

An Economic Approach to Adultery Law

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Abstract

A long-term relationship such as marriage will not operate efficiently without sanctions for misconduct, of which adultery is one example. Traditional legal sanctions can be seen as different combinations of various features, differing in who initiates punishment, whether punishment is just a transfer or has real costs, who gets the transfer or pays the costs, whether the penalty is determined ex ante or ex post, whether spousal rights are alienable, and who is punished. Three typical sanctions, criminal penalties for adultery, the tort of alienation of affections, and the self-help remedy of justification are formally modelled. The penalties are then discussed in a variety of specific applications to past and present Indiana law .

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"Wilt thou have this woman to thy wedded wife, to live together after God's ordinance in the holy estate of Matrimony? Wilt thou love her, comfort her, honour, and keep her, in sickness and in health; and, forsaking all other, keep thee only unto her, so long as ye both shall live?" (*Book of Common Prayer*, 1662 edition. [Http://www.recus.org/1662.html](http://www.recus.org/1662.html) [January 2000])

1. INTRODUCTION

When two people marry, they promise fidelity. Adultery occurs when one of them breaks this promise, and it is generally believed that breaking promises, and breaking this promise in particular, is wrong. "Every wrong has its remedy," equity used to say. The subject of this paper is which of the myriad possible remedies are suitable for adultery. In modern practice in the United States, the remedy is that the wronged party can file for divorce and force a division of the assets. This really is not a remedy, however, since under modern no-fault divorce laws anyone can file for divorce anyway, no reason being required. To the extent that divorce deters adultery, it does so simply as an extension of adultery's tendency to displease the injured spouse. In the eyes of the law, adultery and complaining about the other spouse's adultery are equally good reasons for divorce.

In the past, other remedies existed of which vestiges continue today. These include criminal penalties, tort actions, and self-help. This chapter discusses remedies from a theoretical point of view using the tools of law-and-economics. The approach will be to view adultery law as a

problem in efficient contracting, setting up a legal regime in which marriage is structured to maximize the net benefit of the husband and wife, with attention, where appropriate, to spillovers onto third parties. At its simplest, when such spillovers do not exist, efficiency requires adultery law which replicates the marriage terms husband and wife would choose if transaction costs were low. Thus, in this chapter adultery will be analyzed not as a problem of morals, or of maintaining an orderly society, or of patriarchal domination, or of inalienable rights, but of the welfare of individuals as seen by individuals.

2. THE MODE

2A. ASSUMPTIONS

It will be useful to set up a formal model to clarify thinking on the costs and benefits of adultery even though I will not use any algebraic manipulation in this chapter. For simplicity, let us take the point of view of a Wife who is considering making an investment such as learning to love her Husband more, giving up her job, or moving to a different city, an investment which is useful only for the sake of the marriage and which she will regret making if her Husband turns out to be unfaithful. (It should be understood that "Husband" in this model means "the spouse who is tempted by adultery," not "the male spouse.") We will call the husband's partner in adultery "the Other Woman". Let us assume, too, that if the Wife does not invest in the marriage, she will be willing to divorce the Husband upon catching him in adultery, and that this threat would be sufficient to deter

him. If, however, she has invested in the marriage, her threat to divorce him would not be credible; she would have too much to lose.

We will normalize the payoffs of Husband and Wife to zero if the Wife does not invest in the marriage. The Wife's benefit if she invests is B if the Husband is faithful and $-C$ if he is not. The Husband receives benefit M from the investment if he faithful and $A > M$ if he is adulterous.¹

The Wife may exert monitoring effort X_{wife} to increase the probability that she detects adultery.² The Husband incurs cost $f(X_{wife})$ to find a woman with whom to commit adultery and cost $X_{husband}$ (X_{wife}) to conceal it, representing the assumption that the Wife chooses X_{wife} first and the Husband decides whether to commit adultery and how much to spend to conceal it after he knows the Wife's level of monitoring. The probability that adultery is detected, if it exists, is $a(X_{wife}, X_{husband})$, which is decreasing or constant in $X_{husband}$ and increasing or constant in X_{wife} . If adultery is detected, the Husband receives additional disutility $D_{husband}$ and the wife receives additional utility D_{wife} , where $D_{wife} < C$. In words, the Wife would rather not have invested in an adulterous marriage even if she is sure to have the pleasure of catching the Husband. The value $D_{husband}$ is a penalty that exists

¹ For many people, the adultery payoff of A would be less than the fidelity payoff of M because of conscience costs, but since such people need no external deterrence to avoid adultery, whatever penalties might exist are irrelevant to them and we will concentrate here on those for whom A is positive. Also, we will not rule out the possibility that $A > B + C$, which says that the Husband's benefit from the adultery is greater than the cost to the Wife, but, for simplicity, we will in this section ignore the possibility of side-payments from the Husband to the Wife in exchange for her acquiescence in his adultery, an agreement unenforceable in court.

independently of the law and represents such things as the Husband's embarrassment at being caught and the inconvenience of his Wife knowing the identity of the Other Woman.³

The assumptions of the model say that undetected adultery hurts the Wife and that she benefits from detecting it, given that it occurs. Why this is so is a difficult question.⁴ A partial answer is that the Wife can deduce that the Husband is committing adultery even if she fails to detect it through her monitoring. Why, however, do people try to learn the specifics of negative occurrences even if they know they become unhappy? We will avoid the question by falling back on the economic idea of revealed preference and using the payoff function to represent willingness to expend resources to obtain particular outcomes, not to represent psychological well-being. Thus, the assumption that the Wife obtains benefit D_{wife} from detecting the Husband's adultery is equivalent to her being willing to expend D_{wife} in resources to detect it, rather than saying anything about whether she feels happier afterwards.

² have implicitly assumed that this probability is positive even with zero effort, since the Husband is deterred from adultery by the threat of divorce if the Wife has not invested in the marriage. Lillian BeVier suggested that the Wife's effort could be socially useful. It could reduce, or, better, increase M .

³ By "independently of the law" I mean that the adultery penalty $D_{husband}$ will take the same value if there is no law concerning adultery. We normally think of the law as increasing the penalty for adultery, but it is also conceivable to have a law protecting adulterous husbands by punishing wives who show their anger, in which case the law could actually reduce $D_{husband}$. This sounds absurd, but no-fault divorce has a similar effect, by allowing the adulterous husband to divorce his wife if she bothers him too much about his affairs.

⁴ This issue arises in other contexts also, e.g. when an unconscious and injured driver has a blood sample taken by police without his consent, *Breithaupt v. Abram* (1957) 352 U.S. 432, or a gynecologist rapes patients without their knowledge, *People v. Minkowski* (1962) 204 Cal. App. 2d 832, 23 Cal. Rptr. 92. The law does recognize undetected harm: in *Breithaupt* the court acknowledged that the driver suffered a loss from the sample but held that it was justified; in *Minkowski*, the court held that there was indeed harm and it was rape.

2B ANALYSIS

Let us first consider what will happen in the absence of legal penalties. The Wife will look ahead and realize that she needs to monitor if she is to deter the Husband's adultery after her investment. Two things could happen. First, she might decide to make the investment and monitor carefully, in which case the Husband will not even try to find the Other Woman. Second, she might decide that deterrence is too expensive and abandon investment in the marriage.

In this simple model, adultery never happens, because it is deterred either by the Wife's precautions or by her credible threat of divorce when she has not invested in the marriage. There is nonetheless, a welfare loss, and potentially a very large welfare loss. This loss is created by the deterrence itself, the Wife's precaution cost or the loss to Husband and Wife if the Wife does not invest.

In a more complicated model, Husbands would differ in their benefits from adultery or costs of avoiding detection. Then adultery would occur in equilibrium, which would create two further costs, the direct loss $B+C$ to the Wife and the adultery transaction cost $X_{husband}$ to the Husband.

Adding a legal penalty for adultery is adding a penalty, P , to the detection embarrassment, $D_{husband}$. To deter adultery efficiently, the penalty must be large enough that even if the Wife spends

nothing on monitoring, setting $X_{wife}=0$, the Husband will find the expected payoff from adultery too low to justify its transaction costs. In that case, the Husband will be deterred, the Wife will feel secure in using her time investing in the marriage and not in monitoring, and social surplus will be maximized at the value $B+M$. Both parties would be happy to accept extraordinary penalties for adultery, ex ante. The Husband would accept heavy adultery penalties because being aware of the penalty he will never become liable for punishment.⁵

It has often been noted, both in contracts generally and marriage in particular, that long-term relationships need penalties for breach and that both parties will freely agree to become liable to punishment.⁶ Indeed, that is the very idea of a contract. Adultery is just one more example of a breach that needs penalties. Viewing the situation ex post, however, it is easy for commentators to see such penalties as illegitimate infringement of the Husband's liberty.⁷

⁵ The model can be modified to add non-deterrable adultery. If it is really true that some people could not prevent themselves from committing adultery even if they were sure to be caught and to receive the death penalty—something I doubt, but which others believe—that can be incorporated into the model as a fixed probability that adultery occurs beyond what is chosen by the husband. The model would not change much

⁶ As Lilian BeVier pointed out to me, even in the absence of law, long-term relationships can survive based on mutual threats of retaliation for breach, something my own writing has discussed— Eric Rasmusen, *Games and Information*, Chapter 5, 2nd edition, Oxford: Blackwell (1994). This requires sufficient interest by both parties in the future, however, and mutual vulnerability to breach, which is why courts are so useful. Mutual threats are more likely to work for minor offenses such as rude language which are instantly detectable and where the benefit from a single transgression is not worth risking later retaliation. This together with the cost of adjudication relative to the alleged harm is why the courts have always stayed out of minor household disputes.

⁷ See, for example, Note (1991) "Constitutional Barriers to Civil and Criminal Restrictions on Pre- and Extramarital Sex," 104 *Harvard Law Review* 1660 (1991).

2C. EXTERNALITIES

So far we have focussed entirely on the Husband and Wife, in analogy to contract law. Adultery also has spillovers, however— externalities, in economic terminology. For the Other Woman-, adultery is a beneficial spillover. For other people, it is harmful. Parents and children dislike adultery, other couples may be dismayed by the bad example, and many people dislike it in their community for reasons of religion, natural law, or aesthetics. Adultery interests outsiders just as much as pollution, racial discrimination, environmental destruction, and new building construction. Adultery law is like land-use law, regulation of how people live based on the idea that people in a community care about what their neighbors are doing. Just as land-use law varies dramatically among different communities, so we should expect adultery law to vary.⁸

Using the model, if the sum of the benefits to the Husband and the Other Woman are exceeded by the cost to the Wife and other people, adultery will be inefficient. The Wife and the outsiders would be willing, were it feasible, to pay the Husband and the Other Woman enough that they would refrain from adultery. Transaction and organization costs prevent this, and so the adultery occurs. A law that prevented adultery would then increase social surplus by leading to the result to which all parties would agree if they could transact costlessly.

The point that other people's desires matter is often resisted, so it is worth making clear. The ideas of economic efficiency, wealth maximization, and Pareto optimality all rely on taking people's preferences as given, without the analyst judging their moral worth. If a consumer says he likes chocolate, the chocolate-neutral analyst does not say that banning chocolate would create no harm. Suppose the Husband and Other Woman would pay \$50,000 and \$40,000 for the right to commit adultery, and the Wife and one hundred outsiders would pay \$60,000 and \$1,000 each to prevent it. The adultery is then inefficient. There is no need to ask whether the outsiders have "really been damaged" or whether the externality "really exists". If someone would pay \$1,000 to prevent an act, the act causes him damage, and the economist does not ask about motivation. Whether the outsiders' objections are religious or material, for example, matters as little as the motivations behind the Husband and Wife's desires.⁹

How much people do care about adultery is an empirical question that would be reflected in such things as their choices in living location, friends, and spouses, and their willingness to trade votes on adultery for votes on tax policy in political logrolling. A common traditional position is that people should care about a society's virtue. A common modern position is that they should

⁸ I have expanded on this point in Eric Rasmusen, "Of Sex and Drugs and Rock'n Roll: Law and Economics and Social Regulation," 21 *Harv. J. L. & Public Policy* 71-81 (1997).

⁹ The puzzle of undetected misbehavior's harm does arise again here. If the Husband is unfaithful and the Wife knows, but the public does not, is the public hurt? If not, then sanctions on the Wife for making the misconduct public might be appropriate. The same issue arises in cases of cruelty to animals; if the only harm was unhappiness from known cruelty, the logical solution is to make secret animal torture legal, with penalties for anyone who tries to bring it to public attention.

not--- that people should not interfere in the private lives of others.¹⁰ The present paper adopts a neutral position, in accordance with the economist's usual pluralistic procedure of taking tastes as given.

3. PENALTIES

3A. FEATURES OF PENALTIES

Having established that efficiency requires some sort of penalty for adultery, let us consider the possibilities. A number of choices need to be made.

(a) Who initiates punishment?

Someone has authority to make the decision to initiate the formal process. In a tort lawsuit, this is the plaintiff; in a criminal prosecution it is the grand jury or prosecutor.

(b) Is the penalty a fine, or does it destroy real resources?

¹⁰ John Stuart Mill is an older proponent of this view, which is a major theme of *On Liberty*. He makes clear what modern legal treatments often do not, that he disapproves even of social disapproval of vice, much less of legal penalties. To be consistent, advocates of this view might wish to turn self-help on its head and make illegal behavior that is ordinarily legal, if it is done from bad motives. Landlords in the United States are forbidden to deny rental to a tenant because of his race, even though they are free to deny rental to him for other reasons. In the case of adultery, a regime that believed sexual behavior to be within a person's sphere of privacy should penalize the Wife if she tried to punish the Husband by what were ordinarily legal means—leaving him, refusing to cooperate in household finances or legal matters, and so forth.

The penalty might be a money transfer, involving no real resources, or it might be a penalty such as confinement that hurts the Husband without benefiting someone else by the same amount.

(c) *Who gets the fine or pays for inflicting the real-resource penalty?*

If a fine is paid, someone receives the fine and benefits from the punishment. If the penalty destroys real resources, someone must pay for that destruction, and bear a cost.

(d) *Is the penalty determined before the offense, or afterwards?*

The penalty can be set ex ante, before the harm occurs, or ex post, once the damage is measured. This is the difference between liquidated and compensatory damages in contract and the difference between fixed and discretionary sentencing in criminal law. Ex ante penalties help the Husband make a more informed decision and are cheaper to implement, but they may be far from the damage in a particular case.

(e) *Can the wife alienate her rights, waiving the penalty?*

It may be that the Wife can (i) stop the penalty from being imposed, or (ii) agree in advance to do stop the penalty from being imposed. If the Wife initiates the penalty process, she certainly can stop the penalty from being imposed, simply by inaction. It is a different matter, however, for her to be able to make a binding agreement to stop the penalty, something she may wish to do in exchange for concessions from the Husband. Also, even if the Wife does not have the ability to initiate the

penalty process, it may be that she can stop it—by being given the authority to veto criminal prosecutions, for example.

(f) *Who is punished—the Husband or the Other Woman, or both?*

The penalty could be imposed on either or both of the two adulterers.

An adultery law could be constructed using any combination of these features. Since there are six of them, each with at least two alternatives, there are at least 64 types of law (two to the sixth power). Here, we will discuss just three representative laws: civil damages, criminal penalties, and self help.

3B. CIVIL DAMAGES

Civil Damages. The Wife initiates punishment of a fine, which is paid to the wife and is variable depending on the amount of damage. The Wife can alienate her right to initiate punishment, and it is the Other Woman who is punished.

Tort and contract law exist to provide recourse for private injuries, when one person inflicts damage on another. It would seem well suited to adultery: the Husband has breached his agreement with the Wife, and the Other Woman cooperated in his breach and took actions which harmed the Wife. The situation has elements of breach of contract, tortious interference with contract, and

intentional tort. In the context of the model, one form of tort liability would be for the Other Woman to be liable to the Wife for compensatory damages, amount $B+C$. Let us assume that the Husband and the Other Woman can agree to cooperate in paying the penalty and other costs of adultery, and, for the moment put aside the possibility of the Wife alienating her right to sue. The Wife might monitor either less or more than she would if tort damages were not available, depending on the function $\mathbf{a}(X_{wife}, X_{husband})$. On the one hand, the possibility of compensation means that adultery causes her less harm on net. If the detection probability $\mathbf{a}(X_{wife}, X_{husband})$ is relatively unresponsive to X_{wife} the Wife's main reason to monitor would be to raise the cost to the Husband of finding the Other Woman enough to forestall adultery, but that reason disappears if she is fully compensated. On the other hand, if adultery does occur and she detects it, she can collect damages. In either case, the Wife is more likely to invest in the marriage, because the Other Woman's liability reduces the loss to the Wife from investment followed by adultery.

One advantage of civil actions when the Wife can alienate her right to sue by agreeing to a settlement, or waiving her right in advance of the adultery is that if the Husband and Other Woman benefit more from adultery than the Wife loses, they will make a deal. The Wife would sell her right to sue, and all parties would save on the transaction costs of detecting or concealing the adultery. This is a disadvantage, however, if spillovers on outside parties are large, since they are not part of the deal; in the example earlier, the Husband and Other Woman would be willing to pay the Wife \$61,000 for her permission, but that does nothing to compensate for the \$100,000 loss to outsiders.

A key practical disadvantage of civil damages is that the defendant may be judgement-proof. If the Other Woman cannot afford to pay damages, the Wife's right to sue is irrelevant. Since many, perhaps most, people lack the wealth to pay damages substantial enough to compensate for a wrecked marriage, or perhaps even for the cost to the Wife of hiring a lawyer, civil suits may disappear as an effective penalty altogether. This is a standard economic argument for why civil suits and fines are not used for the various misbehaviors we call criminal (see section 7.2 of Richard Posner, *Economic Analysis of Law*, 4th edition, Boston: Little, Brown (1992)). A problem special to adultery is that the Husband and Wife are financially interdependent. Even if the Other Woman paid the entire penalty, much of its deterrent effect would be nullified if the Husband, as part of the household, were to receive half the penalty. Or, if the Husband aids the Other Woman in paying the judgement, the household ends up paying damages to itself.

Another general disadvantage of civil suits is the cost of determining the size of the damage. If the plaintiff gives 1/3 of his judgement to compensate his lawyer, the defendant spends about the same amount, and there is a competitive market for lawyers, then it must be that the cost of establishing and measuring liability is about 2/3 of the size of the damage itself. It is not necessary that civil judgements be variable, of course. They could be fixed, like workmen's compensation for the loss of a particular body part. The problem would then arise of plaintiffs choosing to sue even if

the true damages are small, knowing that the court has committed itself to positive error in the damage award.¹¹

3B. CRIMINAL PENALTIES

Criminal Penalties. The state initiates punishment in the form of a real penalty, whose cost is paid by the state. The penalty is fixed, independent of the damage. The Wife can block the punishment and can alienate her right to do so, and both Husband and Other Woman are punished.

Criminal law is used for penalties for many kinds of intentional injuries. Punitive damages are used for the same purpose in civil suits, but punitive damages are never fixed ex ante and the person injured initiates the penalty process and receives its benefit. Criminal law is often used for injuries whose main damage is not economic, such as assault and rape, which are crimes even if the physical damage is slight or nonexistent, which points towards possible appropriateness for adultery too.

One form of the law laid out above would be for adultery to be prosecuted at the discretion of the county prosecutor on complaint by the Wife, with a sentence of five years in the state prison. If this sentence is long enough, the Husband would be deterred even if the Wife did not exert special effort to monitor him and the Other Woman were willing to compensate him up to her own benefit

¹¹ See Eric Rasmusen, "Predictable and Unpredictable Error in Tort Awards: The Effect of Plaintiff Self

from adultery. This achieves the efficient outcome: the Wife can safely invest in the marriage, and neither she nor the Husband incurs transaction costs.

Alienability becomes relevant if the adultery is efficient from the point of view of the three parties. Unless the wife's right to veto prosecution is alienable, if the criminal penalty is large adultery will not occur even if it is efficient. If it is alienable, however, then no harm results even if the state has set the penalty extremely high. The penalty will not be imposed anyway, because the Wife will veto it in exchange for compensation, and the penalty serves only as the starting point for bargaining between her and the Husband.¹²

Alienability does have two disadvantages. First, if there are externalities to the public, these will be ignored by the Wife when she accepts payment from the Husband and Other Woman to tolerate the adultery. This problem shows up in many areas of criminal law. Victims prefer to free the criminal to commit crimes against others rather than forego extracting concessions from him; an employer, for example, would rather be reimbursed for embezzlement than stop his criminal employee stealing from a future employer. The second disadvantage is that alienability prevents strategic precommitment. The penalty is likely to be costly to the Wife as well as the Husband, because of public shame or loss of the Husband's earning power. Thus, she might veto prosecution

Selection and Signalling," *International Review of Law and Economics*, 15: 323-345 (September 1995).

¹² This perhaps helps explain why adultery prosecutions have never been common, despite the prevalence of adultery laws. The law may be important, but only as a threat the injured spouse could wield to extract concessions from the adulterous spouse. To the extent that the law served this purpose, its penalties would not need to be imposed.

because it hurts the household. She might actually benefit from not being allowed to veto prosecution because then the threat of punishment becomes credible and the Husband would be deterred. This paradox is not merely theoretical; it is the justification for the “zero-tolerance” rules that have become common for spousal assault.¹³ In many jurisdictions, if a wife calls the police for help when her husband hits her, if the police decide that he has indeed hit her, the criminal process will proceed even if the wife objects.

The 1962 Model Penal Code, proposed by the American Law Institute and a strong influence on state criminal codes, deliberately decriminalized adultery, saying, "private immorality should be beyond the reach of the penal law". Its primary reasons are that adultery laws were rarely enforced anyway, that it would be costly to enforce them, and that there is no reason to make something illegal "simply because such behavior is widely thought to be immoral." The ALI recognized that adultery laws are popular with voters and that the crime is not a victimless one, but regarded these as unimportant points.¹⁴

Non-enforcement is a red herring. Many crimes exist which are rarely prosecuted. A notorious example is the Federal Brady Bill, which makes attempts by felons to buy guns illegal. This is much easier to prosecute than adultery, since the government has in its hands written evidence that

¹³ "Domestic Abuse Bills Gain Momentum in Legislatures," *The National Law Journal*, Rorie Sherman, , p. A9 (4 July 1994).

¹⁴ *Model Penal Code and Commentaries*, Philadelphia: American Law Institute, 1980, Part II, Article 213, "Note on Adultery and Fornication".

the felon broke the law. Yet in the two years or so of its existence, the government claimed to detect some 186,000 violations, of which it chose to prosecute just 7, about 1 in 20,000.¹⁵ Even such an uncontroversial crime as burglary is rarely prosecuted. In 1994, only about 1.4 percent of burglaries in the United States led to conviction and 0.8 percent to incarceration.¹⁶ My impression is that the real problem for the American Law Institute is that its members do not think adultery is really immoral, since they offer no grounds to differentiate adultery from other crimes, and they put no weight on popular taste when it differs from their own. The ALI certainly did not consider the spillover argument explained in the present article, which is in keeping with the general disdain for retribution by intellectuals of the 1950's.

3C. SELF HELP

Self Help. The Wife initiates punishment, a real penalty whose cost she pays and which is variable in magnitude. The Wife can alienate her right to inflict punishment and she can punish both the Husband and the Other Woman.

¹⁵ 7 prosecutions in 17 months: "Implementation of the Brady Handgun Violence Prevention Act," Report to the Committee on the Judiciary, U.S. Senate, and the Committee on the Judiciary, U.S. House of Representatives, GAO/GGD-96-22 Gun Control, January 1996. 186,000 illegal acts in the first 28 months: "Gun-Control Laws Scrutinized After Empire State Shooting," Ron Scherer, *The Christian Science Monitor*, February 27, 1997, p.3.

“Self help” refers to a private person being allowed to take actions which the state ordinarily prohibits.¹⁷ Ordinarily, one person cannot take away another person's furniture and sell it. A creditor, however, is allowed do just that. In the case of adultery, self help consists of the Wife being allowed to punish the adulterous Husband by actions that would ordinarily be illegal— by dissipating assets, leaving with the children, refusing to help support him financially, assaulting him, or even murder. The law can do this formally, by statute or case law, or informally, by non-prosecution or jury nullification. The right is alienable if the Wife loses her defense for the criminal act and is prosecuted as a normal defendant if it is shown that she agreed to the adultery.

Self help combines features of tort and criminal law. Like tort law, it is initiated by the offended party and the penalty is variable. Like criminal law, the penalty is a real cost. Self help can be seen as privatized criminal law. The Wife, not the State, initiates the punishment and bears its cost, but she is allowed to use violence, something the State ordinarily monopolizes.

Self help has both advantages and disadvantages. An advantage is low transactions costs. Although it does not completely eliminate government costs, since the government still must

¹⁶ Patrick Langan and David Farrington, Bureau of Justice Statistics, Crime and Justice in the United States and in England and Wales, 1981-96, October 1998, NCJ 169284, pages 19 and 29. In England, 0.6 percent of burglaries lead to conviction and 0.2 percent-- 1 in 500-- to incarceration.

¹⁷ More narrowly, self help is used to refer to a private person being allowed to immediately take an action that otherwise requires going through a legal process, e.g., to repossess an automobile used as collateral without waiting

determine whether self help was justified, clear cases will avoid lawyers and courts altogether, and penalties can be variable without the need for a government factfinder to evaluate damage. Moreover, if the imposition cost is increasing in the size of the penalty, and the Wife's satisfaction from a greater penalty increases with the emotional damage of the adultery to her, then she will choose to inflict a larger penalty if the damage is greater. A Wife who did not really care about adultery would not bother even scolding the Husband; a Wife who did care might kill him. This contrasts with civil damages, which have the disadvantage that even an indifferent Wife would pretend to be hurt in order to collect the damages.

Self help also has disadvantages. If people are systematically mistaken, and more mistaken than courts when evaluating whether their spouses are adulterous, self help will move the amount of punishment further from the optimum. It puts the cost of mistakes and the cost of inflicting punishment on the victims, who may be ill-prepared to bear those costs. It has real costs, unlike civil damages. And self help, like civil suits and alienable criminal penalties, takes no account of spillovers on the public.

4. ADULTERY LAW IN PRACTICE

for a court's order. I use the term to refer generally to taking actions that except for the special circumstances are illegal.

As one might expect when efficiency calls for a law, diverse nations and times have provided legal sanctions for adultery, from the Bible's "Thou shalt not commit adultery" up to the present day United States.¹⁸ Describing the law in any particular time and place is difficult because much of it has been unwritten, being embodied in prosecutorial policy, the attitude of juries, and the degree of self help tolerated. Even more than in most areas of the law, published cases are an unreliable guide to what actually happens, since the especially shameful nature of the offense makes quiet resolution attractive. What I have done below line with Richard Posner and Richard Epstein's good advice that theorizing in the complete absence of real-world examples is risky is to choose a sampling from statutes and published opinions of the state of Indiana with some mention of other jurisdictions, to illustrate the taxonomy I have laid out above.¹⁹

4A CIVIL DAMAGES

¹⁸ The commandment is Exodus 20:14: "Thou shalt not commit adultery," with specifics in Leviticus 20:10: "And the man that committeth adultery with another man's wife, even he that committeth adultery with his neighbour's wife, the adulterer and the adulteress shall surely be put to death." Note that if the penalty was alienable, we would expect it to usually have been replaced by transfer of goods. Chapter 8 of Posner and Silbaugh's 1996 book is the best place to look for modern American laws relating to adultery. See also Melissa Haggard, "Note: Adultery: A Comparison of Military Law and State Law and the Controversy this Causes Under our Constitution and Criminal Justice System," *Brandeis Law Journal*, 37: 469, (Spring 1998-1999); and Jeremy Weinstein, "Note: Adultery, Law, and the State: A History," *Hastings Law Journal* 38: 195 (November 1986).

¹⁹ Richard Posner, *The Problematics of Moral and Legal Theory*, Chapter 2: Legal Theory, Moral Themes. Harvard University Press, 1999. Richard Epstein, "Life Boats, Desert Islands, and the Poverty of Jurisprudence," 68 *Miss. L.J.* 861-885 (Spring 1999).

The English common law's formal remedy for adultery was a civil action for damages.

Blackstone says,

"Adultery, or criminal conversation with a man's wife, though it is, as a public crime, left by our laws to the coercion of the spiritual courts; yet, considered as a civil injury (and surely there can be no greater,) the law gives a satisfaction to the husband for it by action of trespass *vi et armis* against the adulterer, wherein the damages recovered are usually very large and exemplary. But these are properly increased or diminished by circumstances; as the rank and fortune of the plaintiff and defendant; the relation or connection between them; the seduction or otherwise of the wife, founded on her previous behavior and character; and the husband's obligation by settlement or otherwise to provide for those children, which he cannot but suspect to be spurious."²⁰

The common law has used two different causes of action for adultery: "alienation of affections" and "criminal conversation". *The Second Restatement of Torts* (1977) describes them as follows:

@ 683 ALIENATION OF SPOUSE'S AFFECTIONS

One who purposely alienates one spouse's affections from the other spouse is subject to liability for the harm thus caused to any of the other spouse's legally protected marital interests.

²⁰ Book 3, Chapter 8 of Blackstone's *Commentaries*,. See also Book 4, Chapter 34, where he discusses adultery in the context of criminal law. Blackstone is somewhat misleading, because the caveat about the spiritual courts is crucial. Until their jurisdiction was limited in 1640, these courts actively prosecuted adultery, imposing severe fines and jailing for nonpayment. See James Stephen, *A History of the Criminal Law of England*, Volume 2, Chapter 25 (1883). It is noteworthy that Macaulay's Indian Penal Code of 1860 made adultery a major crime, prosecutable only at the husband's request, even though England rejected domestic criminalization in 1858.

@ 685 CRIMINAL CONVERSATION WITH A SPOUSE

One who has sexual intercourse with one spouse is subject to liability to the other spouse for the harm thus caused to any of the other spouse's legally protected marital interests.

The elements of the two actions are different. The wrong in alienation of affections is foreseeable damage to the relationship between husband and wife, which requires that the marriage not have been in ruins before the outsider interfered.²¹ On the other hand, the action does not require adultery, and even an interfering mother-in-law can be liable for breaking up a marriage.²² Criminal conversation, on the other hand, is an unintentional tort with strict liability. The third party is liable even if he did not know that the adulterous spouse was married.²³ A single act is sufficient (though perhaps with small damages), but a physical act is necessary.

Macaulay was perhaps enough of a utilitarian to recognize the spillover problem; Section 298 of his code also criminalized deliberate insults against someone's religion. Stephen, Volume 3, Chapter 33.

²¹ Comment h to @ 683: "Not only must the actor have caused a diminution of one spouse's affections for the other by acts, but the acts must have been done for the very purpose of accomplishing this result."

²² For such a case, see *Beem v. Beem* 193 Ind. 481; 141 N.E. 81(1923). This case also illustrates the requirement of malice. The Indiana Supreme Court approves of the following jury instruction requested by the defense but rejected by the trial judge (at 489, italics from original): "... were they [*the defendant parents*] impelled by a spirit of malice and ill will toward said plaintiff or were they acting in good faith and without malice and what they considered for the best interest of said Bruce. If the latter, your verdict should be for the defendants." Note, however, that an adulterous third party can rarely assert the defense that his motives in breaking up the marriage were disinterested.

²³ Comment f. to @685: "Although knowledge or belief that a person is married is essential to liability for alienation of affections under the rule stated in @ 683, neither knowledge nor belief is necessary to liability under the rule stated in this Section. One who has sexual relations with a married person takes the risk that he or she is married to another. The fact that the spouse misrepresents the marital status is not a defense."

Indiana abolished both of these in 1935, in "An Act to promote public morals, by abolishing civil causes of action for breach of promise to marry, alienation of affections . . ."²⁴ In 1999 Indiana Code § 34-12-2-1a still specifically prohibits those causes of action, along with breach of promise and seduction. The prohibition was tested in 1937 when a suit against obnoxious in-laws argued that since Article 1, Section 12 of the Indiana Constitution said, "every man, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. . . .," the abolition of alienation of affections was unconstitutional. The Indiana Supreme Court disagreed in *Pennington v. Stewart*, 212 Ind. 553;554; 10 N.E.2d 619 (1937), saying that neither person, property, nor reputation were hurt and that marriage was a matter not of contract or property but of a status that falls under the regulatory power of the state.²⁵

Alienation of affections has gone out of style as a tort, an exception to the general increase of tort liability in the United States.²⁶ Oddly enough, the similar action of tortious interference with contract is alive and well.²⁷ The *Restatement* says:

²⁴ As cited in *Pennington v. Stewart*, 212 Ind. 553;554; 10 N.E.2d 619 (1937).

²⁵ That marriage is not a contract is a common finding in American courts. A more recent example is *In re the Marriage of Franks*, 189 Colo 499, 542 P.2d 845 (1975) (en banc) which rejected the argument that a no-fault divorce law violated the contracts clause of the state constitution when it nullified existing marriage contracts. The *Pennington* Court did rule unconstitutional a provision of the 1935 act which made the plaintiff liable to a criminal penalty of from one to five years of prison for even trying to bring an action for alienation of affections.

²⁶ Like Indiana, many states abolished alienation of affections in the 1930's, and the topic was actively discussed in law reviews then. See Weinstein at 220. England abolished criminal conversation by Stat. 20 & 21 Vict. ch. 85, sched. 59 (1857) and enticement by Law Reform (Miscellaneous Provisions) Act 1970, sched. 5. Two states in which the tort is still alive are Illinois and North Carolina. "Alienated-affections case ends in \$ 11,667 verdict," *Chicago Daily Law Bulletin*, Carol Sander, p. 3 (28 July 1997); "Personal Negligence: Alienation of Affection 90,001 Verdict: Emotional Distress," *Personal Injury Verdict Reviews*, 7: 22 (24 November 1999).

@ 766 INTENTIONAL INTERFERENCE WITH PERFORMANCE OF CONTRACT BY THIRD PERSON

One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

Note the exception for marriage. As in so many areas of the law, marital agreements receive substantially less protection than commercial agreements. Whether a prenuptial agreement executed as a commercial contract would expose a third party to liability for tortious interference is an interesting question not yet tested in any court, to my knowledge.

4b CRIMINAL PENALTIES

Until 1976, Indiana made adultery a crime, as some states still do,²⁸ but in that year the law was repealed.²⁹ The pre-1976 law did not criminalize adultery *per se*. Rather, as the Indiana

²⁷ Tortious interference has received considerable attention from law-and-economics scholars. See William Landes & Richard Posner "Joint and Multiple Tortfeasors: An Economic Analysis," 9 *J. Legal Stud.* 517 (1980). Lillian BeVier "Reconsidering Inducement," 76 *Virginia Law Review* 877 (1990). Fred McChesney, "Tortious Interference with Contract versus "Efficient" Breach: Theory and Empirical Evidence," 28 *Journal of Legal Studies* 131 (January 1999).

²⁸ Footnote 4 of Melissa Haggard, "Note: Adultery: A Comparison of Military Law and State Law and the Controversy this Causes Under our Constitution and Criminal Justice System," *Brandeis Law Journal*, 37: 469, (Spring 1998-1999) gives cites for 24 state laws against adultery in 1998. In New York, Virginia, North Dakota, and Utah only the married adulterer is liable (Haggard, at 474). See also Richard Posner & Katharine Silbaugh, *A Guide to America's Sex Laws*, Chicago: University of Chicago Press (1996). In Minnesota and North Dakota, the injured

Supreme Court put it in *Warner v. State*, 202 Ind. 479; 483; 175 N.E. 661(1931), “The offenses prohibited by the statute here involved (although sometimes inaccurately referred to as "adultery" and "fornication") are cohabiting with another in a state of adultery or fornication.... The design of this law is not to affix a penalty for the violation of the Seventh Commandment, but to punish those who, without lawful marriage, live together in the manner of husband and wife.” Occasional, or even frequent acts of adultery were not criminal by themselves; “cohabitation” was an essential element of the crime.

What this suggests is that the criminalization of adultery was aimed not so much at protection of the victimized spouse (who had, until 1935, civil damages and divorce-for-fault available) but at protecting the public from the consequences of open and notorious adultery. Whether the ill consequences of public immorality was thought to be direct offense to the feelings of the public or a tendency to corrupt others is unclear, but damage to the non-adulterous spouse was not the main concern. If public feeling in Indiana changed by 1976, then it is quite possible that the criminalization of open adultery was efficient earlier but became inefficient due to social change.³⁰

spouse is explicitly authorized to block prosecution Minn. Stat. Ann. 609.36; N.D. Cent. Code 12.1-20-09 (1997). Adultery is still actively prosecuted in the U.S. military. See *United States v. Green*, 39 M.J. 606 (A.C.M.R. 1994). It is also subject to federal law in the White-Slave Traffic (Mann) Act, ch. 395, 36 Stat. 825 (1910), *Caminetti v. United States*, 242 U.S. 470 (1916), *Whitt v United States* (1959, CA6 Ky) 261 F2d 907.

²⁹ Indiana Code “§§ 35-1-82-1-- 35-1-82-3. [Repealed.] COMPILER'S NOTES. This chapter, concerning incest, cohabitation, and seduction, was repealed by Acts 1976, P.L. 148, § 24.” Curiously, Indiana Code § 34-15-5-1, on slander, still says, “Every charge of incest, homosexuality, bestiality, fornication, adultery, or whoredom falsely made against any person is actionable in the same manner as in the case of slanderous words charging a felony.”

³⁰ A separate question is whether criminal (or other) laws against adultery somehow violate the state or Federal constitution. At the Federal level, various opinions have said in dicta that adultery is a legitimate subject for criminal law, but one never knows what the Supreme Court will do in the future. *Poe v. Ullman*, 367 U.S. 497, 546, 552 (1961)

Other kinds of penalties might also be best classified under “criminal penalties,” even though they do not require proof beyond a reasonable doubt or indictment: various legal disabilities created by commission of adultery. I have only been able to find one such disability currently in force in Indiana: elimination of any claim by an active and continual adulterer and deserter to the estate of an intestate spouse.³¹ In the past, other disabilities have also existed, particularly in connection with divorce. Before Indiana adopted no-fault divorce in 1971, adultery could be considered in division of property, as well as being one of the grounds that made divorce available in the first place.³² Moreover, under an “unclean hands” statute which codified earlier case law, a spouse’s adultery barred filing for divorce on the grounds of the other spouses’ adultery.³³

(Harlan, J. dissenting): “[L]aws forbidding adultery, fornication, and homosexual practices . . . form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis....I would not suggest that adultery, homosexuality, fornication and incest are immune from criminal enquiry, however privately practiced.” *Griswold v. Connecticut*, 381 U.S. 479, 498 (1965) (Goldberg, J., concurring): “The State of Connecticut does have statutes, the constitutionality of which is beyond doubt, which prohibit adultery and fornication.” *Bowers v. Hardwick*, 478 U.S. 186, 208 (1986): “[a] State might define the contractual commitment necessary to become eligible for [marital] benefits to include a commitment of fidelity and then punish individuals for breaching that contract.”

³¹ Indiana Code § 29-1-2-14 says, “If either a husband or wife shall have left the other and shall be living at the time of his or her death in adultery, he or she as the case may be shall take no part of the estate of the deceased husband or wife.” This came up in reported cases as recently as the early 1990’s: *Oliver v. Estate of Oliver*, 554 N.E.2d. 8 (1990 Ind. App. 1st) and *Estate of Calcutt v. Calcutt*, 6 N.E.2d 1288 (1991 Ind. App. 5th).

³² As discussed in *Clark v. Clark*, 578 N.E.2d 747 (1991 Ind. App. 4th). The opinion starkly tells Mrs. Clark the current state of the law, at 750, “Wife also argues when it awarded attorney fees and litigation expenses, the trial court failed to consider that husband had taken another woman, that wife had not wanted the separation, and that it was solely husband’s idea. Wife is wrong. The court may not consider such matters when dividing property in a dissolution of marriage action.”

³³ *O’Connor v. O’Connor*, 253 Ind. 295; 307 (1968) quotes the Indiana Code as saying § 3-1202 that “Divorces shall not be granted for adultery in any of the following cases:... Third. When the party seeking the divorce has also been guilty of adultery under such circumstances as would have entitled the opposite party, if innocent, to a decree,” and notes that “The statute was originally passed in 1873 (Acts 1873, ch. 43, § 9, p. 107) but the doctrine had already been recognized by case law.”

4C SELF HELP

Adultery being grounds for divorce creates a penalty similar to self help in the sense that adultery provides an excuse for the innocent spouse to do something that would otherwise be illegal: to unilaterally terminate the marriage. Such a divorce is not self help in its purest form, however, because it still requires petition to the courts. The innocent spouse cannot simply behave as if unmarried (for example, marrying someone else) and then plead the other spouse's adultery as an excuse when later prosecuted or sued. Self help proper consists of imposing a penalty without the aid of the courts but with their acquiescence when the penalty would be an illegal act except for the justification of adultery. The most dramatic form is for adultery to be a legal justification for killing someone.³⁴ Indiana has never formally allowed this, although whether juries would convict a wronged spouse for murder is uncertain. Their reluctance to do so is known as the "unwritten law," which is pervasive enough across time and cultures to make the relevance of written laws suspect.³⁵

³⁴ Texas, Utah, New Mexico, and Georgia all allowed adultery as an excuse for killing up until the 1970's, Georgia by judicial interpretation and the other states by statute. See Weinstein at 232. Interestingly, Texas did not allow castration to replace killing: *Sensobaugh v. State* 92 Tex. Crim. 417 (1922). The first Georgia case on point makes an interesting argument from jury nullification and democratic common law: "Has an American jury ever convicted a husband or father of murder or manslaughter, for killing the seducer of his wife or daughter? And with this exceedingly broad and comprehensive enactment on our statute book, is it just to juries to brand them with perjury for rendering such verdicts in this State? Is it not their right to determine whether, in reason or justice, it is not as justifiable in the sight of Heaven and earth, to slay the murderer of the peace and respectability of a family, as one who forcibly attacks habitation and property?" *Biggs v. State*, 29 Ga. 723, 728 (1860).

³⁵ Three notorious examples from the United States are: (a) the 1994 sentencing of husband Keith Peacock to just 18 months of imprisonment on work-release by a sympathetic judge ("She Strays, He Shoots, Judge Winks," *New York*

Jury instructions from Indiana judges, however, would be to convict, as the case law amply shows. Adultery of the dead spouse can reduce the charge from murder to manslaughter, but cannot excuse the killing altogether, and the killing must have occurred immediately on discovery of the adultery for the charge to be reduced at all.

“The mere fact that one person had sexual intercourse with another person's wife will not justify the taking of human life. Proof of this fact alone will be no defense in a prosecution for criminal homicide. The most it can do is, in certain cases, to reduce the grade of the crime from murder to manslaughter. If a man finds another in the act of sexual intercourse with his wife and kills him in a heat and transport of passion engendered thereby, the crime will be manslaughter only.” (*Thrawley v. State*, 153 Ind. 375; 378; 55 N.E. 95 [1899])

Indeed, a plausible interpretation of this doctrine is that Indiana is not granting the killer a discount from his prison sentence because he was engaged in self help, but that murderous passion is so typical of people who discover adultery that it is a waste of time to debate whether such a person has the state of mind that ordinarily qualifies a killing as manslaughter instead of murder.

Similarly, adultery has generally not been considered sufficient provocation to justify battery, and courts have held that the victims of such battery are legally entitled to damages, including

Times, p. A22 [22 October 1994]); (b) Lorena Bobbitt's acquittal for mutilating her husband ("Lorena Bobbitt Acquitted In Mutilation of Husband," *New York Times*, David Margolick, p. 1 [Jan. 22, 1994]); and (c) the acquittal of Congressman Daniel Sickles for murder of his wife's lover after a defense by attorney Edwin Stanton, later U.S. Attorney General and Secretary of War ("It Didn't Start With O.J.; Like the Simpson Saga, the 1859 Murder Trial of Dan Sickles Grippled the Nation," *The Washington Post*, Daniel Rezneck, p.C5 [24 July 1994]).

punitive damages. This means that even if the prosecutor uses his discretion not to bring criminal charges against the angry spouse, the adulterous third party may sue on his own behalf. Whether the jury will be sympathetic, is again questionable.³⁶

Self help also comes up in less dramatic forms than murder and mayhem. One is for the injured spouse to be exempt from what would otherwise be marital duties. The Indiana statutes of 1933 said,

"Whosoever deserts his wife, except for the cause of adultery or other vicious or immoral conduct, leaving her without reasonable means of support and continuing support, or whoever deserts his or her child or children and leaves them, or any of them, without reasonable means of support and continuing support, or a charge upon any county or township of this state, shall be deemed guilty of a felony, and, upon conviction thereof, shall be imprisoned in the state prison not less than one year nor more than three years, and be disfranchised and rendered incapable of holding any office of trust or profit for a period of three years."³⁷

This is interesting not only for its disqualification of deadbeat dads as elected officials but for the extent of its excuse of marital duties. Not only may a man refuse to support his adulterous wife in

³⁶ Two cases show what can happen. *Hamilton v Howard* (1930) 234 Ky 321 involved appeal from erroneous jury instructions by a trial judge that if the plaintiff victim of three gunshots in the legs had attempted to alienate the affections of the defendant's wife, defendant would not be liable. The appeals court reversed and remanded, but noted that the jury could take provocation into account in setting punitive damages, which were the bulk of the claim. *Chykirda v Yanush* (1945) 131 Conn 565 was an appeal from an award of \$72 to a supposed alienator of affections who was the target of battery. The jury said the \$72 included both compensatory and punitive damages, and the appellate court ruled that the jury was justified in considering provocation in the setting of the punitive damages.

the style to which she is accustomed; he may abandon her and their children entirely, to the extent that they must live on public charity. It is a clear example of self help, and of one of the difficulties mentioned earlier in this paper: even if the husband were free to hurt the adulterous one, he might find it painful. The law allowed a man to impoverish his children, no doubt to the unhappiness of his wife, but this hurts the punisher as much as the punished--at least if they really are his children.³⁸

Thus, currently, Indiana law has almost no penalties for adultery, but in the past it has used tort law, criminal law, and self help, in different ways and perhaps to achieve different objectives. Tort law has deterrent and compensatory effects for the wealthy; the self-help remedy of reduced penalties for wronged spouses provides deterrence for the judgement-proof, and criminal law prevents open adultery from offending public feelings and corrupting public manners. The most important penalty may have been adultery as grounds for divorce and in the terms of divorce, a mixed penalty which, like a criminal penalty is not proportionate to damage, but which, like a civil penalty, is imposed at the initiative of the injured spouse and to his or her benefit.

5. CONCLUDING REMARKS

³⁷ *Crumley v. State*, 204 Ind. 396; 399; 184 N.E. 533 (1933), citing "Section 2866 Burns 1926, Acts 1913, p. 956, ch. 358, § 1."

³⁸ If the husband's paternity was a legal presumption in Indiana at that time, one purpose of the desertion statute might have been to amend that presumption for practical purposes.

It is important to have some legal remedy for adultery. Civil damages, criminal law, and self help all have their advantages and disadvantages. The law need not restrict itself to one of these, and traditionally has used all three. This article has laid out a theoretical framework for thinking about adultery law, but which laws are best depends heavily on empirical magnitudes such as the strength of public offense, the size of damage to injured spouses, and the assets available for paying judgements. One policy which is clearly beneficial from the point of view of wealth maximization, however, is to allow people to opt into adultery penalties via prenuptial agreements. The law could allow people to opt into tort, criminal, or self-help penalties as they are now free to opt into certain kinds of financial arrangements. This would require specific statutes for criminal and self-help penalties, since they are not standardly available as penalties for breach of contract. For civil damages, it would merely require dependable government enforcement of contracts, though statutory clarification that such contracts would be enforced would help. The argument is the same as for contract enforceability in general: it permits a disjunction of mutual performances and encourages reliance on future performance.³⁹ Some contracts, such as those for price-fixing or murder-for hire, have negative spillovers onto third parties and should not be enforced, but if spillovers are nonexistent or positive, court enforcement is a public good. Whether the law should go

³⁹ For detailed discussion see Lloyd Cohen, "Marriage, Divorce, and Quasi Rents; Or, "I Gave Him the Best Years of My Life", "16 *Journal of Legal Studies*, 267 (1987).; Eric Rasmusen & Jeffrey Stake, "Lifting the Veil of Ignorance: Personalizing the Marriage Contract," *Indiana Law Journal*, 73: 454-502 (Spring 1998); and Jeffrey Stake, "Mandatory Planning for Divorce," 45 *Vanderbilt Law Review* 397 (1992). On the confused current state of the law on enforcing these agreements, see also Laura Graham, "The Uniform Premarital Agreement Act and Modern Social Policy: The Enforceability of Premarital Agreements Regulating the Ongoing Marriage," *Wake Forest Law Review*, 28:1037 (1993); and Theodore Haas, "The Rationality and Enforceability of Contractual Restrictions on Divorce," 66 *North Carolina Law Review* 879 (1988).

beyond this, and include penalties for adultery as the default for every marriage contract or even require marriage to include them, is a more difficult matter, depending on the size of spillovers.

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