of courts have upheld their views that adultery-based actions, in whatever context, are not viable claims, with few exceptions.

1. Heart Balm Offenses

Courts previously recognized heart balm offenses, which were brought in civil court and granted a spouse recovery for a disruption or interference within the marriage caused by a third party.¹¹⁰ Heart balm offenses included actions for alienation of affection, criminal conversation, breach of promise to marry, and seduction.¹¹¹ Alienation of affection generally occurs when a plaintiff proves: “(1) plaintiff and her husband were happily married and a genuine love and affection existed between them; (2) the love and affection was alienated and destroyed; and (3) the wrongful and malicious acts of defendant produced the alienation of affections.”¹¹² Criminal conversation is slightly distinguishable from alienation of affection, because criminal conversation only requires a third party to engage in sexual intercourse with your spouse during the marriage.¹¹³ Most jurisdictions have abolished heart balm offenses, with a minority of jurisdictions recognizing alienation of affection and criminal conversation.¹¹⁴ The pioneer state in abolishing heart balm offenses was Indiana in 1930.¹¹⁵ Other states followed Indiana’s abolition, and since then, multiple reasons have been provided for abolishing heart balm offenses, which included that these offenses: (1) treated spouses as property; (2) cheapened and did not protect the institution of marriage; (3) encouraged criminal and vindictive behavior; and (4) infringed upon a defendant’s right to privacy; while also recognizing (5) assessing damages would be arbitrary and likely punitive making this a better action for criminal court; (6) marriages that are at risk are only those that have other “discord” causes; and (7) causation would be difficult to prove.¹¹⁶

110. R. KEITH PERKINS, DOMESTIC TORTS: CIVIL LAWSUITS ARISING FROM CRIMINAL CONDUCT WITHIN FAMILY RELATIONSHIPS, 2D § 8:2 (2024).

111. *Id.*

112. *See Darnell v. Rupplin*, 371 S.E.2d 743, 745 (N.C. Ct. App. 1988) (quoting *Chappell v. Redding*, 313 S.E.2d 239, 241 (N.C. Ct. App. 1984)).

113. *See Beavers v. McMican*, 898 S.E.2d 690, 696 (N.C. 2024).

114. N.C. GEN. STAT. ANN. § 52-13 (West 2024); S.D. CODIFIED LAWS § 20-9-7 (2024); *see Hunt v. Chang*, 594 P.2d 118, 123–24 (Haw. 1979); *Davis v. Davis*, 360 So. 3d 196, 201 (Miss. 2023); *Hodges v. Howell*, 4 P.3d 803, 804–07 (Utah Ct. App. 2000); *Thompson v. Chapman*, 600 P.2d 302, 304 (N.M. Ct. App. 1979). While New Mexico has not officially abolished alienation of affection claims, the *Thompson* court professed, “[i]f we had the power to [abolish alienation of affections], we would follow in the footsteps of *Wyman v. Wallace*, 15 Wash. App. 395, 549 P.2d 71 (1976). It abolished the common law remedy for alienation of affections.” *Thompson*, 600 P.2d at 304.

115. PERKINS, *supra* note 110.

116. *See id.*; Nehal A. Patel, Note, *The State’s Perpetual Protection of Adultery: Examining Koestler v. Pollard and Wisconsin’s Faded Adultery Torts*, 2003 WIS. L. REV. 1013, 1024 (2003)

While the trend amongst states has been to abolish heart balm offenses, North Carolina has taken the off-beaten path and recently upheld the laws of alienation of affection and criminal conversation.¹¹⁷ In *Malecek v. Williams*, the defendant husband challenged the facial constitutionality of the offenses of alienation of affection and criminal conversation, claiming that “they violate individuals’ First and Fourteenth Amendment rights to engage in intimate sexual activity, speech, and expression with other consenting adults.”¹¹⁸ The court began its Fourteenth Amendment analysis by distinguishing *Lawrence v. Texas* from the case at hand.¹¹⁹ While the defendant in *Malecek* argued for a strict scrutiny review, the North Carolina Court of Appeals applied the *Lawrence* standard, which was a robust rational basis review.¹²⁰

In comparing the state interests of the *Malecek* case versus the *Lawrence* case, the North Carolina Court of Appeals reasoned that while Texas did not have a legitimate state interest in upholding its sodomy laws in the *Lawrence* case, North Carolina did have a legitimate interest in protecting marriage.¹²¹ Specifically, North Carolina’s purpose of the heart balm offenses was meant “to prevent and remedy personal injury, and to protect the promise of monogamy that accompanies most marriage commitments.”¹²² Texas’s attempts to regulate private sexual conduct without injury to a person were unconstitutional, while North Carolina’s alienation of affection and criminal conversation actions only sought remedial measures against a defendant whose private sexual conduct caused an injury to the plaintiff.¹²³ As a result, the court held that the actions of alienation of affection and criminal conversation did not violate the Fourteenth Amendment, because North Carolina had a legitimate interest in protecting marriage, and was able to achieve those means without discrimination to any party.¹²⁴

As for the defendant’s First Amendment claim in the *Malecek* case, the court noted that while sexual activity may be expressive in some circumstances, it may not be given freedom of speech and expression protection if there are harms that result from the speech, but are unrelated to the content of the speech.¹²⁵ The court provides the example of an open marriage that both spouses agree to, which would operate as a defense to alienation of affection and criminal conversation, supporting that the state is not interested in regulating the content of the speech of private individuals, but instead is substantially

(“An emphasis on personal choice, keeping courts out of the bedroom, decriminalizing sex acts, and removing the use of law to legislate morality resulted in the abolition of amatory torts in almost every state.”).

117. *Malecek v. Williams*, 804 S.E.2d 592 (N.C. Ct. App. 2017).

118. *Id.* at 594.

119. *Id.*

120. *Id.* at 596.

121. *Id.* at 595.

122. *Id.* at 594.

123. *Id.*

124. *Id.* at 596.

125. *Id.* at 597–98.

interested in protecting against the harms that would negatively affect a marriage.¹²⁶

Further, the Supreme Court of North Carolina more recently reviewed an evidentiary and statutory interpretation question on alienation of affection and criminal conversation case on appeal in March 2024.¹²⁷ In *Beavers v. McMican*, the court analyzed what evidence was necessary to prove alienation of affection and criminal conversation claims, while acknowledging that “adultery is nearly always proved by circumstantial evidence . . . as misconduct of this sort is usually clandestine and secret.”¹²⁸ The *Beavers* court also held that “evidence of post-separation conduct can be used to corroborate evidence of pre-separation conduct in alienation of affection and criminal conversation claims, if the pre-separation conduct gives rise to more than mere conjecture.”¹²⁹ Consequently, the *Malecek* case details North Carolina’s reasoning for upholding alienation of affection and criminal conversation claims, and *Beavers* continued the review of the heart balm offenses.

2. Intentional Infliction of Emotional Distress

In comparison to long-standing torts, intentional infliction of emotional distress is one of the more recent torts recognized in the United States. Traditionally, emotional damages have been closely scrutinized by courts, but in 1934, the Restatement of Torts incorporated Section 46, Conduct Intended to Cause Emotional Distress Only.¹³⁰ Since then, at common law, a plaintiff may successfully recover emotional damages on an intentional infliction of emotional distress claim if they prove the defendant intentionally or recklessly caused severe emotional distress through the means of extreme and outrageous conduct.¹³¹

Intentional infliction of emotional distress has operated as somewhat of an anomaly in the tort arena. In *Howell v. New York Post Co.*, the Court of Appeals of New York enlightens us on the complexities surrounding the tort, asserting “[u]nlike other intentional torts, intentional infliction of emotional distress does not proscribe specific conduct, but imposes liability based on after-the-fact judgments about the actor’s behavior.”¹³² According to the *Howell*

126. *Id.* at 598. The defendant also argued First Amendment freedom of association, which was quickly struck down as invalid by the court, given that someone can freely associate with a married person without triggering an alienation of affection claim. *Id.*

127. *Beavers v. McMican*, 898 S.E.2d 690 (N.C. 2024).

128. *Id.* at 695 (quoting *In re Estate of Trogon*, 409 S.E.2d 897 (N.C. 1991)).

129. *Id.* at 695–96. In the *Beavers* case, the plaintiff-husband caught his wife sending nude pictures from her phone to someone named “Bestie.” The wife admitted to having sexual intercourse with someone else during the course of the marriage, but did not say it was the defendant, whom the wife began to date after the plaintiff-husband and wife separated. Despite the plaintiff-husband presenting evidence of phone call logs, he could not prove any pre-separation evidence to show the defendant was the man the wife had begun a relationship with. *Id.* at 693, 699.

130. RESTATEMENT (FIRST) OF TORTS § 46 (A.L.I. 1934).

131. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 46 (A.L.I. 2012).

132. *Howell v. New York Post Co.*, 612 N.E.2d 699, 702 (N.Y. 1993).

court, intentional infliction of emotional distress is so broad and “as limitless as the human capacity for cruelty” that “the actor may not have notice of the precise conduct proscribed.”¹³³ Some courts have rejected intentional infliction of emotional distress claims based on the former legal requirement that the plaintiff must suffer from physical harm to recover.¹³⁴

The element at the forefront of the analysis in an intentional infliction of emotional distress claim is “extreme and outrageous” conduct.¹³⁵ While the courts evaluate what is extreme and outrageous on a case-by-case basis, the generally accepted test to determine extreme and outrageous conduct is whether the defendant’s conduct goes beyond all bounds of decency that it would be regarded as utterly intolerable by society.¹³⁶ If an average member of the community would exclaim, “outrageous!” in response to the defendant’s conduct, then a court will find that the conduct is extreme and outrageous.¹³⁷

Magnifying the scope of the extreme and outrageous element, courts consider policy arguments, the relationships between the parties, any vulnerabilities of the plaintiff, and repeated or prolonged conduct.¹³⁸ However, as detailed by the New Mexico Court of Appeals in *Padwa v. Hadley*, “a free and democratic society must tolerate certain offensive conduct as well as some obnoxious or morally deviant behavior.”¹³⁹ As such, courts have an extremely high bar for meeting the extreme and outrageous element, which in turn makes it extremely difficult for plaintiffs to succeed on these claims.¹⁴⁰

There have been four recent cases where intermediate courts found extreme and outrageous conduct, resulting in successful intentional infliction of emotional distress claims.¹⁴¹ The type of extreme and outrageous conduct found amongst these four cases vastly ranges.

133. *Id.* (citing Daniel Givelber, *The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress*, 82 COLUM. L. REV. 42, 51–52 (1982)).

134. *See* *Browning v. Browning*, 584 S.W.2d 406, 408 (Ky. Ct. App. 1979).

135. A.L.I., *Principles of the Law of Family Dissolution: Analysis and Recommendations*, 8 DUKE J. GENDER L. & POL’Y 1, 50–51 (2001).

136. RESTATEMENT (THIRD) OF TORTS § 46 cmt. d (A.L.I. 2012); *see* *Chisholm v. St. Mary’s City Sch. Dist. Bd. of Educ.*, 947 F.3d 342, 353 (6th Cir. 2020) (“Under Ohio common law, a claim for intentional infliction of emotional distress requires . . . (2) that the actor’s conduct was so extreme and outrageous as to go beyond all possible bounds of decency and was such that it can be considered as utterly intolerable in a civilized community. . . .”).

137. RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (A.L.I. 1965).

138. RESTATEMENT (THIRD) OF TORTS § 46 cmt. d (A.L.I. 2012); *see* *Gonzales v. Gonzales*, 704 S.W.3d 54, 68 (Tex. App. 2024) (“In determining whether certain conduct is extreme and outrageous, courts consider the context and the relationship between the parties.” (quoting *GTE Sw., Inc. v. Bruce*, 998 S.W.2d 605, 612 (Tex. 1999))).

139. *Padwa v. Hadley*, 981 P.2d 1234, 1238 (N.M. Ct. App. 1999).

140. *See* *Trahanas v. Nw. Univ.*, 64 F.4th 842, 859 (7th Cir. 2023) (“Illinois sets a ‘high bar’ for intentional infliction of emotional distress claims.”)

141. *See* *Gonzales*, 704 S.W.3d at 69–70; *Waterbury v. New York City Ballet, Inc.*, 168 N.Y.S.3d 417 (N.Y. App. Div. 2022); *Schrick v. Durham Sch. Servs., L.P.*, 667 S.W.3d 259 (Tenn. Ct. App. 2022); *Gibson Bros., Inc. v. Oberlin Coll.*, 187 N.E.3d 629 (Ohio Ct. App. 2022).

In *Gonzales*, the court found a husband engaged in extreme and outrageous behavior against his wife when he repeatedly physically and mentally abused her.¹⁴² In *Waterbury*, one of the named defendants, “repeated[ly] record[ed] and disseminat[ed] [] intimate images of [the plaintiff], without her knowledge or consent,” which the court considered to be extreme and outrageous behavior.¹⁴³ In *Schrick*, the defendant-employer of a driver (who caused a crash that killed children) had notice of the bus driver’s dangerous conduct, which included two prior motor vehicle accidents, falling asleep while driving, purposefully slamming on breaks, and missing safety meetings.¹⁴⁴ The defendant-employer did nothing with the knowledge of their employee-driver’s conduct, which the court held a jury could find their conduct was extreme and outrageous.¹⁴⁵ In *Gibson Bros.*, the plaintiff-business owner sought emotional damages from the defendant-college, for their role in the ongoing conflict surrounding an employee of the business owner accusing an African American student of the college of stealing from the business.¹⁴⁶ After the incident, other students from the college claimed the African American students were racially profiled, which led the university to become involved by stopping business with the business owner, allowing the distribution of flyers about the situation on campus, and other actions that caused harm to the business owners’ reputation, physical condition of the business, as well the physical wellbeing of the grandfather, who broke his back after an altercation.¹⁴⁷ The court found that this repeated conduct of harming the plaintiff could constitute extreme and outrageous conduct.¹⁴⁸

Examining adultery under the umbrella of intentional infliction of emotional distress, courts have quickly disposed of extramarital affairs as not constituting extreme and outrageous conduct, finding that although the act of adultery might be extreme, it does not rise to the level of outrageous.¹⁴⁹ Specifically addressing that there is a distinction between the requirements of extreme and outrageous, the Third Restatement states that “marital infidelity—

142. *Gonzales*, 704 S.W.3d at 69. In this case, the court noted the specific actions committed by the defendant, which included threatening to kill his wife, fighting her to the death, violently yelling at her in front of others, physically injuring her, breaking her laptop, calling her derogatory names like “trash,” “slut,” and “whore,” waited outside her house at night after their separation, threatened to take the child away, set up at least one unknown camera to the wife, and taking money and denying access to community funds. *Id.*

143. *Waterbury*, 168 N.Y.S.3d at 426.

144. *Schrick*, 667 S.W.3d at 267. In this case, the court found that the plaintiff’s claims were neither fraudulent nor trivial. *Id.* at 268.

145. *Id.*

146. *Gibson Bros.*, 187 N.E.3d at 638–39. There were three total African American students involved in the incident. *Id.* at 639.

147. *Id.* at 651.

148. *Id.* at 651–52.

149. See *Norton v. Hoyt*, 278 F. Supp. 2d 214, 222 (D.R.I. 2003) (holding that adulterous affairs, openly conducted affairs, and consensual sexual relationships do not constitute extreme and outrageous conduct); *Whittington v. Whittington*, 766 S.W.2d 73, 74 (Ky. Ct. App. 1989) (holding that “ordinary fraud and adultery can never reach the status of outrageous conduct.”).

is sufficiently common that it could not be characterized as extreme (although today it may also not be outrageous).”¹⁵⁰ On the other hand, courts have explained that “there must be evidence of some conduct that takes the dispute outside the scope of an ordinary marital dispute and into the realm of extreme and outrageous conduct.”¹⁵¹

Reviewing the courts’ definition and application of extreme and outrageous conduct, legal scholars have criticized the failure to apply adultery in intentional infliction of emotional distress claims.¹⁵² Addressing the application of adultery-based claims in Wisconsin, Dr. Patel discusses how, up until the Wisconsin legislature abolished adultery-based claims, courts justified and awarded damages on heart balm offenses, thereby “recogniz[ing] the emotional harm caused by adultery.”¹⁵³ Dr. Patel continues his criticism of the Wisconsin legislature’s abolition of adultery-based claims and policies underlying the abolition, describing them as, “little more than a recycled list used by courts across the country to justify dismissing claims involving adultery.”¹⁵⁴ The public policy factors considered and upheld by the *Koestler v. Pollard* court were: (1) blackmail and extortion, (2) mercenary and vindictive motives, (3) the ability to do more harm than good, and (4) inappropriate judicial intervention.¹⁵⁵

3. Breach of Contract

Marriage is generally thought to be a contract, because parties are making a promise to each other. However, marriage has not necessarily operated in the same way as one would understand an official, legal contract to operate. In *Maynard v. Hill*, the court explained that even though marriage starts with two parties agreeing to engage in a relationship, once the marriage begins, the parties obtain a status enjoying certain rights and duties of law, rather than a lingering contract.¹⁵⁶ Spouses have been unable or unsuccessful in bringing contractual claims against their spouses.¹⁵⁷ Courts have found that a marriage, and any promises within it, will not be enforced as a commercial contract would.¹⁵⁸

150. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 46 cmt. d (A.L.I. 2012).

151. *Gonzales v. Gonzales*, 704 S.W.3d 54, 68 (Tex. App. 2024) (quoting *Ross v. Ross*, No. 03-02-00771-CV, 2004 WL 792317, at *6 (Tex. App. April 15, 2004)).

152. *See* Patel, *supra* note 116, at 1030.

153. *Id.*

154. *Id.* at 1032 (citing *Koestler v. Pollard*, 471 N.W.2d 7 (Wis. 1991)).

155. *Id.* at 1032–36.

156. *Maynard v. Hill*, 125 U.S. 190, 211 (1888); *see* *Balfour v. Balfour* [1919] 2 KB 571 at 574 (Eng.). English courts held that domestic commitments between spouses do not give a basis for a viable contract claim, because the agreement was not accompanied by an intention that there be legal consequences. *See, e.g., id.* at 574.

157. *See* *Poston v. Poston*, 436 S.E.2d 854, 856 (N.C. Ct. App. 1993).

158. *Id.*

The courts treat [marriage] as a contract only in the sense that contract . . . precedes it and is essential to its validity. But, when formed, it is more than a civil contract; it is a *relation*, an *institution*, affecting not merely the parties, like business contracts, but offspring particularly, and society generally.¹⁵⁹

Hence, marriage has not been legally recognized as a civil contract.

Adultery has recently become the subject of interesting provisions included within prenuptial agreements.¹⁶⁰ Commonly seen are spouses incorporating a provision in their prenuptial agreement that voids the agreement or limits spousal support if a spouse commits adultery during the marriage.¹⁶¹ Courts that have enforced adultery penalties in prenuptial agreements reason that if contracts between parties are made without fraud, duress, mistake, misrepresentation, unconscionability, or the like, then voiding prenuptial agreements due to triggered adultery provisions would not violate public policy, as the courts would still decide how to split property and award spousal support.¹⁶² Other positions amongst courts and legal scholars argue that adultery penalties would not be effective in punishing adultery, and from a litigation perspective, parties should be cautious about these actions, as they could bring courts into individuals' private, sexual lives.¹⁶³

V. THE EFFECT OF THE LACK OF ENFORCEMENT OF ADULTERY-BASED ACTIONS

Despite the abundance of adultery claims that have been presented, courts have been playing a never-ending game of chicken, waiting for each other to make a move. While the majority of courts are at a standstill, victims are left with open, bleeding wounds that are only festering. Ignoring adultery has had significant effects on society. As shown above, with new technology and self-destructive social behaviors, the act of adultery and its potential for recourse is ripe for courts to address.

Criminal courts have been lax in their enforcement and are even more so now, given the holding from *Lawrence v. Texas*.¹⁶⁴ While family law courts seem to be the appropriate fit for adultery, the effect of no-fault divorces has essentially made recovery for a victim of adultery impossible. In comparing the majority and minority jurisdictions' stances on heart balm offenses, the Indiana Legislature's decision to abolish heart balm offenses was only somewhat justified. As thoroughly discussed in *Pennington v. Stewart*, heart balm offenses

159. *Id.* at 855–56 (quoting *State v. Hairston*, 63 N.C. 451, 453 (N.C. 1869)).

160. See Elizabeth R. Carter, *Adultery Provisions in Matrimonial Agreements*, 73 AM. U.L. REV. 679 (2024).

161. *Id.* at 708.

162. See *MacFarlane v. Rich*, 567 A.2d 585, 590 (N.H. 1989); Carter, *supra* note 160, at 710 (citing *MacFarlane*, 567 A.2d at 585; *Weymouth v. Weymouth*, 87 So. 3d 30 (Fla. Dist. Ct. App. 2012)).

163. Carter, *supra* note 160, at 709, 727 (citing *In re Marriage of Cooper*, 769 N.W.2d 582 (Iowa 2009)).

164. *Lawrence v. Texas*, 539 U.S. 558 (2003).

operated as property actions.¹⁶⁵ The *Pennington* court would not accept the husband's argument that he received property injuries after losing his wife's affections, because doing so would require the wife to become disposable, as suggested by the meaning of the word property itself.¹⁶⁶

As the Indiana Legislature reasoned, these types of actions were better left to the criminal courts.¹⁶⁷ While it appears the Indiana Legislature intended for victims of adultery to seek recourse through the criminal courts, they failed to consider or address, as stated earlier, that adultery was rarely, if ever, prosecuted. As a result, victims of adultery in Indiana (and other states that abolished heart balm offenses) were left with no separate legal action for adultery that was not divorce.

Addressing the minority approach, North Carolina's reasoning for their decision in *Malecek* encompasses the importance of providing remedies for those injured by adultery.¹⁶⁸ Marriage is consistently held as an important institution to society.¹⁶⁹ However, while North Carolina is correct in upholding the state's interests, heart balm offenses are not the proper actions to remedy the injury, because they proceed against the third-party paramour and not the wrongdoing spouse. Since marriage is a contract between two people, any other party being sued would be improper, because the third party would not be in privity to the marriage contract. Thus, while the recognition of heart balm offenses adequately addresses the importance of remedying adultery victims, the actions do not seek recovery from the proper party, or both parties.

A. *Self-Regulation as a Form of Recourse*

Naturally, people who have been wronged by adulterous acts and have suffered harms that have no avenue for recovery will take matters into their own hands—and they have. With social media being an effective tool for communication, secret groups are being created on social media platforms to publicly shame and warn other people of their ex.¹⁷⁰ On Facebook, registered users are creating groups, typically requiring some form of permission or

165. *Pennington v. Stewart*, 10 N.E.2d 619, 619–22 (Ind. 1937).

166. *Id.* at 621.

167. PERKINS, *supra* note 110.

168. *Malecek v. Williams*, 804 S.E.2d 592, 597–98 (N.C. Ct. App. 2017).

169. *Obergefell v. Hodges*, 576 U.S. 644, 657 (2015) (“These and other developments in the institution of marriage over the past centuries were not mere superficial changes. Rather, they worked deep transformations in its structure, affecting aspects of marriage long viewed by many as essential.”); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (citing *Skinner v. State of Oklahoma*, 316 U.S. 535, 541 (1942)) (“Marriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival.”); *In re Estate of Glogovsek*, 618 N.E.2d 1231, 1237 (Ill. App. Ct. 1993) (In deciding whether the presumption of undue influence could apply to spouses in a challenge to a will, the court stated “that the use of the presumption of undue influence must be applied with caution as to marital relationships, because of the unique relationship between spouses and the importance of marriages in our society.”).

170. See Haque, *supra* note 12; Wiseman, *supra* note 12.

acceptance of rules to enter.¹⁷¹ Some of the groups' rules to participate in the conversations include, in a very *Fight-Club* fashion, not revealing that the group exists.¹⁷² Participants will then post about their ex, including posting their picture online for other members to see, reveal personal information about their relationship and the particular person they are warning about, and other participants can comment about what the original poster claimed. Most recently, an app called "Tea" has been created, intended as a safer way for women to date, where women can find information about men without screenshots and remain anonymous.¹⁷³ On the official website, in an animated swiping screen, the site promotes, in addition to "dating safety tools that protect women" for women to use their source to, "avoid red flags . . . swipe safely . . . protect your heart . . ."¹⁷⁴ Another tagline of the site is "[t]he safest space to spill tea" which means to gossip about someone or something.¹⁷⁵ On Tea's "About Us" page, they emphasize that the app is intended for women's safety, but also state:

At its core, Tea is built on one fundamental belief: Women should never have to compromise their safety while dating.

With features like Reverse Image Search to catch catfish, Phone Number Lookup to check for hidden marriages, and Background Checks to uncover criminal records, Tea ensures that women have the information they need before meeting someone new.

Beyond safety tools, Tea fosters the largest women's group chat in the U.S., where users share experiences, anonymous dating reviews, and support.¹⁷⁶

On Google Play, the app is described as a place where:

Users can access a nationwide forum of posts and can set alerts for a man's name so you never miss any tea about your potential date, ex, or partner, and so you can make sure they are not a cheater. Users can anonymously ask for dating and relationship advice to find

171. See *Are We Dating the Same Guy—New York City*, FACEBOOK, <https://www.facebook.com/groups/340985311306448/> [<https://perma.cc/7NT8-MNSS>] (last visited July 30, 2025); ARE WE DATING THE SAME GUY?, <https://www.aredatingthesameguy.com> [<https://perma.cc/3SWQ-UCT7>] (last visited July 30, 2025). This source also has Facebook groups based on regional location.

172. See *Are We Dating the Same Guy—New York City*, *supra* note 171; CHUCK PALAHNIUK, *FIGHT CLUB* 48 (2016) ("The first rule about fight club is you don't talk about fight club. The second rule about fight club is you don't talk about fight club.").

173. TEA DATING ADVICE, <https://www.teaforwomen.com/> [<https://perma.cc/C6MD-KJBF>] (last visited July 30, 2025).

174. *Id.*

175. *Id.*

176. *About Us*, TEA DATING ADVICE, <https://www.teaforwomen.com/about> [<https://perma.cc/N23J-BU9>] (last visited July 31, 2025). This page has since been removed from Tea's website.

support and empowerment from our community of verified women.¹⁷⁷

The creation of these groups and apps illustrates that victims do not feel there is an outlet to remedy their harms, so they feel they must take it upon themselves to either remedy or protect themselves from future harms. While anyone about to date might want to protect themselves or let women know about their experience with their ex, these groups create potential issues for the courts further down the road.¹⁷⁸ Users of these groups are placing themselves in a position to be sued for defamation by the ascertainable individual if they happen to discover the group and posts, the information is false, and damages are proven. If there were an effective recourse for victims of adultery through legal means, the courts would not be faced with these other tortious claims. With that said, no matter how much courts try to avoid it, it appears they would be forced to hear the merits of adultery anyway. All that has been done has simply made matters more complex with the added elements of potential defamation.

B. The Application and Abolition of Adultery-Based Claims Has Created an Inequitable Result Between the Genders

Courts have provided a variety of reasons why adultery and heart balm offenses are unenforceable. As stated above, a majority of courts find that heart balm offenses are not necessarily the proper course of action for a victim to recover from adultery.¹⁷⁹ However, courts' stated reasoning on why adultery and heart balm offenses should be abolished sheds light on a larger issue: women being inequitably considered in the application of the offenses.

The Maryland Court of Appeals reviewed the action of criminal conversation in *Kline v. Ansell*.¹⁸⁰ In *Kline*, the husband claimed criminal conversation against his wife's paramour.¹⁸¹ In deciding the case, the *Kline* court makes a point to analyze the Maryland Equal Rights Amendment in 1972, which provides: "Equality of rights under the law shall not be abridged or denied because of sex."¹⁸² The court explains that it would be a burden to only allow a man to sue or be sued for criminal conversation, while a woman would not have that right. As a result, the court found that abolishing criminal

177. *Tea Dating Advice*, GOOGLE PLAY, https://play.google.com/store/apps/details?id=com.tea.tea&hl=en_US [<https://perma.cc/6WPA-86GR>] (last updated July 15, 2025).

178. See Tessa DiTirro, *Tea or Trouble? Wadsworth Man Planning to Sue Meta After Being Posted in Private Date Screening Group*, NEWS 5 CLEVELAND <https://www.news5cleveland.com/news/local-news/tea-or-trouble-wadsworth-man-planning-to-sue-meta-after-being-posted-in-private-date-screening-group> [<https://perma.cc/K2FX-FWZT>] (last updated Sep. 13, 2024, at 09:24 ET).

179. See *Hunt v. Chang*, 594 P.2d 118, 616 (Haw. 1979); *Davis v. Davis*, 360 So.3d 196, 201 (Miss. 2023); *Thompson v. Chapman*, 600 P.2d 302, 304 (N.M. Ct. App. 1979); *Hodges v. Howell*, 4 P.3d 803, 804–07 (Utah Ct. App. 2000).

180. *Kline v. Ansell*, 414 A.2d 929 (Md. 1980).

181. *Id.* at 929–930.

182. *Id.* at 932 (quoting MD. DECLARATION OF RTS. art. 46).

conversation, instead of extending the right to women, was the most equitable way to decide this case.¹⁸³

While it may have been the court's intention to equally apply this law by abolishing criminal conversation, the *Kline* court's decision did the opposite. The *Kline* court explained that criminal conversation evolved into a personal rights action, rather than the historic property rights action, and a plaintiff's reason for bringing criminal conversation actions is "purely mercenary or vindictive motives."¹⁸⁴ The court also takes the stance that bringing a criminal conversation action may "destroy a chance to restore a meaningful relationship."¹⁸⁵ Strikingly, the court also reasoned through the judicial abolition of criminal conversation "[m]ost important[ly], [because] today's sense of the increasing personal and sexual freedom of women is incompatible with the rationale underlying this action."¹⁸⁶

While on its face, the abolition of criminal conversation does not violate or take away rights from anyone based on gender, the abolition does have a discriminatory effect and purpose. If it were the court's true intention to equally apply the law, then a woman's personal and sexual freedom should not be a consideration as to whether a woman can sue or be sued for a criminal conversation action. Sexual freedom implies that one is free to explore their sexual desires without inhibition or restriction.¹⁸⁷ When discussing a heart balm offense, such as criminal conversation, the reasoning of sexual freedom cannot accurately be applied because marriage requires commitment, and it is generally expected that a spouse will not engage in sexually free activities without the condonation of the spouse. It must also be noted that women are more likely to suffer from the effects of adultery than men.¹⁸⁸ Affording women the opportunity to bring a criminal conversation action was crucial to women for remedying harms and establishing equality.

The *Kline* court removed the opportunity for women to equally prosecute their injustices, which men had had since its inception. Further, if the decision were truly decided in the light of the Maryland Equal Rights Amendment, then the decision would violate the amendment, since it specifically states that a law shall not be denied because of sex.¹⁸⁹ The *Kline* decision was a façade of equality for women, and nothing more than a representation of effectual gender discrimination that is readily apparent in society and, tragically, the courtroom.

183. *Id.* at 932–33.

184. *Id.* at 930–31.

185. *Id.* at 931.

186. *Id.*

187. *Sexual Liberation*, AM. PSYCH. ASS'N, <https://dictionary.apa.org/sexual-liberation> [<https://perma.cc/DAC4-5KGG>] (last updated April 19, 2018).

188. Rokach & Chan, *supra* note 27, at 5 (citing A. Cano & K.D. O'Leary, *Infidelity and Separations Precipitate Major Depressive Episodes and Symptoms of Nonspecific Depression and Anxiety*, 68 J. CONSULTING & CLINICAL PSYCH. 774 (2000)) ("Women who had experienced threats of marital dissolution or of their husband's infidelity were six times more likely to be diagnosed with a major depressive episode than those who had not experienced either of those events.").

189. *Kline v. Ansell*, 414 A.2d 929, 932 (Md. 1980) (quoting MD. DECLARATION OF RTS. art. 46).

VI. COMPARATIVE VIEW OF COURTS THAT ENFORCE ADULTERY

Even though adultery has been brushed under the rug by courts, there are specialized courts that do recognize a cause of action for adultery offenses. Given that there are courts that enforce adultery in various ways, it supports that adultery is not completely inactionable. Courts should begin comparatively reviewing adultery to see which approach best fits our societal values, while also remedying the damages adultery victims have suffered.

A. *United States Military Courts*

Although in the United States state courts do not necessarily enforce adultery laws, the United States Military Courts enforce adulterous actions against their members, typically with another underlying charge.¹⁹⁰ Under Article 133 of the Uniform Code of Military Justice, conduct that is unbecoming of an officer shall be punished.¹⁹¹ In addition, Article 134 of the Uniform Code of Military Justice (“UCMJ”) states:

[A]ll disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.¹⁹²

Under the Manual for Court Martials (“MCM”) 99 Article 134 Extramarital Sexual Conduct, the following elements must be met to bring a viable extramarital conduct offense:

- (1) That the accused wrongfully had sexual intercourse with a certain person;
- (2) That, at the time, the accused or the other person was married to someone else; and
- (3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.¹⁹³

The manual, specifically listed in the 2016 edition, provides an “explanation” to determine if the extramarital conduct was prejudicial.¹⁹⁴ “Adulterous conduct

190. See *Extramarital Sexual Conduct—Adultery*, THE L. OFF. OF PETER KAGELEIRY, JR. <https://www.ucmjlaw.com/courts-martial/military-crimes/extramarital-sexual-conduct-adultery/> [https://perma.cc/BCG6-T75R] (last visited July 31, 2025) (“Military prosecutors often include charges of adultery alongside other offenses like rape or sexual assault. Military Prosecutors generally do not prosecute adultery at court-martial unless it is part of a broader misconduct allegation.”).

191. Uniform Code of Military Justice, 10 U.S.C. § 933.

192. Uniform Code of Military Justice, 10 U.S.C. § 934.

193. MANUAL FOR COURT-MARTIAL § 62 art. 134 (2016) [hereinafter MCM (2016)]; see MANUAL FOR COURT-MARTIAL § 99 art. 134 (2024) [hereinafter MCM (2024)];

194. MCM (2016), *supra* note 193, § 62 art. 134(c)(2).

. . . includes conduct that has an obvious, and measurably divisive effect on unit or organization discipline, morale, or cohesion, or is clearly detrimental to the authority or stature of or respect toward a servicemember” as well as “discrediting.”¹⁹⁵ While the court will consider all relevant factors, the MCM lists factors for consideration, such as marital status, military rank, continuity of the conduct, negative impact of the conduct, misuse of government time and resources, other UCMJ violations, and legal separation, among others.¹⁹⁶

Military courts have consistently held that adultery is unbecoming conduct that is subject to punishment.¹⁹⁷ “Adultery is clearly unacceptable conduct, and it reflects adversely on the service record of the military member.”¹⁹⁸ Any member of the military is subject to prosecution for adultery, as it is applied neutrally.¹⁹⁹ Further, military courts have held that adultery is a crime against the other person’s spouse, allowing otherwise privileged communications between the spouses to be admissible in court, if the prior communications between the spouses were in relation to the adultery.²⁰⁰ If a military service member is found to have committed adultery, the MCM provides that the maximum punishment is dishonorable discharge, forfeiture of all pay and allowances, and confinement for one year.²⁰¹

In *United States v. Rudometkin*, a military judge’s conduct and impartiality in a separate case was questioned due to his alleged unbecoming conduct with a captain’s wife.²⁰² Though the court found that the evidence did not rise to a level that proved adultery, the evidence showed that the judge and wife engaged in unbecoming personal affairs together, such as going to yoga classes together, eating meals together, studying at the courthouse, exchanging gifts, texting daily, attending the park together, and even picking up the wife’s daughter from school.²⁰³

In *United States v. Orellana*, the defendant admittedly had sexual intercourse outside of his marriage with multiple women, including a minor, and after his conviction, claimed that his adultery conviction violated his sexual

195. *Id.* (“Discredit means to injure the reputation of the armed forces and includes adulterous conduct that has a tendency, because of its open or notorious nature, to bring the service into disrepute, make it subject to public ridicule, or lower it in public esteem.”).

196. *Id.* § 62 art. 134(c)(2)(a)–(i).

197. *See* *United States v. Schneider*, 38 M.J. 387, 390 (C.M.A. 1993) (citing *U.S. v. Johanss*, 20 M.J. 155, 156, 161 (C.M.A. 1985)).

198. *United States v. Jonsson*, 67 M.J. 624, 626 (Coast Guard Crim. App. 2009) (quoting MCM (2016), § 62 art. 134(c)(1)).

199. *See* MCM (2024), *supra* note 193, § 62 art. 134(b) (noting that the law is “gender neutral”); William T. Barto, *The Scarlet Letter and the Military Justice System*, 1997 ARMY L. 3, 4 (1997) (stating “[adultery] is likewise a gender-neutral prohibition; the accused may therefore be either male or female.”).

200. *United States v. Taylor*, 62 M.J. 636, 639 (N.M. Ct. Crim. App. 2006).

201. *See* MCM (2016), *supra* note 195, § 62 art. 134(c).

202. *United States v. Rudometkin*, 82 M.J. 396 (C.A.A.F. 2022).

203. *Id.* at 398.

privacy rights set by *Lawrence v. Texas*.²⁰⁴ Recognizing “that not every instance of adultery is a criminal offense under military law,” the court provided a thorough explanation as to what is required for the adultery analysis.²⁰⁵ Referencing the MCM, the court analyzed whether the adulterous conduct was directly prejudicial to good order and discipline or if it was service discrediting.²⁰⁶ Without having to prove damages, if the conduct is “clearly detrimental to the authority or stature of or respect toward a service member,” then it is directly prejudicial.²⁰⁷ Further, so long as the conduct creates a “tendency” to affect the service in public image, then the conduct is service discrediting.²⁰⁸ Ultimately, the court found that the defendant’s behavior satisfied both of the prongs.²⁰⁹ As for the defendant’s *Lawrence* argument, the court quickly dismissed the argument, reiterating the military’s interest in protecting marriage:

[T]he military has a particular interest in promoting the preservation of marriages within its ranks. Because military families are often required to endure extended separations from a spouse due to operational commitments, commanders have a unique responsibility to ensure that the morale of their deployed personnel (and that of the spouses left behind) is not adversely affected by concerns over the integrity of their marriages.²¹⁰

The *Rudometkin* case clearly shows how the military seriously takes these allegations. While there are critics of the military’s approach to adultery, claiming “that the military is out of touch with society,”²¹¹ the court in the *Orellana* case thoroughly exhibits the importance of marriage and how breaking marital vows can affect an entire community. Distinguishing the military’s approach to adultery versus civilian life, a judge was seriously investigated for his behavior, without proof of intercourse.²¹² In cases where civilians have been proven to have had intercourse outside their marriage, state courts simply brush off the matter.

B. International Courts

Understanding the levels of enforcement of adultery through an international, comparative perspective is imperative to establishing viable causes of action for the United States. Enforcement of adultery varies between

204. *United States v. Orellana*, 62 M.J. 595, 596–97 (N.M. Ct. Crim. App. 2005); *see Lawrence v. Texas*, 539 U.S. 558 (2003).

205. *Orellana*, 62 M.J. at 599.

206. *Id.* (citing MCM § 62(c)(2) (2005)). The MCM 2024 edition still recognizes the same standard. *See* MCM (2024), *supra* note 195, § 62 art. 134.

207. *Orellana*, 62 M.J. at 599.

208. *Id.*

209. *Id.* at 600–01.

210. *Id.* at 601.

211. *See* Christopher Scott Maravilla, *The Other Don’t Ask, Don’t Tell: Adultery Under the Uniform Code of Military Justice After Lawrence v. Texas*, 37 CAP. U. L. REV. 659, 676 (2009).

212. *United States v. Rudometkin*, 82 M.J. 396 (C.A.A.F. 2022).

countries due to a multitude of factors, including religion and types of government.

In Nova Scotia if a husband or wife leaves their spouse while in the act of adultery, the husband or wife cannot receive anything from their spouse's estate at the time of the spouse's death.²¹³ While most European countries do not enforce adultery actions, France, on the other hand, has codified fidelity amongst spouses, stating: "The spouses owe each other mutual respect, fidelity, help, assistance."²¹⁴ While France does not have a specific action for adultery, the legislation of fidelity speaks for itself on the importance of marriage.

Japan's Civil Code 709 and 710 provide damages for torts and compensation for damages other than property.²¹⁵ On February 19, 2019, the Supreme Court of Japan applied both of the codes to the context of adultery and third parties, specifically stating, "Either a husband or wife may claim against the spouse compensation for damages on grounds that either the husband or wife was compelled to get a divorce from the spouse due to the spouse's fault and suffered mental distress" while holding that third parties can be liable under special circumstances, mainly if they "compelled" a spouse to leave their marriage.²¹⁶

There are countries and cultures outside of the United States that offer extreme punishments for adulterers.²¹⁷ These punishments are extreme approaches to adultery and should never be considered by American courts and legislatures. For example, Iran regularly prosecutes adultery offenses, with some as recent as the year 2022.²¹⁸ Iranian law requires that spouses who engage in sexual intercourse outside their marriage, also known as *zina*, suffer corporal punishment, which could include death.²¹⁹ First, given the idea of separation of

213. Intestate Succession Act, R.S.N.S. 1989, c. 236, s. 17 (Can.) ("(1) If a wife has left her husband and is living in adultery at the time of his death, she shall take no part of her husband's estate under this Act. (2) If a husband has left his wife and is living in adultery at the time of her death, he shall take no part of his wife's estate under this Act.").

214. Code civil [C. civ.] [Civil Code] art. 212 (Fr.).

215. "A person that has intentionally or negligently infringed the rights or legally protected interests of another person is liable to compensate for damage resulting in consequence." MINPŌ [MINPŌ] [CIV. C.] art. 709, para. 1, no. 1 (Japan). "A person liable for compensation for loss or damage pursuant to the provisions of the preceding Article must also compensate for loss or damage other than property, regardless of whether that person infringed the body, liberty or reputation of another person, of infringed property rights of another person." MINPŌ [MINPŌ] [CIV. C.] art. 710, para. 1, no. 1 (Japan).

216. Saiko Saibansho [Sup. Ct.] Feb. 19, 2019, 2017 (Ju) no.1456,73 Saiko SAIBANSHO MINJO HANREISHU [MINSHU] (Japan).

217. See Nqobizwe Mvelo Ngema & Desan Iyer, *Penalty for Committing Fornication & Adultery (Zina) in Islamic Law as a Violation of Freedom from Torture*, 15 OIDA INT'L J. SUSTAINABLE DEV. 11 (2022).

218. *Iran Sentences a Woman to Death for Adultery, State Media Say*, ASSOCIATED PRESS (Nov. 3, 2023, at 14:34 ET), <https://apnews.com/article/iran-death-penalty-adultery-39ac846801400d8d1399ca05f1053ac8> [https://perma.cc/HB56-WHPN].

219. See ISLAMIC PENAL CODE OF THE ISLAMIC REPUBLIC OF IRAN, (Book Two arts. 63–107) (2013) (Iran) (unofficial English Translation by Iran Human Rights Documentation Center).

church and state and the multiple religions represented in the United States, having religion as the sole basis of law would be impractical. Second, as stated earlier, it has been found that the act of adultery does not justify the punishment of death, and Western cultures have become more progressive in their approach to adultery.²²⁰ Representative Ted Poe spoke out against the Iranian government for the stoning of adultery offenses, stating that “still in the stone age.”²²¹

VII. RECOMMENDATIONS

Marriage must be valued by the courts to counteract the self-destructive legal cycle that continuously harms victims of adultery. Adulterers must be held accountable for their actions, and those they harm should be compensated.

A. Enforce Adultery-Based Actions as a Form of Deterrence

Although some judges, scholars, and politicians state that enforcing adultery would not operate as an effective form of deterrence for the act²²² or serve government interests in protecting communities,²²³ this reasoning is entirely contradictory to how the law has been applied in practice. Without issue, the New York court methodically applied the adultery laws in *People v. Lucas* and found that the defendant in that case committed adultery, which assuredly protected the community and future victims.²²⁴ The military also applies their adultery laws with a clear guide to prosecution.²²⁵ The North Carolina Court of Appeals clearly detailed why governments would have an interest in protecting marriage in the *Malecek* case.²²⁶

One of the core purposes of law is to regulate societal behaviors, and in fact, scholars have deliberated how the use of laws affects a person's attitudes and morals surrounding the regulated behavior.²²⁷ Analogizing behaviors,

220. MacLennan, *supra* note 46.

221. 154 CONG. REC. H861 (2008) (daily ed. Feb. 12, 2008) (statement of Rep. Ted Poe). Representative Ted Poe, Texas, served on the Committee on Foreign Affairs from 2013–2014, wherein that committee received a simple resolution to free a Sudanese woman, Meriam Yahia Ibrahim Ishag, who was convicted of and sentenced to death for apostasy and adultery for being a married Christian woman. *See* Resolution Condemning the Death Sentence Against Meriam Yahia Ibrahim Ishag, a Sudanese Christian Woman Accused of Apostasy, H.R. Res. 601, 113th Cong. (2014).

222. *See Doe v. Doe*, 747 A.2d 617, 623 (Md. 2000) (“An award of damages does not constitute an effective deterrent to the act of adultery” (quoting *Kline v. Ansell*, 414 A.2d 929, 931 (Md. 1980))); Izaguirre, *supra* note 55.

223. *See* Izaguirre, *supra* note 55.

224. *See* *People v. Lucas*, 194 N.Y.S.3d 913, 920 (2023).

225. MCM (2016), *supra* note 193, § 62 art. 134.

226. *See* *Malecek v. Williams*, 804 S.E.2d 592 (N.C. Ct. App. 2017).

227. *See* Kenworthy Bilz & Janice Nadler, *Law, Moral Attitudes, and Behavioral Change*, in THE OXFORD HANDBOOK OF BEHAVIORAL ECONOMICS AND THE LAW 241 (Eyal Zamir & Doron Teichman eds., 2014). Legal regulation can accomplish its goals directly, through fear of sanctions or desire for rewards. But it can also do so indirectly, by changing *attitudes* about the regulated behaviors. Ironically, this indirect path can be the most efficient one, particularly if the regulation

surely it can be estimated that the majority of society agrees that smoking is bad for an individual. Despite the negative outlook, our country has enabled the use of cigarettes through its legalization, and people partake in the act, even though it comes at a high cost to people's wallets and health.²²⁸ Theoretically, if there were more legal restrictions on smoking or adultery, we might see a decrease in the number of people engaging in the acts, because of the deterrent effect. This theory can be supported by the immense increase in marijuana users after states began legalizing marijuana, which went from about less than one million users in 1992 to 17.7 million users in 2022.²²⁹ Obviously, people are not going to stop smoking, just as people are not going to stop committing adultery, particularly if our legislatures and courts continue to enable it.

The courts and legislatures have the power to regulate societal conduct without infringing upon anyone's privacy rights, while simultaneously protecting those who might be harmed from the conduct. Sexual conduct is a private matter, but any conduct that inflicts knowing harm on an individual should be regulated and remedied by the courts, which is why we see causes of action for battery, assault, rape, pedophilia, and other crimes and torts. However, since there are no types of enforcement, or minimal enforcement, against adulterous behavior, the conduct has spiraled out of control. The absence of enforcement has created a blind acceptance.

Civil courts should start recognizing their states' legitimate interest in protecting marriage, as North Carolina has recognized, while also looking more closely at how the military enforces adultery. Of course, this article does not suggest that private civilians be required to live up to the exact standard as a member of the military. However, as a society, we can certainly look to the military for guidance on how to behave more civilly in private relationships, with respect for the institution of marriage, and how adulterous actions can affect those around us.

B. Amend States' Family Law Codes to Include an Opportunity for At-Fault Grounds Divorce and Relief in the Form of Alimony or Future Damages

For those states that recognize at-fault grounds for a divorce, adultery does not influence the proceedings.²³⁰ Considering how long the no-fault grounds for divorce have been implemented, and the fact that some people do just make a mistake by getting married, it would be impractical to get rid of no-fault divorce.

changes attitudes about the underlying *morality* of the behaviors. This is because if laws change moral attitudes, we reduce—maybe drastically—the need for the state to act on or even monitor regulated players.

228. *Id.* The authors highlight in their article how taxes on cigarettes are intended to discourage their usage. However, simply taxing an item is not sufficient for deterrence.

229. See Carla K. Johnson, *Daily Marijuana Use Outpaces Daily Drinking in the US, a New Study Says*, ASSOCIATED PRESS (May 22, 2024, at 21:41 ET), <https://apnews.com/article/marijuana-cannabis-alcohol-drinking-daily-use-b91c2c5957fdb2d48e6616c3baa14c13> [https://perma.cc/8BKU-VSGS].

230. PETRELLI PREVITERA, LLC, *supra* note 7.

However, the United States' legislatures should make adultery an at-fault ground for divorce in every state, for those who have truly suffered harm from adultery.

Reiterating the importance of providing recourse for adulterous acts, plaintiffs might suffer serious, if not lifetime, harm in addition to simply terminating the marriage. One of those harms, in cases of adultery, is an STD. As stated, acquiring an STD is a common result of an adulterous affair.²³¹ But not only is an STD common, it is more likely to occur with an unfaithful partner.²³² Many people also believe that when you acquire an STD then there will be symptoms.²³³ However, it is true that there are STDs that can go undetected or do not have symptoms.²³⁴ For example, the human papillomavirus, commonly referred to as "HPV," is a very common STD that often does not have any symptoms,²³⁵ but affects approximately 42 million Americans per year, with each year developing another 13 million new cases.²³⁶ One of the major risks associated with HPV is that it could potentially develop cervical or other types of cancers.²³⁷ In consequence, victims of adultery, particularly female victims, could go years without knowing they have HPV, but have the underlying risk.

It is for this example, and other similar examples, that adulterous spouses should be responsible for the victim-spouse's healthcare-related costs associated with adultery. Courts could order the adulterous spouse to pay for the victim-spouse's STD testing, for as long as necessary to clear the victim-spouse of any disease, as determined by a physician. In alimony statutes, legislatures could codify this payment for STD testing, if there is proof of extramarital sexual activity.

Additionally, courts and legislatures should follow the middle-ground approach to alimony taken by Kentucky in *Chapman* and Oklahoma in *Smith*.²³⁸ As demonstrated earlier, since adultery can significantly deteriorate the victim-spouse's mental health and physical health beyond the risk of STDs, the

231. See Stabile, *supra* note 38.

232. Terri D. Conley et al., *Unfaithful Individuals are Less Likely to Practice Safer Sex than Openly Nonmonogamous Individuals*, 9 J. SEXUAL MED. 1559, 1564 (2012).

233. See *10 Common STD Myths and Facts You Should Know About*, N. ATLANTA WOMEN'S CARE (Mar. 15, 2023), <https://www.nawcare.com/blog/common-std-myths-and-facts-you-should-know-about> [<https://perma.cc/D9Y4-T88Q>] ("STDs are often asymptomatic and need to be diagnosed with blood tests. Though you are asymptomatic, you can still spread the infection to others. That's why it is crucial to get tested for STDs before having sex.")

234. See *Sexually Transmitted Infections (STIs)*, NAT'L HEALTH SERV., <https://www.nhs.uk/conditions/sexually-transmitted-infections-stis/> [<https://perma.cc/8GKU-9ASD>] (last visited July 31, 2025).

235. See *About Genital HPV Infection*, CDC (Jan. 31, 2025), <https://www.cdc.gov/sti/about/about-genital-hpv-infection.html> [<https://perma.cc/T6GL-NKEP>].

236. See *About HPV*, CDC (July 3, 2024), <https://www.cdc.gov/hpv/about/index.html> [<https://perma.cc/ZR6B-EP7W>].

237. *Id.*

238. *Chapman v. Chapman*, 498 S.W.2d 134, 138 (Ky. Ct. App. 1973); *Smith v. Smith*, 847 P.2d 827, 829–30 (Okla. Civ. App. 1993).

adulterous spouse can pay for the victim-spouse's health insurance until remarriage of the victim spouse. Mandating the adulterous spouse to pay for health insurance is a reasonable approach because health insurance access is typically considered when finalizing a divorce.²³⁹ Further, as discussed in *Smith*, requiring the adulterous spouse to pay for the victim-spouse's health insurance or health-related costs would not serve as punishment, but it would be a need as a result of the adulterous conduct.²⁴⁰ Courts could review this law on a case-by-case basis, taking into consideration any defenses, such as both spouses committing adultery or condonation, and whether the mandate should apply.

C. *Expand Definition of "Extreme and Outrageous Conduct" in Intentional Infliction of Emotional Distress Claims to Include Adultery-Based Actions*

While not all cases of adultery might rise to the level of extreme and outrageous, it is misleading and incorrect to provide blanket guidance that all adultery would not be extreme and outrageous. The argument against including adultery within the definition of extreme and outrageous is essentially condoning the behavior. In effect, arguments against the incorporation are stating that just because adultery happens so often that we must now accept it as socially acceptable. Not only is this a dangerous precedent to set for generations going forward, but the holdings and reasoning are inconsistent with how society reacts to adulterous affairs.

For example, former President William Clinton had an affair with then White House intern Monica Lewinsky, which sparked public outcry and led to a series of investigations against the President.²⁴¹ In the reality television arena, the news of the breakup of a famous couple, which was allegedly caused by an affair, consumed viewers and social media users, resulting in a tidal wave of public condemnation against the acts of the adulterer.²⁴² Secretary Pete Hegseth was ridiculed for a past adulterous affair at his confirmation hearing.²⁴³ Senator Tim Kaine subjected Hegseth to a brutal line of questioning about his personal life, trying to connect his past choices to his ability to perform his role as the Secretary of Defense.²⁴⁴ More recently, there has been another social media frenzy of a CEO and HR executive caught via a jumbo screen at a Coldplay

239. See *Divorce and Your Health Insurance Coverage in Orlando, Florida*, AIKIN FAM. L. GRP., <https://aikinlaw.com/florida/orlando/divorce-and-your-health-insurance-coverage-in-orlando-florida/> [<https://perma.cc/VZ39-5VLY>] (last visited July 31, 2025).

240. *Smith*, 847 P.2d at 829–30.

241. See Olivia B. Waxman & Merrill Fabry, *From an Anonymous Tip to an Impeachment: A Timeline of Key Moments in the Clinton-Lewinsky Scandal*, TIME (May 4, 2018), <https://time.com/5120561/bill-clinton-monica-lewinsky-timeline/> [<https://perma.cc/D3HN-Z85P>].

242. Hannah Selinger, *Every Detail of the Vanderpump Rules #Scandoval Drama in Chronological Order*, VULTURE, <https://www.vulture.com/article/vanderpump-rules-affair-timeline-scandoval.html> [<https://perma.cc/8VDK-3UPZ>] (last updated May 25, 2023).

243. *Pete Hegseth Questioned About Marital Infidelity*, C-SPAN (Jan. 14, 2025), <https://www.c-span.org/clip/senate-committee/pete-hegseth-questioned-about-marital-infidelity/51>

49107 [<https://perma.cc/W66H-VBJT>].

244. *Id.*

concert, which led to both parties resigning from their positions in addition to being investigated.²⁴⁵ If adultery were not an outrageous or extreme action, companies would not investigate their employees for private behavior, nor would those employees have to resign from their positions. These examples demonstrate that adultery is not taken as lightly by society as it is in the courtroom.

Adultery stirs an uproar in the community, enticing everyone to add their own opinions to the analysis. Accordingly, if intentional infliction of emotional distress and the extreme and outrageous element requires the courts to look at what an average member of the community would exclaim “outrageous!,” then society, more times than not, has spoken for the court and how they feel about adultery. Because community, society, and personal relationships in an intentional infliction of emotional distress claim are important parts of the claim’s equation, it is reasonable to deduce that the definition of what constitutes extreme and outrageous might change over time with those factors in mind.

Moreover, legal experts have discussed whether the measure of what constitutes extreme and outrageous in a marital relationship should be objective or subjective.²⁴⁶ As outlined in *Principles of the Law of Family Dissolution: Analysis and Recommendations* of Duke Journal of Gender Law & Policy, using *Massey v. Massey* to showcase a court’s measurement, what is considered outrageous might vary between marriages.²⁴⁷ Although the *Principles* ultimately conclude there are overall evidentiary issues with emotional harm and adultery claims,²⁴⁸ pondering a husband’s “bullying behavior” against a wife’s adultery in *Massey*, the *Principles* do query:

Although other cases reject [intentional infliction of emotional distress] claims based upon adultery, the *Massey* jury instruction might itself suggest that her adultery provides a context (combined perhaps with her excessive drinking, if he proved that claim as well) in which his behavior should not be found ‘outrageous’? Indeed, if the parties’ ‘mutual understanding’ at the outset of their marriage defines the standard, one might wonder whether her adultery might not be more outrageous than his bullying behavior.²⁴⁹

Courts can meet plaintiffs halfway and, at a minimum, analyze the context of the marriage to determine how the adulterous behavior severely affected the victim-spouse. However, courts and scholars heavily focus on the factor of privacy within a marriage, finding that courts should not get involved in private, marital matters. As a result, injured private parties’ claims are discarded and

245. See *HR Exec Caught on Coldplay Cam Resigns After Embrace with CEO Went Viral*, ASSOCIATED PRESS (July 25, 2025, at 18:17 ET), <https://apnews.com/article/coldplay-kiss-cam-viral-public-event-privacy-9d3ed25a5391732d58786705e9a234a9> [https://perma.cc/A98S-U4GR].

246. A.L.I., *supra* note 135, at 53–54.

247. *Id.* (citing *Massey v. Massey*, 807 S.W.2d 391 (Tex. Ct. App. 1991)).

248. *Id.* at 55–58.

249. *Id.* at 55.

plaintiffs cannot seek a remedy. If the spouse wanted life to stay private, then that spouse should not have injured others along the way. This simple premise is applied to all other torts across the country without any question regarding its applicability. With new technology and, more colloquially, screenshots and “receipts”²⁵⁰ one can prove adultery more easily than what we could even prove a decade ago.

For these reasons, courts need to reevaluate what exactly the standard for extreme and outrageous conduct should be, while considering society’s responses to adulterous situations and the context of a marriage, to compensate victims of adultery under intentional infliction of emotional distress claims.

VIII. CONCLUSION

The courts’ indifference to adultery, combined with the current approaches to dating and the accessibility of sex in technology, is increasing harm to victims of adultery. Courts cannot keep turning a blind eye to adultery, nor can society sit around and accept this behavior. Adultery will continue, but the suffering and increasing harm of its victims does not have to. For these reasons, courts should uphold tortious actions against adulterers and deliver justice to the adulterers’ victims.

250. Screenshots and “receipts” are modern ways to refer to “proof” of something.

