

AVATARS, SCARLET “A”S, AND ADULTERY IN THE TECHNOLOGICAL AGE

Sandi S. Varnado*

As the law struggles to keep pace with technology, this Article addresses a relatively new and quickly escalating twist on the age-old problem of adultery—namely, online infidelity—and questions whether victim spouses should be allowed to secure a fault-based divorce. The Article surveys the current and predicted future opportunities for online sexual gratification and provides an overview of the history of divorce and adultery and the legal effects of fault-based divorce. It goes on to examine the current law of adultery and questions whether that law should be expanded to include online infidelity. The Article considers the evolution of marriage and infidelity, acknowledging that infidelity and adultery are not interchangeable terms. Thus, after establishing that online infidelity is infidelity, it considers whether this particular form of infidelity should be equated with adultery. Finally, the Article concludes that the definition of adultery should be extended to capture certain forms of online infidelity and offers a proposal for legislators and decision-makers.

* Assistant Professor of Law, Loyola University New Orleans College of Law. I would like to thank Loyola University New Orleans College of Law for the research grant to support the writing of this Article. I would also like to thank several people who read and commented constructively on earlier drafts of this Article: Hillary Allen, Andrea Armstrong, John Blevins, Carolyn Buckley, William R. Corbett, Aaron Hurd, Johanna Kalb, Marc Mandich, Jessica Pizzolato Sorrels, and Monica Wallace. Additionally, I would like to thank Hillary Barnett, Carolyn Buckley, Claire Noonan, Stephanie Riemer, and Jessica Pizzolato Sorrels for their excellent research assistance. Finally, I would like to thank Shaneil Strevia for her painstaking formatting and proofreading. An earlier draft of this Article was presented at the Southeastern Association of Law Schools New Scholars' Panel in Amelia Island, Florida, and at Marquette University Law School, as part of the Scholar Exchange Program between that institution and Loyola University New Orleans College of Law. The feedback and input I received at both events, particularly from my SEALS Mentor, Susan Frelich Appleton, was extremely valuable.

TABLE OF CONTENTS

TABLE OF CONTENTS	372
INTRODUCTION	372
I. CURRENT AND PREDICTED FUTURE OPPORTUNITIES FOR ONLINE SEXUAL GRATIFICATION	377
II. BACKGROUND: ADULTERY IN THE UNITED STATES	383
A. Brief History of Adultery	384
B. Legal Effects of Adultery	386
1. Effect of Adultery on the Timing of Divorce	387
2. Effect of Adultery on the Right to Spousal Support	388
3. Effect of Adultery on Marital Property Rights	390
4. Effect of Adultery on Child Custody Rights	391
III. THE CURRENT LAW OF ADULTERY IN FAULT-BASED DIVORCE JURISDICTIONS: DEFINITION AND DEFENSES	394
A. Marriage as a Societal Institution	394
B. Marriage as a Contract	396
IV. SHOULD THE CURRENT LAW OF ADULTERY BE EXPANDED?	399
A. The Evolution of Views on Marriage and Infidelity	400
B. Should Online Infidelity Constitute Adultery?	401
V. SOLUTION: ANALYTICAL FRAMEWORK TO INCLUDE SOME BUT NOT ALL ONLINE INFIDELITY AS ADULTERY	409
A. Medium of Online Infidelity	410
B. Sexual Activity	412
C. Frequency and Intensity of Online Infidelity	413
D. The Relationship Between the Spouse and the Online Partner(s)	414
E. Victim's Reaction to Spouse's Online Infidelity	415
CONCLUSION	415

INTRODUCTION

People have a love affair with the Internet, particularly with using it to communicate with others.¹ A December 2012 survey revealed that 81% of all adults in the United States use the Internet,² which has impacted American society in both positive and negative ways.³ One such hidden danger is the potential effect

1. Because laptops and smartphones have become so commonplace, the ability to communicate over the Internet has become increasingly more mobile. Such communication no longer requires that one be sitting in front of a computer.

2. *What Internet Users Do Online*, PEW INTERNET, <http://pewinternet.org/Static-Pages/Trend-Data-%28Adults%29/Online-Activites-Total.aspx> (last visited Apr. 8, 2013).

3. Marlene M. Maheu, *Women's Internet Behavior: Providing Psychotherapy Offline and Online for Cyber-Infidelity 2* (Aug. 1999) (paper presented at the 107th annual conference of the American Psychological Association in Boston, Mass., Aug. 20–24, 1999) (on file with author) (“The Internet offers both glorious freedoms and hidden dangers to

of online communications on marriage. Given the advent, variety, and prevalence of online sexual gratification⁴ (defined herein as any and all online activity that could lead to sexual satisfaction), it is not difficult to imagine that many Internet users are engaging in online sex (defined herein as two online users engaging in a discussion of sexual fantasies, usually while self-stimulating sexually).⁵ For purposes of this Article, when one or both Internet users are married, their online sex constitutes online infidelity.⁶

For example, married Congressman Anthony Weiner admittedly engaged in erotic communications over the Internet, drawing significant media attention to the issue of online infidelity. Conduct like Mr. Weiner's, however, is no longer particularly unusual. Technology has become such the norm in America that spouses have increasingly turned to the Internet as a social outlet.⁷ Sometimes this

those who frequent its cyberwaves.”); see also Katherine M. Hertlein & Fred P. Piercy, *Therapists' Assessment and Treatment of Internet Infidelity Cases*, 34 J. MARITAL & FAM. THERAPY 481, 481 (2008) (“Technology can be used for both good and bad.”).

4. Peter D. Goldberg et al., *Cybersex: The Impact of a Contemporary Problem on the Practices of Marriage and Family Therapists*, 34 J. MARITAL & FAM. THERAPY 469, 469 (2008) (“Sex has been reported to be the most popular search topic on the Internet . . . [and approximately] 69.7 million people are using the Internet for sexual purposes”); see also Brian Dew et al., *From the Altar to the Internet: Married Men and Their Online Sexual Behavior*, 13 SEXUAL ADDICTION & COMPULSIVITY 195, 196 (2006) (“[B]etween 20% and 34% of adult Internet users have engaged in some form of OSA [online sexual activity].”); Hertlein & Piercy, *supra* note 3, at 481–82 (“[O]ne of the apparent misuses [of technology] involves its role in facilitating Internet infidelity. . . . [T]he prevalence of this problem for couples is increasing rapidly. . . . [A]pproximately 20% of all Internet users report engaging in some sexual activity online.”). Thirty-eight percent of people “have engaged in explicit online sexual conversation.” April Y. Pennington, *Cyber Sex, Real Divorce*, HITCHED, <http://www.hitchedmag.com/article.php?id=20> (last visited Apr. 8, 2013).

5. Kimberly S. Young et al., *Online Infidelity: A New Dimension in Couple Relationships with Implications for Evaluation and Treatment*, 7 SEXUAL ADDICTION & COMPULSIVITY 59, 60 (2000). Of course, close cousins of online sex are telephone sex and sexting. A May 2010 survey reports that 15% of adults have received “‘a sexually suggestive nude or nearly nude photo or video’ on their cell phone, and 6 percent said they had sent such a text.” Jocelyn Noveck, *Is Internet Sex Cheating? Many Folks Say Yes*, PEW INTERNET (June 8, 2011), <http://67.192.40.213/Media-Mentions/2011/Is-Internet-sex-cheating-Many-folks-say-yes.aspx>. This Article's analysis could also apply by analogy to these forms of remote sexual activity.

6. See Maheu, *supra* note 3, at 3 (defining cyber-infidelity as “the act of engaging in acts of a romantic or sexual nature with an individual or individuals through electronic or virtual communities”); David Schnarch & Ruth Morehouse, *Online Sex, Dyadic Crises, and Pitfalls for MFTs*, FAM. THERAPY MAG., Sept./Oct. 2002, at 14, 14. Note that I have chosen to use the term “online infidelity” instead of “cyber-infidelity” to more closely mirror current terminology. Additionally, I recognize that other definitions of the term have been proffered.

7. Christina Tavella Hall, *Sex Online: Is This Adultery?*, 20 HASTINGS COMM. & ENT. L.J. 201, 214 (1997).

social outlet becomes a sexual outlet.⁸ Thus, it is safe to say that conduct like Mr. Weiner's is becoming more widespread in American society because technological advancements are simply making it easier to connect sexually with someone outside of marriage.

The early Internet craze of the mid- to late 1990s caused many people to focus solely on its positive aspects, while overlooking the negative ones.⁹ Thus, due to the Internet's popularity as a technological advancement, many greatly underestimated online infidelity as a cause of marital dissolution.¹⁰ In more recent times, some have claimed that the Internet has profoundly changed human sexual behavior for the worse.¹¹ This has led some to label it "the biggest threat marriage has ever faced,"¹² while some choose a more colloquial label: the most recent home-wrecker.¹³

Research over the last several years validates these claims. The Internet became widely available in 1994,¹⁴ and just five years later, online infidelity had already been cited as a cause of marital strife and divorce.¹⁵ In 2002, researchers predicted that online infidelity would become "a major factor in deteriorating marital relations."¹⁶ The next year, University of Florida researcher Beatriz Avila Mileham predicted that online infidelity would eventually top the list of the most common forms of infidelity.¹⁷ In that same year, Dr. Monica Therese Whitty implored researchers to start seriously questioning how online infidelity impacts

8. A study of 9,265 respondents conducted in 2000 found "that the majority of Internet users spend up to 10 hours per week involved in online sexual activities." Vaughn S. Millner, *Internet Infidelity: A Case of Intimacy with Detachment*, 16 FAM. J. 78, 78 (2008). Another source reports that at least 200,000 Americans visit Internet sex sites at least 11 hours per week. Jan Larue, *Last Time Around: Victims of Pornography Month Should Not Exist*, NAT'L REV. ONLINE (June 2, 2003, 12:00 AM), <http://www.nationalreview.com/articles/207086/last-time-around/jan-larue>. Another claims that "[I]nternet users devote three hours each week to online sexual exploits." *Infidelity Statistics*, WOMANSAVERS, <http://womansavers.com/infidelity-statistics.asp> (last visited Apr. 8, 2013).

9. Joan D. Atwood & Limor Schwartz, *Cyber-Sex: The New Affair Treatment Considerations*, 1 J. COUPLE & RELATIONSHIP THERAPY 37, 37 (2002) (referring to a statement made by then-president of the American Academy of Matrimonial Lawyers).

10. Young et al., *supra* note 5, at 61.

11. Jennifer Mitchell, Study Note, *Sex, Lies, and Spyware: Balancing the Right to Privacy Against the Right to Know in the Marital Relationship*, 9 J.L. & FAM. STUD. 171, 173 (2007) (citing Marilyn Gardner, *Is It Cyber-Flirting or Cyber-Betrayal?*, CHRISTIAN SCI. MONITOR, Aug. 19, 2004, at 12, 12).

12. Mark Teich, *Love but Don't Touch*, 39 PSYCHOL. TODAY 80, 82 (2006).

13. Dennis Fiely, *Internet Access Implicated in Growing Number of Divorces*, COLUMBUS DISPATCH, Sept. 4, 2003, at B1.

14. Goldberg et al., *supra* note 4, at 469.

15. Maheu, *supra* note 3, at 3.

16. Katherine M. Hertlein & Fred P. Piercy, *Internet Infidelity: A Critical Review of the Literature*, 14 FAM. J. 366, 368 (Oct. 2006) (referencing Azy Barak & William A. Fisher, *The Future of Internet Sexuality*, in SEX AND THE INTERNET: A GUIDEBOOK FOR CLINICIANS 270 (Al Cooper ed., 2002)).

17. Cathy Keen, *UF Study: Online Dating Virtually Irresistible to Some Married Folks*, U. FLA. NEWS (July 17, 2003), <http://news.ufl.edu/2003/07/17/internetinfidelity/>.

relationships.¹⁸ More recently, the rise in online infidelity has kept marriage counselors busy¹⁹ and has been blamed for many divorces.²⁰ In fact, two-thirds of divorce lawyers have claimed that the Internet's role in divorces is significant,²¹ and one source indicates that online infidelity caused one-third of divorce litigation.²²

But because online infidelity lacks in-person contact, it does not qualify as adultery in most jurisdictions allowing fault-based divorce on those grounds.²³ Assessing the age-old issue of adultery through the lens of modern technology raises the question of whether family law is lagging behind the technological advances that invade its sphere.²⁴ As one writer remarked in his discussion of the Anthony Weiner scandal: "What's worth debating now isn't what he did, but what it means. In the annals of lust and sin, [he] is just another straying husband. But in the unfolding story of information technology, he's a milestone worth thinking about."²⁵ So, what does conduct like Mr. Weiner's mean? Where

18. Monica Therese Whitty, *Pushing the Wrong Buttons: Men's and Women's Attitudes Toward Online and Offline Infidelity*, 6 CYBERPSYCHOL. & BEHAV. 569, 577 (2003).

19. See Mitchell, *supra* note 11, at 171.

20. But see Fiely, *supra* note 13 (explaining that at least one divorce educator, Cindy Hide, does not blame the Internet for more divorces and quoting her as saying: "There are different ways to choose to be unfaithful. The Internet is another option, but the issue is always the same: How strong is the foundation of the marriage?"); Randy Dotinga, 'Sexting' Common for Those Who Cheat: Study, U.S. NEWS & WORLD REP. (June 24, 2011), <http://health.usnews.com/health-news/family-health/brain-and-behavior/articles/2011/06/24/sexting-common-for-those-who-cheat-study> ("You can't blame cheating on the Internet. People who don't have the Internet are still cheating." (quoting sociologist Diane Kholos Wysocki)).

21. Mitchell, *supra* note 11, at 174; see also Tim Richardson, *Internet Blamed for Marriage Break Ups*, REGISTER (Nov. 15, 2002, 12:08 PM), http://www.theregister.co.uk/2002/11/15/internet_blamed_for_marriage_break/. The top two problems cited in many Internet-related divorces are meeting a new online lover and an obsessive interest in pornography. *Id.* Other reported problems were excessive use of the Internet and chat rooms. *Id.* One mediator reports a rise in online infidelity cases, estimating that 10% of mediating couples in his office are there because of a spouse's online affair. Pennington, *supra* note 4.

22. Tatiana Morales, *A Look at Internet Infidelity*, CBS NEWS (Feb. 11, 2009, 8:34 PM), <http://www.cbsnews.com/stories/2003/08/04/earlyshow/living/caught/main566488.shtml>; see also *Infidelity Statistics*, *supra* note 8.

23. The Author recognizes that arguments have been proffered in support of the abolition of fault-based divorces altogether. For counterarguments see, for example, Michelle L. Evans, Note, *Wrongs Committed During a Marriage: The Child That No Area of the Law Wants to Adopt*, 66 WASH. & LEE L. REV. 465 (2009) and Robin Fretwell Wilson, *Beyond the Bounds of Decency: Why Fault Continues to Matter to (Some) Wronged Spouses*, 66 WASH. & LEE L. REV. 503 (2009). That debate is beyond the scope of this Article.

24. Of course, this question is not reserved for family law alone, as technology outpaces the law in other areas. Mitchell, *supra* note 11, at 172 ("Technology . . . has evolved faster than the law designed to regulate it . . .").

25. William Saletan, *Meetless Weiner*, SLATE (June 7, 2011, 8:35 AM),

does, or should, online infidelity fit into existing family law? More specifically, is online infidelity included within the traditional definition of infidelity, and if so, should it also be included within the legal definition of adultery in those jurisdictions still recognizing it as a fault-based ground for divorce?²⁶

There are no clear answers to these questions, and even attempting to answer them is very difficult. Given its inherent lack of in-person contact, online infidelity is, in some respects, different from traditional adultery,²⁷ and just as traditional adultery can cover a wide spectrum of sexual activity, so too can online infidelity. At least traditional adultery has a solid basis—intimate, physical interaction with another person. By contrast, online infidelity encompasses a broader range of interactions.²⁸ Thus, according to some marriage and family therapists, online infidelity “is confounding how we define some of our most basic beliefs about sex, intimacy, and relationships.”²⁹

With this background in mind, Part I provides an overview of the currently available options for online sexual gratification, as well as those predicted to be available in the near future. Part II introduces and provides a brief history of the concept of adultery in the United States and discusses the legal effects of adultery in the context of divorce law, including the timing of divorce,

http://www.slate.com/articles/health_and_science/human_nature/2011/06/meetless_weiner_s_ingle.html.

26. These questions are not unique to the United States. For example, in Belgium and the United Kingdom, victims of online infidelity have filed for divorce, alleging that their spouses' online infidelity constituted adultery. *Virtual Sex Is 'Grounds for Divorce'*, [sic] *Say Judges*, EXPATICA.COM (Sept. 29, 2005), http://www.expatica.com/be/news/local_news/virtual-sex-is-grounds-for-divorce-say-judges-24092.html. Belgium's high court found that a spouse's online infidelity justified divorce, reasoning that such behavior is incompatible with spouses' duty of mutual respect. *Id.* Moreover, in November 2010, Italian judges set an astonishing legal precedent by annulling a marriage simply because a wife thought about having an affair, lending credence to the idea that, in Italy, it is highly likely that claims of online infidelity could lead to annulment or divorce. *Marriage Annulled Because Wife Thought About Having an Affair*, MAIL ONLINE (Nov. 9, 2010, 1:19 PM), <http://www.dailymail.co.uk/news/article-1328164/Marriage-annulled-wife-THOUGHT-having-affair.html#ixzz24rWjLZgo>. It is safe to predict that it is only a matter of time before state courts in the United States will be forced to confront and decide the same issue (because of the domestic-relations exception to the federal courts' subject matter jurisdiction, divorces are not heard or decided in federal court. *See, e.g., Ankenbrandt v. Richards*, 504 U.S. 689, 692–704 (1992)). In fact, the opportunity arose in New Jersey when a man filed for divorce based on his wife's online infidelity in 1996; however, it disappeared when the couple reconciled, allowing the court to avoid deciding the issue. *See Henry Gottlieb, High Drama, Low Expectations in 1996*, 146 N.J. L.J. 1209, 1209 (1996).

27. The term “traditional adultery” is used to refer to adultery that is committed in person.

28. Todd Melby, *Cheating in a Wired World: How the Internet Has Redefined Infidelity*, CONTEMPORARY SEXUALITY, Oct. 2010, at 3, 3.

29. Goldberg et al., *supra* note 4, at 471; *see also* Tony Docan-Morgan & Carol A. Docan, *Internet Infidelity: Double Standards and the Differing Views of Women and Men*, 55 COMM. Q. 317, 319 (2007) (noting the sense of ambiguity in determining which activities are acceptable and unacceptable).

spousal support, marital property, and child custody. Part III provides insight into the current law of adultery as a fault-based ground for divorce, highlighting its respect for marriage as both a societal institution and a contract between two people. Part IV then considers whether the definition of adultery should be expanded. It addresses the evolution of marriage and infidelity, and acknowledges that “infidelity” and “adultery” are not necessarily synonymous terms. Thus, after establishing that online infidelity is infidelity, as that term is currently defined, this Part considers whether this particular form of infidelity should also constitute adultery. It concludes that even though further empirical studies are needed, decision-makers may nonetheless be forced to confront the issue before such studies can be performed. In the event this happens, several factors support the argument that the definition of adultery should be extended to some, but not necessarily all, instances of online infidelity. With those considerations in mind, Part V proposes that online infidelity should only constitute adultery when it is a substantial factor in the breakdown of a marriage. Guiding factors suggested for making that determination include: the medium in which the online infidelity occurred; the sexual activity engaged in by the unfaithful spouse; the frequency and intensity of the online infidelity; the relationship between the unfaithful spouse and his or her online partner(s); and the reaction of the victim spouse.

I. CURRENT AND PREDICTED FUTURE OPPORTUNITIES FOR ONLINE SEXUAL GRATIFICATION

Initially, online sexual gratification was limited to the one-sided viewing of pornography. However, it quickly progressed to e-mail,³⁰ chat rooms,³¹ and instant messaging,³² with picture and live video capabilities.³³ All of these technologies allow users to communicate directly with another person, including complete strangers, acquaintances, friends, and/or potential lovers. Thus, these technologies allow married people to more easily commit online infidelity. Today, due to the increasing use of social networking sites (like Facebook, Twitter, and others), online virtual worlds (like Second Life), and online dating sites (like Ashley Madison), spouses can more easily search for, find, and connect with online sex partners.³⁴

30. Ninety-one percent of American adults use the Internet to send or read e-mail. *What Internet Users Do Online*, *supra* note 2. One source claims that 2.5 billion e-mails per day are pornographic. *Pornography Statistics*, FAM. SAFE MEDIA, http://family.safemedia.com/pornography_statistics.html#time (last visited Apr. 8, 2013).

31. “Approximately 70% of time online is spent in chat rooms or sending e-mail; of these interactions, the vast majority are romantic in nature.” *Infidelity Statistics*, *supra* note 8.

32. Forty-six percent of American adults use the Internet to send instant messages. *What Internet Users Do Online*, *supra* note 2.

33. Seventeen percent of American adults use the Internet to “[v]iew live images of a remote location or person, using a webcam.” *Id.*

34. Mitchell, *supra* note 11, at 173 (“[T]he constant accessibility of the Internet makes it too easy for people to connect—a spouse does not have to sneak out to a bar to meet with her lover, but can engage in sexual behavior online.”); Maheu, *supra* note 3, at 3

Social networking, in particular, has been embraced by the American public.³⁵ While it has many benign functions, social networking can serve as fuel for the infidelity fire. “As social media usage hits all-time highs, many marriages are hitting all-time lows,” with many people pursuing divorce based on their spouses’ sexual activity on social networking sites.³⁶ As of December 2012, Facebook reports that more than one billion people actively use the site each month.³⁷ Approximately one in five adults uses it for flirting,³⁸ and some claim that flirting is the least of the problems with the popular social networking site, touting Facebook as “the fast track to blowing up marriages.”³⁹ The numbers seem to support these assertions, as more than 80% of polled divorce attorneys say that the number of people using social media to engage in extramarital activity is rapidly increasing,⁴⁰ with the most common of these activities being inappropriate sexual chats.⁴¹

Second Life has the potential to take online infidelity up a notch, as it blurs “[t]he line between actual reality and virtual reality”⁴² In this virtual, three-dimensional world,⁴³ members can engage in all sorts of innocent activities, like buying property, having a job, and engaging in recreational activities. Yet, people can also meet, have online sex with, and get married to others, all through

(noting that the Internet allows romance and sexuality from the comfort and privacy of home). Using Facebook or similar tools to locate and begin a relationship with a former crush or lover has been creatively labeled “retro-sexing.” See *Cyber Sex on Facebook Fueling Divorces?*, CLIFFVIEW PILOT (MAY 17, 2010), <http://www.cliffviewpilot.com/beyond/1280-cyber-sex-on-facebook-fueling-divorces>; *Cybersex on Social Media Networks and Role-Playing Sites Linked to Divorce*, ELEMENTS BEHAV. HEALTH, <http://www.elementsbehavioralhealth.com/sexual-addiction-2/cybersex-social-media-divorce/> (last visited Apr. 8, 2013).

35. Sharon Nelson et al., *The Legal Implications of Social Networking*, 22 REGENT U. L. REV. 1, 1 (2009). Sixty-seven percent of people on the Internet use it for social networking. *What Internet Users Do Online*, *supra* note 2.

36. *Cybersex on Social Media Networks and Role-Playing Sites Linked to Divorce*, *supra* note 34.

37. *Key Facts*, FACEBOOK NEWSROOM, <http://newsroom.fb.com/Key-Facts> (last visited Apr. 8, 2013). Sixteen percent of American adults use the similar networking site Twitter. *What Internet Users Do Online*, *supra* note 2.

38. Leanne Italie, *Divorce Lawyers: Facebook Tops in Online Evidence in Court*, USA TODAY (June 29, 2010, 10:41 AM), http://usatoday30.usatoday.com/tech/news/2010-06-29-facebook-divorce_N.htm.

39. Tony Cooper, *One in Five U.S. Divorces Fueled by Facebook, Social Media*, SAN DIEGO NEWS (Mar. 1, 2011), <http://www.sandiego.com/news/one-in-five-u.s.-divorces-fueled-by-facebook-social-media>; see also *Cyber Sex on Facebook Fueling Divorces*, *supra* note 34.

40. Cooper, *supra* note 39.

41. *Cyber Sex on Facebook Fueling Divorces*, *supra* note 34.

42. Philip Victor, *Virtual Affair Ends in Real-Life Divorce*, ABC NEWS (Nov. 14, 2008), <http://abcnews.go.com/International/SmallBiz/story?id=6255277&page=1>.

43. Claude T. Aiken IV, *Sources of Law and Modes of Governance: Ethnography and Theory in Second Life*, 10 U. PITT. J. TECH. L. & POL’Y 1, 6 (2009).

their avatars.⁴⁴ Recently, real-life jealousy has seeped into this virtual world, as some spouses have filed for divorce based on the sexual behavior of their partner with another person in Second Life.⁴⁵ Interestingly, some of the victims of online infidelity via Second Life have caught their spouses virtually cheating by hiring a virtual private investigator within the game.⁴⁶

Online dating sites also allow for connecting with an online, extramarital lover. According to a December 2012 survey, 8% of American adults use an online dating site.⁴⁷ As of March 2013, AllDatingWebsites.com indicates that there are 1,114 such sites that allow individuals to connect with others with like interests,⁴⁸ and 31 are specifically classified as extramarital.⁴⁹ One of these is the notorious

44. Victor, *supra* note 42; Mark Ward, *Life Lessons in Virtual Adultery*, BBC NEWS (Apr. 11, 2005, 12:44 PM), <http://news.bbc.co.uk/2/hi/technology/4432019.stm>. Research shows that, as of March 25, 2013, Second Life has over 33 million residents. Tyche Shepherd, *Second Life Grid Survey—Economic Metrics*, SECOND LIFE ECON. METRICS REPOSITORY, <http://gridsurvey.com/economy.php> (last visited Apr. 8, 2013).

45. See, e.g., *More Virtual Divorce: Second Life Leads to First Divorce*, NOLO (Nov. 17, 2008), <http://www.divorceandfamilylawblog.com/2008/11/more-virtual-divorce-second-li.html> (reporting on a case from the United Kingdom); Richard Edwards, *Woman Divorces Husband for Having a 'Virtual' Affair on Second Life*, TELEGRAPH (Nov. 14, 2008, 7:34 AM), <http://www.telegraph.co.uk/technology/3453273/Woman-divorces-husband-for-having-a-virtual-affair-on-Second-Life.html>; Victor, *supra* note 42. The legal issues stemming from Second Life are not limited to divorce suits. See generally Aiken, *supra* note 43. For example, a Pennsylvania lawyer has sued the developers of Second Life over his portfolio of virtual real estate and currency. Kathleen Craig, *Second Life Land Deal Goes Sour*, WIRED (May 18, 2006), <http://www.wired.com/gaming/virtualworlds/news/2006/05/70909>. Businessman Kevin Alderman (Second Life name Stroker Serpentine), sued an avatar known as Volkov Catteneo for copyright infringement of the virtual sex bed that Alderman/Serpentine created and sold in Second Life's virtual world. Wagner James Au, *Second Life Avatar Sued for Copyright Infringement*, GIGAOM (July 4, 2007, 2:10 AM), <http://gigaom.com/2007/07/04/second-life-avatar-sued-for-copyright-infringement/>. Further, Second Life is becoming more of a force in the real world than one would initially imagine. Research reveals that Harvard Law School has held a virtual evidence class in Second Life, and Judge Posner has spoken in Second Life. See Aiken, *supra* note 43, at 4, 24. Also, some law firms have expanded their businesses into the virtual world. Peter Lattman, *Second Life & the Law*, WALL ST. J. (July 31, 2007, 9:28 AM), <http://blogs.wsj.com/law/2007/07/31/second-life-the-law/> (detailing the expansion into Second Life of Greenberg & Lieberman from Washington, D.C., and citing Steven Lieberman for the notion that the firm made nearly \$20,000 in its first year there); Aiken, *supra* note 43, at 7, 27 (discussing brokers like Italian firm Gabetti and American firm Coldwell Banker that have ventured into the virtual real estate world of Second Life and also Ailan Graef who has become a real-world millionaire in virtual land assets and whose avatar appeared on the cover of *Business Week* as a result).

46. See Ward, *supra* note 44.

47. *What Internet Users Do Online*, *supra* note 2.

48. *SweetDiscreet.com—Reviews*, ALLDATINGWEBSITES.COM, <http://www.alldatingwebsites.com/reviews/sweetdiscreet.com/> (last visited Mar. 10, 2013).

49. *Id.* On the list are also such categories as “Adult Datingsites” (numbering 105), “Casual Dating” (numbering 14), “Cougar Dating” (numbering 16), “Sugar Daddy Dating” (numbering 17), and “Webcam Datingsites” (numbering 2). *Id.*

infidelity-based site, Ashley Madison.⁵⁰ This site, in its 11th year of operation and currently servicing 17 countries,⁵¹ has announced plans for global marketing.⁵² In the United States alone, Ashley Madison has almost ten million members and is one of the fastest growing networks, with a new member registering every nine seconds.⁵³

According to *Future of Sex* editor Meg White, three emerging areas of commercial sex include remote sex, virtual sex worlds, and robot sex.⁵⁴ All of these advancements have brought or will bring online infidelity to a whole new level by extending the opportunities for and the experience of online sexual gratification.⁵⁵

Although still in its infancy, remote sex is now a reality.⁵⁶ Most forms of remote sex are achieved by way of haptic technology, the science of transmitting a sense of touch by applying force feedback, vibrations, and motions to the user.⁵⁷ Some examples of haptic technology are the various prototypes of phones created

50. Others include Illicit Encounters, MaritalAffair.co.uk, Find New Passion, UnTrue.com, Discreet Adventures, Married But Playing, Lonely Housewives, Real Wives Cheating, Married Wanting Sex, BeDiscreet, NoStringsAttached, and WebAffair.com. *Id.*

51. Some of these countries include Australia, Brazil, Britain, Canada, Germany, and Italy. *Online Infidelity Tops the 13 Million Mark and It's Still Going Up*, DATING SITES (Mar. 6, 2012), <http://www.datingsites.co.uk/2012/03/06/online-infidelity-tops-the-13-million-mark-and-its-still-going-up/>. The site generates €40 million in annual revenue. *Id.*

52. *Id.*

53. *Id.*

54. Emily Empel, *The Future of Sex? 5 Trends That May Completely Transform Our Sex Lives*, ALTERNET (Apr. 18, 2012), http://www.alternet.org/story/155049/the_future_of_sex_5_trends_that_may_completely_transform_our_sex_lives. According to White,

[t]he accessibility of technology will create a greater demand for sex-based products and services. 'Sex-ond' lives will redefine what it means to be in a relationship, have sex, and be in love. Couples will seriously discuss whether sex with robots constitutes cheating; and policy makers will debate what rights exist for sex workers in online communities.

Id.

55. Maheu, *supra* note 3, at 6–7 (proclaiming in 1999 that the world of cyber-infidelity is “just beginning” and predicting that the next generation may be “virtually sexual in new and powerful ways”).

56. *Is Virtual Sex a Blessing or a Curse?*, IT'S CHEATING (Oct. 13, 2011), <http://www.itscheating.com/technology-2/is-virtual-sex-a-blessing-or-a-curse/#more-262>.

57. Lucian Dorneanu, *What Is Haptics and How Does It Feel?*, SOFTPEDIA (June 22, 2007, 8:58 AM), <http://news.softpedia.com/news/What-Is-Haptics-and-How-Does-It-Feel-57998.shtml>; Meg White, *Haptics: How Technologies of Touch Create Emotional Immersion*, FUTURE SEX (Feb. 13, 2011), <http://futureofsex.net/remote-sex/wearable-haptics-enhances-emotional-immersion/>. Note that the uses of haptic technology certainly extend beyond those involving sex. Haptics is responsible for the vibrations in many cellular phones and is credited with revolutionizing the gaming industry by being incorporated into the Wii console. *See, e.g.*, Dorneanu, *supra* note 57. It is used in CAD, a virtual system used by engineers and programmers, and may lead to remote surgery, allowing doctors “to perform surgery without being present at the patient’s side.” *Id.*

by designer Fabian Hemmert of the Berlin University of the Arts; these phones allow people to engage in sexual activity from a distance.⁵⁸ One of them simulates kissing by use of a “wet sponge pushing against a membrane”⁵⁹; it can even distinguish a quick peck from a more passionate kiss.⁶⁰ Other devices, like the RealTouch, developed by a former NASA engineer, go even further with a hands-free sexual experience for men with a never-ending supply of accommodating partners.⁶¹ The RealTouch involves a glove-like device made of faux-flesh that includes heating elements and a lubrication mechanism.⁶² After inserting his penis into the device, the man watches a pornographic video, synchronized in real time with the device’s movements.⁶³ It “also offers real-life experiences through live chat online [for those] [w]ith a computer and camera, [who can] connect with people all over the world for online remote sex.”⁶⁴ There are even interactive remote sex toys for the Nintendo Wii console.⁶⁵ Called the Mojowijo and nicknamed “the new vibrator in town,” this device “can be connected wirelessly to a laptop and controlled remotely.”⁶⁶ It has two parts—a vibrator for females and a

58. See *Intimate Mobiles*, FABIAN HEMMERT, <http://www.fabianhemmert.com/projects/intimate-mobiles> (last visited Apr. 8, 2013).

59. ‘Emotional’ Phones Simulate Hand Holding, Breathing and Kissing, L.A. TIMES (Sept. 8, 2011, 6:50 PM), <http://latimesblogs.latimes.com/technology/2011/09/phone-breathing-kissing.html>.

60. Kate Torgovnick, *A Cell Phone That Can Kiss You*, FRISKY (Sept. 11, 2011), <http://www.thefrisky.com/2011-09-11/a-cell-phone-that-can-kiss-you/>. This prototype, part of Hemmert’s *Intimate Mobiles* series, is called the “crying phone” and is equipped with a semipermeable membrane and a motorized sponge that allows the use of liquids as an interactive means. *Intimate Mobiles*, *supra* note 58. This series also includes: (1) the “grasping mobile,” which is equipped with a widening loop that contracts with the other user’s motion, allowing for an actuation of tightness; and (2) the “whispering phone,” which is equipped with a set of air jets that “allow for the reproduction of the caller’s nostril airstreams and the air involved in speech.” *Id.* A similar product is the Pillow Talk, which “simulates the experience of lying in bed with a partner by mimicking a heartbeat [enclosed] in a large pillow.” Empel, *supra* note 54.

61. *Is Virtual Sex a Blessing or a Curse?*, *supra* note 56. A similar device, manufactured in China, allows for remote sex via a USB device. Jeremy Goldkorn, *USB Cybersex Device*, DANWEI (Mar. 30, 2005, 5:44 PM), http://www.danwei.org/internet/usb_cybersex_device.php. Each toy kit contains a computer board, headphones, a microphone, and a vibrator or vagina that each connects to the individual’s personal computer through the computer boards. *Id.* “According to the instructions, a male partner can control the vibrator of the woman . . . whereas the female partner . . . is able to manipulate the vagina used by the man.” *Id.*

62. *Is Virtual Sex a Blessing or a Curse?*, *supra* note 56.

63. *Id.*

64. *Id.*

65. *Id.*

66. Deborah Arthurs, *The Skype Is the Limit! Sex Toy That Connects to Laptop Lets Couples Hit the Big O from a Distance (. . . and It’s a Novel Use for Your Nintendo Wii Remote)*, MAIL ONLINE (May 10, 2012, 4:03 PM), <http://www.dailymail.co.uk/femail/article-2141776/The-Skype-limit-Sex-toy-connects-laptop-lets-couples-hit-big-O-distance--novel-use-Nintendo-Wii-remote.html>; see also *Is Virtual Sex a Blessing or a Curse?*, *supra* note 56.

penis ring for males—both of which “are fitted to a handle that can be attached to the accessory port of a Nintendo Wii remote control.”⁶⁷ “Using patented Motion2Vibration technology, the device is able to transform the movements performed by each user into vibration signals and send them to another selected device—either in the same room or over the Internet.”⁶⁸ To initiate the devices, couples download the appropriate software and dial into each other’s laptops using Skype, which picks up the presence of the two remotes.⁶⁹

The passage of time will bring with it virtual sex, which once existed only as some far-fetched concept in futuristic cinema.⁷⁰ As aptly noted by author, educator, and sex addiction specialist Robert Weiss, “evolving sexnologies are about to make sexting nude pictures to strangers as old-school as passing around last month’s Playboy.”⁷¹ By 2020,⁷² the world could see full-immersion sex suits, capable of transmitting sensory information between partners and allowing a person to see and hear a virtual sex partner as if he or she was in the same room.⁷³ By 2030, according to engineer and futurologist Ian Pearson, one will be able to “beam” a partner into bed for remote sex.⁷⁴ Pearson predicts that this technology will even allow virtual partners to experience the other’s emotions while the electronic sex takes place.⁷⁵ This predicted advance will be a giant leap beyond the current “virtual lovemaking” technologies, which only allow for motorized physical touches.⁷⁶ “Hotel sheets and sleepwear will have special fibers that produce sensory responses, allowing clients to ‘feel’ the sensations of sex.”⁷⁷

Yet, as currently drafted and interpreted, the law of adultery as a fault-based ground for divorce requires in-person contact. Therefore, it does not capture the existing options for online sexual gratification and will not capture those predicted for the future.

67. Arthurs, *supra* note 66.

68. *Id.*

69. *Id.*

70. For example, in *DEMOLITION MAN* (Warner Bros. 1993), characters played by Sandra Bullock and Sylvester Stallone engaged in then-inconceivable virtual sex using headsets.

71. *Is Virtual Sex a Blessing or a Curse?*, *supra* note 56.

72. See Michael Anissimov, *Full Body Haptic Suits*, *ACCELERATING FUTURE* (Nov. 10, 2007), <http://www.acceleratingfuture.com/michael/blog/2007/11/full-body-haptic-suits/>.

73. Maheu, *supra* note 3, at 6–7.

74. *Is Virtual Sex a Blessing or a Curse?*, *supra* note 56; see also *Virtual Sex and Controllable Dreams in Hotels of the Future*, *CNN TRAVEL* (June 10, 2011), <http://travel.cnn.com/explorations/life/hotel-rooms-future-will-offer-virtual-sex-and-controllable-dreams-says-report-1751>.

75. *Virtual Sex and Controllable Dreams in Hotels of the Future*, *supra* note 74. Further, a person will be able to wear lenses to change how his or her remote partner looks while having sex—even without that partner’s knowledge. *Id.* “These lenses are supposed to be worn under the eyelids and deliver 3D images directly onto the retina.” *Id.* The lenses will also “allow sleepers to watch TV and check e-mails before they fall asleep.” *Id.*

76. *Id.*

77. *Is Virtual Sex a Blessing or a Curse?*, *supra* note 56.

II. BACKGROUND: ADULTERY IN THE UNITED STATES

The authority of a state court in the United States to grant a divorce or to dissolve a marriage is purely statutory.⁷⁸ A court has no power to end a marriage simply because it views it as over; instead, it may do so only on grounds enumerated in its jurisdiction's statutes. Prior to the 1970s, marriages in the United States were terminated only on fault-based grounds.⁷⁹

Thereafter, the no-fault divorce revolutionized family law. Initially, public opinion was very hostile to the idea, and many still believe that it has harmed women, children, and the institution of marriage.⁸⁰ Yet, over time, state legislatures accepted the no-fault divorce, and today every jurisdiction has adopted some form of it.⁸¹ In fact, some of these jurisdictions have abolished fault-based grounds for divorce altogether, leaving the no-fault divorce as the sole option for ending a marriage.⁸² However, most jurisdictions, while adopting no-fault statutes, continue to recognize the traditional fault-based grounds for divorce⁸³ and thereby

78. See, e.g., *Ledvinka v. Ledvinka*, 840 A.2d 173, 181 (Md. Ct. Spec. App. 2003); *Condit v. Condit*, 190 Ohio St. App. 3d 634, 2010-Ohio-5202, 943 N.E.2d 1041, 1045, at ¶ 13; *In re Marriage of Robinson*, 248 P.3d 532, 534 (Wash. Ct. App. 2010).

79. Elena B. Langan, *We Can Work It Out: Using Cooperative Mediation—A Blend of Collaborative Law and Traditional Mediation—To Resolve Divorce Disputes*, 30 REV. LITIG. 245, 249–50 (2011).

80. Shahar Lifshitz, *Married Against Their Will: Toward a Pluralist Regulation of Spousal Relationships*, 66 WASH. & LEE L. REV. 1565, 1632 (2009).

81. Courtney G. Joslin, *Modernizing Divorce Jurisdiction: Same-Sex Couples and Minimum Contacts*, 91 B.U. L. REV. 1669, 1704 (2011) (citing Adrienne D. Davis, *Regulating Polygamy: Intimacy, Default Rules, and Bargaining for Equality*, 110 COLUM. L. REV. 1955, 2010–11 (2010)).

82. See, e.g., ARIZ. REV. STAT. ANN. § 25-312 (2013); CAL. FAM. CODE § 2310 (2013); COLO. REV. STAT. ANN. § 14-10-106 (2013); D.C. CODE § 16-904 (2013); FLA. REV. STAT. ANN. § 61.052 (2013); HAW. REV. STAT. § 580-41 (2013); IOWA CODE ANN. § 598.17 (2013); KY. REV. STAT. ANN. § 403.140 (2013); MICH. COMP. LAWS ANN. § 552.6 (2013); MINN. STAT. ANN. § 518.10 (2013); MO. REV. STAT. § 452.305 (2013); MONT. CODE ANN. § 40-4-104 (2013); NEB. REV. STAT. ANN. § 42-353 (2013); OR. REV. STAT. ANN. § 107.036 (2013); WASH. REV. CODE ANN. § 26.09.030 (2013); WIS. STAT. ANN. § 767.315 (2013); WYO. STAT. ANN. § 20-2-104 (2013).

83. See, e.g., ALA. CODE § 30-2-1 (2013); ALASKA STAT. ANN. §§ 25.24.050, 25.24.200 (2013); ARK. CODE ANN. § 9-12-301 (2013); CONN. GEN. STAT. ANN. § 46b-40 (2013); DEL. CODE ANN. tit. 13, § 1505 (2013); GA. CODE ANN. § 19-5-3 (2013); IDAHO CODE ANN. § 32-603 (2013); 750 ILL. COMP. STAT. ANN. 5/401 (2013); IND. CODE ANN. § 31-15-2-3 (2013); LA. CIV. CODE art. 103 (2013); ME. REV. STAT. tit. 19-A, § 902 (2013); MASS. GEN. LAWS ch. 208, § 1 (2013); MD. CODE ANN. FAM. LAW § 7-103 (2013); MISS. CODE ANN. § 93-5-1 (2013); N.H. REV. STAT. § 458:7 (2013); N.J. STAT. ANN. § 2A:34-2 (2013); N.M. STAT. ANN. § 40-4-1 (2013); N.Y. DOM. REL. LAW § 170 (2013); N.C. GEN. STAT. §§ 50-6, 50-7 (2013); N.D. CENT. CODE § 14-05-03 (2013); OHIO REV. CODE ANN. § 3105.01 (2013); 43 OKL. ST. ANN. tit. 43, § 101 (2013); 23 PA. CONS. STAT. § 3301 (2013); R.I. GEN. LAWS § 15-5-2 (2013); S.C. CODE ANN. § 20-3-10 (2013); S.D. CODIFIED LAWS § 25-4-2 (2013); TENN. CODE ANN. § 36-4-101 (2013); TEX. FAM. CODE ANN. § 6.001 to .007 (2013); UTAH CODE ANN. § 30-3-1 (2013); VT. STAT. ANN. tit. 15, § 551 (2013); VA. CODE ANN. § 20-91 (2013); W. VA. CODE ANN. § 48-5-202 to -209 (2013).

allow spouses either option. Adultery is one of the most commonly recognized grounds for fault-based divorce in almost every jurisdiction still recognizing such a form of divorce.⁸⁴ This Part provides a brief history of adultery, along with an explanation of the legal effects of adultery on divorcing spouses.

A. Brief History of Adultery

Sexual infidelity is not a new problem. It is one that has historically harmed people and destroyed marriages, institutions still highly revered by American society.⁸⁵ Originally, one of the chief concerns surrounding infidelity was that a married woman who was sexually unfaithful to her husband could become impregnated by another man, give birth to a spurious offspring, and adulterate her husband's bloodline. The existence of such a child could—from a financial standpoint, at a minimum—negatively affect both her husband and her legitimate children with her husband.⁸⁶ As such, adultery was originally the province of a married woman. However, by the eleventh century, Christian culture had exerted its influence over society's views on adultery.⁸⁷ Because the Church of England viewed adultery as morally wrong and destructive to families, canon law extended the definition of the term to include extramarital sexual activity by a married man.⁸⁸ When the colonists left England for America, they brought with them a deep-seated hostility towards adultery,⁸⁹ evidenced by their criminal laws, divorce laws, and tort laws.

84. See, e.g., ALA. CODE § 30-2-1(a)(2); ARK. CODE ANN. § 9-12-301(b)(4); CONN. GEN. STAT. ANN. § 46b-40(c)(3); DEL. CODE ANN. tit. 13, § 1503(6); GA. CODE ANN. § 19-5-3(6); IDAHO CODE ANN. § 32-603(1); 750 ILL. COMP. STAT. ANN. 5/401(a)(1); LA. CIV. CODE art. 103(2); MASS. GEN. LAWS ch. 208, § 1; MISS. CODE ANN. § 93-5-1; MD. CODE ANN., FAM. LAW § 7-103(a)(1); N.J. STAT. ANN. § 2A:34-2(a); N.M. STAT. ANN. § 40-4-1(c); N.Y. DOM. REL. LAW § 170(4); N.D. CENT. CODE ANN. § 14-05-03(1); OHIO REV. CODE ANN. § 3105.01(c); S.C. CODE ANN. § 20-3-10(1); S.D. CODIFIED LAWS § 25-4-2(1); TENN. CODE ANN. § 36-4-101(a)(3); TEX. FAM. CODE ANN. § 6.003; VT. STAT. ANN. tit. 15, § 551(1); VA. CODE ANN. § 20-91(A)(1); W. VA. CODE ANN. § 48-5-204. Indiana recognizes fault-based grounds for divorce but does not include adultery. IND. CODE ANN. § 31-15-1-2 (2013).

85. Shauna M. Deans, Note, *The Forgotten Side of the Battlefield in America's War on Infidelity: A Call for the Revamping, Reviving, and Reworking of Criminal Conversation and Alienation of Affections*, 53 HOW. L.J. 377, 378 (2010).

86. Her husband would, throughout his life and after his death, through an inheritance, unwittingly support a child that was not his biological progeny. Brenda Cossman, *The New Politics of Adultery*, 15 COLUM. J. GENDER & L. 274, 277 (2006). Additionally, that wife's children with her husband would be forced to share their inheritance with the spurious child. Peter Nicolas, *The Lavender Letter: Applying the Law of Adultery to Same-Sex Couples and Same-Sex Conduct*, 63 FLA. L. REV. 97, 107 (2011). This concern, i.e., that a man's bloodline would be adulterated, gave rise to the name.

87. Deans, *supra* note 85, at 385.

88. Nicolas, *supra* note 86, at 107. Under canon law, the marital status of the third party determined whether he was also guilty of adultery (if he was married, too) or simply fornication (if he was not). *Id.* at 107–08.

89. See Deans, *supra* note 85, at 387.

The colonies outlawed adultery through legislation⁹⁰ or through the adoption of the English common law rules on adultery.⁹¹ Like its English counterpart, adultery in the colonies found its legal basis in theft,⁹² and during that period adultery was universally considered a crime.⁹³ Criminal punishment varied from the well-known scarlet letter, to whip lashing,⁹⁴ to sitting with a hangman's noose around one's neck while being whipped,⁹⁵ to a death sentence.⁹⁶ Continuing into the nineteenth century, criminal statutes against adultery were common.⁹⁷ Today, adultery is still a felony in some states but is merely a misdemeanor in others.⁹⁸ Current punishments for committing the crime of adultery range from nominal fines to jail time.⁹⁹

In addition to criminalizing adultery, the colonists allowed adultery to remain a viable ground for divorce throughout the development of the American legal system.¹⁰⁰ Once states started allowing judicial divorce, adultery was immediately a ground for divorce in every jurisdiction,¹⁰¹ and in many states

90. These statutes typically incorporated the English common law, the canon law, or some hybrid of the two.

91. Those adopting the English common law still viewed the harm of adultery as the danger to a husband's bloodline. Cossman, *supra* note 86, at 277 (discussing an 1838 New Jersey Supreme Court case, which noted that the harm of adultery is not "the alienation of the wife's affections, and loss of comfort in her company" but is in the "tendency to adulterate the issue of an innocent husband, and to turn the inheritance away from his own blood, to that of a stranger").

92. Martha Chamallas, *The New Gender Panic: Reflections on Sex Scandals and the Military*, 83 MINN. L. REV. 305, 341 n.145 (1998).

93. Lawrence M. Friedman, CRIME AND PUNISHMENT IN AMERICAN HISTORY 34 (1994).

94. *Id.* at 40.

95. *Id.*

96. *Id.* at 41.

97. *Id.* at 127–28.

98. Andrew D. Cohen, *How the Establishment Clause Can Influence Substantive Due Process: Adultery Bans After Lawrence*, 79 FORDHAM L. REV. 605, 613 (2010); see also Nicolas, *supra* note 86, at 100 (noting that 24 states and territories still criminalize adultery). Some may question the constitutionality of criminalizing adultery in the wake of *Lawrence v. Texas*, 539 U.S. 558 (2003). See, e.g., Marghretta Adeline Hagood, *South Carolina's Sexual Conduct Laws After Lawrence v. Texas*, 61 S.C. L. REV. 799, 799 (2010); Pamela Laufer-Ukeles, *Reconstructing Fault: The Case for Spousal Torts*, 79 U. CIN. L. REV. 207, 249 (2010); Jennifer A. Herold, Note, *A Breach of Vows but Not Criminal: Does Lawrence v. Texas Invalidate Utah's Statute Criminalizing Adultery?*, 7 J.L. & FAM. STUD. 253, 259 (2005); Gabrielle Viator, Note, *The Validity of Criminal Adultery Prosecutions after Lawrence v. Texas*, 39 SUFFOLK L. REV. 837, 853–54 (2006). However, because this Article focuses on adultery as a basis for fault-based divorce, that issue is beyond the scope of this Article.

99. Cohen, *supra* note 98, at 614.

100. See Evans, *supra* note 26, at 472.

101. *Id.* at 472 n.47.

adultery was the only ground for divorce.¹⁰² Today, adultery is a fault-based ground for divorce in 32 states and two territories.¹⁰³

The mid-nineteenth century saw many states, beginning with New York in 1864,¹⁰⁴ developing a new area of law in which adulterers could be punished: tort law. Tort claims were originally brought only by husbands,¹⁰⁵ and included alienation of affections, criminal conversation, seduction, and breach of marriage promise.¹⁰⁶

To succeed on an alienation of affections claim, a plaintiff had to prove that the defendant, knowing of the marital relationship between the plaintiff and his spouse, took actions to deprive the plaintiff of his spouse's affections.¹⁰⁷ Success on such a claim allowed one to recover for mental anguish and intangible harms associated with the loss of a spouse.¹⁰⁸ To sue for criminal conversation, a plaintiff only had to prove that the defendant had sex with his spouse, with the only defense being plaintiff's consent.¹⁰⁹ A claim for seduction was brought by an unmarried woman's father or the woman herself for injury resulting from premarital sex or unwed motherhood.¹¹⁰ Finally, a claim for breach of marriage promise involved a woman's claim that a promise of future marriage by a man induced her to engage in sexual behavior that she would not have but for the promise and expectation of marriage.¹¹¹ These torts were inspired as a way to vindicate one's property rights in his spouse.¹¹² However, over time, these claims were disallowed and are currently available in only seven states.¹¹³

B. Legal Effects of Adultery

The potential reasons that a spouse may seek a divorce on fault-based grounds, including adultery, are varied. The most obvious reason is that obtaining a divorce judgment on these grounds may bring a feeling of retribution to the

102. *Id.*

103. Nicolas, *supra* note 86, at 102 (citing the statutes of the relevant states and territories).

104. *Helsel v. Noellsch*, 107 S.W.3d 231, 232 (Mo. 2003). Soon, most states followed New York's lead. *Id.*

105. Deans, *supra* note 85, at 401. Later, the Married Women's Property Acts extended the claim to wives. Nicolas, *supra* note 86, at 113–14.

106. Lance McMillan, *Adultery as Tort*, 90 N.C. L. REV. 1987, 1989 (2012).

107. Nicolas, *supra* note 86, at 113.

108. Deans, *supra* note 85, at 388.

109. Nicolas, *supra* note 86, at 113.

110. McMillan, *supra* note 106, at 1989.

111. *Id.*

112. *Helsel v. Noellsch*, 107 S.W.3d 231, 232 (Mo. 2003).

113. These seven states are Hawaii, Illinois, Mississippi, New Mexico, North Carolina, South Dakota, and Utah. *See, e.g.*, *Hunt v. Chang*, 594 P.2d 118, 123 (Haw. 1979); *Schroeder v. Winyard*; 873 N.E.2d 35, 40 (Ill. App. Ct. 2007); *Fitch v. Valentine*, 2005-CA-01800-SCT (¶ 16) (Miss. 2007); 959 So. 2d 1012, 1019–20; *Thompson v. Chapman*, 600 P.2d 302, 304 (N.M. Ct. App. 1979); *Heller v. Somdahl*, 696 S.E.2d 857, 860–61 (N.C. Ct. App. 2010); *Hershey v. Hershey*, 467 N.W.2d 484, 489 (S.D. 1991).

victim spouse.¹¹⁴ Additionally, in many jurisdictions fault-based divorces are granted without any requisite waiting period, unlike the no-fault divorce, which requires that a specific length of time passes before a divorce will be granted. Also, depending on the jurisdiction, a spouse who seeks to obtain a divorce judgment on fault-based grounds may enjoy an advantageous legal position with regard to permanent spousal support (also known as alimony or maintenance), marital (or community) property, and child custody.¹¹⁵ Further, in some jurisdictions, fault plays a role in determining these legal rights, even when a spouse is granted a no-fault divorce.¹¹⁶ Essentially, adultery gives the innocent spouse a way out of the marriage, while simultaneously punishing the philandering spouse.¹¹⁷

1. *Effect of Adultery on the Timing of Divorce*

A spouse eager to dissolve the marriage may prefer to obtain a fault-based divorce, as these are typically granted with no requisite waiting period.¹¹⁸ By contrast, in some jurisdictions, a no-fault divorce can be obtained only after satisfying a statutorily imposed waiting period,¹¹⁹ which is triggered by one spouse's manifestation of her intent to dissolve the marriage.¹²⁰ The exact length of

114. See, e.g., Evans, *supra* note 26, at 400; Wilson, *supra* note 26, at 506.

115. See *infra* Part II.B.

116. Kristine Cordier Karnezis, Annotation, *Fault as a Consideration in Alimony, Spousal Support, or Property Division Awards Pursuant to No-Fault Divorce*, 86 A.L.R. 3d 1116, § 3[a]. But see Heilman v. Heilman, 610 So. 2d 60, 61 (Fla. Dist. Ct. App. 1992); Kaur v. Singh, 843 N.Y.S.2d 350, 350–51 (N.Y. App. Div. 2007).

117. Bethany Catron, Case Note, *If You Don't Think This Is Adultery, Go Ask Your Spouse: The New Hampshire Supreme Court's Faulty Interpretation of Adultery in In re Blanchflower*, 834 A.2d 1010 (2003)—*Grounds for a Fault Based Divorce*, 30 U. DAYTON L. REV. 339, 351 (2005).

118. Note, though, that in at least one jurisdiction, even fault-based divorces require a short waiting period of 60 to 90 days. TENN. CODE ANN. § 36-4-101 (2013). Additionally, some jurisdictions may require a certain waiting period to prove certain bases for divorce. See CONN. GEN. STAT. ANN. § 46b-40 (2013) (divorce may be granted upon a finding that one of the spouses endured "legal confinement in a hospital or hospitals or other similar institution or institutions, because of mental illness, for at least an accumulated period totaling five years within the period of six years next preceding the date of the complaint"); N.Y. DOM. REL. LAW § 170 (2013) (Divorce may be granted based on "[t]he abandonment of the plaintiff by the defendant for a period of one or more years" or "[t]he confinement of the defendant in prison for a period of three or more consecutive years after the marriage of plaintiff and defendant"); OHIO REV. CODE ANN. § 3105.01 (2013) ("Willful absence of the adverse party for one year.").

119. For example, Alabama has a waiting period of two years, ALA. CODE § 30-2-1 (2013), and Connecticut has a waiting period of 18 months. CONN. GEN. STAT. ANN. § 46b-40. Louisiana's requisite separation period ranges from six months to one year, based on various factors. LA. CIV. CODE arts. 102, 103.1 (2013). Ohio has a waiting period of one year. OHIO REV. CODE ANN. § 3105.01.

120. See Sinha v. Sinha, 526 A.2d 765, 767 (Pa. 1987) ("Physical separation alone does not satisfy the separate and apart requirement of § 201(d). There must be an independent intent on the part of one of the parties to dissolve the marital union before the

the waiting period varies by jurisdiction¹²¹ and has a purpose that is two-fold: (1) it shows the court that the marriage is truly at an end;¹²² and (2) it allows spouses an opportunity to reconcile.¹²³

2. Effect of Adultery on the Right to Spousal Support

The right to claim final spousal support may be affected by a spouse's fault in some jurisdictions.¹²⁴ Some believe that considering fault in spousal support determinations holds an at-fault spouse accountable and also compensates the other spouse for harm suffered at the hands of the at-fault spouse.¹²⁵ On the other hand, others believe that spousal support is not designed to be punitive and that the other spouse's remedy should lie in tort law or criminal law.¹²⁶

Many jurisdictions do consider marital fault in fashioning spousal support awards.¹²⁷ In some jurisdictions, fault, such as adultery, operates as an absolute bar to a claim for spousal support;¹²⁸ however, most states mandating the consideration of fault in spousal support determinations provide that it is not determinative but

three year period commences. This intent must be clearly manifested and communicated to the other spouse.”)

121. See *supra* note 119.

122. Dailey v. Dailey, 463 N.E.2d 427, 429 (Ohio Ct. App. 1983) (noting that the waiting period “is based upon the theory that living apart for a long period of time is the best evidence that a marriage has broken down”).

123. See *Sinha*, 526 A.2d at 767 (“The granting of a divorce [without both the physical separation and intent to end the marriage] would deprive the unknowing party an opportunity to attempt reconciliation, a specific policy goal of the legislature.”).

124. In many jurisdictions, by contrast, fault plays no role in determining temporary (or interim) spousal support. This is because the obligation of temporary spousal support arises from “the statutorily-imposed duty of the spouses to support each other during their marriage,” and its purpose is to maintain the standard of living the spouses are accustomed to, pending a determination of permanent spousal support. See, e.g., *In re Marriage of Nussbeck*, 899 P.2d 347, 349 (Colo. App. 1995); *Kirkpatrick v. Kirkpatrick*, 41,851, p. 2 (La. App. 2 Cir. 1/24/07); 948 So. 2d 390, 393; *Belfiglio v. Belfiglio*, 469 N.Y.S.2d 978, 979 (N.Y. App. Div. 1984).

125. Larry R. Spain, *The Elimination of Marital Fault in Awarding Spousal Support: The Minnesota Experience*, 28 WM. MITCHELL L. REV. 861, 866 (2001). For an excellent discussion of the history of spousal support, as well as the various rationales for it and how fault plays into those rationales, see *Mani v. Mani*, 869 A.2d 904, 908–10 (N.J. 2005).

126. *Id.*

127. Nineteen states statutorily require the decision-maker to consider fault. By contrast, many others, although not enumerating fault by statute, consider it under a catch-all factor, such as “[a]ny other factor that the court expressly finds to be relevant and equitable.” See, e.g., CAL. FAM. CODE § 4320 (2013); OHIO REV. CODE ANN. § 3105.18 (2013); WIS. STAT. ANN. § 767.56 (2013) (stating that courts should consider “[s]uch other factors as the court may in each individual case determine to be relevant”).

128. These jurisdictions include Georgia, Louisiana, North Carolina, South Carolina, and West Virginia. See, e.g., LA. CIV. CODE art. 112 (2013); N.C. GEN. STAT. § 50-16.3A (2013); S.C. CODE ANN. § 20-3-130 (2013); *Peters v. Peters*, 283 S.E.2d 454, 455 (Ga. 1981); *Uldrich v. Uldrich*, 474 S.E.2d 593, 596 (W. Va. 1996).

simply one of several factors to be considered.¹²⁹ Thus, “[i]f, after weighing the comparative fault or misconduct, the court finds that one party was principally at fault and that the fault was a contributing factor to the deterioration of the marital relationship, the court may consider that circumstance in making an alimony award.”¹³⁰ In sum, most jurisdictions agree that entitlement to or amount of spousal support should not rest solely on marital misconduct.¹³¹

129. Other factors typically include: (1) the past relations and conduct of the parties; (2) the length of the marriage; (3) the abilities of the parties to work; (4) the source and the amount of property awarded to the parties; (5) the parties’ ages; (6) the abilities of the parties to pay support; (7) the present situation of the parties; (8) the needs of the parties; (9) the parties’ health; (10) the parties’ prior standard of living and whether either is responsible for the support of others; (11) the contributions of the parties to the joint estate; (12) the effect of cohabitation on a party’s financial status; and (13) general principles of equity. *Woodington v. Shohooki*, 792 N.W.2d 63, 69 (Mich. Ct. App. 2010); *see also Lee v. Lee*, 477 N.W.2d 429, 433 (Mich. Ct. App. 1991); *Pirri v. Pirri*, 631 S.E.2d 279, 285 (S.C. Ct. App. 2006). Please note, however, that in some states, where “fault” is not defined by statute, some courts have struggled to apply this factor. For instance, one Utah court found that “[w]here the legislature has not defined fault in the statute, it is virtually impossible for trial courts to quantify it, and the consequences thereof, when fashioning alimony awards.” *Mark v. Mark*, 2009 UT App. 374, ¶ 18, 223 P.3d 476, 482. As such, the court noted:

[I]t is unclear whether fault relates to the alternate grounds for divorce contemplated by Utah Code Ann. § 30-3-1(3) (listing grounds for divorce, including impotency, adultery, desertion, neglect, habitual drunkenness, felony conviction, cruel treatment, irreconcilable differences, and insanity), or if it means how the parties dealt with, for example, marital assets or liabilities, or some other behavior unrelated to the cause of the divorce.

Id. (citation omitted).

130. *Durnell v. Durnell*, 460 S.E.2d 710, 714 (W. Va. 1995). Some states provide that fault, for purposes of spousal support, must be of such as to contribute to the dissolution of the marriage. *Venuti v. Venuti*, 440 A.2d 878, 880 (Conn. 1981). Florida and Texas specify that adultery will constitute fault for purposes of spousal support decisions. FLA. STAT. ANN. § 61.08 (2013) (“The court may consider the adultery of either spouse and the circumstances thereof in determining the amount of alimony, if any, to be awarded.”); TEX. FAM. CODE ANN. § 8.052 (2013) (The court shall consider “marital misconduct, including adultery” in making an alimony determination after a finding that the spouse is eligible based on need and other factors).

131. In some jurisdictions, it is inappropriate to consider fault when determining the parties’ spousal support rights and obligations. Some states statutorily prohibit courts from considering fault when determining spousal support awards. *See, e.g., ARIZ. REV. STAT. ANN. § 25-319(B)* (2013); *COLO. REV. STAT. ANN. § 14-10-114(4)* (2013); *MINN. STAT. ANN. § 518.552(2)* (2013). Others do so via case law. *See, e.g., Rodriguez v. Rodriguez*, 13 P.3d 415, 418 (Nev. 2000). According to one source, in total, there is a “slight minority of states, twenty-three, [in which] marital fault is not considered in alimony determinations.” *See Spain, supra* note 125, at 867 (reaching the number 23 by combining states that statutorily exclude fault as a factor in alimony considerations and those that exclude it via case law).

3. *Effect of Adultery on Marital Property Rights*

The rights of spouses to marital property may also be impacted by their fault in some jurisdictions. Most jurisdictions agree that equitable division of marital property is necessary. However, equitable does not necessarily mean equal,¹³² and in most jurisdictions, fault will have some impact on marital property distributions. Research reveals no jurisdiction where fault is an absolute bar to entitlement to marital property, but 26 states consider fault in determining how to divide marital property.¹³³

The concept of fault varies from one jurisdiction to another. Eight of the 26 states¹³⁴ limit the concept of fault to economic misconduct¹³⁵ or acts that shock the conscience.¹³⁶ The other 18 allow for a broad consideration of fault¹³⁷ and define the term as conduct or circumstances of the parties during the marriage that contribute to the breakdown of the marriage.¹³⁸

132. See, e.g., ARIZ. REV. STAT. ANN. § 25-318; ARK. CODE ANN. § 9-12-315 (2013); DEL. CODE ANN. tit. 13, § 1513 (2013); *Rockett v. Rockett*, 77 So. 3d 599, 602 (Ala. Civ. App. 2011).

133. The remaining states generally divide marital property “without regard to marital misconduct.” See, e.g., ARIZ. REV. STAT. ANN. § 25-318(A); COLO. REV. STAT. ANN. § 14-10-113(1). Note, though, that even in these states, many hold that “[t]he prohibition against considering marital misconduct does not prevent consideration of a party’s depletion of the marital assets.” See, e.g., *Anstutz v. Anstutz*, 331 N.W.2d 844, 846 (Wis. Ct. App. 1983); *Romano v. Romano*, 632 So. 2d 207, 210 (Fla. Dist. Ct. App. 1994).

134. These include Alaska, Florida, Indiana, Nevada, New York, North Carolina, South Dakota, and Wisconsin.

135. ALAS. STAT. ANN. § 25.24.160(a)(4) (2013); FLA. STAT. ANN. § 61.075 (2013); IND. CODE ANN. § 31-15-7-5 (2013); S.D. CODIFIED LAWS § 25-4-45.1 (2013); *Wheeler v. Upton-Wheeler*, 946 P.2d 200, 203 (Nev. 1997); *K. v. B.*, 784 N.Y.S.2d 76, 84 (N.Y. App. Div. 2004); *Smith v. Smith*, 331 S.E.2d 682, 686–87 (N.C. 1985); *Anstutz*, 331 N.W.2d at 846.

136. *Blickstein v. Blickstein*, 472 N.Y.S.2d 110, 113–14 (N.Y. App. Div. 1984) (giving one case as an example where the husband had tried to have his wife murdered during divorce proceedings).

137. These states include Alabama, Arkansas, Connecticut, Idaho, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Nebraska, New Hampshire, North Dakota, Rhode Island, South Carolina, Texas, Vermont, Virginia, and Wyoming.

138. ARK. CODE ANN. § 9-12-315; CONN. GEN. STAT. ANN. § 46b-81 (2013); MASS. GEN. LAWS ch. 208, § 34 (2013); MD. CODE ANN. FAM. LAW § 8-205 (2013); R.I. GEN. LAWS § 15-5-16.1 (2013); VA. CODE ANN. § 20-107.3 (2013); WYO. STAT. ANN. § 20-2-114 (2013); *Lutz v. Lutz*, 485 So. 2d 1174, 1176 (Ala. Civ. App. 1986); *Jackson v. Jackson*, 393 P.2d 28, 30 (Idaho 1964) (“It is clear the statute intends that not less than one-half of the community property be awarded an injured party granted a divorce on grounds of adultery or extreme cruelty.”); *Sparks v. Sparks* 485 N.W.2d 893, 894 (Mich. 1992); *Singley v. Singley*, 1999-CT-00754-SCT (¶ 6) (Miss. 2002); 840 So. 2d 1004, 1006; *Fields v. Fields*, 643 S.W.2d 611, 616 (Mo. Ct. App. 1982); *Ivins v. Ivins*, 108 N.W.2d 99, 106 (Neb. 1961); *Boucher v. Boucher*, 553 A.2d 313, 315 (N.H. 1988); *Heley v. Heley*, 506 N.W. 2d 715, 718 (N.D. 1993) (“It is within the discretion of the trial court, after hearing the testimony and applying the . . . guidelines to determine an equitable distribution of the property depending on the facts and circumstances in each individual case.” (citations

Courts in most of these 18 jurisdictions begin with the premise that the distribution should be equal unless inequality is justified by the circumstances.¹³⁹ Then, much like in spousal support decisions, the court weighs several factors¹⁴⁰ and has broad discretion in doing so.¹⁴¹ One of these factors is the conduct of the parties in causing the divorce.¹⁴² Thus, in most jurisdictions, fault is only one factor to consider. Typically, in these 18 states, adultery will qualify as fault. Courts in these jurisdictions vary widely in how much weight they place on a spouse's adulterous conduct. And many courts will only consider adultery if it places a burden on or substantially affects the other spouse.¹⁴³

4. *Effect of Adultery on Child Custody Rights*

Another area potentially impacted by judicial determination of a spouse's fault, particularly adultery, is child custody. In the past, there was a general rule favoring the nonadulterous parent.¹⁴⁴ In other words, if a divorce was granted based on one parent's adulterous behavior, the other parent was granted custody of the children.¹⁴⁵ Thus, evidence of adultery was sufficient, standing alone, to

omitted)); *Woodside v. Woodside*, 350 S.E.2d 407, 412 (S.C. Ct. App. 1986); *Young v. Young*, 609 S.W.2d 758, 762 (Tex. 1980); *Emmons v. Emmons*, 450 A.2d 1113, 1115 (Vt. 1982).

139. See generally FLA. STAT. ANN. § 61.075; *Smith v. Smith*, 331 S.E.2d 682, 686 (N.C. 1985).

140. The relevant factors may include (1) the contribution to the marriage by each spouse, including contributions to the care and education of the children and services as homemaker; (2) the economic circumstances of the parties; (3) the duration of the marriage; (4) any interruption of personal careers or educational opportunities of either party; (5) the contribution of one spouse to the personal career or educational opportunity of the other spouse; (6) the desirability of retaining any asset, including an interest in a business, corporation, or professional practice, intact and free from any claim or interference by the other party; (7) the contribution of each spouse to the acquisition, enhancement, and production of income or the improvement of, or the incurring of liabilities to, both the marital assets and the nonmarital assets of the parties; (8) the desirability of retaining the marital home as a residence for any dependent child of the marriage, or any other party, when it would be equitable to do so, it is in the best interest of the child or that party, and it is financially feasible for the parties to maintain the residence until the child is emancipated or until exclusive possession is otherwise terminated by a court of competent jurisdiction; (9) the intentional dissipation, waste, depletion, or destruction of marital assets after the filing of the petition or within 2 years prior to the filing of the petition; (10) any other factors necessary to do equity and justice between the parties. See, e.g., FLA. STAT. ANN. § 61.075.

141. *In re Marriage of Hanni*, 2000 MT 59, ¶ 28, 299 Mont. 20, 997 P.2d 760, 766; *Hatchette v. Hatchette*, 57 S.W.3d 884, 888 (Mo. Ct. App. 2001).

142. See, e.g., *Frost v. Frost*, 2009 Ark. App. 290, at 6, 307 S.W.3d 41, 45.

143. *Hatchette*, 57 S.W.3d at 888.

144. See, e.g., *Keyes v. Keyes*, 171 So. 2d 489, 490 (Miss. 1965) (“[W]hen a divorce has been properly granted because of the adultery of the wife, she is not entitled either to alimony or to the custody of the children . . .” (quoting *Winfield v. Winfield*, 35 So. 2d 443, 444 (Miss. 1948) (internal quotation mark omitted))).

145. *Wallis v. Wallis*, 200 A.2d 164, 165 (Md. 1964).

establish a parent's moral unfitness.¹⁴⁶ This general rule was not applied to punish the adulterous parent or to reward the nonadulterous one. Rather, it was based upon the presumption that one parent's adultery "is a highly persuasive indicium that [he or she] does not meet the test when unfortunately a choice must be made between parents, of which is the better suited to bear responsibilities of rearing the children."¹⁴⁷

Later, courts moved away from a presumption of unfitness based on adulterous behavior, determining instead that an adulterer is not automatically disqualified as the custodial parent.¹⁴⁸ Instead, courts decided that the ultimate consideration in determining custody is the best interest of the child.¹⁴⁹ The best-interest test consists of several factors¹⁵⁰ and requires a decision-maker to consider the totality of the circumstances of the child and parent(s) on a case-by-case basis.¹⁵¹ Accordingly, in most jurisdictions, marital fault like adultery is no longer the primary factor in custody determinations.¹⁵²

146. *Keyes*, 171 So. 2d at 490; *Shanbarker v. Dalton*, 247 A.2d 278, 281 (Md. 1968).

147. *Wallis*, 200 A.2d at 165–66. Note, however, that because this presumption was one of fact, it was not absolute and allowed for a couple of exceptions to it, including the reformation rule (in some jurisdictions) and the tender-years doctrine. The reformation rule allowed an adulterer's later actions to mitigate or obliterate the effects of his prior indiscretion on his child custody rights. *See, e.g., Monsour v. Monsour*, 347 So. 2d 203, 205 (La. 1977). Such reformation occurred, for example, when the adulterous parent terminated his adulterous relationship either by ending his immoral behavior or by marrying his paramour. *See, e.g., Rogers v. Rogers*, 577 So. 2d 761, 764 (La. Ct. App. 1991). The tender-years doctrine, known in some jurisdictions as the maternal preference rule, provided that "[i]n all cases where any child is of such tender age as to require the mother's care for its physical welfare it should be awarded to her custody, at least until it reaches that age and maturity where it can be equally well cared for by other persons." *See, e.g., Albright v. Albright*, 437 So. 2d 1003, 1004 (Miss. 1983). Although the doctrine did not preclude a consideration of the mother's moral fitness, *Fulco v. Fulco*, 254 So. 2d 603, 605 (La. 1971), to the extent the mother had engaged in adulterous conduct, the tender-years doctrine essentially counteracted fitness considerations. The tender-years doctrine has since been abolished due to its unconstitutional gender-based classification. *See, e.g., Albright*, 437 So. 2d at 1005; *Cherradi v. Lavoie*, 662 So. 2d 751, 753 (Fla. Dist. Ct. App. 1995).

148. *See, e.g., Davis v. Davis*, 372 A.2d 231, 235 (Md. 1977); *Ford v. Ford*, 419 S.E.2d 415, 417 (Va. Ct. App. 1992). As the judiciary began to recognize, a parent's decision to engage in an adulterous relationship is not an adequate basis on which to make custody decisions. *Varley v. Varley*, 934 S.W.2d 659, 666–67 (Tenn. Ct. App. 1996).

149. *Carr v. Carr*, 480 So. 2d 1120, 1121 (Miss. 1985); *see also Mullis v. Mullis*, 994 So. 2d 934, 940 (Ala. Civ. App. 2007); *Lockard v. Lockard*, 227 N.W.2d 581, 582–83 (Neb. 1975).

150. In the early 1980s, state legislatures and courts across the United States began to set forth factors to assist judges in determining the best interest of the child. *Albright*, 437 So. 2d at 1004; *see DEL. CODE ANN. tit. 13, § 722* (2013); *LA. CIV. CODE art. 134* (2013); *TENN. CODE ANN. § 36-6-106* (2013); *Pettinato v. Pettinato*, 582 A.2d 909, 913 (R.I. 1990).

151. *Cassidy v. Cassidy*, 514 So. 2d 1198, 1199 (La. Ct. App. 1987). In most jurisdictions, the trial court has discretion to weigh the factors in light of the evidence

That said, in most jurisdictions¹⁵³ adultery can be considered under one of the best-interest factors—the parents’ moral fitness.¹⁵⁴ Adultery does not necessarily render a parent morally unfit per se.¹⁵⁵ In fact, most courts only consider adultery in making custody determinations if the conduct has a direct and adverse effect on the child;¹⁵⁶ if it does, the trial court has discretion to place great weight on the moral fitness factor.¹⁵⁷

Some courts have used the moral fitness factor against adulterous parents. As one court explained, “adultery is a reflection of a parent’s moral values [and] should be considered in evaluating the moral climate in which a child is to be reared.”¹⁵⁸ In essence, some courts will find that the unwholesome influence of an

presented and is not required to weigh the factors equally. *See Brown v. Brown*, 39,060, p. 4 (La. App. 2d Cir. 7/21/04); 877 So. 2d 1228, 1233. However, it likewise cannot assign disproportionate weight to particular factors while disregarding others. *See Williams v. Barbec*, 243 P.3d 995, 1005 (Alaska 2010).

152. *See Carr*, 480 So. 2d at 1122.

153. *Id.* at 1123.

154. Other factors include the age of the children; the health and sex of the children; which parent had the continuity of care prior to the separation; which parent has the best parenting skills and which has the willingness and capacity to provide primary child care; the employment of the parents and their responsibilities in that employment; the physical and mental health and age of the parents; emotional ties between parent and child; the home, school, and community record of the child; the preference of the child if of sufficient age; the stability of the home environment and employment of each parent; and any other relevant factors. *See supra* note 150.

155. *Shivers v. Shivers*, 44,596, p. 12 (La. App. 2 Cir. 7/1/09); 16 So. 3d 500, 507; *Mabus v. Mabus*, 01-CA-00381-SCT (¶ 46) (Miss. 2003); 890 So. 2d 806, 817–18; *Hollon v. Hollon*, 00-CA-00141-SCT (¶ 23) (Miss. 2001); 784 So. 2d 943, 949; *Lockard v. Lockard*, 227 N.W.2d 581, 583 (Neb. 1975).

156. *Smith v. Smith*, 39 So. 3d 458, 461 (Fla. Dist. Ct. App. 2010) (“[T]he act of adultery should not be taken into consideration in determining custody if . . . the spouse’s adultery does not have any bearing on the children’s welfare.”); *Martin v. Martin*, 820 A.2d 410, 463 (Del. Fam. Ct. 2002); *Swain v. Swain*, 406 A.2d 680, 683 (Md. Ct. Spec. App. 1979) (“[T]here are now no presumptions whatsoever with respect to the fitness of a parent who has committed, or is committing, adultery. Rather, adultery is relevant [o]nly insofar as it [a]ctually affects a child’s welfare.”). Some of the factors courts have considered in deciding that issue are “(1) whether the children were aware of the illicit relationship, (2) whether sex play occurred in their presence, (3) whether the furtive conduct was notorious and brought embarrassment to the children, and (4) what effect the conduct had on the family home life.” *Scott v. Scott*, 95-0816, pp. 8–9 (La. App. 1 Cir. 12/15/95), 665 So. 2d 760, 766. *But see Mabus*, 2001-CA-00381-SCT (¶ 46); 890 So. 2d at 818 (Mississippi Supreme Court considered the adulterous relationship and concluded that the wife’s affair “interfered with [the wife’s] ability to effectively parent, regardless of whether the children knew of it”). The court must consider the circumstances of each case in determining whether such adultery will negatively affect the children concerned. *See Carr*, 480 So. 2d at 1122.

157. *Brown v. Brown*, 39,060, p. 4 (La. App. 2d Cir. 7/21/04); 877 So. 2d 1228, 1233.

158. *Ford v. Ford*, 419 S.E.2d 415, 418 (Va. Ct. App. 1992).

adulterous parent could impair a child's best interest.¹⁵⁹ Further, in some jurisdictions, an adulterer who continues an extramarital relationship post-divorce may see the court scrutinize the effect of that relationship on the child.¹⁶⁰

III. THE CURRENT LAW OF ADULTERY IN FAULT-BASED DIVORCE JURISDICTIONS: DEFINITION AND DEFENSES

The current law of adultery reflects the dual role of marriage as both an institution in which society has historically been heavily invested and a contract between two individual people. The current law balances these two facets of marriage by incorporating its value as a societal institution in defining adultery and its contractual flavor in allowing a spouse sued for divorce on grounds of adultery to raise certain defenses.

A. Marriage as a Societal Institution

Marriage is touted as the foundation of the family and society, and it has been credited with furthering civilization and progress.¹⁶¹ For this reason, and additionally because marriage bestows a specific legal status on those who enter into it, the public has traditionally been interested in preserving it. Currently, in the context of fault-based divorce, the legal definition of adultery incorporates society's mores. This approach has generated criticism, as some have argued that as individual privacy has gained the upper hand in the marital relationship, marriage has come to be viewed less as an institution and more as a contract between two people.¹⁶² This belief has led many to opine that the courtroom is an inappropriate place to define adultery and that individual spouses should be allowed to determine the meaning of the term.¹⁶³ Yet the law has never defined adultery on this basis, nor should it. Spouses are certainly free to express to each other their personal ideas on what constitutes "cheating." However, the terms

159. Carr, 480 So. 2d at 1123; see also Brown, 39,060, p. 4; 877 So. 2d at 1228. Of course, some divorces involve allegations of adultery by both spouses, which troubles decision-makers in some jurisdictions. This situation arose in *Retzer v. Retzer*, 578 So. 2d 580 (Miss. 1990), and the trial court, while granting custody to the mother, noted that "the example set by both parents as to sexual conduct will greatly jeopardize the children." *Id.* at 595. The Mississippi Supreme Court affirmed, mainly because the initial custody decision had been made two and one-half years ago. The court did, however, call the record "troubling" and stated that "[i]t would take the wisdom of Solomon to know at this time what is truly in the best interest of these children." *Id.* at 596.

160. Martin v. Martin, 820 A.2d 410, 463 (Del. Fam. Ct. 2002) ("[A]lthough the relationship might not be considered immoral as statutorily determined in this opinion, the Court must still consider how the new relationship between parent and significant other impacts upon the child.").

161. Maynard v. Hill, 125 U.S. 190, 211 (1888).

162. Mitchell, *supra* note 11, at 182.

163. *Online Affairs 'Are Infidelity,'* BBC NEWS (Apr. 17, 2004, 10:58 AM), <http://news.bbc.co.uk/2/hi/health/3631961.stm> ("[C]ouples need to be clear what the rules are when it comes to online cheating." (quoting Dr. Monica Whitty of Queen's University)). "Where the boundary [of adultery] is depends on the individual relationship." *Id.* (quoting Christine Northam, senior counselor at Relate, a group of relationship guidance experts).

“cheating,” “infidelity,” and “adultery” are not necessarily interchangeable, and the two spouses’ definitions of any, some, or all of those terms may not match¹⁶⁴ and could change over time. Further, relying on individual spouses to dictate the parameters of adultery as applicable to his or her own marriage may (or may not) work in terms of spousal scorecards of wrongs but will not work in the judicial world of fault-based divorce mainly due to issues of consistency and proof. Therefore, the law has traditionally relied on societal views to determine what sort of behavior constitutes adultery.

Determining exactly what in-person sexual activity outside of marriage constitutes adultery is no easy task. One need only look to a very famous—or infamous—extramarital relationship, that of former President Bill Clinton and his intern, Monica Lewinsky.¹⁶⁵ In an oft-quoted statement, former President Clinton adamantly denied that he had sex with her—or “that woman,” as he called her.¹⁶⁶ Once the public learned that he and Ms. Lewinsky did engage in oral sex, many began debating the definition of words like “sex” and “adultery.”

Courts, too, have had difficulty in defining the term “adultery.” Conflicting results from judicial opinions around the country indicate that the only thing clear about the definition of adultery is that it is anything but clear. Some jurisdictions define adultery (either statutorily or jurisprudentially) by referencing specific sexual acts.¹⁶⁷ Of these, some define the term very narrowly. For example, many jurisdictions define adultery as when a spouse engages in voluntary sexual intercourse with one who is not a spouse,¹⁶⁸ and courts in these jurisdictions have historically refused to extend the definition.¹⁶⁹ Given the use of the word “intercourse” in the definition, questions have arisen as to the extent of adultery,

164. See, e.g., Mark D. White, *Is Adultery Ever Justified?*, PSYCHOL. TODAY (July 3, 2012), <http://www.psychologytoday.com/articles/201206/is-adultery-ever-justified>. (“[D]ifferent things imply cheating for different people. For some, it may be just sex, but for others it may include kissing or even coffee with another person.”).

165. Peter Baker & John F. Harris, *Clinton Admits to Lewinsky Relationship, Challenges Starr to End Personal ‘Prying,’* WASH. POST, Aug. 18, 1998, at A1.

166. *Id.*

167. CONN. GEN. STAT. ANN. § 46b-40 (2013); W. VA. CODE ANN. § 48-5-204 (2013); see also BLACK’S LAW DICTIONARY 60 (9th ed. 2010); 24 AM. JUR. 2D *Divorce and Separation* § 56 (2013); 27A C.J.S. *Divorce* § 88 (2012).

168. See *supra* note 167.

169. *Anonymous v. Anonymous*, 217 So. 2d 240, 240–41 (Ala. 1968) (ruling that sexual relations that do not include sexual intercourse are not adultery).

namely whether other sex acts are included within its scope.¹⁷⁰ Other jurisdictions define adultery by reference to specific sexual acts besides intercourse.¹⁷¹

Other jurisdictions fail to statutorily define adultery, and their courts do not specifically state what sexual acts constitute adultery,¹⁷² relying more or less on the “I know it when I see it” principle. Some courts in these jurisdictions have rejected the argument that intercourse is required for a finding of adultery.¹⁷³

Despite the differing definitions of adultery under current law, a common thread can be found. That is, in practically every jurisdiction that recognizes adultery as a fault-based ground for divorce, some type of in-person sexual conduct must occur.

B. Marriage as a Contract

Although the current law of adultery embraces marriage as a societal institution by using societal mores to define adultery, it reserves a place for the role of the spouses as parties to a contract by recognizing certain defenses to a divorce filed on grounds of adultery.¹⁷⁴ Depending on the jurisdiction, these defenses include some or all of the following: condonation (also known as

170. This, of course, raises the question as to whether homosexual activity can ever constitute adultery, a question that has yielded conflicting answers. *Compare In re Blanchflower*, 834 A.2d 1010 (N.H. 2003) (homosexual activity cannot be adultery under New Hampshire law), *with Owens v. Owens*, 274 S.E.2d 484, 485–86 (Ga. 1981) (homosexual activity can be adultery under Georgia law). *See generally* Nicolas, *supra* note 86 (discussing whether homosexual activity constitutes adultery).

171. *See, e.g.*, N.Y. DOM. REL. LAW §§ 170(4), 200(4) (2013) (defining adultery as “the commission of an act of sexual intercourse, oral sexual conduct or anal sexual conduct, voluntarily performed by the defendant, with a person other than the plaintiff after the marriage of plaintiff and defendant”).

172. *See, e.g.*, *Brown v. Brown*, 665 S.E.2d 174, 178 (S.C. Ct. App. 2008).

173. *See, e.g.*, *Rosser v. Rosser*, 355 So. 2d 717, 719 (Ala. Civ. App. 1977) (dictum) (referring to a wife’s conduct in performing oral sex on another man as adultery); *Bonura v. Bonura*, 505 So. 2d 143, 145 (La. Ct. App. 1987) (finding wife committed adultery where she engaged in intimate touching of another man’s sexual organ and laid naked in bed with him); *Menge v. Menge*, 491 So. 2d 700, 701–02 (La. Ct. App. 1986) (ruling that oral sex constitutes adultery); *Nemeth v. Nemeth*, 481 S.E.2d 181, 184 (S.C. Ct. App. 1997).

174. These defenses can also be used in other fault-based divorce actions and may be provided for by statute or at common law. *See, e.g.*, ALASKA STAT. ANN. § 25.24.120 (2013) (lapse of time); GA. CODE ANN. § 19-5-4 (2013) (condonation); N.Y. DOM. REL. LAW § 171 (2013) (connivance); N.D. CENT. CODE § 14-05-13 (2013) (condonation); S.D. CODIFIED LAWS § 25-4-19, -20, -22 (2013) (connivance and condonation); *Ramsay v. Ramsay*, 244 P.2d 381, 382 (Nev. 1952) (“The defense of condonation in this state is not governed by statute but remains a part of the common law.”).

reconciliation¹⁷⁵ or forgiveness¹⁷⁶), connivance, insanity, lapse of time, provocation, and recrimination.¹⁷⁷

Condonation “is one spouse’s forgiveness of the other spouse’s adulterous misconduct, usually evidenced by resumption and continuation of apparently normal matrimonial relations.”¹⁷⁸ Also known as reconciliation in some jurisdictions, condonation typically requires a reinstatement of “full marital rights” and not just forgiveness.¹⁷⁹ In cases of adultery, some courts have considered an act of intercourse between the spouses to be sufficient evidence of condonation.¹⁸⁰ By its very nature, condonation is a conditional defense in that the condoning spouse must know of the fault.¹⁸¹ Thus, if the adulterous spouse commits further adulterous acts after the condonation, the cause for divorce is revived.¹⁸²

Unlike condonation, which occurs after the fault, connivance occurs prior to it.¹⁸³ “Connivance is the consent, either expressed or implied, of one spouse to the proposed misconduct of the other spouse.”¹⁸⁴ It is “manifested by passive permission, with intent to connive at or actively procure the commission of the acts complained of.”¹⁸⁵

175. See LA. CIV. CODE art. 104 (2013).

176. ALASKA STAT. ANN. § 25.24.120; N.Y. DOM. REL. LAW § 171.

177. Collusion may also be used as a bar to divorce on fault grounds. It is not a defense that one spouse raises, but something the court determines *sua sponte*. As the term is used in matrimonial actions, it “is an agreement between a husband and wife to procure a judgment dissolving the marriage contract, which judgment, if the facts were known, the court would not grant.” *Rosenzweig v. Rosenzweig*, 246 N.Y.S. 231, 233 (N.Y. App. Div. 1930).

178. *Hollis v. Hollis*, 427 S.E.2d 233, 235 (Va. Ct. App. 1993); see also N.D. CENT. CODE § 14-05-13 (2013); S.D. CODIFIED LAWS § 25-4-22 (2013).

179. *Christensen v. Christensen*, 134 A. 373, 373–74 (Me. 1926) (“To be effectual, condonation must include a restoration of the offending party to, or a continuance of, all marital rights, after the offense becomes known. While condonation imports forgiveness, the converse is not necessarily true.”).

180. *Ramsay v. Ramsay*, 244 P.2d 381, 383 (Nev. 1952) (“The general rule in such cases appears to be that a single act of intercourse will suffice as condonation since it serves to demonstrate in the clearest possible manner that the offended spouse is in fact reconciled to the specific offense and has chosen to forgive it. The action bespeaks forgiveness more clearly than words could do.”).

181. See N.D. CENT. CODE § 14-05-13 (“[C]ondonation can be made only after the cause of divorce has become complete as to the acts complained of.”).

182. *Mitchell v. Mitchell*, 133 N.E.2d 79, 82 (Ind. Ct. App. 1956) (“Condonation ceases to be a defense where the condoned offense is subsequently repeated.”).

183. *Hollis*, 427 S.E.2d at 235 (“While condonation occurs after the misconduct, connivance occurs before the misconduct.”).

184. *Id.*; see also *Santoro v. Santoro*, 55 N.Y.S.2d 294, 295 (N.Y. App. Div. 1945) (“[T]he corrupt consenting of a married party to that offense of the spouse for which that party afterward seeks a divorce.”).

185. S.D. CODIFIED LAWS § 25-4-20 (2013). Although some jurisdictions differentiate between procurement and connivance, (procurement being the active encouragement of misconduct and connivance being a more passive permission of it), most

In some jurisdictions, insanity may be raised as a defense to a fault-based divorce action.¹⁸⁶ In these jurisdictions, it is a defense if the evidence reveals that the adulterous spouse either did not know the nature and consequences of his or her acts or did not have the ability to distinguish between right and wrong.¹⁸⁷ Many jurisdictions will also allow a lapse of time defense where there is a significant amount of time between the misconduct and the commencement of an action on those grounds.¹⁸⁸

Another available defense to fault is provocation. This defense is used when one spouse is guilty of misconduct that leads the other spouse to commit an act of wrongdoing.¹⁸⁹ If the initial wrongdoer brings an action for divorce, the spouse committing the subsequent fault will have the defense of provocation as long as the subsequent act of misconduct does not exceed the initial provocation.¹⁹⁰

Finally, “[t]he doctrine of recrimination provides that when the conduct of both parties has been such as to furnish grounds for divorce, neither of the parties is entitled to relief.”¹⁹¹ However, it applies only when the fault of the

jurisdictions do not. *Compare* ALASKA STAT. ANN. § 25.24.120 (2013), *and* N.Y. DOM. REL. LAW § 171 (2013), *with* *Herriford v. Herriford*, 155 S.W. 855 (Mo. Ct. App. 1913).

186. *Clarady v. Mills*, 431 S.W.2d 63, 64 (Tex. Civ. App. 1968) (“[N]o act committed by the defendant while she is insane may be grounds for divorce.”); *see also* *Popper v. Popper*, 388 S.W.2d 468, 470 (Tex. Civ. App. 1965) (holding wife’s schizophrenia as defense to divorce on grounds of her cruel treatment of husband).

187. *Anonymous v. Anonymous*, 236 N.Y.S.2d 288, 291 (N.Y. App. Div. 1962); *Manley v. Manley*, 164 A.2d 113, 120 (Pa. Super. Ct. 1960).

188. ALASKA STAT. ANN. § 25.24.120 (2013) (lapse of time defense may be used where two or more years have lapsed between the misconduct and commencement of action); N.Y. DOM. REL. LAW § 171 (2013) (stating that lapse of time defense may be used where five or more years have lapsed between the misconduct and commencement of action); N.D. CENT. CODE § 14-05-16 (2013) (stating that an “unreasonable” lapse of time will bar an action for divorce); S.D. CODIFIED LAWS § 25-4-29 (2013). This defense is typically raised in connection with divorce actions based on cruel treatment or desertion.

189. *Passantino v. Passantino*, 450 N.Y.S.2d 98, 99 (N.Y. App. Div. 1982) (“If provocation by the plaintiff has incited the defendant’s acts, the acts, though wrong, may be excused, and the action for a divorce dismissed.”).

190. *McDowell v. McDowell*, 386 S.E.2d 468, 469–70 (S.C. Ct. App. 1989) (“A divorce on the ground of physical cruelty will not be granted when the physical cruelty is provoked by the complaining spouse and the physical cruelty is not out of proportion to the provocation.”); *Smith v. Smith*, 170 S.E.2d 650, 652 (S.C. 1969) (“The conduct of the party who claims to have been provoked, however, may be out of all proportion to provocation, in which event provocation does not bar an action for divorce.”).

191. *Rocconi v. Rocconi*, 196 S.W.3d 499, 503 (Ark. Ct. App. 2004) (citing *Narisi v. Narisi*, 320 S.W.2d 257 (Ark. 1959)).

parties is equal.¹⁹² Although recrimination is a defense to fault-based divorce actions in some jurisdictions,¹⁹³ others statutorily prohibit it.¹⁹⁴

The current law of adultery in fault-based divorce jurisdictions successfully incorporates both societal mores and notions of spouses' contractual freedom. Yet, it is narrow in the sense that it requires in-person sexual activity. As discussed in the following Part, the time may be ripe to extend the application of legal adultery into the online world.

IV. SHOULD THE CURRENT LAW OF ADULTERY BE EXPANDED?

Given the fact that the opportunities for online infidelity have exploded in the last 15 years and given the predicted technological advances that may render online infidelity a very close cousin of traditional adultery in the near future, it is inevitable that a judge will eventually be confronted with a divorce case involving online infidelity. Further, given the evolution of the views on marriage and infidelity, the time is ripe to reassess how adultery is defined and whether online infidelity should qualify.¹⁹⁵

Although further empirical studies are needed and not all infidelity is necessarily adultery in the eyes of the law, several considerations support the argument that certain instances of online infidelity do qualify as adultery. First, many experts opine that online infidelity triggers the same types of harms as does traditional infidelity.¹⁹⁶ Second, early studies indicate that the younger generation, which is arguably more informed and accustomed to technology, equates online infidelity with traditional adultery.¹⁹⁷ Third, recent trends in the current law of adultery indicate that many courts are moving away from a strict definition of adultery by recognizing that certain in-person sexual activity that is "less than" intercourse still qualifies as adultery.¹⁹⁸ Fourth, recent jurisprudence reveals a trend, in at least one jurisdiction, of judicial disapproval of even emotional affairs presented in dissolution actions based on irretrievable breakdown of the

192. *Id.*; see also *Dorman v. Dorman*, 98-CA-00258-COA (¶ 9) (Miss. Ct. App. 1999); 737 So. 2d 426, 430. If one party is more at fault than the other, then a divorce may be granted to the less culpable of the two. *Rocconi*, 196 S.W.3d at 503.

193. ALASKA STAT. ANN. § 25.24.120; IDAHO CODE ANN. § 32-611 (2013); *Id.* § 32-613 ("Recrimination is a showing by the defendant of any cause of divorce against the plaintiff, in bar of the plaintiff's cause of divorce."); N.Y. DOM. REL. LAW § 170.

194. CONN. GEN. STAT. ANN. § 46b-52 (2013) ("The defenses of recrimination and condonation to any action for dissolution of marriage or legal separation are abolished."); HAW. REV. STAT. § 580-42.5 (2013) ("Recrimination shall not be a defense to an application for divorce or separation."); N.J. STAT. ANN. § 2A:34-7 (2013) ("Recrimination, condonation and the clean hands doctrine are hereby abolished as defenses to divorce from the bonds of matrimony.").

195. Catron, *supra* note 117, at 353 (noting that the meaning of the word "adultery" may change from generation to generation).

196. See *infra* Part IV.B.

197. See *infra* Part IV.B.

198. See *infra* Part IV.B.

marriage.¹⁹⁹ Finally, some jurisprudence and scholars, in elucidating why certain conduct constitutes adultery, have already opened the door to extending the definition of adultery to at least some instances of online infidelity.²⁰⁰

A. *The Evolution of Views on Marriage and Infidelity*

While technology has been advancing at a rapid pace, views on marriage and infidelity have been changing as well. Marriage is, and always has been, one of the valued institutions in America,²⁰¹ and it has been built on a foundation of sexual and emotional exclusivity.²⁰² Some experts believe that the importance of the emotional exclusivity of marriage has increased over time.²⁰³ In fact, some researchers go even further by claiming that mental exclusivity, remaining true to a spouse in the mind, may be just as important as sexual exclusivity.²⁰⁴

Currently, because trust is a cornerstone of modern marriage,²⁰⁵ “infidelity is now framed as a violation of the emotional intimacy of marriage,”²⁰⁶ such that emotional infidelity is just as much a violation of marriage as sexual infidelity.²⁰⁷ Because the harm of infidelity has been recast as a violation of emotional intimacy, infidelity can also include nonsexual encounters,²⁰⁸ and betrayal is not limited to physical or sexual contact with another person.²⁰⁹ At least in the opinion of some legal scholars and marriage therapists, infidelity can occur

199. See *infra* Part IV.B.

200. Because of its lack of in-person contact, online infidelity admittedly is not a perfect “fit” with adultery, as that area of law is currently framed. Because of this, some may perceive it as less offensive than traditional adultery and urge that it should be analyzed under some fault-based ground of a “lesser” degree, like, for example, cruel treatment, habitual intemperance, or indignity. However, some jurisdictions do not include these types of fault as grounds for divorce. See, e.g., IND. CODE ANN. § 31-15-2-3 (2013); LA. CIV. CODE art. 103 (2013). In others, the cruel treatment must actually endanger the life of a spouse, see, for example, N.C. GEN. STAT. § 50-7 (2013), or be at least of a physical nature. See, e.g., S.C. CODE ANN. § 20-3-10 (2013). Further, due to its sexual nature and its parallels in effect to traditional adultery, online infidelity may be perceived as more offensive, causing it to fall somewhere in between those grounds and adultery. While online infidelity may fall within the gambit of other types of fault, the purpose of this Article is to assess if and when online infidelity should rise to the level of legal adultery.

201. Deans, *supra* note 85, at 407–08 (“[M]arriage is a valuable institution in our culture.”).

202. *Id.* at 412, 419 (discussing the “well-recognized expectations of sexual and emotional exclusivity in intimate relationships”).

203. Hall, *supra* note 7, at 213.

204. Whitty, *supra* note 18, at 576 (explaining 1998 research by P.E. Yarab, C.C. Sensibaugh, & E. Rice Allgeier).

205. Mitchell, *supra* note 11, at 171–72.

206. Cossman, *supra* note 86, at 280.

207. *Id.* at 280; see also Hertlein & Piercy, *supra* note 16, at 368.

208. Cossman, *supra* note 86, at 274, 277.

209. Hertlein & Piercy, *supra* note 16, at 367 (citing a 2003 study by Monica Whitty of 1,117 respondents).

without any sexual contact at all,²¹⁰ as “[s]ometimes the greatest betrayals happen without touching.”²¹¹ One poll reveals that 45% of women and 30% of men believe that emotional betrayal is actually *more* hurtful than betrayal of a sexual nature.²¹²

Tension exists between the current law of adultery, which neglects to consider emotional betrayal at all,²¹³ and current views on marriage and infidelity, which prioritize emotional exclusivity. But should any and all activity that qualifies as “infidelity” also automatically qualify as legal adultery?

From a practical standpoint, it is not advisable to extend the legal definition of adultery to include intimacy of solely an emotional nature. Frankly, allowing a concept as nebulous as emotional betrayal to serve as the lone benchmark for adultery would be over-inclusive and could very well lead to absurd results. For example, one may hide from a spouse feelings shared with his or her family or platonic friends. This is emotional betrayal, yet one could not seriously argue that such conduct is adulterous. After all, although spouses commit themselves emotionally to each other, they do not pledge emotional exclusivity. Spouses, like all humans, have numerous, different relationships, from various familial relationships to friendships, in which they share their emotions. So, even though emotional betrayal may constitute infidelity, this type of infidelity is not necessarily entirely synonymous with legal adultery.

B. Should Online Infidelity Constitute Adultery?

Few would argue that online infidelity is a betrayal, such that it could constitute infidelity. Some professors of marriage and family therapy have noted that “[b]ecause of the structure of the Internet, lovers engage in many behaviors, forcing couples, therapists, and society to expand the definition of what is considered infidelity behavior.”²¹⁴ Researchers acknowledge the lack of empirical studies on characterizing online infidelity,²¹⁵ but preliminary research has

210. Cossman, *supra* note 86, at 274, 277 (citing Karen Peterson, *Infidelity Reaches Beyond Having Sex*, USA TODAY, Aug. 1, 2003, at 8D).

211. *Id.* at 279; see also Monica T. Whitty & Laura-Lee Quigley, *Emotional and Sexual Infidelity Offline and in Cyberspace*, 34 J. MARITAL & FAM. THERAPY 461, 463 (2008) (referencing a study which found that “emotional infidelity was stressed as much as sexual infidelity”); Gail Saltz, *You Don’t Have to Have Sex for It to Be an Affair*, TODAY RELATIONSHIPS (Aug. 17, 2005, 9:13 PM), <http://today.msnbc.msn.com/id/8990045/ns/today-relationships/t/you-dont-have-have-sex-it-be-affair/> (“Not every affair involves sex. They ARE still affairs.”).

212. Cossman, *supra* note 86, at 280 (citing Sharon Begley, *You Must Remember This, a Kiss Is but a Kiss: Infidelity and the Science of Cheating*, NEWSWEEK, Dec., 30, 1996, at 56–59); see also Saltz, *supra* note 211 (stating that emotional affairs may be more serious than physical ones).

213. Courts have discussed emotional betrayal in the context of petitions for divorce or dissolution of marriage or civil unions based on grounds other than adultery. See *infra* Part IV.B.

214. Hertlein & Piercy, *supra* note 3, at 483.

215. Hertlein & Piercy, *supra* note 16, at 370.

indicated that some victims of online infidelity rank it as equivalent to traditional adultery. One survey reports that victims of online infidelity felt that online affairs were just as emotionally painful as traditional ones, causing the perception that online infidelity qualified as adultery to the same extent as traditional affairs.²¹⁶ One victim adamantly exclaimed, “My husband has actually cheated on me[,] and . . . [online infidelity] FEELS NO DIFFERENT. The online ‘safe’ cheating has just as dirty, filthy, a feel to it as does the ‘real-life’ cheating.”²¹⁷ The same survey reported that victims of online infidelity felt emotions such as mistrust, suspicion, fear, lack of intimacy, hurt, betrayal, rejection, abandonment, devastation, depression, loneliness, shame, isolation, humiliation, jealousy, anger, rage, and loss of self-esteem (related to feelings of sexual inadequacy and feeling unattractive and ugly).²¹⁸ As such, many experts also agree that one engaging in online infidelity has been unfaithful.²¹⁹

But should this particular form of infidelity rise to the level of legal adultery? Some Americans, including those engaging in online infidelity, would say “no.” Their justification is that this conduct, given its nonphysical nature,²²⁰ is harmless, or is nothing more than “typed words on a screen.”²²¹ Thus, they do not believe that online infidelity carries with it the same consequences of traditional adultery.²²² Others disagree, perceiving “online acts of infidelity as authentic and real as offline acts.”²²³ According to one poll, almost half of those surveyed equate

216. Jennifer P. Schneider, *Effects of Cybersex Addiction on the Family: Results of a Survey*, 7 *SEXUAL ADDICTION & COMPULSIVITY* 31, 57 (2000). This survey obtained responses from 94 persons whose spouse or partner was heavily involved in online sex.

217. *Id.* at 46.

218. *Id.* at 38.

219. See, e.g., Goldberg et al., *supra* note 4, at 470 (“While a cyberchat of a sexual nature may be entertaining for one person, it may also represent a deep betrayal for another.”).

220. Mary-Joan Gerson, *Cyberspace Betrayal; Attachment in an Era of Virtual Connection*, 22 *J. FAM. PSYCHOTHERAPY* 148, 154 (2011) (explaining that this rationalization “revolves around the noncorporeality of the contact, the fact that bodies are merely represented, that language rather than touch is exchanged”); Jeanne Shaw, *Treatment Rationale for Internet Infidelity*, 22 *J. SEX ED. & THERAPY* 29, 29 (1997) (finding that people excuse online infidelity as “it cannot be infidelity because it didn’t actually happen”); Fiely, *supra* note 13. According to her study of 86 people in “married” chat rooms, University of Florida researcher Beatriz Avila Mileham found that 83% of them did not equate online contact with unfaithfulness. Fiely, *supra* note 13; see also Keen, *supra* note 17 (discussing Mileham’s research, which showed that the other 17% saw their online sexual activity as a “weak” form of adultery). Dr. Joy Browne, radio talk-show host, author, clinical psychologist, and relationship expert, agrees: “I’m one of those people who says no body fluids exchanged is not an affair.” Morales, *supra* note 22.

221. Young et al., *supra* note 5, at 70.

222. Hall, *supra* note 7, at 220.

223. Whitty, *supra* note 18, at 576 (surveying 1,117 respondents as to what behaviors they would characterize as unfaithful).

an online affair with real sex,²²⁴ whereas another revealed that individuals perceive at least some online interactions as acts of betrayal.²²⁵

Interestingly, in some studies, younger individuals, who are from one of the first generations to grow up with the Internet,²²⁶ rated a wider range of online sexual behaviors as infidelity.²²⁷ Although more empirical studies are needed, this potential age differentiation on the topic could be a very relevant consideration in proactively reconsidering the parameters of adultery in family law. After all, the very purpose of the law is to reflect societal mores of the times.²²⁸ Thus, these early surveys indicate that future generations may be even more hostile to online infidelity, lending credence to the theory that certain forms of it should qualify as adultery as a ground for divorce in fault-based divorce jurisdictions.

Many equate online infidelity with traditional adultery because both can pose a real threat to couples.²²⁹ Both have the potential to result in the same detrimental effects on a marriage.²³⁰ Like traditional adultery, online infidelity

224. Maheu, *supra* note 3, at 6. (referencing the SHPM Cyber-affair Survey conducted by SelfhelpMagazine.com). Polls in Britain have yielded similar results. *See, e.g., Online Affairs 'Are Infidelity,' supra* note 163 (referencing a survey by Dr. Monica Whitty, wherein she found that 51% of students participating in the survey considered an online affair to be infidelity). *But see* Schnarch & Morehouse, *supra* note 6, at 14 (referencing a poll in which 60% of people did not consider cyber-sex with another person to be infidelity). Some polls evidence a difference in opinion between men and women. For example, a poll revealed on Infidelity Check indicated that only 46% of men but 71% of women consider online infidelity to be adultery. Casey Holley, *Dangers of a Cyber Affair: Internet Affairs Are Not Harmless*, YAHOO! VOICES (Jan. 7, 2008), <http://voices.yahoo.com/dangers-cyber-affair-785965.html>. A different poll found that 63% of all women felt that online affairs constituted infidelity. Stephany Alexander, *Emotional Infidelity: Top 10 Signs of Emotional Infidelity*, WOMANSAVERS, <http://womansavers.com/emotional-infidelity.asp> (last visited Apr. 8, 2013). *See generally* Whitty & Quigley, *supra* note 211 (discussing the differences between the sexes in this regard).

225. Whitty, *supra* note 18, at 576.

226. Docan-Morgan & Docan, *supra* note 29, at 334.

227. Hertlein & Piercy, *supra* note 16, at 367 (referencing Dr. Monica Whitty's 2003 study); *see also* Docan-Morgan & Docan, *supra* note 29, at 323 (surveying 208 college students on the topic).

228. As one New Jersey court noted: "[I]t is the function of the court to define terms, based upon the standards of the times so that law may truly reflect the mores of our society." S.B. v. S.J.B., 609 A.2d 124, 126 (N.J. Super. Ct. Ch. Div. 1992). *See also, e.g.,* Kathryn Carney, Note, *Rape: The Paradigmatic Hate Crime*, 75 ST. JOHN'S L. REV. 315, 351 (2001); Andrew B. Davis, Note, *Pure Economic Loss Claims Under the Oil Pollution Act: Combining Policy and Congressional Intent*, 45 COLUM. J.L. & SOC. PROBS. 1, 12 (2011).

229. Whitty, *supra* note 18, at 576.

230. *Id.* at 570; *see also* Hertlein & Piercy, *supra* note 3, at 482 (citing another study for the proposition that "Internet infidelity constitutes the same sense of betrayal as found in traditional infidelity"); Jordan Baker, *Virtual Adultery*, SYDNEY MORNING HERALD (Aug. 20, 2005), <http://www.smh.com.au/news/icon/virtual-adultery/2005/08/16/1123958066357.html> (quoting Anne Hollonds of Relationship Australia); *More Spouses Fear Online Affairs*, MERCURY (Australia), Jan. 31, 2012, at 5, available at 2012 WLNR 2053272

damages trust and integrity, the cores of a romantic relationship.²³¹ As such, one therapist has noted that online infidelity is different from traditional adultery only in degree.²³² Initial surveys of victim spouses show that feelings of betrayal arise because the victim's spouse is (1) interacting in a sexual manner with someone else and (2) withdrawing from the marital relationship in both an emotional and sexual manner.²³³ As one marital therapist explained, a victim may ask their spouse the following question: "Why are you not lustily and emotionally touching me?"²³⁴

Victims reported various feelings associated with the knowledge that their spouses had engaged in sexual acts with online partners. One victim, a 38-year-old woman divorcing her husband of 15 years, was quoted as saying she felt used and violated because of her husband's online sexual behavior with another woman.²³⁵ Some victims reported that their spouse's behavior caused them to doubt their own judgment and sanity.²³⁶ As one researcher noted, "[i]t is perhaps not the amount of physical contact or the idea that one's partner is masturbating, but rather that their partner has desire for another and is seeking out a sexual encounter with an individual other than themselves."²³⁷ Another explained that "[t]he focus on genital arousal outside of a relationship instead of in it invites distance instead of intimacy between partners."²³⁸

The victims also reported a negative response to their spouses' withdrawal from them. Like traditional adulterers, those committing online infidelity typically engage in secrecy and deception and deny the suspicions of those who notice something amiss.²³⁹ Over time, one committing online infidelity will withdraw emotional and sexual energy from his or her partner.²⁴⁰ One victim, whose spouse was addicted to online sex, complained that her husband had been using sexual energy with his online partner that he should have been using with her.²⁴¹ On the emotional front, one legal scholar noted that "[t]he new infidelity is

("Despite the lack of any physical contact, these online relationships can involve the same kinds of emotions and thinking as traditional affairs." (quoting Relationships Australia Tasmania chief executive Mat Rowell)).

231. Maheu, *supra* note 3, at 3; *see also* Schneider, *supra* note 216, at 39 ("Trust was a major casualty of the secrecy of cybersex addiction.").

232. Shaw, *supra* note 220, at 29.

233. Marital therapists agree. *See, e.g., id.* (noting the harm of "[t]aking sexual energy out of a relationship, or avoiding sexual energy in a relationship").

234. *Id.*

235. Schneider, *supra* note 216, at 32.

236. *Id.*

237. Whitty, *supra* note 18, at 576.

238. Shaw, *supra* note 220, at 29–30.

239. Schneider, *supra* note 216, at 56 (noting that victims reported that "[b]eing lied to repeatedly was a major cause of distress"); *id.* at 38 (quoting one victim as saying: "Without a doubt, the lies have been the worst"); *see also* Shaw, *supra* note 220, at 31 (explaining that online infidelity, like traditional adultery, involves making the unilateral, secretive decision to engage in such behavior).

240. Maheu, *supra* note 3, at 4; Shaw, *supra* note 220, at 30.

241. Schneider, *supra* note 216, at 45.

between people who unwittingly form deep, passionate connections before realizing that they've crossed the line from platonic friendship into romantic love."²⁴² The violation of the marital relationship, according to her, is that those engaging in emotional affairs reveal "more of their 'inner self, frustrations and triumphs [with their online lovers] than with their spouses."²⁴³ Another added that "[i]n some situations, someone having a one-night stand might have less effect on a relationship than someone who has quite a deep engagement with someone over the internet."²⁴⁴

This withdrawal not only aggrieves the feelings of the victim spouse but also adversely affects the sexual relationship between the victim spouse and his or her spouse committing online infidelity.²⁴⁵ In response to the unfaithful spouse's withdrawal, some victims report that initially they attempted to increase the quantity and variety of sexual activities with their spouse, including, for some, engaging in online sexual activities with their spouse; however, most victims eventually lost their sexual desire for their spouse.²⁴⁶ Many victims also reported that their spouse had little to no interest in having sex with them.²⁴⁷ Of those unfaithful spouses who did still have sex within their marriage, most were said to be detached and lacking in emotion during the act.²⁴⁸ This negatively affects the victim spouse, as one researcher explained: "When one partner is emotionally absent (especially during sexual intercourse), the other partner knows that estrangement, at least unconsciously. Estrangement from a partner physically beside you hurts."²⁴⁹

Some victims of online infidelity claim that such behavior, in some ways, is *more* hurtful than traditional adultery, given the heightened betrayal they suffer in finding out that their spouse is accessing an online lover from inside the marital

242. Cossman, *supra* note 86, at 279–80 (quoting SHIRLEY GLASS, NOT "JUST FRIENDS": REBUILDING TRUST AND RECOVERING YOUR SANITY AFTER INFIDELITY (2004)) (internal quotation marks omitted). Quoting Professor Cossman is not meant to suggest that she would agree with the solution I propose in this Article.

243. *Id.* at 280 (quoting SHIRLEY GLASS, NOT "JUST FRIENDS": REBUILDING TRUST AND RECOVERING YOUR SANITY AFTER INFIDELITY (2004)).

244. Baker, *supra* note 230 (quoting Anne Hollonds of Relationship Australia); see also Pamela Johnson, *Are You Cheating?*, ESSENCE, Jan. 2001, at 102, 128–29 (citing author William July II for the proposition that women view an emotional attachment's encroachment on a relationship as more complex than a physical affair and quoting him as saying: "Any woman will tell you, when she's shooting straight, that she'd rather her man just went out and 'got some' than if he had an emotional attachment . . ."); *Cyber Sex on Facebook Fueling Divorces*, *supra* note 34 (quoting a divorced woman as saying, "I would almost rather see someone I'm with have a one-night stand" because in that case "there's no emotional involvement").

245. See generally Schneider, *supra* note 216.

246. *Id.* at 39–43.

247. *Id.*

248. *Id.*

249. Shaw, *supra* note 220, at 31.

home.²⁵⁰ Additionally, because online activity leaves a nearly permanent record,²⁵¹ when a victim accesses that record, he or she becomes privy not only to the knowing of their spouse's betrayal, but also to every word said in committing it.²⁵² As one victim noted: "I can't tell you how excruciating it was to read the e-mails from people supposedly speaking with my wife, but she wasn't talking like my wife."²⁵³ Another possible explanation for the additional hurt is that unlike traditional adultery, which is typically discovered in stages over a period of time, online infidelity is usually exposed very suddenly. Thus, the victim spouse, all at once, has access to many communications between his or her spouse and the online partner,²⁵⁴ making the pain abrupt and intense.²⁵⁵

Beyond the aggrieved feelings of the victim spouse and the opinions of experts in the psychology field, recent trends in the current law of adultery reflect that courts in many jurisdictions no longer define adultery on the basis of intercourse alone. For example, to find adultery, many jurisdictions require only (1) an adulterous inclination, which may be shown by either an infatuation for a particular person or a general adulterous nature,²⁵⁶ and (2) an opportunity to satisfy it.²⁵⁷

For example, in *Nemeth v. Nemeth*, a wife employed at Restorative Dentistry took a cruise with two of her fellow employees (one male and one female) and a male patient.²⁵⁸ Initially, cabins on the ship were to be shared based on gender, but the wife's two co-employees became engaged to be married before the cruise.²⁵⁹ Therefore, the wife and the male patient shared a cabin.²⁶⁰ Testimony indicated that this arrangement was the only way that the two of them could still go on the cruise without forfeiting their entire fare, as no other cabins were available.²⁶¹ While on the cruise, one witness's testimony revealed that the wife and the male patient behaved as nothing more than friends.²⁶² However, that same

250. Maheu, *supra* note 3, at 6; *see also* Gerson, *supra* note 220, at 151; Melby, *supra* note 28, at 5 (quoting sex therapist Tammy Nelson as saying that spouses can converse with online lovers "in bed with a laptop with their [partner] lying next to them" and an Eastern University professor as saying, "[i]t brings the person you're having an affair with into your house . . . They are right there with you."); Baker, *supra* note 230 (detailing Dr. Monica Whitty's discussion of this factor).

251. Gerson, *supra* note 220, at 152; Mitchell, *supra* note 11, at 176 (quoting Marilyn Gardner, *Is It Cyber-Flirting or Cyber-Betrayal?*, CHRISTIAN SCI. MONITOR, Aug. 19, 2004, at 12, available at <http://www.csmonitor.com/2004/0819/p12s02-lifp.html>).

252. Mitchell, *supra* note 11, at 176.

253. Baker, *supra* note 230.

254. *See* Gerson, *supra* note 220, at 150.

255. *Id.* at 150–51.

256. *See, e.g.*, Pool v. Pool, 06-CA-01237-COA (¶ 14) (Miss. Ct. App. 2008); 989 So. 2d 920, 925.

257. *See id.*

258. 481 S.E.2d 181, 183 (S.C. Ct. App. 1997).

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.*

witness also testified that the wife stated, before the cruise, that she would like to have a sexual relationship with the male patient but could not because of physical problems.²⁶³ At the end of the cruise, the wife and the male patient spent the night together in a hotel room in Vancouver.²⁶⁴

At trial, the wife admitted to sharing a cabin on the cruise and a room in the Vancouver hotel with the male patient but labeled the two of them as just friends.²⁶⁵ She also presented evidence of chronic vaginal pain and painful intercourse for which she had received medical treatment.²⁶⁶ According to her treating physician, the wife's medical condition—at a visit occurring a month after her husband asserted his adultery claim against her—was so bad that the doctor found her condition “totally incapacitating from a sexual standpoint.”²⁶⁷ The husband testified that the wife had confessed an affair with the male patient to him, and one of the parties' children testified that the male patient was the wife's boyfriend.²⁶⁸ The South Carolina court found that the wife had the opportunity to commit adultery with the male patient during the Alaska cruise and in the Vancouver hotel room.²⁶⁹ It explained that despite the possible innocent explanation for the sleeping arrangements on the cruise, no such explanation existed for the subsequent night in the hotel.²⁷⁰ The court also found that the evidence established that the wife had the inclination to commit adultery with the male patient.²⁷¹ Therefore, the court held that the husband had established a prima facie showing of adultery by the wife and found the wife's testimony and medical evidence insufficient to rebut it.²⁷²

In *Lister v. Lister*, a Mississippi court found that a husband had committed adultery, despite his and the other woman's denial.²⁷³ In making its ruling, the court relied on evidence that the husband and the other woman, his receptionist, spent a lot of time together; were often absent from the office at the same time; the husband loaned her money, took long trips with her, and allowed her to move into a mobile home that he owned that was situated next to his.²⁷⁴

Finally, in *Watts v. Watts*, a Virginia appellate court upheld a trial court's finding that the husband had committed adultery.²⁷⁵ In that case, the wife had overheard the husband conversing with someone and telling her how much he missed and loved her.²⁷⁶ The husband's alleged mistress admitted to socializing

263. *Id.*

264. *Id.*

265. *Id.* at 183–84.

266. *Id.* at 184.

267. *Id.*

268. *Id.* at 183.

269. *Id.* at 184.

270. *Id.*

271. *Id.*

272. *Id.*

273. 2005-CA-00494-COA (¶ 33) (Miss. Ct. App. 2008); 981 So. 2d 340, 345.

274. *Id.*

275. 581 S.E.2d 224, 230 (Va. Ct. App. 2003).

276. *Id.*

with the husband before he and his wife separated, and she provided no explanation for their after-work liaisons that had been documented by a private detective.²⁷⁷ The husband and his alleged mistress had several meetings during which they embraced and kissed in public.²⁷⁸ Finally, the husband did not provide an explanation for being with the alleged mistress until late hours of the night at various residences.²⁷⁹

These cases indicate that many courts are willing to accept that sexual activity that is not proven to rise to the level of intercourse can still constitute legal adultery. This may be based on an unacknowledged perception that the harm of such conduct is no different from that resulting from actual intercourse. Given the similarity in harm of some online infidelity to traditional adultery, it seems logical that some instances of online infidelity should also constitute adultery.

Recent judicial opinions from Connecticut reveal that courts in that jurisdiction, in considering divorce and dissolution petitions based on grounds of irretrievable breakdown of the marriage, disapprove of even emotional affairs. For example, in *Hurlburt v. Vasbinder*, the court dissolved a civil union and noted that one of the women had an emotional affair with another woman and should bear “the blame for the breakup of the union.”²⁸⁰ In *Pierce-Gardner v. Gardner*, the court dissolved the marriage, finding it irretrievably broken with no reasonable probability of reconciliation.²⁸¹ In doing so, the court discussed the husband’s use of online dating services and found “no physical or significant emotional infidelity” while the marriage was viable, thus leading to the inference that had such activity occurred during the marriage’s viability, the husband may have been cast in blame.²⁸² Finally, in *Odell v. Odell*, the court dissolved the marriage, finding it irretrievably broken with no hope for reconciliation. The court went so far as to state that the husband’s self-described emotional affair with another woman “was in every respect a multi-year affair, consisting of deception, betrayal and lies wholly inconsistent with his marriage.”²⁸³

277. *Id.*

278. *Id.*

279. *Id.*

280. No. FA094043049, 2010 WL 2132490, at *1 (Conn. Super. Ct. Apr. 19, 2010).

281. No. FA054002538S, 2006 WL 1681231, at *3 (Conn. Super. Ct. June 6, 2006).

282. *Id.* at *2.

283. No. FA084008070S, 2009 WL 3416172, at *2–3 (Conn. Super Ct. Sept. 22, 2009). In some cases, however, the courts, while dissolving the marriage based on irretrievable breakdown, in part due to one spouse’s emotional affair, have found, under specific factual scenarios, that such conduct was not the sole cause of the failure of the marriage and have refused to place a greater portion of the blame on the spouse who emotionally strayed. *E.g.*, *Goldstein v. Goldstein*, No. FA104052508, 2011 WL 2536425, at *1 (Conn. Super. Ct. June 3, 2011).

Other courts have gone even further by analyzing what makes certain conduct qualify as adultery, focusing on the effect on the injured spouse.²⁸⁴ According to a New Jersey court faced with a divorce claim by a man whose wife was in a lesbian relationship, “adultery exists when one spouse rejects the other by entering into a personal intimate sexual relationship with any other person, irrespective of the specific sexual acts performed, the marital status, or the gender of the third party. It is the rejection of the spouse coupled with out-of-marriage intimacy that constitutes adultery.”²⁸⁵ Some scholars have offered similar definitions for the term,²⁸⁶ and others have opined that online infidelity constitutes adultery.²⁸⁷

It is likely that a United States judge will have to decide whether online infidelity reaches the level of adultery in the eyes of the law. Certainly, the law is supposed to mirror societal mores, and research on how exactly society feels about online infidelity is still in its infancy. Yet, as this Part makes clear, experts have already begun to cast online infidelity in the same light as traditional adultery in terms of its effect on spouses. The young adult generation is hostile to online infidelity. Decision-makers have backed away from a strict interpretation of adultery. Courts have started to acknowledge the harm of emotional affairs, and courts and scholars are focusing on why certain conduct constitutes legal adultery. Arguably, because the harm of traditional adultery is erosion of intimacy between the spouses, similar erosions, like some forms of online infidelity, may also qualify.

V. SOLUTION: ANALYTICAL FRAMEWORK TO INCLUDE SOME BUT NOT ALL ONLINE INFIDELITY AS ADULTERY

Accepting that some forms of online infidelity should qualify as adultery, the next question is which ones? After all, online infidelity is a unique animal, and “online acts of [infidelity] do not fall into a discrete category of their own.”²⁸⁸ The level of sexual involvement online can vary, just as it can with traditional infidelity, ranging from viewing pornography to years of romance with an online lover.²⁸⁹ These many different levels make it difficult to proffer a simple definition

284. Nicolas, *supra* note 86, at 122 (explaining that some courts focus on the “breach of the marital vow and its attendant injury to the other spouse”); Catron, *supra* note 117, at 353–54 (“[A]ll laws dealing with the termination of a marriage must first be looked at through the eyes of the injured spouse.”).

285. S.B. v. S.J.B., 609 A.2d 124, 127 (N.J. Super. Ct. Ch. Div. 1992).

286. See, e.g., Catron, *supra* note 117, at 344, 354 (“Adultery should be defined as any sexual act committed outside of the marriage. . . . [A]dultery is the rejection of the innocent spouse by the adulterous spouse by going outside of the marriage and engaging in intimate sexual activities with another person.”).

287. See, e.g., Cossman, *supra* note 86, at 274 (“[Online infidelity is] included within the ambit of adulterous relationships that violate the marital relationship.”).

288. Whitty, *supra* note 18, at 576.

289. Maheu, *supra* note 3, at 4.

of the term,²⁹⁰ and therefore, make it even more difficult to determine which instances should rise to the level of legal adultery.

Recognizing these difficulties, this Article offers a workable framework to legislatures and decision-makers in jurisdictions that still recognize adultery as a fault-based ground for divorce. Online infidelity should only qualify as adultery when that conduct is a substantial factor in the breakdown of the marriage. In order to make that determination, this Article offers several guiding factors, all of which should be balanced, in order to determine whether the case at hand should constitute adultery, with no one factor being determinative. These factors should not serve as a mechanical checklist but instead should be considered in full, and an adultery-based divorce should be granted only when the factors lead to a finding that the online infidelity substantially contributed to the breakdown of the marriage. These factors include: (1) the medium in which the online infidelity occurs; (2) the sexual activity; (3) the frequency and intensity of the online infidelity; (4) the relationship between the unfaithful spouse and his or her online partner(s); and (5) the reaction of the victim to the unfaithful spouse's online infidelity. The proposed framework is similar to others found in the family law arena. For example, in determining custody and spousal support, jurisdictions typically employ an overarching standard ("best interest of the child" and "needs of the claimant and means of the other party," respectively), along with guiding factors to assist decision-makers.²⁹¹

A. Medium of Online Infidelity

Assessing the medium in which online infidelity occurs is important in determining whether it should constitute adultery as a fault-based ground for divorce.²⁹² These mediums should be assessed for severity, with those that more closely mirror traditional adultery being deemed more severe. Traditional adultery involves several characteristics. First, it is interactive in that it requires the participation of another person. Second, it involves an immediate connection with that other person, i.e., it occurs in real time. Finally, traditional adultery is, in fact, real such that one engaging in it experiences it with all of the senses. Comparing those characteristics to those present in the different forms of online sexual gratification reveals, as a general proposition, a severity continuum. On this continuum, the online mediums can be ranked from least to most severe as follows: (1) simple pornography; (2) erotic activity over e-mail, in chat rooms, or by instant message; (3) engaging in interactive pornography; (4) erotic activity via video chat; and (5) remote sex. The sexual activities that may occur in connection with these media of communication are discussed with the next factor for consideration.

290. Hertlein & Piercy, *supra* note 3, at 494 ("[T]herapists find it difficult to define what exactly Internet infidelity is.").

291. *See supra* Part II.B.2-4.

292. *See* Docan-Morgan & Docan, *supra* note 29, at 335.

This Article ranks simple pornography as the least severe medium of online sexual gratification,²⁹³ despite its potentially profound effects on those who view it and their spouses.²⁹⁴ This is because simple pornography is the form of online sexual gratification least similar to traditional adultery. While it does involve visual stimulation, because viewing pornography is voyeuristic, there is typically no interaction with another person.²⁹⁵ The pornographic star featured in the online video may be engaged in sexual behavior, but he or she is not a participant in any sort of sexual activity with the viewer. There is also little possibility that a spouse will ever meet a porn star face-to-face. In this way, online pornography is no different from watching a pornographic movie on a VCR or DVD player and is simply a ramped-up version of a pornographic magazine. Further, viewing pornography is nothing new; such magazines and videos have been around for many years. Ultimately, no distinction exists between simple online pornography and viewing the same material in another medium, and the law has never recognized viewing pornography as adultery. While one's viewing of pornography may be frowned upon by one's spouse, standing alone and in the absence of any of the other factors,²⁹⁶ it should not constitute adultery as a fault-based ground for divorce due to its lack of similarity to traditional adultery.

Moving further along the continuum leads to erotic activity over e-mail and by instant message or in chat rooms. Although there is no visual component to these forms, aside from words on a screen, these activities rank as higher in severity than simple pornography because they actually require the participation of another person. As one victim of online infidelity proclaimed,

The person on the other end of that computer is live and is participating in a sexual activity. It is one thing to masturbate to a two-dimensional image in a magazine. But to engage in an interactive sexual encounter in real time means that you are being sexual with another person. I believe that is cheating.²⁹⁷

293. This ranking is consistent with 2003 research performed by Dr. Monica Whitty, wherein many of the 1,117 respondents surveyed revealed that pornography is less threatening to a relationship than is other forms of online infidelity. Whitty, *supra* note 18, at 576.

294. For example, those who view Internet pornography "may develop unrealistic expectations about sexual behavior and body image and often have difficulty 'sustaining relationships and feeling sexually satisfied.'" Mitchell, *supra* note 11, at 174 (quoting Pamela Paul, *The Porn Factor*, TIME, Jan. 19, 2004, at 99). Further, online pornography may become so addictive as to disrupt the lives of those who view it, for example, causing them to neglect household duties and spend less time with family and also to become emotionally distant, lacking interest in sex with their significant other. *Id.* at 174-75. Those discovering their spouse's Internet pornography have reported feeling betrayed and inadequate. *Id.* at 175.

295. Schneider, *supra* note 216, at 45.

296. Other factors may raise such conduct to the level of adultery. For example, if a spouse is addicted to simple pornography, such that a judge finds his or her conduct frequent and intense, the judge may find him adulterous.

297. Schneider, *supra* note 216, at 45 (quoting victim who compared viewing pornography to other forms of online infidelity and finding the former less severe).

Engaging in interactive pornography is the next activity on the form-severity continuum. Interactive pornography, in this Article, refers to the practice of watching a video while enjoying stimulation from a mechanical device, like the RealTouch (described in Part I).²⁹⁸ This type of pornography is ranked higher than simple pornography because, unlike simple pornography, it does not just involve a spouse simply “looking” at another person. Instead, it involves the simulated participation of another person, although that other person may be simply doing his or her job. Finally, it is also ranked as more severe than erotic activity over e-mail and by instant message and in chat rooms because, unlike those mediums, engaging in interactive pornography is closer to traditional adultery as it includes visual stimulation.

Erotic activity via video chat ranks next. Like all the other forms of online sexual gratification except for simple pornography, erotic activity via video chat requires the participation of another person. Additionally, such activity occurs in real time. Finally, like simple pornography and engaging in interactive pornography, erotic activity via video chat includes visual stimulation.

Remote sex should rank as even more severe. Devices like the RealTouch (when used to connect with another “real” person) and the Mojowijo (detailed in Part I) can be used by a spouse with a computer and a camera for real-life sexual experiences through live chat online with people all over the world.²⁹⁹ These devices are very similar to traditional adultery in that, when used in this way, they allow the spouse to connect with another person who is participating in the sexual acts, albeit remotely. For that same reason, it would also occur in real time and involve most of the five senses. Engaging in remote sex allows a spouse to see, hear, and feel, albeit virtually, the sexual acts performed. Of course, the difference between remote sex and traditional adultery is that the people involved are not in the same location.

Should the predicted advancements in virtual sex come to fruition, such activity should be presumed to be adultery even in the absence of any other factor. This is because virtual sex bears a marked similarity to traditional adultery.

B. Sexual Activity

The second factor that should be considered in the context of online infidelity is the sexual activity involved, and it too should be assessed for severity. This is somewhat similar to assessing the medium in which online sexual gratification occurs in that it compares the sexual activity to traditional adultery and looks less favorably upon those activities that more closely mirror traditional adultery. Comparing the potential sex acts available in the context of online infidelity to those available to traditional adultery illustrates a second severity continuum. On this continuum, erotic talk alone is the least severe, followed by erotic talk accompanied by masturbation.

298. *Is Virtual Sex a Blessing or a Curse?*, *supra* note 56.

299. *Id.*

One could find erotic talk between a spouse and someone online, standing alone, to be the least destructive level of online sexual gratification because it involves no physical activity. In essence, this type of activity is more akin to mental fantasy and is the least comparable to traditional adultery. However, as the conduct moves along the severity continuum, the level of sexual activity increases to include masturbation. In deciding where to rank this type of conduct, one could consider whether the self-stimulation occurs during the erotic conversation or afterwards and also whether it is done privately or shared. One may find self-stimulation that occurs after erotic discussions less offensive than one would the same conduct occurring simultaneously with erotic talk. If an unfaithful spouse waits to masturbate until after the erotic conversation has ended, this behavior is more akin to self-pleasure after a mental fantasy or after viewing pornography. By contrast, masturbation during erotic conversation is more similar to traditional adultery in that it occurs in real time and involves the participation of another person. One could also consider whether masturbation occurs privately or if it is shared with a spouse's online partner. Again, private masturbation does not involve the online partner, whereas shared masturbation does.

C. Frequency and Intensity of Online Infidelity

The third factor that should be considered in the context of online sexual gratification is the frequency and intensity of the conduct.³⁰⁰ Because of the availability of technology, one can engage in online sexual activity at any time, and the mechanism for doing so is usually close at hand.³⁰¹ Spouses who engage in repeated or prolonged online sexual gratification are distracted from their primary relationships.³⁰² They suddenly “become evasive and . . . demand . . . privacy online.”³⁰³ Over time, they become distracted by their online activities and begin to divert energy from the marriage³⁰⁴ in favor of the online partner(s). This, in turn, causes them to neglect the marriage³⁰⁵ and their spouse, treating him or her indifferently, or blatantly rejecting him or her,³⁰⁶ and eventually withdrawing altogether.³⁰⁷ Accordingly, many marriage and family therapists define online

300. One source reports that 8–10% of Internet users become addicted to online sex. *Infidelity Statistics*, *supra* note 8. Another reports the higher number of 17%. M. Deborah Corley, *AAMFT Consumer Update: Online Infidelity*, AAMFT, http://www.aamft.org/imis15/Content/Consumer_Updates/Online_Infidelity.aspx (last visited Apr. 8, 2013).

301. Gerson, *supra* note 220, at 152.

302. Dew et al., *supra* note 4, at 196.

303. Young et al., *supra* note 5, at 63.

304. *See, e.g.*, Fiely, *supra* note 13 (quoting a counselor).

305. *See, e.g., id.* (quoting a counselor as stating that those involved in online infidelity “siphon[] energy from [the] marriage”).

306. *Id.* (noting the opinion of a psychologist).

307. Maheu, *supra* note 3, at 4 (stating that this withdrawal is typically both emotional and sexual). This type of behavior can also extend to children. As one mental health professional noted, over time, a once loving parent who becomes involved in online sexual gratification can turn to the Internet and away from taking care of the children. Young et al., *supra* note 5, at 63; *see also* Goldberg et al., *supra* note 4, at 470 (noting,

infidelity to include “any other relationship that depletes the primary dyad of energy and is facilitated by Internet use.”³⁰⁸ Thus, one would probably look more harshly on a spouse who repeatedly engages in online infidelity or does so for long periods of time as opposed to one who does so only sporadically, as the latter is less likely to be a substantial factor in breaking down a marriage.

D. The Relationship Between the Spouse and the Online Partner(s)

The fourth factor to be considered in the context of online infidelity is the relationship between the spouse and the online partner(s).³⁰⁹ This factor incorporates current societal concerns with emotional infidelity. Online infidelity can range from random sexual encounters with various partners occurring shortly after meeting to a long-term relationship with one specific person online. Research reveals that the greater the threat of the online sexual gratification to the current relationship, the higher most people rated it as unfaithful.³¹⁰ According to one mental health professional, spouses who reveal themselves to another person and share their life’s highs and lows with that person violate their marital relationship.³¹¹ One expert has even explained that an intense emotional relationship with someone over the Internet may be more hurtful to a victim than if the spouse engaged in a one-time physical affair.³¹² Likewise, many people feel that an extramarital relationship with an emotional component is more damaging to a marriage and more hurtful to a victim than is one with solely a physical component.³¹³ As such, online sexual gratification is perceived as less threatening to a marriage than an online affair.

In assessing this factor, one could consider numerous circumstances. First, one could consider the number of online partners the spouse at issue has or has had. A high number of online partners could indicate that a spouse had little, if any, emotional connection to those with whom he or she was engaging in online infidelity. Second, one could consider whether the spouse in question had an

among other effects of those engaged in online infidelity, demands for privacy and isolation, disregard for responsibilities, loss of interest in partner sex, and decline in relationship investment, all of which impact the family).

308. Hertlein & Piercy, *supra* note 3, at 494.

309. Note that a victim collecting evidence of online infidelity from his or her spouse’s computer, particularly the type of evidence to prove the relationship between his or her spouse and online partner, may unwittingly violate federal or state electronic privacy laws. For a discussion of this issue see, for example, Sharon D. Nelson & John W. Simek, *Spy v. Spy: Electronic Snooping by Husbands, Wives, and Lovers*, 28 FAM. ADVOC. 20, 23 (2006); Mitchell, *supra* note 11, at 177–88; Sharon D. Nelson & John W. Simek, *Adultery in the Electronic Era: Spyware, Avatars and Cybersex*, WYO. LAW., Dec. 2008, at 20, 22; Stephanie Rosenbloom, *I Spy; Doesn’t Everyone?*, N.Y. TIMES, Sept. 7, 2006, at E1.

310. Whitty, *supra* note 18, at 576.

311. Cossman, *supra* note 86, at 280 (quoting SHIRLEY GLASS, NOT “JUST FRIENDS”: REBUILDING TRUST AND RECOVERING YOUR SANITY AFTER INFIDELITY (2004)).

312. Baker, *supra* note 230 (quoting Anne Hollonds of Relationship Australia); see also *Cyber Sex on Facebook Fueling Divorces*, *supra* note 34; Johnson, *supra* note 244, at 128–29.

313. See generally *supra* Part IV.B.

ongoing relationship with the online partner(s) and look less favorably on a spouse who is in a committed online relationship with one person. Third, one could also assess the identity of the spouse's online partner(s). He or she may look less favorably on online sex with a partner (or partners) to whom the spouse is connected in "real life" than one would look on a spouse engaging in the same conduct with a random partner (or partners). This is because online infidelity with random persons would be less likely to result in a traditional affair. Fourth, one could also take into account the type of connection between the spouse and the online partner(s). A court may look less favorably on a spouse who, in addition to sexual conversation and/or activity, also engages in conversations of an emotional nature.

E. Victim's Reaction to Spouse's Online Infidelity

The final factor that should be considered in the context of online infidelity is the reaction of the victim to the spouse's conduct. As researchers note, online sexual gratification (with or without accompanying physical sexual satisfaction) may be harmless, and even fun, when both spouses know about and accept its occurrence.³¹⁴ In those situations, such conduct does not divert sexual energy outside of the relationship. These couples prioritize their real relationship, such that they are not competing with the Internet for time, attention, or sex.³¹⁵ After all, it is not the erotic experience that damages the relationship but the context in which it happens.³¹⁶ Thus, one should give great weight to a person's consent to his or her spouse's online sexual activity or a person's forgiveness of the conduct after the fact.

These proposed factors collectively remain true to the dual nature of marriage as both a societal institution and a contractual relationship between two individuals. For example, the first four factors focus on marriage as a societal institution by reflecting societal views on the definition of adultery, whereas the final factor focuses on marriage as a contractual relationship between two people by considering the victim's reaction to online infidelity. Additionally, the factors also reflect a healthy respect for the focus of the current law of adultery, as well as current and potential future societal mores. For example, the first two factors consider the sexual side of infidelity, and the last incorporates the victim spouse's reaction, all of which are in line with the current law of adultery. The third and fourth factors, by assessing the frequency and intensity of conduct and the nature of the spouse's relationship with his or her online partner(s), focus on the level of betrayal caused by the online infidelity, bringing the law of adultery more in line with modern societal mores.

CONCLUSION

Online infidelity is a serious problem that adversely impacts spouses and society. While many jurisdictions consider adultery as one factor in determining

314. Shaw, *supra* note 220, at 30.

315. *Id.*

316. *Id.*

numerous legal rights of adulterous spouses, the current definition of adultery in most jurisdictions is not broad enough to include online infidelity. It could be that the current law of adultery has lagged behind the pace of technology, considering the current and future opportunities for online infidelity; the evolution of the views on marriage and infidelity; the similarity of the effects of traditional adultery and online infidelity; the views of younger people; the direction of the law of adultery; and the stated reasons for finding certain activity to be adultery. Therefore, it may be time to expand the law of adultery to include some, but not all, instances of online infidelity. Infidelity is a problem as old as the institution of marriage itself, but the new mechanisms to achieve it demand consideration of whether the current law of adultery should be revamped.