

AN ECONOMIC APPROACH  
TO ADULTERY LAW

Eric Rasmusen

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Harvard Law School  
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## **An Economic Approach to Adultery Law**

Eric Rasmusen<sup>\*</sup>

### ***Abstract***

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

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<sup>\*</sup> Olin Senior Research Fellow, Harvard Law School, and Professor of Business Economics and Public Policy and Sanjay Subhedar Fellow, Kelley School of Business, Indiana University.

# An Economic Approach to Adultery Law

Eric Rasmusen<sup>\*</sup>

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

## 1. INTRODUCTION

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

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<sup>\*</sup> Olin Senior Research Fellow, Harvard Law School, and Professor of Business Economics and Public Policy and Sanjay Subhedar Fellow, Kelley School of Business, Indiana University. I would like to thank Antony Dnes, Lillian BeVier, Margaret Brinig, Gertrude Fremling, Kevin Kordana, Geoffrey Manne, Richard Posner, J. Mark Ramseyer, and participants in seminars at the Purdue Economics Department, the Federalist Society of the University of Virginia, and Northwestern University Law School for their comments. This will be a chapter in the forthcoming *Marriage and Divorce: An Economic Perspective*, edited by Antony Dnes and Robert Rowthorn, Cambridge: Cambridge University Press.

In the past, other remedies existed of which vestiges continue today. These include criminal penalties, tort actions, and self-help. This chapter discusses remedies using the tools of law-and-economics. The approach will be to view adultery law as a problem in efficient contracting, of setting up a legal regime in which marriage is structured to maximize the net benefit of the husband and wife, with attention, where appropriate, to spillovers onto third parties. When such spillovers do not exist, the simplest case, efficiency requires adultery law which replicates the marriage terms husband and wife would choose if transaction costs were low. Adultery will be analyzed not as a problem of morals, order in society, patriarchal domination, or inalienable rights, but of the welfare of individuals as seen by individuals.

## 2. THE MODEL

### 2A. ASSUMPTIONS

It will be useful to set up a verbal formal model to clarify thinking on the costs and benefits of adultery. For simplicity, let us take the point of view of a Wife who is considering making an investment such as learning to love her Husband more, giving up her job, or moving to a different city, an investment which is useful only for the sake of the marriage and which she will regret making if her Husband turns out to be unfaithful.<sup>1</sup> We will call the husband's partner in adultery "the Other Woman". Assume that if the Wife does not invest in the marriage, she will be willing to divorce the Husband upon catching him in adultery and this threat would be sufficient to deter him. If, however, she has invested in the marriage, her threat to divorce him would not be credible; she would have too much to lose. The Husband also receives a benefit from the Wife's investment if he faithful, but his most preferred outcome is for the Wife to invest and for himself to commit adultery.

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<sup>1</sup> It should be understood that "Husband" in this model means "the spouse who is tempted by adultery," not "the male spouse". The conventional wisdom has it that men are more tempted than women, however, and this seems to be true in the 39 Fairfax County, Virginia cases examined in Allen & Brinig (1998). I am well aware that in most times and cultures, adultery law has treated men and women asymmetrically. The reasons why (evolutionary biology? the relative unimportance of adultery with prostitutes? the greater danger of violence from angry men?) are well worth exploring, which could be done using the framework of the present article. If in some cultures women do not mind the kind of adultery by husbands that occurs, then asymmetric laws would be efficient; if the laws simply ignore wives' harm from adultery, they are inefficient. I judged it best to focus on the United States here.

The Wife may exert monitoring effort to increase the probability that she detects adultery.<sup>2</sup> The Husband incurs a cost to find a woman with whom to commit adultery and to conceal it, a cost which depends on the Wife's precautions. With some probability depending on these efforts, the Wife detects the adultery if it exists. Such detection reduces the utility of the Husband and increases the utility of the Wife, though not so much that would invest in an adulterous marriage just for the pleasure of catching the Husband. This detection disutility for the Husband is a penalty independent of the law and represents such things as his embarrassment at being caught and the inconvenience of his Wife knowing the identity of the Other Woman. Many, perhaps most men and women would be deterred from adultery by a high value for detection disutility combined with a low benefit from the adultery itself, just as shame and scruples deter most people from crimes such as burglary, but the law is concerned with those people for whom social norms are insufficient.<sup>3</sup>

In this model, undetected adultery hurts the Wife but she benefits from detecting it, given that it occurs. Why should this be so?<sup>4</sup> A partial answer is that the Wife can deduce that the Husband is committing adultery even if she fails to detect it through her monitoring. Why, however, do people try to learn the specifics of negative occurrences even if they know they become unhappy? We will avoid the question by falling back on the economic idea of revealed preference and using the payoff function to represent willingness to expend resources to obtain particular outcomes, not to represent psychological well-being. Thus, the assumption that the Wife obtains a benefit from detecting the Husband's adultery is equivalent to her

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<sup>2</sup> I have implicitly assumed that this probability is positive even with zero effort, since the Husband is deterred from adultery by the threat of divorce if the Wife has not invested in the marriage. Lillian BeVier has suggested to me that the Wife's effort to prevent adultery could be socially useful, increasing the benefits to both parties from the investment if, for example, it consisted of being unusually attentive to the Husband's desires. If this effect is strong enough, adultery should be made fully legal so as to channel the Wife's efforts in this good direction, just as pedestrians could be made more careful by removing liability for the negligence of drivers.

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

<sup>4</sup> This issue arises in other contexts also, e.g. when a gynecologist rapes patients without their knowledge, *People v. Minkowski* 204 Cal. App. 2d 832 (1962), where the court held that there was indeed criminal harm.

being willing to expend resources to detect it, rather than saying anything about whether she feels happier afterwards.

## 2B ANALYSIS

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

In this simple model, adultery never happens, because it is deterred either by the Wife's precautions or by her credible threat of divorce when she has not invested in the marriage. There is nonetheless, a welfare loss, and potentially a very large welfare loss. This loss is created by the deterrence itself, the Wife's precaution cost or the loss to Husband and Wife if the Wife does not invest. If we relaxed the assumption that the Wife knows the Husband's degree of temptation precisely, adultery could occur in equilibrium when the Wife underestimates the precautions she needs to take. This would create two further costs, the direct loss to the Wife and the transaction costs to the Husband of committing and concealing adultery.

Adding a legal penalty for adultery is adding a new penalty to the private detection embarrassment. To deter adultery efficiently, the penalty must be large enough that even if the Wife spends nothing on monitoring, the Husband will find the expected payoff from adultery too low to justify its transaction costs. In that case, the Husband will be deterred, the Wife will feel secure in using her time investing in the marriage and not in monitoring, and social surplus will be maximized. Both parties would be happy to accept the possibility of extraordinary penalties for adultery, *ex ante*; the Husband would be willing because he knows that if the penalties are in place he will be deterred and not have to suffer them.<sup>5</sup>

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<sup>5</sup> See, for example, Cohen (1987) and Dnes (1998). The present model can be modified to add non-deterrable adultery. If it is really true that some people could not prevent themselves from committing adultery even if they were sure to be caught and to receive the death penalty—something I doubt, but which others believe—that can be incorporated into the model as a fixed probability that adultery occurs beyond what is chosen by the husband. The model would not change much.

It has often been noted regarding contracts generally and marriage in particular that long-term relationships are likely to break down without penalties for breach and that both parties will freely agree to become liable to punishment.<sup>6</sup> Indeed, that is the very idea of a contract. Adultery is just one more example. Viewing the situation *ex post*, however, it is easy for commentators to see such penalties as illegitimate infringement on the Husband's liberty (see, for example, Note (1991)).

## 2C. EXTERNALITIES

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

Using the model, if the sum of the benefits to the Husband and the Other Woman are exceeded by the cost to the Wife and other people, adultery will be inefficient. The Wife and the outsiders would be willing, were it feasible, to pay the Husband and the Other Woman enough that they would refrain from adultery. Transaction and organization costs prevent

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<sup>6</sup> As Lilian BeVier pointed out to me, even in the absence of law, long-term relationships can survive based on mutual threats of retaliation for breach, something my own writing has discussed in Chapter 5 of Rasmusen (1994). This requires sufficient interest by both parties in the future, however, and mutual vulnerability to breach, which is why courts are so useful. Mutual threats are more likely to work for minor offenses such as rude language which are instantly detectable and where the benefit from a single transgression is not worth risking later retaliation. This together with the cost of adjudication relative to the alleged harm is why the courts have always stayed out of minor household disputes. In addition, some people are trustworthy even in the absence of material incentives, in marriage as in business relationships. Even those people, however, face the cost of establishing their trustworthiness if no material incentives back it up; one would expect lengthier courtships or more screening by families and friends, and fewer marriages across ethnicity or class if more checking needs to be done.

this, and so the adultery occurs. A law that prevented adultery would then increase social surplus by leading to the result to which all parties would agree if they could transact costlessly.

The point that other people's desires must enter a cost-benefit analysis is often resisted, so it is worth clarification. The ideas of economic efficiency, wealth maximization, and Pareto optimality all rely on taking people's preferences as given, without the analyst judging their moral worth. If a consumer says he likes chocolate, the chocolate-neutral analyst does not say that banning chocolate would create no harm. Suppose the Husband and Other Woman would pay \$50,000 and \$40,000 for the right to commit adultery, and the Wife and one hundred outsiders would pay \$60,000 and \$1,000 each to prevent it. The adultery is then inefficient. There is no need to ask whether the outsiders have "really been damaged" or whether the externality "really exists". If someone would pay \$1,000 to prevent an act, the act causes him damage, and the economist does not ask about motivation.<sup>7</sup> Whether the outsiders' objections are religious or material, for example, matters as little as the motivations behind the Husband and Wife's desires.<sup>8</sup>

A common traditional position is that people should care about a society's virtue. A common modern position is that people should not interfere in the private lives of others.<sup>9</sup> The present paper adopts a neutral

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<sup>7</sup> For further discussion of the general principle, see Rasmusen (1997). The puzzle of undetected misbehavior's harm arises again here. If the Husband is unfaithful and the Wife sees this but the public does not, is the public hurt? If not, then sanctions on the Wife for publicizing the adultery might be appropriate. The same issue arises in cases of cruelty to animals; if the only harm is unhappiness from observed cruelty, the logical solution is to legalize discreet torture but to penalize anyone who brings it to public attention. Of course, in both cases it seems that people also dislike knowing that the behavior is occurring somewhere even if they do not actually observe it, merely deducing it from human nature and the absence of legal penalties.

<sup>8</sup> The economic approach is, of course, vulnerable to the standard anti-utilitarian criticism that some desires are illegitimate. It implies that if there are enough sadists, then torture is socially good, for example. The burden of proof is rightly on those who criticize a given desire, however. In the present case, this says that the burden is on those who say either that the Husband's benefit or the Wife and other people's disutility from adultery should be ignored. Ignoring either of these requires religious or philosophical considerations that take us outside of the economic approach to law.

<sup>9</sup> John Stuart Mill is an older proponent of this view, which is a major theme of *On Liberty*. He makes clear what modern legal treatments often do not, that he disapproves even of social disapproval of vice, much less of legal penalties. To be consistent, advocates of this view might wish to turn self-help on its head and make illegal behavior that is ordinarily legal, if it is done from bad motives. Landlords in the United States are forbidden to deny rental to a tenant because of his race, even though they are free to deny rental to him for other reasons. In the case of adultery, a regime that believed sexual behavior to be within a person's sphere of privacy

position, in accordance with the economist's usual pluralistic procedure of taking tastes as given. The degree to which people care about adultery is a crucial empirical question, of course, which would be reflected in such things as their choices in living location, friends, and spouses, and their willingness in political logrolling to trade votes on adultery law for votes on tax policy.

### 3. PENALTIES

#### 3A. FEATURES OF PENALTIES

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

*(a) Who initiates punishment?*

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

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

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

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

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

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

The penalty can be set *ex ante*, before the harm occurs, or *ex post*, once the damage is measured. This is the difference between liquidated and compensatory damages in contract and the difference between fixed and discretionary sentencing in criminal law. *Ex ante* penalties help the Husband make a more informed decision and are cheaper to implement, but they may be far from the damage in a particular case.<sup>10</sup>

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should penalize the Wife if she tried to punish the Husband by what were ordinarily legal means—leaving him, refusing to cooperate in household finances or legal matters, and so forth.

<sup>10</sup> The *ex ante/ex post* distinction is similar to Robert Cooter's distinction between "prices" and "sanctions"—that is, between penalties lacking in moral opprobrium and varying

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

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

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

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

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

### 3B. CIVIL DAMAGES

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

Tort and contract law exist to provide recourse for private injuries, when one person inflicts damage on another. It would seem well suited to adultery: the Husband has breached his agreement with the Wife, and the Other Woman cooperated in his breach and took actions which harmed the Wife. The situation has elements of breach of contract, tortious interference with contract, and intentional tort generally. In the context of the model, one form of tort liability would be for the Other Woman to be liable to the Wife for compensatory damages, amount  $B+C$ . Let us assume that the Husband and the Other Woman can agree to cooperate in paying the penalty and other costs of adultery, and for the moment put aside the possibility of the Wife

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with the scale of the behavior and fixed, discontinuous penalties with moral opprobrium. Cooter (1984) argues that sanctions are appropriate when the lawmaker knows behavior is undesirable but cannot measure the harm easily, which would seem to be the case with adultery.

alienating her right to sue. The Wife might monitor either less or more than she would were tort damages not available. On the one hand, the possibility of compensation means that adultery causes her less harm on net. If the detection probability is relatively unresponsive to the Wife's effort, the Wife's main reason to monitor would be to raise the cost to the Husband of finding the Other Woman enough to forestall adultery, but that reason disappears if she is fully compensated. On the other hand, if adultery does occur and she detects it, she can collect damages. In either case, the Wife is more likely to invest in the marriage, because the Other Woman's liability reduces the loss to the Wife from investment followed by adultery.

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

A key practical disadvantage is that the defendant may be judgement-proof. If the Other Woman cannot afford to pay damages, the Wife's right to sue is irrelevant. Since many, perhaps most, people lack the wealth to pay damages substantial enough to compensate for a wrecked marriage, or perhaps even for the cost to the Wife of hiring a lawyer, civil suits may disappear as an effective penalty altogether. This is a standard economic argument for why civil damages and fines are not used for the various misbehaviors we call criminal (see Posner, 1998., Section 7.2). A problem special to adultery is that the Husband and Wife are financially interdependent. Even if the Other Woman paid the entire penalty, much of its deterrent effect would be nullified if the Husband, as part of the household, were to receive half the penalty. Or, if the Husband aids the Other Woman in paying the judgement, the household ends up paying damages to itself.

Another general disadvantage of civil suits is the cost of determining the size of the damage. If the plaintiff gives 1/3 of his judgement to compensate his lawyer, the defendant spends about the same amount, and

there is a competitive market for lawyers, then it must be that the cost of establishing and measuring liability is about 2/3 of the size of the damage itself. The measurement problem is particularly severe for an injury such as adultery whose damage is not monetary; for adultery, proof of liability may be relatively easy compared to typical tort and contract suits, but proof of damages is relatively difficult. It is not necessary that civil judgements be variable, of course. They could be fixed, like workmen's compensation for the loss of a particular body part. The problem would then arise of plaintiffs choosing to sue even if the true damages are small, knowing that the court has committed itself to positive error in the damage award (see Rasmusen,1995).

Civil damages are, however, the remedy most often used in the area of commercial law closest to marriage: partnership. As Levmore (1995) nicely lays out using the property/liability framework of Calabresi & Melamed (1972), the common law remedy in partnership disputes has been dissolution of the partnership followed by civil litigation over prior misbehavior. He notes that the requirement of dissolving the partnership first creates difficulties, and has gradually been eroding in partnership law, but that in marriage law, to which he compares it, the requirement remains much stronger and the possibilities for later lawsuit are weaker. Note, too, that criminal penalties are also available for misbehavior in partnership if the violation of fiduciary duty is severe enough.

### 3B. CRIMINAL PENALTIES

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

Criminal law is used for penalties for many kinds of intentional injuries. Punitive damages are used for the same purpose in civil suits, but punitive damages are never fixed ex ante and the person injured initiates the penalty process and receives its benefit. Criminal law is often used for offenses such as rape and robbery which are considered serious and have high mental costs to the victim even if the out-of-pocket costs are small,. This suggests that criminal law might be suitable for adultery also.

One form a criminal law might take is for adultery to be prosecuted at the discretion of the county prosecutor, on complaint by the Wife, with a

sentence of five years in the state prison. If this sentence is long enough, the Husband would be deterred even if the Wife did not exert special effort to monitor him and the Other Woman were willing to compensate him up to her own benefit from adultery. This achieves the efficient outcome: the Wife can safely invest in the marriage, and neither she nor the Husband incurs transaction costs.

Alienability becomes relevant if the adultery is efficient from the point of view of the three parties. Unless the wife's right to veto prosecution is alienable, if the criminal penalty is large adultery will not occur even if it is efficient. If it is alienable, however, then no harm results even if the state has set the penalty extremely high. The penalty will not be imposed anyway, because the Wife will veto it in exchange for compensation, and the penalty serves only as the starting point for bargaining between her and the Husband.<sup>11</sup>

Alienability does have two disadvantages. First, if there are externalities to the public, these will be ignored by the Wife when she accepts payment from the Husband and Other Woman to tolerate the adultery. This problem shows up in many areas of criminal law. Victims prefer to free the criminal to commit crimes against others rather than forego extracting concessions from him; an employer, for example, would rather be reimbursed for embezzlement than stop his criminal employee stealing from a future employer. The second disadvantage is that alienability prevents strategic precommitment. The penalty is likely to be costly to the Wife as well as the Husband, because of public shame or loss of the Husband's earning power. Thus, she might veto prosecution because it hurts the household. She might actually benefit from not being allowed to veto prosecution because then the threat of punishment becomes credible and the Husband would be deterred. This paradox is not merely theoretical; it is the justification for the "zero-tolerance" rules now common for spousal assault.<sup>12</sup> In many jurisdictions, if a wife calls the police for help when her husband hits her, if the police decide that he has indeed hit her, the criminal process will proceed even if the wife objects.

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<sup>11</sup> This perhaps helps explain why adultery prosecutions have never been common, despite the prevalence of adultery laws. The law may be important, but only as a threat the injured spouse could wield to extract concessions from the adulterous spouse. To the extent that the law served this purpose, its penalties would not need to be imposed.

<sup>12</sup> "Domestic Abuse Bills Gain Momentum in Legislatures," *The National Law Journal*, Rorie Sherman, p. A9 (4 July 1994).

The Model Penal Code, proposed by the American Law Institute in 1962 and a strong influence on U.S. state criminal codes, deliberately decriminalized adultery, saying, "private immorality should be beyond the reach of the penal law" (Part II, Article 213, "Note on Adultery and Fornication"). It said that adultery laws were rarely enforced anyway, that it would be costly to enforce them, and that an act should not be illegal "simply because such behavior is widely thought to be immoral." While recognizing that adultery laws were popular with voters and that the crime is not victimless, the ALI regarded these as unimportant points.

Non-enforcement is a red herring. Many crimes exist which are rarely prosecuted. A notorious example is the U.S. "Brady Bill", which makes attempts by felons to buy guns illegal. This is much easier to prosecute than adultery, since the government has in its hands written evidence that the felon broke the law. Yet in the two years or so of its existence, the government claimed to detect some 186,000 violations, of which it chose to prosecute just 7, about 1 in 20,000.<sup>13</sup> Even such an uncontroversial crime as burglary is rarely prosecuted. In 1994, only about 1.4 percent of burglaries in the United States led to conviction and 0.8 percent to incarceration.<sup>14</sup> There is, to be sure, a qualitative difference between the precisely 0 percent prosecution rate for adultery in many states and the 0.005 percent rate for Brady offences, but it is not clear why that difference should matter. My impression is that the real problem for the American Law Institute was that its members did not think adultery was really immoral, since they offer no grounds to differentiate adultery from other criminal behavior. The same issue arises with respect to laws against cruelty to animals (see Beirne, 1999), which the Model Penal Code proposes at 250.11 "to prevent outrage to the sensibilities of the community." The ALI certainly did not consider the spillover argument explained in the present article, in keeping with the common 1950's position that tastes for retribution are barbarous and illegitimate.

### 3C. SELF HELP

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<sup>13</sup> 7 prosecutions in 17 months: "Implementation of the Brady Handgun Violence Prevention Act," Report to the Committee on the Judiciary, U.S. Senate, and the Committee on the Judiciary, U.S. House of Representatives, GAO/GGD-96-22 Gun Control, January 1996. 186,000 illegal acts in the first 28 months: "Gun-Control Laws Scrutinized After Empire State Shooting," Ron Scherer, *The Christian Science Monitor*, February 27, 1997, p.3.

<sup>14</sup> Langan and Farrington (1998, pages 19 and 29). In England, 0.6 percent of burglaries lead to conviction and 0.2 percent-- 1 in 500-- to incarceration.

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

“Self help” refers to a private person being allowed to take actions which the state ordinarily prohibits.<sup>15</sup> Ordinarily, one person cannot take away another person's furniture and sell it. A creditor, however, is allowed to do just that. In the case of adultery, self help consists of the Wife being allowed to punish the adulterous Husband by actions that would ordinarily be illegal— by dissipating assets, leaving with the children, refusing to help support him financially, assaulting him, or even murder. The law can do this formally, by statute or case law, or informally, by non-prosecution or jury nullification. The right is alienable if the Wife loses her defense for the criminal act and is prosecuted as a normal defendant if it is shown that she agreed to the adultery.

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

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

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<sup>15</sup> More narrowly, self help is used to refer to a private person being allowed to immediately take an action that otherwise requires going through a legal process, e.g., to repossess an automobile used as collateral without waiting for a court's order. I use the term to refer generally to taking actions that except for the special circumstances are illegal.

Self help also has disadvantages. If people are often mistaken, and more mistaken than courts, in evaluating whether their spouses are adulterous, self help will move the amount of punishment further from the optimum. It puts the cost of mistakes and the cost of inflicting punishment on the victims, who may be ill-prepared to bear those costs. "Self-help" carried out by unbiased committees rather than victims would work rather better-- the classic vigilante committees--but this starts to shade into criminal punishment, for what else are courts? In any case, even then self help would have real costs, unlike civil damages. And self help, like civil suits and alienable criminal penalties, takes no account of spillovers on the public.

Self help is relevant to this discussion in one more way: as a motive for providing civil or criminal legal remedies to the victim. If these are not provided, the victim may decide to punish the adulterer even if it is illegal, creating the possibility of mistakes and requiring the government to bear a cost of punishing the adultery victim. Smith (1998) has noted this kind of victim retaliation as a reason for the illegality of blackmail, and the argument carries over to much of criminal law. Indeed, it was explicitly cited as a reason for passing a criminal law against adultery by natives in Rhodesia in 1916. The native criminal law had been abolished by the British without replacement (though civil damages were still available in native courts), and numerous hut burnings were the result (Mittlebeeler, 1976, pp. 122-134, 183). This argument depends, of course, on a culture's level of honor and violence.

#### 4. ADULTERY LAW IN PRACTICE

Posner (1999, Chapter 2) and Epstein (1999) have recently argued persuasively that theorizing about law without reflecting on any real cases or statutes is dangerous. This section responds to that warning. As one might expect when efficiency calls for a law, diverse nations and times have provided legal sanctions for adultery, from "Thou shalt not commit adultery" up to the present day.<sup>16</sup> Describing the law in any particular time

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<sup>16</sup> The commandment is *Exodus* 20:14: "Thou shalt not commit adultery," with specifics in *Leviticus* 20:10: "And the man that committeth adultery with another man's wife, even he that committeth adultery with his neighbour's wife, the adulterer and the adulteress shall surely be put to death." Note that if the death penalty was alienable, side payments might have resulted in it being rarely inflicted in Israel. Chapter 8 of Posner and Silbaugh's (1996) is the best place to look

and place is difficult because much of it has been unwritten, being embodied in prosecutorial discretion, the attitude of juries, and the degree of self help tolerated. Even more than usual published cases are an unreliable guide to what actually happens; the shame of the offense to both victim and perpetrator makes quiet resolution attractive. What is easier, however, is to pick one jurisdiction and show how its law fits in the theoretical framework I have used. I will pick my own state of Indiana, not because Indiana law, Anglo-American law, or 1990's law are the most important laws to study, but simply because I have easy access to it and it is not unrepresentative of modern American law.

#### 4A CIVIL DAMAGES

The English common law's remedy for adultery was a civil action for damages. Blackstone says,

"Adultery, or criminal conversation with a man's wife, though it is, as a public crime, left by our laws to the coercion of the spiritual courts; yet, considered as a civil injury (and surely there can be no greater,) the law gives a satisfaction to the husband for it by action of trespass *vi et armis* against the adulterer, wherein the damages recovered are usually very large and exemplary. But these are properly increased or diminished by circumstances; as the rank and fortune of the plaintiff and defendant; the relation or connection between them; the seduction or otherwise of the wife, founded on her previous behavior and character; and the husband's obligation by settlement or otherwise to provide for those children, which he cannot but suspect to be spurious."<sup>17</sup>

Two different causes of action for adultery are available in the common law: "alienation of affections" and "criminal conversation". *The Second Restatement of Torts* (1977), one of the American Law Institute's efforts to summarize the common law, describes the two actions thus:

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for modern U.S. state and federal law on adultery. See also Haggard (1999) and Weinstein (1986).

<sup>17</sup> Book 3, Chapter 8 of Blackstone's *Commentaries*. See also Book 4, Chapter 34, where he discusses adultery in the context of criminal law. Blackstone is somewhat misleading, because the caveat about the spiritual courts is crucial. Until their jurisdiction was limited in 1640, these courts actively prosecuted adultery, imposing severe fines and jailing for nonpayment (Stephen, 1883, Volume 2, Chapter 25). It is noteworthy that Macaulay's Indian Penal Code made adultery a major crime, prosecutable only at the husband's request, even though England had recently rejected domestic criminalization. Macaulay was perhaps enough of a utilitarian to recognize the spillover problem; Section 298 of his code also criminalized deliberate insults against someone's religion (Stephen, 1883, Volume 3, Chapter 33).

@ 683 ALIENATION OF SPOUSE'S AFFECTIONS. One who purposely alienates one spouse's affections from the other spouse is subject to liability for the harm thus caused to any of the other spouse's legally protected marital interests.

@ 685 CRIMINAL CONVERSATION WITH A SPOUSE. One who has sexual intercourse with one spouse is subject to liability to the other spouse for the harm thus caused to any of the other spouse's legally protected marital interests.

The elements of the two actions are different. The wrong in alienation of affections is foreseen damage to the relationship between husband and wife, which requires that the marriage not have been in ruins before the outsider interfered.<sup>18</sup> On the other hand, the action does not require adultery, and even an interfering mother-in-law can be liable for breaking up a marriage.<sup>19</sup> Criminal conversation, on the other hand, is closer to strict liability. It is an intentional tort in the sense that the third party must intentionally be performing the sexual act, but he is liable even if he did not know the adulterous spouse was married.<sup>20</sup> A single act is sufficient (though perhaps with small damages), but a physical act is necessary.

Indiana abolished both actions in 1935, the first of several American states to do so in the 1930's, in "An Act to promote public morals, by abolishing civil causes of action for breach of promise to marry, alienation of affections . . ." <sup>21</sup> The act was tested in 1937 when a suit argued that since Article 1, Section 12 of the Indiana Constitution said, "every man, for injury

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<sup>18</sup> Comment h to @ 683: "Not only must the actor have caused a diminution of one spouse's affections for the other by acts, but the acts must have been done for the very purpose of accomplishing this result."

<sup>19</sup> For such a case, see *Beem v. Beem*, 193 Ind. 481 (1923). This case also illustrates the requirement of malice. The Indiana Supreme Court approves of the following jury instruction requested by the defense but rejected by the trial judge (at 489, italics from original): ". *were they [the defendant parents] impelled by a spirit of malice and ill will toward said plaintiff or were they acting in good faith and without malice and what they considered for the best interest of said Bruce. If the latter, your verdict should be for the defendants.*" Note, however, that an adulterous third party can rarely assert the defense that his motives in breaking up the marriage were disinterested.

<sup>20</sup> Comment f. to @685: "Although knowledge or belief that a person is married is essential to liability for alienation of affections under the rule stated in @ 683, neither knowledge nor belief is necessary to liability under the rule stated in this Section. One who has sexual relations with a married person takes the risk that he or she is married to another. The fact that the spouse misrepresents the marital status is not a defense."

<sup>21</sup> As cited in *Pennington v. Stewart*, 212 Ind. 553;554 (1937). Nolan (1951) describes how 19th century Indiana was a divorce-mill state for some time, to which people from New York travelled for easy divorces. In 1999, Indiana Code § 34-12-2-1a still specifically eliminates the two actions, along with breach of promise and seduction.

done to him in his person, property, or reputation, shall have remedy by due course of law. . . .," the abolition of alienation of affections was unconstitutional. The Indiana Supreme Court disagreed, saying that neither person, property, nor reputation were hurt and that marriage was a matter not of contract or property, but of a status that falls under the regulatory power of the state.<sup>22</sup>

Alienation of affections has gone out of style as a tort, an exception to the general increase of tort liability in the United States.<sup>23</sup> Oddly enough, the similar action of tortious interference with contract is alive and well (see Landes & Posner, 1980; BeVier,1990; McChesney, 1999). The *Restatement* says:

@ 766 INTENTIONAL INTERFERENCE WITH PERFORMANCE OF CONTRACT BY THIRD PERSON

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

Note the exception for marriage. As in so many areas of the law, marital agreements receive substantially less protection than commercial agreements. Whether a prenuptial agreement executed as a commercial contract would expose a third party to liability for tortious interference is an interesting question not yet tested in any court, to my knowledge. When people have brought suit against their spouses on general tort grounds such as fraud or intentional infliction of emotional distress, however, they have

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<sup>22</sup> *Pennington v. Stewart*, 212 Ind. 553 (1937). That marriage is not a contract is a common finding in American courts. A more recent example is *In re the Marriage of Franks*, 189 Colo 499 (1975, en banc), which rejected the argument that a no-fault divorce law violated the contracts clause of the state constitution when it nullified existing marriage contracts. The *Pennington* Court did rule unconstitutional a provision of the 1935 act which made the plaintiff liable to a criminal penalty of from one to five years of prison for even trying to bring an action for alienation of affections.

<sup>23</sup> Like Indiana, many states abolished alienation of affections in the 1930's, and the topic was actively discussed in law reviews then (Weinstein, 1986, p. 220). England abolished criminal conversation by Stat. 20 & 21 Vict. ch. 85, sched. 59 (1857) and enticement by Law Reform (Miscellaneous Provisions) Act 1970, sched. 5. Two states in which the tort is still alive are Illinois and North Carolina. "Alienated-affections case ends in \$ 11,667 verdict," *Chicago Daily Law Bulletin*, Carol Sander, p. 3 (28 July 1997); "Personal Negligence: Alienation of Affection 90,001 Verdict: Emotional Distress," *Personal Injury Verdict Reviews*, 7: 22 (24 November 1999).

lost, with courts saying that because of the abolition of torts such as criminal conversation, behavior that might otherwise have been tortious must now be ruled legal.<sup>24</sup> Thus, in some states the law has changed to the point where behavior that would otherwise be tortious is exempted from liability if it can be shown to be connected with adultery. Curiously enough, feminist scholarship has noted the same point, though with more attention to the distributional effects. Linda Hirshman and Jane Larson have proposed that adultery be restored in divorce settlements and in tort (Hirshman & Larson, 1998, pp. 283-286). Larson (1993, 471) comments that

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

#### 4b CRIMINAL PENALTIES

Until 1976, adultery was a crime in Indiana, as it still is some American states, but in that year the law was repealed.<sup>25</sup> The earlier law did not criminalize adultery *per se*. Rather, "The offenses prohibited by the statute here involved (although sometimes inaccurately referred to as "adultery" and "fornication") are cohabiting with another in a state of

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<sup>24</sup> *Doe v. Doe*, Court of Appeals of Maryland, Sept 1998, no. 99 (2000), <http://pub.bna.com/fl/99a98.htm>; *Weicker v. Weicker*, 22 N.Y.2d 8 (1968); *Koestler v. Pollard*, 162 Wis.2d 797 (1991); *Speer v. Dealy*, 242 Neb. 542 (1993). Note that the common law rule of interspousal immunity from suit had to be abolished before spouse could sue spouse on these grounds.

<sup>25</sup> Indiana Code "§§ 35-1-82-1-- 35-1-82-3. [Repealed.] COMPILER'S NOTES. This chapter, concerning incest, cohabitation, and seduction, was repealed by Acts 1976, P.L. 148, § 24." Curiously, Indiana Code § 34-15-5-1, on slander, still says, "Every charge of incest, homosexuality, bestiality, fornication, adultery, or whoredom falsely made against any person is actionable in the same manner as in the case of slanderous words charging a felony." Footnote 4 of Haggard (1999) gives cites for 24 state laws against adultery in 1998. In New York, Virginia, North Dakota, and Utah only the married adulterer is liable (Haggard, 1999 p. 474). In Minnesota and North Dakota, the injured spouse is explicitly authorized to block prosecution Minn. Stat. Ann. 609.36; N.D. Cent. Code 12.1-20-09 (1997). Adultery is still actively prosecuted in the U.S. military. See *United States v. Green*, 39 M.J. 606 (A.C.M.R. 1994). It is also subject to federal law in the White-Slave Traffic (Mann) Act, ch. 395, 36 Stat. 825 (1910), *Caminetti v. United States*, 242 U.S. 470 (1916), *Whitt v United States* 261 F2d 907 (1959, CA6 Ky).

adultery or fornication.... The design of this law is not to affix a penalty for the violation of the Seventh Commandment, but to punish those who, without lawful marriage, live together in the manner of husband and wife.” (*Warner v. State*, 202 Ind. 479, 483 [1931]). Occasional, or even frequent acts of adultery were not criminal by themselves; “cohabitation” was an essential element of the crime.

What this suggests is that criminalization was motivated not so much by the victimized spouse (who had, until 1935, civil damages and divorce-for-fault available), but by the public. Whether the ill consequence of public immorality was thought to be direct offense to the feelings of the public or a tendency to corrupt is unclear, but damage to the non-adulterous spouse was not the main concern. If public feeling in Indiana changed by 1976, then it is possible that the criminal law was efficient earlier but became inefficient due to change in tastes.<sup>26</sup>

#### 4C SELF HELP

Adultery being grounds for divorce creates a penalty similar to self help in the sense that adultery provides an excuse for the innocent spouse to do something that would otherwise be illegal: to unilaterally terminate the marriage. Such divorce is not self help in its purest form, however, because it still requires petition to the courts. The innocent spouse cannot simply behave as if unmarried (for example, marrying someone else) and then plead the other spouse’s adultery as an excuse when later prosecuted or sued. Self help proper consists of imposing a penalty without the aid of the courts but

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<sup>26</sup> Note also that the benefits of adultery law may have diminished. Contraception prevents bastardy, antibiotics cure venereal diseases, and automation reduces the need for women to specialize in housekeeping. The reason for the decline of adultery law is not judicial activism. At the Federal level, at least, various opinions have said in dicta that adultery is a legitimate subject for criminal law, and state courts have not been the driving force behind repeal of adultery laws. *Poe v. Ullman*, 367 U.S. 497, 546, 552 (1961) (Harlan, J. dissenting): “[L]aws forbidding adultery, fornication, and homosexual practices . . . form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis....I would not suggest that adultery, homosexuality, fornication and incest are immune from criminal enquiry, however privately practiced.” *Griswold v. Connecticut*, 381 U.S. 479, 498 (1965) (Goldberg, J., concurring): “The State of Connecticut does have statutes, the constitutionality of which is beyond doubt, which prohibit adultery and fornication.” *Bowers v. Hardwick*, 478 U.S. 186, 208 (1986): “[a] State might define the contractual commitment necessary to become eligible for [marital] benefits to include a commitment of fidelity and then punish individuals for breaching that contract.”

with their acquiescence when the penalty would be an illegal act except for the justification of adultery. The most dramatic form is adultery as justification for killing someone.<sup>27</sup> Indiana has never formally allowed this, although whether juries would convict a wronged spouse for murder is uncertain. Their reluctance to convict is known as the "unwritten law," which is pervasive enough across time and culture to make the relevance of written laws suspect.<sup>28</sup> If prosecutors will not prosecute and juries will not convict, the written law's relevance is questionable. Jury instructions from Indiana judges, however, have always been to convict, as the case law amply shows. Adultery can reduce the charge from murder to manslaughter but cannot excuse the killing altogether, and the killing must have occurred immediately on discovery of the adultery for the charge to be reduced at all.

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

Indeed, a plausible interpretation of this doctrine is that Indiana is not granting the killer a discount from his prison sentence because he was engaged in self help, but that murderous passion is so typical of people who

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<sup>27</sup> Texas, Utah, New Mexico, and Georgia all allowed adultery as an excuse for killing adulterers caught *in flagrante delicto* up until the 1970's, Georgia by judicial interpretation and the other states by statute (Weinstein, 1986, p. 232). I am told that Grotius said the same for civil law, but have not found the reference. Interestingly, Texas did not allow castration to replace killing: *Sensobaugh v. State* 92 Tex. Crim. 417 (1922). The first Georgia case on point makes an interesting argument from jury nullification and democratic common law: "Has an American jury ever convicted a husband or father of murder or manslaughter, for killing the seducer of his wife or daughter? And with this exceedingly broad and comprehensive enactment on our statute book, is it just to juries to brand them with perjury for rendering such verdicts in this State? Is it not their right to determine whether, in reason or justice, it is not as justifiable in the sight of Heaven and earth, to slay the murderer of the peace and respectability of a family, as one who forcibly attacks habitation and property?" *Biggs v. State*, 29 Ga. 723, 728 (1860).

<sup>28</sup> Three notorious examples are: (a) the 1952 acquittal of Yvonne Chevallier for shooting her husband, a cabinet minister and mayor of Orleans, upon his refusal to give up his mistress (pp. 127-131 of Stanley Karnow, 1997, *Paris in the Fifties*, New York: Random House); (b) Lorena Bobbitt's acquittal after mutilating her husband ("Lorena Bobbitt Acquitted In Mutilation of Husband," *New York Times*, David Margolick, p. 1 [Jan. 22, 1994]); and (c) the acquittal of Congressman Daniel Sickles for murder of his wife's lover after a defense by attorney Edwin Stanton, later U.S. Attorney General and Secretary of War ("It Didn't Start With O.J.; Like the Simpson Saga, the 1859 Murder Trial of Dan Sickles Grippped the Nation," *The Washington Post*, Daniel Rezneck, p.C5 [24 July 1994]).

discover adultery that it is a waste of time to debate whether such a person has the state of mind that ordinarily qualifies a killing as manslaughter instead of murder.

Similarly, adultery has generally not been considered sufficient provocation to justify battery, and courts have held that the victims of such battery are legally entitled to damages, including punitive damages. This means that even if the prosecutor uses his discretion not to bring criminal charges against the angry spouse, the adulterous third party may sue on his own behalf. Whether the jury will be sympathetic is again questionable.<sup>29</sup>

Various legal disabilities created by commission of adultery are hard to classify as either civil, criminal, or self help, since the penalty is neither a cost borne by the state or the victim nor a property transfer. I have only been able to find one example currently in force in Indiana: elimination of any claim by an active and continual adulterer and deserter to the estate of an intestate spouse.<sup>30</sup> In the past, other disabilities have also existed, particularly in connection with divorce. Before Indiana adopted no-fault divorce in 1971, adultery could be considered in division of property, as well as being one of the grounds that made divorce available in the first place.<sup>31</sup> Moreover, under an “unclean hands” statute which codified earlier case law,

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<sup>29</sup> Two cases show what can happen. *Hamilton v Howard*, 234 Ky 321(1930) involved appeal from erroneous jury instructions by a trial judge that if the plaintiff victim of three gunshots in the legs had attempted to alienate the affections of the defendant's wife, defendant would not be liable. The appeals court reversed and remanded, but noted that the jury could take provocation into account in setting punitive damages, which were the bulk of the claim. *Chykirda v Yanush* 131 Conn 565 (1945) was an appeal from an award of \$72 to a supposed alienator of affections who was the target of battery. The jury said the \$72 included both compensatory and punitive damages, and the appellate court ruled that the jury was justified in considering provocation in the setting of the punitive damages.

<sup>30</sup> Indiana Code § 29-1-2-14 says, “If either a husband or wife shall have left the other and shall be living at the time of his or her death in adultery, he or she as the case may be shall take no part of the estate of the deceased husband or wife.” This came up in reported cases as recently as the early 1990's: *Oliver v. Estate of Oliver*, 554 N.E.2d. 8 (Ind. App. 1<sup>st</sup>, 1990) and *Estate of Calcutt v. Calcutt*, 6 N.E.2d 1288 (Ind. App. 5<sup>th</sup>, 1991).

<sup>31</sup> As discussed in *Clark v. Clark*, 578 N.E.2d 747 (Ind. App. 4<sup>th</sup>, 1991). The opinion starkly tells Mrs. Clark the current state of the law, at 750, “Wife also argues when it awarded attorney fees and litigation expenses, the trial court failed to consider that husband had taken another woman, that wife had not wanted the separation, and that it was solely husband's idea. Wife is wrong. The court may not consider such matters when dividing property in a dissolution of marriage action.” In some states—Virginia, for example-- adultery can still affect divorce settlements and alimony. See *L.C.S. vs. S.A.S.* 453 S.E.2d 580 (Va. App. 1995) and Va. Code Ann. pp. 20-107.2-3.

a spouse's adultery barred filing for divorce on the grounds of the other spouses' adultery.<sup>32</sup>

In summary, the law of one jurisdiction, Indiana, has almost no penalties for adultery, but in the past it has used tort law, criminal law, and self help in different ways and to achieve different objectives. Tort law has deterrent and compensatory effects for the wealthy; the self-help deters the judgement-proof, and criminal law prevents open adultery from offending public feelings. The most important penalty may have been the status of adultery in divorce proceedings, which like a criminal penalty is not proportionate to damage but which like a civil penalty is imposed at the initiative and to the benefit of the injured spouse.

## 5. CONCLUDING REMARKS

Efficiency in marriage, as in partnership, requires that there be a legal remedy for adultery. Civil damages, criminal law, and self help all have their advantages and disadvantages. The law need not restrict itself to one of these, and traditionally has not. Which laws are best depends heavily on empirical magnitudes such as the strength of public offense, the amount of damage to injured spouses, and the assets available for paying judgements. This article has not, of course, considered other objectives besides efficiency, but even for those people who consider other objectives more important, it will be useful to know when wealth is being sacrificed. The efficient laws may well violate one person's beliefs about what is necessary for a free society and another's for a virtuous society, but even for those people it is useful to consider how much one's favorite societal features cost.

One policy which seems clearly beneficial from the point of view of wealth maximization, and perhaps freedom and virtue as well, would be to allow people to opt into adultery penalties via prenuptial agreements. The law could be written to allow people to opt into tort, criminal, or self-help as they are now free to opt into certain kinds of financial arrangements. This

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<sup>32</sup> *O'Connor v. O'Connor*, 253 Ind. 295; 307 (1968) quotes the Indiana Code as saying § 3-1202 that "Divorces shall not be granted for adultery in any of the following cases:... Third. When the party seeking the divorce has also been guilty of adultery under such circumstances as would have entitled the opposite party, if innocent, to a decree," and notes that "The statute was originally passed in 1873 (Acts 1873, ch. 43, § 9, p. 107) but the doctrine had already been recognized by case law."

would require specific statutes for criminal and self-help penalties, since they are not standardly available as penalties for breach of contract. For civil damages, it would merely require dependable government enforcement of premarital contracts, without judicial discretion to ignore them as marriage-related. The argument is the same as for contract enforceability in general: it permits a disjunction of mutual performances and encourages reliance on future performance.<sup>33</sup> Some contracts, e.g. for price-fixing or murder-for hire, have negative spillovers onto third parties and should not be enforced, but if spillovers are nonexistent or positive, court enforcement is a public good. Whether the law should go beyond this and include penalties for adultery as the default for every marriage contract or even require marriage to include them, is a more difficult matter, depending on the size of spillovers.

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<sup>33</sup> For detailed discussion see Cohen (1987), Stake (1992), Rasmusen & Stake (1998); and Dnes (1998). The 1997 Louisiana "covenant marriage" law goes some way towards this, offering a choice of two marriage types. See 1997 La. House Bill 756 amending 9 Louisiana Revised Statutes sec 272-275 and 307-309. On the confused current state of the law on enforcing premarital agreements, see Graham (1993) and Haas (1988). Also see, however, Merrill & Smith (2000), for an objection from property law: allowing many forms of marriage increases the transactions cost of anyone, such as an employer, who wishes to categorize people by marital status. Merrill and Smith do not note the application to marriage law, but it is implicit in their argument.

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