ADULTERY PROVISIONS IN MATRIMONIAL AGREEMENTS

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Can a contract discourage your spouse from cheating or compensate you for a broken heart? Adultery penalties in marriage contracts seek to do exactly that. An adultery penalty is a financial penalty in a marriage contract triggered by a spouse's infidelity. While many practitioners advise clients against adultery provisions in marriage contracts, some clients demand them. However, are adultery provisions enforceable? Should they be? This Article considers the socio-legal history of adultery and provides new insight into the enforceability and wisdom of adultery penalties. This Article also provides novel arguments that adultery provisions should not be enforced and calls upon courts to consider the issue more thoughtfully.

TABLE OF CONTENTS

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INTRODUCTION

Marriage is a uniquely risky contractual relationship. Failure rates are notoriously high, and failure is often accompanied by financial and emotional hardship. Even enduring marriages may bring financial and emotional hardship to one or both spouses. A host of laws seek to mitigate against the risk of financial hardship. Community property laws, equitable distribution laws, and spousal support awards can offer some protection from financial hardship. Spouses are also free to craft personalized matrimonial agreements that stipulate the financial consequences of a marriage or its failure.

But, what about the emotional risks of marriage? Adultery, and its attendant emotional hardship, is a routine cause of marriage failure in the United States. Can spouses protect themselves against the emotional harms of adultery by discouraging it in a marriage contract? Can a financial penalty in a marriage contract that is tied to adultery compensate a jilted spouse for their heartache? Adultery penalties in marriage contracts seek to do exactly that. Adultery penalties attach a financial penalty to a spouse's infidelity. Clients sometimes demand adultery penalties, often over the sound advice of counsel advising

against such penalties.[1] This Article considers the socio-legal history of adultery and argues that adultery penalties should be unenforceable.

This Article proceeds as follows. Part I outlines the evolution of the role adultery plays in American law and shows that American law has generally retreated from allowing financial recovery for the emotional harms caused by adultery. Part II compares two major lines of jurisprudence relating to adultery penalties and considers some ancillary issues relating to adultery penalties. Part III provides novel arguments for refusing to enforce adultery penalties even in jurisdictions that have traditionally permitted them.

I. THE EVOLVING ROLE OF ADULTERY IN AMERICAN LAW

Adultery is a term of legal significance with a long and colorful history. Adultery not only is the oldest and most widely agreed upon basis for divorce, but it also gave rise to civil and criminal penalties throughout much of history.[2] The historical roots of adultery prohibitions reveal heteronormative and patriarchal views of sexuality and morality.[3] Prohibitions of adultery were usually imposed and regulated by men, often to the disadvantage of women.[4] Men were generally punished less severely than women for similar sexual transgressions, if they were punished at all.[5] But, why? This Part traces the origins of and the declining role of adultery in American law. In the modern era, courts are less enthusiastic to punish adulterers, a policy view with important implications for the enforceability of adultery penalties in marriage contracts. This Part also highlights the evolving legal definition of adultery, how it has been shaped by patriarchal and heteronormative notions of gender and sexuality, and

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1. *See, e.g.*, 20 FRANK L. MCGUANE, JR. & KATHLEEN A. HOGAN, COLORADO PRACTICE SERIES: FAMILY LAW & PRACTICE § 39.6 (2d ed. 2022) (advising against adultery penalties because they "may be unworkable based on difficulties of proof and would infuse any future divorce with a level of animosity which most prenuptial agreements strive to avoid").

2. *See* discussion *infra* Section I.A (discussing the historical evolution of adultery).

3. *See* discussion *infra* Section I.A (exploring the connection between societal views on adultery and gender roles).

4. *See* discussion *infra* Section I.B.1 (highlighting how women have historically suffered greater fallout from adultery than men).

5. *See* discussion *infra* Section I.A (emphasizing that the consequences of adulterous behavior have traditionally followed a heteronormative approach where women are penalized to a greater extent than men).

explores the somewhat narrow legal definition of adultery adopted by courts.

A. Adultery's Historical Roots

Religious views of sexual morality—particularly patriarchal Judeo—Christian views—influenced most western legal traditions.[6] Religious tradition treated women as property belonging to men—women belonged first to their fathers and then to their husbands.[7] That tradition also viewed most expressions of female sexuality and sexual desire as dangerous, shameful, and sinful.[8] Adultery was a gendered crime in religious tradition—it always required the involvement of a married woman.[9] The marital status of the married woman's male lover, however, was irrelevant; it was the marital status of the woman that made adultery such a serious crime.[10] The usual punishment for adultery was death, for both the married woman and her male lover.[11] However, a man, married or unmarried, faced little or no consequences for having sex with an unmarried woman.[12]

Adultery retained gendered distinctions in most western legal traditions.[13] Common law partly left regulation of marriage, adultery,

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6. *See, e.g.*, Steven R. Morrison, *Creating Sex Offender Registries: The Religious Right and the Failure to Protect Society's Vulnerable*, 35 AM. J. CRIM. L. 23, 32 (2007) ("It can scarcely be denied that biblical sexual prohibitions have had a major effect on Western law.").

7. Angela L. Padilla & Jennifer J. Winrich, *Christianity, Feminism, and the Law*, 1 COLUM. J. GENDER & L. 67, 75 (1991).

8. *See id.* at 73 (analyzing Christianity's impact on gender roles and society's understanding of how those roles manifest sexually); *see also* ISABEL DRUMMOND, THE SEX PARADOX 8 (1953) (asserting that negative societal views around women's sexuality contribute to the disproportionate consequences women face from adultery).

9. EDWARD J. WHITE, THE LAW IN THE SCRIPTURES: WITH EXPLANATIONS OF THE LAW TERMS AND LEGAL REFERENCES IN BOTH THE OLD AND THE NEW TESTAMENTS 134–35 (1935).

10. *Id.*

11. *Id.*

12. *Id.*

13. *See* John Witte Jr., *Church, State, and Sex Crimes: What Place for Traditional Sexual Morality in Modern Liberal Societies?*, 68 EMORY L.J. 837, 839 (2019) (explaining the connection between sexual behavior and religious norms); *see also* 1 MARCEL PLANIOL & GEORGE RIPERT, TREATISE ON THE CIVIL LAW ch. IX, § 900 (La. State L. Inst. trans., 12th ed. 1959) (1939) (outlining different punishments for men and women who commit adultery).

and similar matters in the hands of the Church.[14] On the one hand, the Church took a broader view of adultery than biblical law and considered it a breach of the marital vow regardless of the married person's gender.[15] On the other hand, many of the Church's teachings and practices continued to reinforce negative patriarchal views of women and female sexuality.[16] Where common law, rather than ecclesiastical law, governed, the harms of adultery remained gendered, focused largely on the role of women as the property of their husbands.[17] Under common law, the married woman's adultery gave her husband a civil action against the other man that aimed to compensate the husband for the risk that the wife would become pregnant with spurious offspring for which the husband would be responsible.[18] The wife had no comparable right against her husband's mistress.[19] More generally, the common law's merger theory of marriage clearly embraced the notion that a wife becomes her husband's property at marriage.[20]

The civil law tradition likewise drew on the gendered roots of religious tradition.[21] French law, for example, imposed harsher criminal penalties on a wife's adultery than on the husband's

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14. *See* Witte, *supra* note 13, at 847 (exploring how religious institutions controlled sex and sexual activity using shame and stigma against women).

15. Peter Nicolas, *The Lavender Letter: Applying the Law of Adultery to Same-Sex Couples and Same-Sex Conduct*, 63 FLA. L. REV. 97, 106 (2011).

16. *See* DRUMMOND, *supra* note 8, at 9–10 (describing the ways women were categorized and perceived at this time: the virgin who does not fall prey to temptation and the sex worker who is "man's refuge from the idealized female"); Padilla & Winrich, *supra* note 7, at 76–89 (explaining how the Bible creates gendered stereotypes about women and their sexuality); Witte, *supra* note 13, at 847, 853 (noting a host of biblical sex crimes that were codified into early laws).

17. Nicolas, *supra* note 15, at 106.

18. *Id.* at 107.

19. Danaya C. Wright, *Untying the Knot: An Analysis of the English Divorce and Matrimonial Causes Court Records, 1858–1866*, 38 U. RICH. L. REV. 903, 973–74 (2004).

20. *See* Elizabeth R. Carter, *The Illusion of Equality: The Failure of the Community Property Reform to Achieve Management Equality*, 48 IND. L. REV. 853, 861 (2015) (highlighting the merger theory: "marriage resulted in the legal merger of the husband and wife into a single individual under the law").

21. *See* PLANIOL & RIPERT, *supra* note 13 (describing the different punishments for adultery for husbands and wives); *see also* Lucy A. Sponsler, *The Status of Married Women Under the Legal System of Spain*, 42 LA. L. REV. 1599, 1619–22 (1982) (exploring how early adoptions of civil law in Spain permitted husbands to murder their adulterous wives); GUSTAVUS SCHMIDT, THE CIVIL LAW OF SPAIN AND MEXICO § 68 (1851) (explaining how wives were to lose their property if they committed adultery).

adultery.[22] The unfaithful husband might face a criminal fine, meanwhile the unfaithful wife could be imprisoned for two years.[23] Any extramarital sex by the wife was considered adulterous.[24] The husband's extramarital dalliances, however, could only be penalized if he brought his mistress into his marital home.[25] Spanish law was similarly forgiving of a husband's affairs:[26] the Spanish wife's adultery deprived her of any rights to the couple's community property, while the unfaithful husband faced no such consequences.[27]

The legal landscape of adultery was complicated in the colonies, and later in the United States. Drawing on religious tradition, many states imposed civil and criminal penalties on adultery, fornication, and other sexual acts.[28] Furthermore, following the common law and biblical approach, some states continued to treat adultery as a gendered act[29] and required a married woman.[30] In the absence of a married woman, extra-marital sex was usually deemed the lesser offense of fornication.[31] Other states adopted the less gendered definition of adultery used by the ecclesiastical law in England.[32] Louisiana imported its gendered views from Spanish and French sources.[33] Spanish views likewise took hold in some former Spanish territories, like Texas and New Mexico.[34]

Western jurists and legal scholars—who were almost always male—routinely explained adultery in patriarchal terms that treated women's

22. PLANIOL & RIPERT, *supra* note 13, §§ 899–900.
23. *Id.* § 900.
24. *Id.*
25. *Id.*
26. Sponsler, *supra* note 21, at 1619–22.
27. SCHMIDT, *supra* note 21.
28. Nicolas, *supra* note 15, at 108.
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *See, e.g.*, LA. CIV. CODE ARTS. 136–37 (1825) (allowing the husband to seek a separation based on the wife's adultery, but only allowing the wife to seek separation when the husband kept his mistress in the marital home).
34. *See* Barnett v. Barnett, 50 P. 337, 338 (N.M. 1897) (asserting that certain U.S. territories would adopt Spanish laws related to marriage and community property); Wheat v. Owens, 15 Tex. 241, 245–46 (1855) (noting that while a man may only be fined for adultery, whereas a woman could be confined to a monastery for the rest of her life and lose all her property).

sexuality and ability to have children with suspicion.[35] Where adultery remained an explicitly gendered concept, jurists and scholars often pointed to biblical sources and the potential for spurious children as justification for the differing treatment of men and women.[36] The concern for spurious offspring, a concern also seen in biblical teachings, punishes women for their biology and for a society limiting their property rights—two things women had little control over in the first place.[37]

Men easily overlooked the obvious. French scholar Marcel Planiol, for example, outright rejected the notion that the harsher treatment of women for committing adultery was a result of men writing the laws.[38] Rather, he argued "[t]he adultery of the wife can have much more dangerous moral and physical consequences than that of the husband" because the wife's pregnancy brought children into the

35. *See, e.g.*, Lynn v. Shaw, 620 P.2d 899, 900–01 (Okla. 1980) (footnote omitted) ("The right of the husband to maintain an action against a third party for either criminal conversation or adultery is founded on the common law conception of the husband's property right in his wife. The basis for the husband's right of action for loss of consortium is premised on the idea that the wife was her husband's servant because an interference with the service of a servant is an actionable trespass."); *accord* Neal v. Neal, 873 P. 2d 871, 874 (Idaho 1994) (examining the view that wives were property in a similar way to horses and were thus not "capable of giving a consent that would prejudice the husband's interest" (quotations marks omitted) (quoting W. PROSSER, LAW OF TORTS § 124 (4th ed. 1971))). Note that some sources use the term "criminal conversation" rather than "criminal conversion" to refer to this tort. The two terms appear to have the same meaning.

36. *See* PLANIOL & RIPERT, *supra* note 13, § 900 (justifying the difference in penalties for adultery by the wife versus the husband by arguing that the potential for the wife to have a child with her lover would "compromise[] the base upon which the legitimate family rests"); *see also* Nicolas, *supra* note 15, at 106 (describing how English common law on adultery remained consistent with Biblical law); *In re* Blanchflower, 834 A. 2d 1010, 1011–12 (N.H. 2003) (explaining the gendered nature of 1800's New Hampshire criminal and civil law), *overruled by In re* Blaisdell, 261 A.3d 306, 306 (N.H. 2021); State v. Bigelow, 92 A. 978, 978–79 (Vt. 1915) (comparing the common law and ecclesiastical definitions of adultery). *See generally* State v. Lash, 16 N.J.L. 380 (N.J. 1838) (opining on the legal construction to the term adultery when a statute did not define what constituted the offence).

37. *See, e.g.*, *Lash*, 16 N.J.L. at 388–89 (discussing how adultery is "criminal intercourse with a *married* woman, which exposes her *husband* to support and provide for another man's issue" in contrast to if a husband becomes unfaithful, how a wife "cannot maintain an action of adultery against him or his *paramour*" because "such infidelity does not adulterate her issue, nor his own; it brings no ones inheritance into jeopardy, nor can it possibly produce a spurious *heir* to disturb the descent of real estates").

38. PLANIOL & RIPERT, *supra* note 13, § 900.

husband's family.[39] Women were not punished because men wrote the laws; women were punished because of their own biology and the law's insistence on male preference in property rights and earning capacity.[40] These views were also popular with American jurists. In refusing to apply an adultery statute to a married man who had sex with an unmarried woman, the Minnesota Supreme Court determined in 1860 that the "gist of the crime [of adultery] . . . is the danger of introducing spurious heirs into a family[.]"[41] The ability of a wife to adulterate the husband's line of inheritance, the court argued, "is much more aggravated in its nature [] than the simple incontinence of a husband[.]"[42] Though extra-marital affairs by men and women were "equally heinous" offenses against the marriage, it was the possibility of a married woman's pregnancy that made her affair more criminally culpable than the husband's.[43] Similarly, the Illinois Supreme Court, in a 1901 decision involving a divorce, opined that the adultery of the wife is the most morally reprehensible action justifying divorce because "the effect . . . may be to introduce into the family circle a spurious offspring and a false heir to divide and share in the patrimony of those the true blood."[44] These views perpetuated the general societal and legal mistrust of women and female sexuality.

B. Adultery Damages and Public Policy

American courts and legislatures traditionally considered marital fidelity and the sexual relationship between spouses to be public policy concerns.[45] This is hardly surprising considering that breach of the

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39. *Id.*

40. Bernie D. Jones, *Revisiting the Married Women's Property Acts: Recapturing Protection in the Face of Equality*, 22 J. GENDER SOC. POL'Y & L. 91, 112–16 (2013) (explaining how the Women's Married Property Act in the United States helped reveal and set off an academic discussion around the historical role of women in society regarding property rights and challenged the idea that "[t]he public sphere of law was within the purview of the male sphere, where husbands would represent the legal identity of the household: a man with dependents, his wife and children").

41. State v. Armstrong, 4 Minn. 335, 341 (1860) (per curium).

42. *Id.*

43. *Id.*

44. Decker v. Decker, 61 N.E. 1108, 1110 (Ill. 1901).

45. *See, e.g.*, Favrot v. Barnes, 332 So. 2d 873, 875 (La. App. 4th Cir. 1976) (holding that the obligation of fidelity is a matter of policy that cannot be altered by the spouses because "[i]t is this abiding sexual relationship which characterizes a contract as marriage"), *rev'd on other grounds*, 339 So. 2d 843, 843 (La. 1976); Owen v. Bracket, 75

obligation of fidelity could be met with civil and criminal penalties. In the divorce setting, an adulterous spouse might be denied spousal support and child custody.[46] Adultery also gave rise to various tort remedies for the aggrieved spouse.[47] Adultery could also be prosecuted as a sex crime in much of the United States.[48]

The extent to which adultery and marital fidelity remain public policy concerns today has important implications for the enforceability of adultery penalties in marriage contracts. American law has generally retreated from its historical views of marital fidelity.[49] The landscape across the country, however, is complicated. Two developments in the law highlight the evolution of legal thinking in this arena: the decline of the amatory torts and the evolution of the role of fault, including adultery, in the divorce setting. Each is considered below.

1. The amatory (heart balm) torts and their decline

The public policies of marital fidelity and women's sexual purity gained footing in American tort law. The amatory torts clearly drew from the same patriarchal well of legal thinking that shaped early adultery laws. Compensatory and punitive damages for the emotional and reputational harms caused by amatory torts[50] were often based on

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Tenn. 448, 448–49 (1881) (arguing that a statute prohibiting marriage between two people who engaged in an adulterous affair "accords with public policy, is predicated of common sense, and tends to assure a decent propagation of the human race").

46. *See* discussion *infra* Section I.B.3 (recognizing that there is a modern trend in American divorce law away from financial penalties for adultery).

47. *See* discussion *infra* Section I.B.1 (explaining how amatory torts were shaped by perceptions of women's limited value outside of the benefit they provided to men).

48. *See* Ephraim Heiliczer, *Dying Criminal Laws: Sodomy and Adultery from the Bible to Demise*, 7 VA. J. CRIM. L. 48, 64–69 (2019) (discussing the criminalization of adultery in early American history).

49. Katherine Shaw Spaht, *The Last One Hundred Years: The Incredible Retreat of Law from the Regulation of Marriage*, 63 LA. L. REV. 243, 243 (2003).

50. The four torts generally known as the amatory torts are: (1) alienation of affections (when a third party causes estrangement between spouses); (2) criminal conversion (when a third party has an adulterous relationship with a plaintiff's wife); (3) seduction (when an unmarried woman sues for damages based on a social injury that resulted from premarital sex or unwed motherhood); and (4) breach of marriage promise (when a promise of future marriage prompted a woman to engage in sexual behavior that she would not have, but for the promise and expectation of marriage). Deana Pollard Sacks, *Intentional Sex Torts*, 77 FORDHAM L. REV. 1051, 1058 n.29 (2008).

the fundamental premises that women were the property of men and that a woman's value was based on her desirability to men.[51]

Breach of promise to marry, for example, was a hybrid tort-contract remedy that came to America from ecclesiastical law.[52] The injury stemmed from a breached contract, but the damages awarded by American courts sounded in tort.[53] Not only could the aggrieved would-be bride (or her parents) recover actual expenses put towards planning the wedding, but damages were awarded on account of the woman's diminished prospects on the marriage market and in society because the breached engagement turned her from a marriageable virgin into damaged goods.[54] Damages for mental distress were also allowed, but these damages tended to reinforce the notion that a woman's primary value was as a wife or virgin daughter.[55]

Breach of promise to marry claims were sometimes brought alongside seduction claims, and the damages in both cases shared many of the same justifications.[56] The tort of seduction allowed an unmarried woman's parents, and sometimes the woman herself, to recover damages against a man who induced her into a sexual

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51. *See* R. KEITH PERKINS, DOMESTIC TORTS § 8:1,6 (2023) (adding that a North Carolina jury awarded a million dollar verdict in an alienation of affection suit against a husband's secretary).

52. *See* Gilbert v. Barkes, 987 S.W.2d 772, 773 (Ky. 1999) (explaining that marriage was viewed as a property transaction); Waddell v. Briggs, 381 A.2d 1132, 1134–35 (Me. 1978) (explaining how breach of contract theories historically intersected with tort liability theories in breach of promise to marry actions).

53. Stanard v. Bolin, 565 P.2d 94, 96 (Wa. 1977) (en banc).

54. *See, e.g.*, Goldstein v. Young, 23 So. 2d 730, 730 (Fla. 1945) (per curiam) (reducing damages awarded to a previously divorced woman who was "well into her forties" because there was no evidence the breach affected the woman's "future prospects of marriage, her social position or her reputation"); *Stanard*, 565 P.2d at 96 (discussing damages for "loss to reputation, mental anguish . . . and loss of the pecuniary and social advantages which the promised marriage offered").

55. *See, e.g.*, *Waddell*, 381 A.2d at 1135 (describing damages for "shame and mortification"); Menhusen v. Dake, 334 N.W.2d 435, 436 (Neb. 1983) (noting that damages for breach are based on the "plaintiff's mental suffering, wounded pride, humiliation, pain, and mortification; and the loss of the pecuniary benefits of the promise to marry").

56. *See, e.g.*, Kralick v. Shuttleworth, 289 P. 74, 78 (Idaho 1930) (noting that the "two actions involve separate parts of what may be one transaction, and one is not necessarily a bar to the other").

relationship predicated on a false promise that he would marry her.[57] Initially, damages in seduction cases were based on the loss to the father of the daughter's services while she was pregnant, a view rooted in the notion that daughters were the property of their fathers.[58] As the tort evolved in American courts, the lost services of the daughter were a less important measure of damages than the shame her sexual relationship brought to her father.[59] Damages could "be recovered for all that the parent may suffer by the ruin of the daughter, and the disgrace to the family."[60]

Criminal conversion gave a husband a right of action against a man who had sex with the husband's wife.[61] The theory of recovery was premised entirely on the wife's status as the husband's property.[62] The wife's consent or even instigation of the affair was immaterial.[63] The husband's consent was the only affirmative defense to a criminal conversion claim.[64] Damages stemmed from the husband's property rights in his wife, her body, and her sexuality. The U.S. Supreme Court explained "the essential injury to the husband consists of the defilement of the marriage bed, in the invasion of his exclusive right to marital intercourse with his wife and to beget his own children."[65] Alienation of affections was essentially the same tort as criminal conversion, sharing the same essential elements and measures of damages.[66]

Even as criminal conversion and alienation of affections evolved into actions that could be pursued by either the husband or the wife,

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57. *See* ELIZABETH R. CARTER, LOUISIANA FAMILY LAW IN COMPARATIVE PERSPECTIVE 105 (2018) [hereinafter LOUISIANA FAMILY LAW] (describing elements of the common law tort of seduction and grounds for recovery); *see also* Sacks, *supra* note 50, at 1057 (discussing how seduction harmed a woman's father because it led to his inability to "marry off" his daughter (internal quotation marks omitted)).

58. Stevenson v. Belknap, 6 Iowa 97, 104–05 (1858).

59. Dwire v. Stearns, 172 N.W. 69, 71 (N.D. 1919).

60. *Id.*

61. Doe v. Doe, 747 A.2d 617, 621 (Md. 2000).

62. Kline v. Ansell, 414 A.2d 929, 930 (Md. 1980).

63. *Id.*

64. *Id.*

65. Tinker v. Colwell, 193 U.S. 473, 484 (1904).

66. Hunt v. Hunt, 309 N.W.2d 818, 820 (S.D. 1981) (citing W. PROSSER, THE LAW OF TORTS § 124, at 876–77 (4th ed. 1980)). *But see* Deming v. Leising, 212 N.Y.S. 213, 214 (App. Div. 1925) (finding a clear distinction between the two torts as adultery is one of the multiple ways an alienation of affections claim may be brought while, in contrast, adultery is essential to the tort of criminal conversion).

gender distinctions in the harms caused and traces of the "wife as property" justifications clearly remained. For example, many courts observed that the wife's right to bring suit was the logical outcome of the Married Women's Property Acts.[67] If the husband's action for criminal conversion or alienation of affections at common law stemmed from his property right in his wife, then the Married Women's Property Acts allowed the wife to recover for a similar property interest in her husband.[68] In extending rights to wives, some jurists created more gender-neutral justifications for the torts.[69] Others continued to support gendered distinctions. For example, a 1925 New York court explained that in criminal conversion cases, the "gist of the wrong to a husband is the shame and dishonor brought upon him, and the hazard of having to maintain spurious issue."[70] The harm to the wife included "the hazard to her right of having a clean man and healthy children."[71] Allowing women to bring these tort actions did little to enhance the status of women in the law or society. Rather, it pitted the wife against the mistress for the failure of the marriage, and it perpetuated the abhorrent view that one spouse had a compensable property right in the body of the other spouse.

The amatory torts were largely abolished by the end of the twentieth century, though some remain viable in a handful of states.[72] As many legislatures, courts, and scholars observed, these torts generally represented antiquated notions about gender roles, morality, and

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67. *See, e.g.*, Parker v. Newman, 75 So. 479, 484 (Ala. 1917) (noting multiple "enabling statutes in favor of married women" as a factor in holding that married women have a right of action to the alienation of affections tort); *see also* Nicolas, *supra* note 15, at 113–14 (emphasizing that the expansion to women "re-theorized the rationale for the torts").

68. *See* Nicolas, *supra* note 15, at 113–14 (explaining that the original rationale for the tort was to "vindicate the husband's property interests in his wife's services").

69. *See id.* at 114 (adding that the revised tort theory was more generally justified by preserving harmony in the marital relationship).

70. *Deming*, 212 N.Y.S. at 214.

71. *Id.*

72. *See, e.g.*, Strock v. Pressnell, 527 N.E.2d 1235, 1240 (Ohio 1988) ("Since the 1930's, more than half of the states have abolished or severely limited actions for alienation of affections."); *see also* Fernanda G. Nicola, *Intimate Liability: Emotional Harm, Family Law, and Stereotyped Narratives in Interspousal Torts*, 19 WM. & MARY J. WOMEN & L. 445, 469, 500 (2013) (stating amatory torts were abolished by the 1980s and including a chart showing locations where tort claims were still allowed as of 2013).

sexual purity.[73] The justifications for rejecting the amatory torts varied. While some advocates of reform pointed to the negative, paternalistic views of women and their sexuality perpetrated by the torts,[74] others pointed to privacy concerns and more general skepticism that the law should be used as a remedy for hurt feelings.[75] Of course, some jurists, legislators, and scholars found justifications for repeal rooted in the fundamental distrust for women and female sexuality. These individuals argued that the torts should be repealed because they provided an opportunity for blackmail, fraud, or extortion.[76] The blame for those bad acts was laid either explicitly or impliedly at the feet of women.[77]

2. Adultery and the intentional infliction of emotional distress

Following the widespread abolition of the amatory torts, some aggrieved spouses sought relief for emotional harms in factual scenarios that, previously, might have been compensable as amatory torts.[78] Most of these cases involve intentional infliction of emotional distress ("IIED") claims.[79] IIED claims are difficult claims for plaintiffs

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73. *See, e.g.*, Doe v. Doe, 747 A.2d 617, 621–23 (Md. 2000) (describing legislative repeal of the amatory torts in Maryland and other states); Fadgen v. Lenkner, 365 A.2d 147, 151 (Pa. 1976) (describing amatory torts as an "anachronism"); *see also* Susan Ayres, *Paternity Un(Certainty): How the Law Surrounding Paternity Challenges Negatively Impacts Family Relationships and Women's Sexuality*, 20 J. GENDER RACE & JUST. 237, 262 (2017) (finding that the amatory torts had the effect of punishing women and rewarding men); Sacks, *supra* note 50, at 1058 (asserting that amatory torts compensated fathers for damages resulting from their daughters' premarital sex).

74. *See* Nicola, *supra* note 72, at 468–69 (finding that heart balm torts were used to sexualize women, notably by paying women to seduce married men and using the result to initiate a divorce or obtain a settlement).

75. *See Strock*, 527 N.E.2d at 1240 (highlighting skepticism about the law's role in enforcing personal morals); Koestler v. Pollard, 471 N.W.2d 7, 11 (Wis. 1991) (rationalizing the human wrong of betrayal as beyond the scope of legal remedy).

76. *See, e.g.*, *Doe*, 747 A.2d at 622 (noting the Maryland legislature's concern with the possibility of "blackmail, extortion, and fraud often encountered when such claims were brought"); *Strock*, 527 N.E.2d at 1240 (explaining that repeal was due, in part, to the potential for abuse via blackmail and extortion).

77. *See* Kyle Graham, *Why Torts Die*, 35 FLA. STATE U. L. REV. 359, 411–18 (2008) (explaining how news media and legislatures casted women as blackmailers and gold diggers in an attempt to outlaw the heart balm torts).

78. *See* Quinn v. Walsh, 732 N.E.2d 330, 332 (Mass. App. Ct. 2000) (alleging intentional infliction of emotional distress resulting from a spouse's affair and claiming that the purpose of the affair was to injure the faithful partner).

79. To succeed on an IIED claim, a plaintiff must show:

to bring successfully because plaintiffs are required to meet an exceptionally high burden of proof.[80] While IIED suits relating to bad marital conduct are not per se prohibited,[81] those relating to ordinary adultery are generally prohibited.[82] In dismissing adultery-related IIED suits, courts often point to the abolition of the amatory torts as conclusively deciding the matter.[83] IIED suits by a spouse against the other spouse's affair partner are really no different from prohibited criminal conversion or alienation of affection suits.[84] In abolishing the amatory torts, courts and legislatures created a strong public policy that the emotional harms of adultery were no longer compensable by tort.[85] Therefore, litigants cannot use IIED claims to circumvent that public policy.[86] Further, many courts hold that affairs do not generally meet the difficult elements required to bring successful IIED claims.[87]

> (1) extreme and outrageous conduct by the defendant; (2) that the defendant intended to cause severe emotional distress; (3) there must be a causal connection between the wrongful conduct and the emotional distress; (4) severe emotional distress must result.

Christians v. Christians, 637 N.W.2d 377, 382 (S.D. 2001) (internal citations omitted); *see also* RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 46 (AM. L. INST. 2012) ("An actor who by extreme and outrageous conduct intentionally or recklessly causes severe emotional harm to another is subject to liability . . . .").

80. *See* Richardson v. Richardson, 906 N.W.2d 369, 377 (S.D. 2017) (highlighting that the high burden of proof for IIED claims eliminates frivolous suits stemming from common arguments).

81. *Id.* at 377–78.

82. *See, e.g.*, Strock v. Pressnell, 527 N.E.2d 1235, 1243 (Ohio 1988) (discussing how courts around the country refused to allow amatory torts to be brought as IIED claims).

83. *Id.*

84. *See* Cherepski v. Walker, 913 S.W.2d 761, 762–63 (Ark. 1996) (holding that the former husband's IIED claim against his adulterous ex-wife was essentially an alienation of affection action and granting summary judgement against him); Speer v. Dealy, 495 N.W.2d 911, 914–15 (Neb. 1993) (denying recovery where the husband's IIED claim was indistinguishable from a criminal conversion or alienation of affection claim).

85. *See Speer*, 495 N.W.2d at 914–15 (noting decisions from New York, South Dakota, Wisconsin, and Ohio, where the state supreme courts refused to allow IIED claims to replace the abolished torts of criminal conversion and alienation of affection).

86. *See id.* (holding that IIED is not an appropriate cause of action for a husband seeking recovery against his wife's affair partner).

87. *See* Ruprecht v. Ruprecht, 599 A.2d 604, 607–08 (N.J. Super. Ct. Ch. Div. 1991) (finding that the wife's alleged adultery did not constitute IIED where the couple had separated multiple times for a total of several years, and both the husband and the wife

Adultery, they contend, is not the type of extreme and outrageous conduct required to support an IIED claim.[88]

A few courts, however, are more willing to consider IIED claims when the adultery implicates a breach of some professional or ethical duty owed to the aggrieved spouse by the spouse's affair partner.[89] In *Figueiredo-Torres v. Nickel*,[90] a Maryland court allowed an IIED suit brought by the husband against the couple's marriage counselor relating to the marriage counselor's sexual relationship with the wife.[91] Similarly, in *Osborne v. Payne*,[92] the Kentucky Supreme Court held that a husband could pursue IIED claims against a Catholic priest who had an affair with the wife at the same time as he was counseling the spouses for their marital difficulties.[93] These cases hinge upon a distinction between regular IIED adultery suits, which are essentially prohibited amatory tort cases under a different name, and IIED adultery suits involving a professional in a position of power or confidence.[94] The latter have the added element of a breach of some professional or fiduciary duty. The *Figueiredo-Torres v. Nickel* Court emphasized the professional duties owed by the therapist to the aggrieved husband.[95] In *Osborne v. Payne*, the court pointed to the "confidential relationship between [the husband] and his priest counselor" as the distinguishing

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had filed for divorce); Bailey v. Searles-Bailey, 746 N.E.2d 1159, 1164–66 (Ohio Ct. App. 2000) (explaining that IIED liability is only appropriate for conduct "so outrageous in character and so extreme in degree that it goes beyond all possible bounds of decency and is regarded as atrocious and utterly intolerable in a civilized society").

88. *See Ruprecht*, 599 A.2d at 608 (holding that a wife's alleged affair with her boss did not "reach the level of outrageousness necessary for liability" in IIED cases).

89. Some courts, however, remain skeptical of these claims. *See* Price v. Fuerst, 24 So. 3d 289, 290–91 (La. Ct. App. 2009) (describing an IIED suit brought by husband against wife's divorce attorney for affair); Scamardo v. Dunaway, 694 So. 2d 1041, 1042–43 (La. Ct. App. 1997) (describing an IIED suit brought by husband against wife's fertility doctor for affair); Homer v. Long, 599 A.2d 1193, 1196, 1200 (Md. App. Ct. 1992) (describing an IIED suit brought by husband against wife's psychiatrist for affair); Gasper v. Lighthouse Inc., 533 A.2d 1358, 1359–60 (Md. App. Ct. 1987) (describing an IIED suit brought by husband against the couples' marriage counselor for affair with wife).

90. 584 A.2d 69 (Md. 1991).

91. *Id.* at 75–77.

92. 31 S.W.3d 911 (Ky. 2000).

93. *Id.* at 914.

94. *See id.* ("It is the concept of *special relationship* that distinguishes this factual situation from [other cases].").

95. *Figueiredo-Torres*, 584 A.2d at 73.

factor.[96] The narrow professional duty exception to the general prohibition of IIED claims for adultery probably has little significance to the enforceability of adultery penalties in marriage contracts. The theory of liability in professional duty cases stems from the breach of the professional's duties to the innocent spouse as a client or patient.[97] Adultery penalties in marriage contracts, in contrast, usually seek to punish the spouse for breach of the marital obligation of fidelity, not the third-party affair partner.[98]

IIED claims brought by one spouse against the other spouse for the other spouse's adultery present a slightly different theory of recovery than claims brought against third parties for their interference in the marriage relationship. The amatory torts of alienation of affections and criminal conversion were suits against the third-party affair partner, not the adulterous spouse.[99] IIED claims brought between spouses, in contrast, seek damages from the individual who is the more direct cause of hurt feelings—the philandering spouse.[100] Interspousal IIED suits could, perhaps, be conceptually distinguished from the historical amatory torts and their abhorrent patriarchal roots. Yet, most courts reject IIED claims brought directly against the adulterous spouse for some of the same rationales discussed above with respect to IIED actions against affair partners.[101] In *Doe v. Doe*,[102] for example, Maryland's highest court rejected a husband's suit against his wife for concealing the paternity of the children to whom she gave birth to during the marriage on policy grounds related to the abolition of the

96. *Osborne*, 31 S.W.3d at 914.

97. *See, e.g.*, *id.* (holding that the priest outrageously breached his duty to the husband when he engaged in an affair with the husband's spouse).

98. *See, e.g.*, MacFarlane v. Rich, 567 A.2d 585, 588, 591 (N.H. 1989) (upholding provision in a prenuptial agreement that voided the entire marriage contract if the husband breached his fidelity obligation); *infra* Section III.B (discussing infidelity provisions in marriage contracts).

99. *See supra* Section I.B.1 (explaining alienation of affections and criminal conversion further).

100. *See* Whittington v. Whittington, 766 S.W.2d 73, 73–74 (Ky. Ct. App. 1989) (explaining how Mrs. Whittington sought both actual and punitive damages to compensate for Mr. Whittington's adulterous conduct and disposal of mutual funds during their divorce proceedings).

101. *See* Doe v. Doe, 747 A.2d 617, 622–23 (Md. 2000) (finding an IIED claim to be no different than the abolished tort of criminal conversion); *see also* Koestler v. Pollard, 471 N.W.2d 7, 10–11 (Wis. 1991) (finding that public policy rationale for outlawing the tort of criminal conversion also barred relief in an IIED claim against the affair partner that only alleged elements of criminal conversion to claim IIED).

102. 747 A.2d 617 (Md. 2000).

amatory torts.[103] The court noted that while the traditional amatory torts granted the husband a right of action against the wife's affair partner rather than against the wife, the IIED claim was "based on the same conduct that formerly gave rise to a criminal conversion action."[104] Therefore, the same "policy considerations, which led to the abolition of criminal conversation," precluded the husband's IIED suit.[105]

Some other courts contend that adultery is not usually sufficiently outrageous to support an IIED claim.[106] In *Bailey v. Searles-Bailey*,[107] for example, an Ohio court conceded that the husband's IIED suit against his wife for concealing her uncertainty about her child's paternity was sufficiently distinguishable from a prohibited amatory tort.[108] The court reasoned that the husband's claim was "based upon the severe emotional distress he sustained in finding out the child born during his marriage was not his biological child, and not on the fact that his wife was having an adulterous affair."[109] However, the husband could not recover because the wife's concealment of her uncertainty for a relatively short period of time was not sufficiently outrageous to support an IIED claim.[110]

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103. *Id.* at 622–23.

104. *Id.*

105. *Id.* at 623.

106. *See* Whittington v. Whittington, 766 S.W.2d 73, 74–75 (Ky. Ct. App. 1989) (holding that adultery alone can never satisfy the outrageous standard); Shea v. Cameron, 93 N.E.3d 870, 878 (Mass. App. Ct. 2018) (holding that even if an adulterous affair where the party knew, or should have known, would cause emotional harm does not qualify for an IIED claim); Ruprecht v. Ruprecht, 599 A.2d 604, 607–08 (N.J. Super. Ct. Ch. Div. 1991) (holding that an adulterous affair that lasted for decades does not meet the outrageous standard); Poston v. Poston, 436 S.E.2d 854, 856 (N.C. Ct. App. 1993) (holding that violating a religious commitment to fidelity in a marriage did not amount to an IIED); Bailey v. Searles-Bailey, 746 N.E.2d 1159, 1165–66 (Ohio Ct. App. 2000) (holding that not immediately informing the plaintiff's husband that he might not be the father of the defendant's child did not amount to IIED). *But see* Miller v. Miller, 956 P.2d 887, 902 (Okla. 1998) (holding that hiding paternity of child for more than 15 years could be sufficiently outrageous).

107. 746 N.E.2d 1159 (Ohio App. Ct. 2000).

108. *Id.* at 1164.

109. *Id.*

110. *Id.* at 1166.

3. Adultery in the divorce setting

Adultery is one of the oldest and most widely accepted bases for divorce in Western legal traditions.[111] Yet, the evolution of American divorce laws reveals an increasing reluctance to impose financial penalties based on adulterous conduct. Historically, separation or divorce could only be granted upon proof of some serious marital fault on the part of one spouse.[112] By requiring findings of fault and innocence on the part of the spouses, "divorce law was an outgrowth of tort law concepts."[113] Adultery was a marital fault sufficient for granting a divorce throughout the country.[114] Not only did a finding of marital fault entitle the innocent spouse to a divorce, it would negatively impact the divorce's outcome for the guilty spouse.[115] A spouse's adultery might cause the spouse to forfeit a share of marital property.[116] A spouse who was found guilty of adultery might be ordered to pay more alimony or be precluded from receiving it altogether.[117] Finally, adulterous spouses were often deemed morally unfit parents and denied custodial rights of their children.[118] As many courts and scholars observed, the fault-based approach to divorce was wrought with serious policy problems.[119] It tended to leave women and

111. *See* Ayelet Hoffmann Libson, *Not My Fault: Morality and Divorce Law in the Liberal State*, 93 TUL. L. REV. 599, 604 (2019) (finding that the most common ground for divorce across states in the 1800's was adultery); Raymond C. O'Brien, *The Reawakening of Marriage*, 102 W. VA. L. REV. 339, 352 (1999) (noting that adultery was one of the original fault grounds in early divorce law).

112. Edward Stein, *Adultery, Infidelity, and Consensual Non-Monogamy*, 55 WAKE FOREST L. REV. 147, 157–58 (2020).

113. Michelle L. Evans, *Wrongs Committed During a Marriage: The Child that No Area of the Law Wants to Adopt*, 66 WASH. & LEE L. REV. 465, 466 (2009).

114. *See* Stein, *supra* note 112, at 157–58 (noting that prior to the 1960s, adultery "was central to divorce law" in the United States).

115. *See id.* at 160–61 (detailing the indirect consequences of adultery, such as a court awarding the adulterous spouse a smaller portion of the marital assets).

116. *Id.* at 161–62.

117. *Id.* at 160.

118. *See id.* at 160 (noting that adultery may undermine the adulterous spouse's custody claims); *see also* Williams v. Williams, 62 So. 2d 729, 729 (Fla. 1953) (en banc) (custody awarded to the father because of the mother's adultery and extreme cruelty towards her husband); Schroeder v. Schroeder, 184 So. 2d 75, 77 (La. Ct. App. 1966) (noting that the mother's adultery was a factor that permitted the award of custody to the father); Carr v. Carr, 480 So. 2d 1120, 1122 (Miss. 1985) (discussing statutory and jurisprudential rules that denied custody to the adulterous parent).

119. *See* Lynn D. Wardle, *No Fault Divorce and the Divorce Conundrum*, 1991 BYU L. REV. 79, 92 (1991) (noting that fault-based divorce "[bred] costly, bitter, counterproductive litigation that impeded reconciliation").

children at a severe financial disadvantage following a divorce.[120] Requiring court findings of fault increased bitterness and acrimony between divorcing spouses.[121] It also encouraged collusion between the spouses who simply wanted to end their marriages with as little drama and court interference as possible.[122]

States responded to these critiques. Between 1965 and 1985, state legislatures adopted no-fault divorce regimes that allowed spouses to divorce without establishing the guilt or innocence of either party.[123] The move to no-fault divorce regimes sought to remedy some of the harms of the fault-based divorce model.[124] Removing fault from the divorce equation also gained support from the emerging view that tort law was the more appropriate vehicle for compensating a spouse for

120. *See, e.g.*, Marchant v. Marchant, 743 P.2d 199, 203 (Utah Ct. App. 1987) (describing the use of fault in child custody decisions as being "flavored with bias against divorced women, an urban environment, and women who pursue [jobs] other than the traditional role of a homemaker"); *see also* June Carbone, *Income Sharing: Redefining the Family in Terms of Community*, 21 HOUS. L. REV. 359, 402 (1994) ("[A]s the courts used the concept of fault to permit [divorce] . . . [divorce was made available] for a price that most men, but fewer women, could afford."); Naomi Cahn, *Faithless Wives and Lazy Husbands: Gender Norms in Nineteenth-Century Divorce Law*, 2002 U. ILL. L. REV. 651, 663–64 (2002) (noting that in addition to financial hardship, women who "breached their marital obligations" would be at risk of losing custody of their children and subjecting themselves and their children to social shame). Some scholars, however, contest this point. *See, e.g.*, Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1556 (1992) (arguing that no-fault, rather than fault-based, divorce regimes have had negative economic consequences for women and their children); Allen M. Parkman, *Reforming Divorce Reform*, 41 SANTA CLARA L. REV. 379, 379–80 (2001) (arguing that women and children are "worse off" in a no-fault divorce regime because the ability of one spouse to obtain a divorce unilaterally results in inadequate compensation to the other spouse and their children).

121. *See* Solangel Maldonado, *Cultivating Forgiveness: Reducing Hostility and Conflict After Divorce*, 43 WAKE FOREST L. REV. 441, 459–60 (2008) (detailing how the nature of fault-based divorce cultivated negative relations between divorcing spouses).

122. Libson, *supra* note 111, at 604.

123. *See* Tiffany N. Lee, *Divorce and Dissolution*, 2 GEO. J. GENDER & L. 347, 353–55 (2001) (describing the rise of no-fault divorce regimes); Shaakirrah R. Sanders, *The Cyclical Nature of Divorce in the Western Legal Tradition*, 50 LOY. L. REV. 407, 430 (2004) (clarifying that the often used phrase "irreconcilable differences" means a no-fault divorce).

124. *See* Lynn D. Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 BYU L. REV. 79, 92 (1991) (noting that no-fault divorce grounds resulted in less hostile and more reconciliatory litigation compared to fault-based regimes).

harms caused by the other spouse's fault.[125] In other words, no-fault divorce reforms sought to separate divorce and tort laws. As discussed above, however, tort law underwent a concurrent evolution that limited the availability of financial recovery for the emotional harms caused by adultery.[126] Taken together, these reforms seriously limited a spouse's ability to seek economic recovery for emotional harms.

Notwithstanding the nationwide adoption of no-fault divorce laws, marital fault, including adultery, remains a relevant divorce consideration in many states.[127] Broadly, state divorce laws can be placed into one of two categories: pure no-fault states and fault-relevant states.[128] A sizable minority of states adopted a "pure no-fault" approach.[129] In these states, marital fault, such as adultery, cannot be considered in divorces.[130] Divorce is only permitted on a no-fault basis, and fault cannot be considered in dividing marital assets or making

125. *See* Am. L. Inst., *Principles of the Law of Family Dissolution: Analysis and Recommendations*, 8 DUKE J. GENDER L. & POL'Y 1, 44 (2001) [hereinafter *Family Dissolution*] (finding that a tort-based model for considering marital misconduct at dissolution addressed the issues not recognized by a no-fault system).

126. *See infra* Section I.B.2 (explaining the general rule that IIED suits for adultery against either the adulterous spouse or the third party are generally prohibited outside of the breach of some professional or ethical duty owed to the aggrieved spouse).

127. *See* Lee, *supra* note 123, at 357–58 (breaking down which states still permit courts to, on a discretionary basis, consider fault in property and alimony determinations). *See generally* Evans, *supra* note 113, at 474 (detailing the emergence of no-fault divorce as either the sole basis for dissolution or an alternative to traditional fault-based systems); Pamela Laufer-Ukeles, *Reconstructing Fault: The Case for Spousal Torts*, 79 U. CIN. L. REV. 207, 209 (2010) (noting that while no-fault divorce was widely accepted for its advantages for parents and children, the fault remains "persistently relevant" whether as a bargaining tool or a way to gain an advantage over financial or custodial matters).

128. Other authors have divided states along similar, if not identical lines; some have more categories, some have fewer. *See, e.g.*, *Family Dissolution*, *supra* note 125, at 40–42 (listing five possible state divorce law categories: (1) pure no-fault; (2) pure no-fault property, almost pure no-fault alimony; (3) almost pure no-fault; (4) no-fault property, fault in alimony; (5) and full-fault); Ira Mark Ellman, *The Place of Fault in a Modern Divorce Law*, 28 ARIZ. ST. L.J. 773, 781–82 (1996) (proposing a five-category division but noting that other surveys would have fewer categories).

129. *See Family Dissolution*, *supra* note 125, at 40 (identifying 20 states as pure no-fault); *see also Charts 2021: Family Law in the Fifty States, D.C., and Puerto Rico*, 55 FAM. L.Q. 513, 514–26 (2022) [hereinafter *Charts 2021*] (listing the pure no-fault states).

130. *Family Dissolution*, *supra* note 125, at 40. However, California now allows fault in the form of abuse to be considered in divorce proceedings. Stasia Rudiman, *Domestic Violence as an Alimony Contingency: Recent Developments in California Law*, 22 J. CONTEMP. LEGAL ISSUES 498, 498 (2015); *see also* CAL. FAM. CODE § 4320 (West 2023).

spousal support awards.[131] In adopting the pure no-fault approach, state legislatures sought to completely remove discussions of marital fault from the divorce process. As is discussed in more depth below, these states also tend to prohibit contractual workarounds to their no-fault public policies.[132]

The remaining states are fault-relevant.[133] In these states, marital fault can enter the divorce proceedings in a variety of manners.[134] Some of the fault-relevant states adhere to a pure no-fault basis for granting a divorce, but they allow fault to be considered in making spousal support awards or other financial awards.[135] For example, Florida, only permits divorce when the "marriage is irretrievably broken," or due to the mental incapacity of one of the parties.[136] These are essentially pure no-fault grounds for divorce.[137] Yet, by statute, Florida courts may consider the adultery of either spouse in making a spousal support award.[138] Similarly, Missouri only permits divorce on a pure no-fault basis but allows fault considerations in spousal support.[139] Moreover, Missouri courts may consider "[t]he conduct of the parties during the marriage"[140] in making spousal support awards, a more expansive fault basis than what is seen in Florida.[141]

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131. *Family Dissolution*, *supra* note 125, at 40.

132. *See infra* Part III (explaining the reasoning behind many courts' reluctance to enforce adultery provisions and penalties in postnuptial agreements).

133. *See Family Dissolution*, *supra* note 125, at 41–42 (discussing states with fault-relevant provisions).

134. *See id.* (noting, for example, that some states allow trial courts discretion to consider fault when awarding alimony, but not when allocating marital property).

135. *See generally Charts 2021*, *supra* note 129, at 514–26 (identifying no-fault states that statutorily permit courts to consider fault when awarding alimony).

136. FLA. STAT. § 61.052 (2023).

137. *See, e.g.*, 25A FLA. JUR. 2D *Family Law* §§ 708–12 (2023) (detailing the requirements for mental incapacity as a ground for dissolution of marriage). Given that mental incapacity is not necessarily a "fault" and that the provisions cited mention no other "fault-based" ground for divorce, Florida is essentially a no-fault state when it comes to grounds for divorce.

138. FLA. STAT. § 61.08 (2023).

139. *See* MO. ANN. STAT. §§ 452.305, 452.335 (2023) (providing that the court will enter a judgement for dissolution of a marriage if the court finds that the marriage has been irretrievably broken, but that in a proceeding for maintenance following dissolution, the court may consider the conduct of the parties during the marriage).

140. *Id.* § 452.335.

141. *See* Sweet v. Sweet, 154 S.W.3d 499, 505 (Mo. Ct. App. 2005) (considering a husband's transfer of assets to his girlfriend); *In re* Marriage of Medlock, 749 S.W.2d

Other fault-relevant states allow divorce to be obtained on both fault and no-fault grounds.[142] Fault in these states is usually relevant both for obtaining a divorce and for making spousal support or other financial awards.[143] For example, Connecticut, allows divorce on no-fault irretrievable breakdown grounds as well as a variety of fault-based grounds, including adultery.[144] In awarding spousal support or dividing marital property, Connecticut courts are permitted to consider the cause of the divorce,[145] and, in practice, Connecticut courts consider a wide array of bad behavior, including adultery, in deciding the economic consequences of divorce.[146]

Most states that continue to consider fault insist that fault should not be used as a reward for innocence or a punishment for guilt.[147] However, if a court considers fault in awarding spousal support or dividing marital property, what is the purpose of considering fault, if

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437, 444–45 (Mo. Ct. App. 1988) (considering a husband's infidelity, abandonment, drinking, and threats of violence in dividing the marital estate). *Compare* MO. ANN. STAT. § 452.335 (2023) (allowing courts to consider the conduct of the parties during the marriage generally), *with* FLA. STAT. § 61.08 (2023) (limiting the courts consideration of fault to adultery).

142. *See generally Charts 2021*, *supra* note 129, at 514 (noting that while all states allow for some form of no-fault divorce, others permit fault grounds in addition to no-fault grounds).

143. *See id.* at 514–26 (listing states that have fault-based divorce and spousal support provisions).

144. CONN. GEN. STAT. ANN. § 46b-40 (West 2023).

145. CONN. GEN. STAT. ANN. §§ 46b-81, 82 (West 2023).

146. *See, e.g.*, Senk v. Senk, 973 A.2d 131, 136 (Conn. App. Ct. 2009) (considering the wife's abusive and controlling behavior, the wife's control of the husband's finances, and the wife causing the husband "to become confused and feeble by plying him with alcohol and prescription drugs not prescribed to him" in awarding marital home to husband); Rivnak v. Rivnak, 913 A.2d 1096, 1100–01 (Conn. App. Ct. 2007) (considering the husband's affairs, domestic violence, and marijuana use in awarding spousal support and dividing marital property); Burns v. Burns, 677 A.2d 971, 973–75 (Conn. App. Ct. 1996) (considering the husband's affairs in making a property division).

147. *See, e.g.*, Witcher v. Witcher, 639 A.2d 1187, 1191 (Pa. Super. Ct. 1994) ("[T]he general philosophy of the Divorce Code has been to accomplish the dissolution of a marriage in a manner that recognizes the family's prior existence as both an economic and social unit, and that emphasizes future welfare of all family members, instead of in a manner that identifies and punishes the guilty party."); Hall v. Hall, 40 P.3d 1228, 1230 (Wyo. 2002) ("Although the trial court cannot divide the property in such a way that it would punish one of the parties, it may consider fault of the respective parties . . . .").

not to impose some punishment? A Utah court called the notion a "distinction without a difference,"[148] and explained:

> In other words, if a trial court uses its broad statutory discretion to consider fault in fashioning an alimony award and then, *taking that fault into consideration*, adjusts the alimony award upward or downward, it simply cannot be said that fault was not used to punish or reward either spouse by altering the award as a consequence of fault.[149]

Nevertheless, many courts, including the Utah Supreme Court, perceive some distinction between simply considering fault and imposing a punishment.[150] Judicial explanations of the distinction remain frustratingly obtuse. Some Tennessee courts, for example, hold that although alimony cannot be used to punish a spouse, the amount of alimony may be reduced due to the recipient spouse's fault.[151] How is a reduction in alimony—due to fault—anything other than a punishment?

A few jurisdictions have crafted a more meaningful distinction by considering or requiring evidence that the fault resulted in actual economic harm. For example, the Florida Supreme Court limited the significance of the statutorily authorized consideration of adultery to cases where the adultery dissipated marital assets.[152] On the one hand, Florida courts can consider adultery in awarding alimony if that fault

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148. Mark v. Mark, 2009 UT App 374, ¶ 17, 223 P.3d 476, 482 (quoting Cent. Fla. Invs., Inc. v. Parkwest Assocs., 2002 UT 3, ¶ 17, 40 P.3d 599, 607).

149. *Id.*

150. *See* Gardner v. Gardner, 2019 UT 61, 452 P.3d 1134, 1149 n.56, 1150 (discussing the difference between considering fault as a punitive measure compared to considering fault to rectify inequity); *Hall*, 40 P.3d at 1230 (finding that the trial court did not abuse its discretion in dividing marital property when the trial court considered, in part, the husband's conduct during the marriage in awarding certain items to the wife).

151. Tait v. Tait, 207 S.W.3d 270, 278 (Tenn. Ct. App. 2006); Duncan v. Duncan, 686 S.W.2d 568, 571 (Tenn. Ct. App. 1984).

152. *See* Noah v. Noah, 491 So. 2d 1124, 1127 (Fla. 1986) (finding that where adulterous conduct did not result in greater financial need by one spouse or where the adulterous conduct did not contribute to the depletion of financial resources, consideration of fault was not appropriate). For a less explicit consideration of economic harms, see Fronsaglia v. Fronsaglia, 246 A.3d 1083, 1096 (Conn. App. Ct. 2021) (considering the defendant's poor business decisions and the payments the defendant made to the third party involved in the extramarital affair when awarding alimony).

dissipated the couple's financial resources.[153] On the other hand, the courts should not consider a spouse's adultery in increasing or decreasing an alimony award.[154] Other jurisdictions reject this view and insist that they can consider fault that resulted in purely emotional, rather than economic, harm without using it as a punishment.[155]

A few states are more candid about the punitive nature of considering fault in crafting economic awards at divorce. In Louisiana, for example, only a spouse free from fault may bring a claim for final periodic spousal support.[156] Similarly, a spouse in Georgia who has committed adultery or desertion is precluded from receiving alimony.[157] The Louisiana and Georgia approaches are difficult to justify in the modern era.[158] They have the effect of punishing the economically disadvantaged spouse for adultery while imposing no comparable penalty on the wealthier spouse.[159] In other words, the

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153. *See Noah*, 491 So. 2d at 1126–27 (finding that where a spouse's adulterous conduct resulted in financial inequity or the depletion of financial resources, courts may consider the adulterous conduct in awarding alimony); *see also* Lostaglio v. Lostaglio, 199 So. 3d 560, 563 (Fla. Dist. Ct. App. 2016) (finding that "in the absence of any evidence that Wife depleted marital assets to further her adulterous behavior," the trial court properly weighed the evidence when awarding durational alimony to the wife).

154. *See Noah*, 491 So. 2d at 1126 (approving the district court's limit when a non-alimony seeking spouse's adultery is solely offered for an increased alimony award); *Lostaglio*, 199 So. 3d at 563–64 (noting that a party's adulterous conduct is not by itself a reason to award a greater share of marital assets).

155. *See* Coleman v. Coleman, 318 S.W.3d 715, 721 (Mo. Ct. App. 2010) (recognizing the emotional impact that marital misconduct may cause as a factor in awarding alimony); McIntosh v. McIntosh, 41 S.W.3d 60, 68–69 (Mo. Ct. App. 2001) (considering the emotional impact from a party's marital misconduct allows courts to realistically address the negative effects on the other party where the misconduct did not cause economic harm).

156. LA. CIV. CODE ANN. arts. 111–12 (2023); *accord* Gober v. Gober, 2020-0820 (La. App. 1 Cir. 3/11/21), 322 So. 3d 787, 789–90 (rejecting a claim that a spouse "refus[ing] normal marital relations," constituted fault sufficient to bar an award of final periodic spousal support under Louisiana law).

157. GA. CODE ANN. § 19-6-1 (West 2023).

158. *See* Kirsten Gallacher, *Fault-Based Alimony in No-Fault Divorce*, 22 J. CONTEMP. LEGAL ISSUES 79, 85 (2014–15) (noting that modern day fault-based alimony provisions can perpetuate gender stereotypes and may impose disproportionate consequences on financially dependent spouses).

159. The Louisiana and Georgia provisions make the determination of alimony dependent only on the receiving spouse's fault or lack thereof. *See* GA. CODE ANN. § 19-6-1 (West 2023) (excluding the availability of alimony payments to those whose

wealthier spouse can cheat without fear of a financial penalty, while the poorer spouse cannot. North Carolina takes a more balanced approach in meting out punishment. Not only is a spouse who engages in "illicit sexual behavior" during the marriage precluded from receiving alimony, but it is also a statutory basis for requiring the guilty spouse to pay alimony.[160] These states are clearly the outliers. For the most part, American law takes the position that courts should not punish adulterers for the emotional harm they caused to their spouses.

C. What Specific Acts Constitute Adultery?

If a matrimonial agreement includes some penalty stemming from a spouse's adultery, what specific acts will be sufficient to invoke that penalty? Though some agreements attempt to craft a specific definition of adultery,[161] others simply refer to adultery without defining the term.[162] In the latter case, a court may be tasked with deciding whether the complained of conduct constitutes adultery. The legal meaning of adultery has been considered extensively by

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"adultery or desertion" caused the parties to separate); LA. CIV. CODE ANN. arts. 111–12 (2023) (limiting the availability of periodic support payments to those spouses who had not been at fault prior to the petition for divorce). The provisions, in effect only, punish financially dependent spouses who have committed adultery, as they are the party who would benefit from a determination of alimony or support payment; meanwhile, they provide no similar consequences for the more financially independent spouse who commits adultery.

160. N.C. GEN. STAT. ANN. § 50-16.3A (West 2023).

161. *See, e.g.*, Diosdado v. Diosdado, 118 Cal. Rptr. 2d 494, 495 (Ct. App. 2002) (addressing an agreement that defined adultery as "to volitionally engage in any act of kissing on the mouth or touching in any sexual manner of any person outside of said marital relationship"); Lloyd v. Niceta, 284 A.3d 808, 816–17 (Md. Ct. Spec. App. 2022) (highlighting an agreement that punished a husband's immoral conduct that included "inappropriate emails; sexting; sending pornographic pictures of himself to the other person; receiving pornographic pictures of the other person; romantically kissing, hugging, fondling, or embracing another person; keeping secret email, cell phone or credit card accounts; or engaging in sexual acts with another person even if it does not lead to intercourse").

162. *See, e.g.*, Thacker v. Thacker, 298 So. 3d 502, 503 (Ala. Civ. App. 2020) (addressing an agreement that simply referred to adultery); Adams v. Adams, 603 S.E.2d 273, 274 (Ga. 2004) (describing an agreement that referred to "unforgiven adultery").

American courts, and it has evolved over time.[163] The meaning, however, may be at odds with individualized views of marital fidelity.

Historical legal views of which sexual acts constitute adultery flow from patriarchal and heteronormative views of human sexuality.[164] Given the gendered history of the punishments meted out on unfaithful spouses, this is hardly surprising. Traditionally, adultery was limited to sexual acts that could result in pregnancy.[165] Initially, of course, it was the pregnancy of a wife that mattered.[166] If adultery was an act that required a married woman, and if the harm of adultery was the potential for spurious offspring,[167] then the act of adultery required a wife to engage in vaginal intercourse with a man other than her husband. This view of adultery was eventually expanded to include acts that risked the husband impregnating a woman other than his wife.[168] These narrow definitions of adultery were clearly based on the "woman as property" view of adultery.[169] They also excluded a wide array of sexual acts that are routine expressions of human sexuality.[170]

Some jurisdictions clung to these antiquated views of adultery for a surprisingly long time.[171] A 1951 New York court refused to grant a wife a divorce based on adultery even though her husband pleaded guilty

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163. *Compare* State v. Lash, 16 N.J.L. 380, 384 (1838) (defining adultery not to include acts committed by a married man with a single woman), *with* Lloyd v. Niceta, 284 A.3d 808, 816–18 (Md. App. 2022) (finding that a married man committed adultery with no mention of the marital status of the third party).

164. *See* Nicolas, *supra* note 15, at 105–06 (finding that the "gendered approach to defining adultery found its way into the English common law").

165. *See generally In re* Blanchflower, 834 A.2d 1010, 1011–12 (N.H. 2003) ("Adultery is committed whenever there is an intercourse from which spurious issue may arise . . . ." (quoting State v. Wallace, 9 N.H. 515, 517 (1838))).

166. *State v. Lash*, 16 N.J.L. at 388–89.

167. *Id.*

168. *See* Sandi S. Varnado, *Avatars, Scarlet "A"s, and Adultery in the Technological Age*, 55 ARIZ. L. REV. 371, 384 (2013) (explaining that the definition of adultery expanded to include infidelity by a married man).

169. *See supra* text accompanying notes 7, 17, 20 (acknowledging that throughout history, religious and common laws have consistently regarded women as property, owned by their fathers and husbands).

170. *See generally*, KINSEY INST. IND. U., ANNUAL REPORT 2022 4 (2022), https://kinseyinstitute.org/pdf/Kinsey_Annual%20Report_2022_FINAL_2page.pdf [https://perma.cc/JJH9-LVHY] (continuing to research and document empirical data, which questions the dominant discourse about American sexual habits, and instead emphasizes wide variation in sexual practices, frequencies, and partners).

171. *See, e.g.*, Glaze v. Glaze, 46 Va. Cir. 333, 333–34 (Ct. 1998) (refusing a divorce because a woman could not, as a matter of law, commit adultery with another woman).

in a criminal case to "the crime of sodomy upon a male person."[172] Similarly, a 1967 New Jersey court held that a woman's sexual activity with another man could not constitute adultery because there was ample evidence that previous cancer treatments had left "her vagina [] completely occluded and obliterated" and her "doctor testified that not the slightest degree of penetration was possible."[173] A 1998 Virginia court refused a husband's suit for divorce from his wife based on her sexual relationship with another woman because adultery required a penis to penetrate her vagina.[174] Even in 2003, the New Hampshire Supreme Court refused to grant a husband a divorce on the basis of his wife's adultery because her sexual relationship with another woman was not legally adultery.[175]

Of course, non-procreative sexual acts were not condoned by the courts and have their own long and colorful religious, social, and legal history, largely tracking that of adultery.[176] Courts often treated these other types of "deviant" sexual acts as a marital fault other than adultery. Many courts considered non-procreative sexual acts outside of the marriage to constitute extreme cruelty, which was a basis for divorce in many states.[177]

In states where the question of adultery is still relevant for divorce, courts usually adopt a more expansive view of which sexual acts constitute adultery.[178] Some courts offer little in the way of analysis for this change in attitude and conclude that sexual activity by a married person with a third party constitutes adultery, regardless of the specific sexual acts involved.[179] Others, however, offer more insights. Rather

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172. Cohen v. Cohen, 200 Misc. 19, 19–20 (N.Y. Sup. Ct. 1951).

173. W. v. W., 226 A.2d 860, 861–62 (N.J. Super. Ct. Ch. Div. 1967).

174. *Glaze*, 46 Va. Cir. at 333–34.

175. *In re* Blanchflower, 834 A.2d 1010, 1011–12 (N.H. 2003).

176. *See, e.g.*, Nicolas, *supra* note 15, at 98, 100–02 (finding the criminalization of sodomy followed that of adultery).

177. *See, e.g.*, Currie v. Currie, 162 So. 152, 153–54 (Fla. 1935) (highlighting how a husband's refusal to have a sexual relationship with his wife, along with his sexual relationships with young men and boys, constituted extreme cruelty); A. v. A., 209 A.2d 668, 668 (N.J. Super. Ct. Ch. Div. 1965) (noting that a homosexual relationship constituted extreme cruelty).

178. *See, e.g.*, Menge v. Menge, 491 So. 2d 700, 701–02 (La. Ct. App. 1986) (including oral sex as adultery); RGM v. DEM, 410 S.E.2d 564, 566–67 (S.C. 1991) (including a sexual relationship between two women as adultery).

179. *See, e.g.*, Patin v. Patin, 371 So. 2d 682, 683 (Fla. Dist. Ct. App. 1979) (noting that the court found no "substantial distinction" between a homosexual affair and a

than focusing on the potential for spurious offspring, these courts tend to focus on the emotional harm one spouse's sexual relationship with a third party causes the other spouse.[180] As one New Jersey court explained: "An extramarital relationship . . . is just as devastating to the spouse irrespective of the specific sexual act performed by the promiscuous spouse or the sex of the new paramour."[181] These decisions sometimes continue to reveal frustratingly patriarchal and heteronormative views. For example, that same New Jersey court went on to opine that the "homosexual violation of marital vows could be well construed as the ultimate in rejection."[182]

Even if the contemporary view of adultery is purportedly rooted in the damage to the psyche of the jilted spouse, traces of the abhorrent spouse's body as property of the other spouse theory remain. Legal adultery generally requires some in-person, person-to-person sexual act. While many spouses and some scholars may feel that purely online conduct like viewing pornography or cybersex is adulterous, courts do not seem to agree.[183] Similarly, so-called emotional affairs may be just as devastating to a relationship and a jilted spouse's psyche as physical affairs, but they apparently do not constitute adultery in the legal sense.[184]

Moreover, not all sexual acts are sufficiently intimate to constitute legal adultery. Numerous court decisions imply that physical acts like amorous kissing and hugging are insufficient to constitute adultery.[185] Instead, some greater physical, sexual act is needed to prove

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heterosexual affair "because both involve extra-marital sex and therefore marital misconduct"); *RGM*, 410 S.E.2d at 567 (adopting the rationale of *Patin* without further elaboration).

180. *See* S.B. v. S.J.B., 609 A.2d 124, 126–27 (N.J. Super. Ct. Ch. Div. 1992) (finding that adultery should be "viewed from the standpoint of the parties" rather than on "purely technical grounds").

181. *Id.* at 126.

182. *Id.*

183. *See* Brenda Cossman, *The New Politics of Adultery*, 15 COLUM. J. GENDER & L. 274, 280 (2006) (discussing the views of two scholars who argue that affairs on the internet constitute adultery). *See generally*, Varnado, *supra* note 168, at 409 (finding that changing attitudes towards online infidelity may cause courts to "have to decide whether online infidelity reaches the level of adultery in the eyes of the law").

184. *See* Beckwith v. Beckwith, No. 12-1165, 2013 WL 4726691, at *2 (W. Va. Sept. 3, 2013) (finding that the petitioner failed to prove adultery based solely on an alleged emotional affair).

185. *See, e.g.*, Rea v. Rea, 822 S.E.2d 426, 429–30 (N.C. Ct. App. 2018) (finding evidence of a husband kissing another woman permitted an inference of adultery but did not itself constitute adultery).

adultery.[186] Quite a few adultery cases include eyewitness testimony, often from private investigators, of kissing, hugging, and other similar conduct.[187] The inference made by most courts is that hugging, kissing, or other similar interactions lead to some greater sexual act that is sufficient to constitute adultery.[188] The logical implication, then, is that these lesser sexual acts alone do not constitute adultery. In *Arnoult v. Arnoult*,[189] for example, a private investigator observed the wife hugging and kissing a man who was not her spouse before going inside the man's home at 3:30 a.m. and remaining there for several hours.[190] The wife conceded that these observations were correct, but she denied the allegations of adultery.[191] Presumably, hugging and kissing did not amount to adultery. Rather, adultery was some unobserved sexual act that occurred within the home. The court observed that the wife and the man "were clearly engaged in sexual foreplay prior to returning to [the man's] residence at 3:30 [A.M.]" and suggested that such evidence supported a finding that adultery occurred within the home.[192]

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186. *See id.* (concluding that kissing, along with other circumstantial evidence, satisfied the "opportunity and inclination doctrine" to surpass mere conjecture of sexual intercourse (quoting Coachman v. Gould, 470 S.E.2d 560, 563 (N.C. Ct. App. 1996))).

187. *See, e.g.*, *id.* (finding eyewitness testimony from a private investigator provided sufficient evidence of a husband kissing another woman); Brown v. Brown, 665 S.E.2d 174, 179–80 (S.C. Ct. App. 2008) (per curiam) (holding that a husband met his burden in proving his wife committed adultery with a third party through the wife's own admissions that she would meet the third party for lunches, kissing, and fondling); Watts v. Watts, 581 S.E.2d 224, 227–28, 230 (Va. Ct. App. 2003) (holding the wife proved her husband committed adultery through clear and convincing evidence substantially provided by a private investigator).

188. *See Rea*, 822 S.E.2d at 430 (holding evidence of a husband kissing and meeting with another woman at a hotel was sufficient to support a finding of adultery); *see also Brown*, 665 S.E.2d at 179 (holding that the wife's secretive meetings in parking lots with a third party provided sufficient evidence to establish adultery).

189. 690 So. 2d 101 (La. Ct. App. 1997), *cert. denied*, 692 So. 2d 1089 (La. 1997) (mem.).

190. *Id.* at 101–02.

191. *Id.* at 102.

192. *Id.* at 102–03.

II. ARE ADULTERY PENALTIES ENFORCEABLE?

Spouses are usually free to enter into marriage contracts with respect to any matter not contrary to public policy.[193] Two very different lines of thinking have emerged among the courts to consider the enforceability of adultery provisions. One line of thinking holds that adultery provisions are unenforceable as a matter of public policy. The other line of thinking allows adultery provisions under the general freedom of contract theory. This Part considers the two different lines of analysis and some interesting ancillary issues relating to adultery penalties.

A. Adultery Provisions Are Unenforceable in Some Jurisdictions

In some states, adultery provisions are per se unenforceable.[194] Courts point to several justifications for this approach. Some courts point to no-fault divorce laws as a policy basis for refusing to enforce adultery penalties. Much of the reasoning in these cases can be traced to *Diosdado v. Diosdado*,[195] a 2002 California Court of Appeal decision.[196] The case involved a postnuptial agreement, signed after the husband had an affair, which contained a $50,000 adultery penalty.[197] The court pointed to California's no-fault divorce legislation as a public policy justification for refusing to enforce the penalty.[198] In adopting an exclusively no-fault divorce regime, the California legislature prevented courts from considering fault, such as adultery, when "dissolving the marriage, dividing property, or ordering support."[199] In seeking to penalize the husband for his adultery, the California Court of Appeal said the agreement did the exact opposite.[200] In the court's view, the adultery penalty was "in direct contravention of the public policy

193. *See* J. Thomas Oldham & David S. Caudill, *A Reconnaissance of Public Policy Restrictions upon Enforcement of Contracts Between Cohabitants*, 18 FAM. L.Q. 93, 94–95 (1984) (listing regularly imposed premarital, postmarital, and separation enforceability limitations such as "fair" written agreements and full disclosure of all relevant facts).

194. *See, e.g.*, Crofford v. Adachi, 506 P.3d 182, 190 (Haw. 2022) (finding the couple's marital agreement, which included an adultery provision, per se unenforceable).

195. 118 Cal. Rptr. 2d 494 (Ct. App. 2002).

196. *Id.* at 496–97.

197. *Id.* at 494–95.

198. *Id.* at 496.

199. *Id.* at 496–97.

200. *Id.*

underlying no-fault divorce."[201] Courts in a handful of other no-fault states have adopted the reasoning in *Diosdado,*[202] and it should be convincing in any pure no-fault divorce state.

Courts have also pointed to more general privacy concerns when refusing to enforce adultery provisions. For example, in *In re Marriage of Cooper*,[203] the Iowa Supreme Court expressed a general reluctance to regulate private conduct.[204] In refusing to enforce an adultery penalty in a postnuptial reconciliation agreement, the court pointed to various policy considerations. The court expressed disfavor for any contract that included "the sexual conduct of the parties within the marital relationship" as a condition precedent to the contract.[205] The court pointed to "[a] unifying theme of [its] historic case law," namely, that it would not enforce "attempt[s] to regulate the conduct of [the] spouses during the marital relationship . . . ."[206] The court further explained that it did "not wish to create a bargaining environment where sexual fidelity or harmonious relationships [we]re key variables."[207] This reasoning is likewise persuasive in any pure no-fault divorce state and might also have traction in some fault-relevant states.

B. Adultery Penalties Are Generally Enforceable in Some Jurisdictions

In some states, under general freedom of contract principles, courts generally consider adultery penalties to be enforceable.[208] The nature of the penalty may vary, but this does not tend to affect

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201. *Id.*

202. *See, e.g.*, Crofford v. Adachi, 506 P.3d 182, 190 (Haw. 2022) (finding the couple's marital agreement requiring the court to evaluate the parties' fault unenforceable as contrary to public policy); *In re* Marriage of Cooper, 769 N.W.2d 582, 587 (Iowa 2009) (holding the couple's reconciliation agreement void, as it inserted fault back into divorce proceedings); Parker v. Green, No. 73176, 2018 WL 3211974, at *2 (Nev. June 25, 2018) (holding that as a no-fault divorce state, Nevada does not allow damage recovery for infidelity).

203. 769 N.W.2d 582 (Iowa 2009).

204. *Id.* at 587.

205. *Id.* at 586.

206. *Id.*

207. *Id.*

208. *See, e.g.*, Weymouth v. Weymouth, 87 So. 3d 30, 37 (Fla. Dist. Ct. App. 2012) (holding a clause in a prenuptial agreement that precluded alimony unless the basis for the divorce was adultery or abuse to be enforceable).

enforceability.[209] Some agreements predicate the enforceability of the entire agreement on spousal fidelity. In *MacFarlane v. Rich*,[210] the New Hampshire Supreme Court approved a provision that voided the married couple's entire prenuptial agreement if the husband left the wife for another woman.[211] Additionally, some agreements tie alimony awards to fidelity or adultery.[212] For example, in *Weymouth v. Weymouth*,[213] a Florida court approved a provision in a prenuptial agreement that waived spousal support claims "unless the basis for the dissolution [wa]s adultery, physical abuse, [or] mental or emotional abuse."[214] In upholding the spousal support award in favor of the wife, the court noted that the trial court had specifically found that the husband's adulterous relationship was the primary cause for the marriage's dissolution.[215]

Some agreements fix adultery penalties in specific dollar amounts.[216] These penalties are sometimes obvious. For example, in *Lloyd v.*

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209. For some additional examples of adultery penalties, see Agulnick v. Agulnick, 136 N.Y.S.3d 462, 466 (App. Div. 2020) holding parties' postnuptial agreement including provisions for greater financial liability for the husband if he engaged in certain acts of sexual infidelity enforceable, and Vanneck v. Vanneck, No. FA 970343100S, 1998 WL 638473, at *2–4 (Conn. Super. Ct. Sept. 8, 1998) refusing to enforce the agreement for various fairness reasons.

210. 567 A.2d 585 (N.H. 1989).

211. *Id.* at 588, 590.

212. *See, e.g.*, *Weymouth*, 87 So. 3d at 32 (explaining that the parties' prenuptial agreement waived any claim to alimony unless the basis for dissolution was adultery or abuse); Vogt v. Vogt, 831 So. 2d 428, 429 (La. Ct. App. 2002) (highlighting a prenuptial agreement that allowed the wife to be awarded alimony so long as she did not commit adultery); *In re* Marriage of Rice, No. 91620, 2005 WL 1661323, at *4 (Kan. Ct. App. Nov. 1, 2005) (per curiam) (describing how in a couple's prenuptial agreement, the wife waived rights to alimony payments if a court found that she committed adultery); Brown v. Brown, No. W2013-00263-COA-R3-CV, 2013 WL 12180656, at *1 (Tenn. Ct. App. Sept. 12, 2013) (highlighting a couple's prenuptial agreement that included a clause stating that the husband would not owe any payments to the wife if she had a sexual affair or committed adultery); Hall v. Hall, No. 2021-04-4, 2005 WL 2493382, at *1 (Va. Ct. App. Oct. 11, 2005) (describing a couple's postnuptial agreement that provided that the wife would relinquish her right to spousal support upon proof that she committed adultery).

213. 87 So. 3d 30 (Fla. Dist. Ct. App. 2012).

214. *Id.* at 32, 34, 37.

215. *Id.* at 37.

216. *See, e.g.*, Brennan v. Brennan, 955 S.W.2d 779, 781 (Mo. Ct. App. 1997) (describing an agreement where the husband would pay the wife $2,000 per month if he committed adultery); Kennedy v. Dep't of Revenue, TC-MD 111263C, 2012 WL

Niceta,[217] the spouses signed a postnuptial agreement that required the husband to pay the wife a lump sum adultery penalty of $7 million.[218] Other agreements use forfeiture language to couch penalties.[219] Such as in *Adams v. Adams*,[220] the spouses' premarital agreement waived any property or spousal support claims the spouses would have at divorce but included a financial award to the wife if she refrained from adultery.[221] Specifically, the agreement entitled the wife to receive $10,000 for each year of marriage, up to a maximum of $100,000, so long as she had not engaged in adultery.[222]

C. Some Ancillary Issues

Adultery provisions can enter marital contracts in some interesting ways. Some couples seek to change the evidentiary standards for determining that adultery has occurred. Others invoke adultery as justification for invalidating agreements that do not expressly contemplate adultery. These ancillary issues are considered below.

1. Evidentiary standards

Some adultery penalties go beyond financial stipulations and attempt to specify the manner in which adultery may be legally established. Contractual modifications of evidentiary rules raise challenging policy considerations. Courts generally allow parties to create their evidentiary rules "in the event of a lawsuit arising from an alleged breach of their contract, so long as [those rules] do[] not unduly interfere with the inherent power and ability of the court to consider relevant evidence."[223] However, the cases upholding contractual modifications to evidentiary rules usually have little to do

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5077895, at *2 (Or. T.C. Oct. 18, 2012) (evaluating an agreement "provid[ing] that suspicion of infidelity would subject the spouse so suspected to a polygraph test and, if found guilty of infidelity, the guilty spouse would pay the other a specified amount of money in the event of a divorce").

217. 284 A.3d 808 (Md. App. 2022), *aff'd*, 301 A.3d 94 (Md. 2023).

218. *Id.* at 816–17.

219. *See* Ford v. Blue, 106 S.W.3d 470, 471–72 (Ky. Ct. App. 2003) (highlighting how the agreement contemplated that lump sum settlement available to the wife at divorce would be lessened if she committed adultery).

220. 603 S.E.2d 273 (Ga. 2004).

221. *Id.* at 274.

222. *Id.*

223. 7 RICHARD A. LORD, WILLISTON ON CONTRACTS § 15:3 (4th ed. 2023) (footnote omitted).

with the divorce setting.[224] For example, courts generally recognize the validity of so-called integration clauses in contracts, which provide that a writing constitutes the entirety of the parties' agreement.[225] Integration clauses have the "effect of precluding the introduction of parol evidence" to challenge the written agreement.[226] While this type of provision is commonly enforceable, it raises different policy concerns than provisions relating to the evidence required to prove adultery.

Courts are more reluctant to enforce contract provisions that change an evidentiary rule, standard, or presumption.[227] In states where adultery remains relevant during a divorce proceeding, existing jurisprudence or legislation usually establishes the types of evidence and evidentiary standards required to prove adultery. A number of states only require proof of adultery by a preponderance of the evidence rather than by the higher clear and convincing standard.[228] Other states, however, require parties to prove adultery under the higher clear and convincing standard.[229] Regardless of which evidentiary standard the law requires, courts routinely allow parties to prove adultery via circumstantial and indirect evidence because direct

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224. *See id.* (referencing merger and integration clauses and discussing a "fraternal benefit insurance contract" as an example).

225. *See id.* (noting that integration clauses are "clearly permissible" and "routinely inserted into contracts," even though such clauses may preclude the parties from introducing "parol evidence to vary or contradict their writing" if a court finds that the integration clauses "reflect the parties' intent that their writing is fully integrated"); *see also* Dwight J. Davis & Courtland L. Reichman, *Understanding the Value of Integration Clauses*, 18 FRANCHISE L.J. 135, 135 (1999) (discussing how courts often enforce integration clauses in different contexts, but "especially in franchise relationships, where the parties typically are more sophisticated than in ordinary consumer transactions").

226. 7 LORD, *supra* note 223, § 15:13.

227. *See* Colter L. Paulson, *Evaluating Contracts for Customized Litigation by the Norms Underlying Civil Procedure*, 45 ARIZ. STATE L.J. 471, 515–22 (2013) ("Courts are much more reluctant to allow contracts that directly interfere with the evidence they may consider.").

228. GA. CODE ANN. § 19-6-1 (2023); Morgan v. Morgan, 353 So. 3d 1026, 1030 (La. Ct. App. 2022); Nemeth v. Nemeth, 481 S.E.2d 181, 183 (S.C. Ct. App. 1997) (per curiam).

229. Brooks v. Brooks, 652 So. 2d 1113, 1116–17 (Miss. 1995), *overruled on other grounds*, Bluewater Logistics, LLC. v. Williford, 55 So. 3d 148 (Miss. 2011); Romero v. Colbow, 497 S.E.2d 516, 519 (Va. Ct. App. 1998).

evidence is often not available to establish adulterous conduct, which tends to occur in private and behind closed doors.[230]

Yet, some couples have sought to establish or modify these evidentiary rules by matrimonial agreement. For example, an Oregon couple agreed that a polygraph examination would conclusively determine whether a party had committed adultery.[231] Their agreement "provided that suspicion of infidelity would subject the spouse so suspected to a polygraph test and, if found guilty of infidelity, the guilty spouse would pay the other a specified amount of money in the event of a divorce."[232] The enforceability of that interesting provision was, unfortunately, not an issue before the court.[233]

In *Thacker v. Thacker*,[234] an Alabama couple sought to raise the evidentiary requirements for adultery.[235] The prenuptial agreement included a financial penalty payable by the husband in the event of his adultery as follows:

> In the event that adultery is proven by photographic, video, or audio recording(s), and not by any other means and specifically not by oral statements or testimony of any person, *and* the wife initiates divorce proceedings against [the] husband for that reason, then as part of that judgment of divorce, and only as part of the judgment of divorce, [the] husband agrees to pay to the wife the sum of Five Hundred [Thousand] and No/100 ($500,000.00) dollars as a property settlement award, payable in one hundred twenty (120) equal monthly installments of Four Thousand One Hundred Sixty-

230. *See* Webb v. Webb, 950 So. 2d 322, 325 (Ala. Ct. App. 2006) (recognizing that "it is difficult and somewhat rare to prove adultery by direct means," allowing parties to prove adultery via circumstantial evidence, and delineating the requisite evidentiary standards (quoting Fowler v. Fowler, 636 So. 2d 433, 435 (Ala. Ct. App. 1994))); *Morgan*, 353 So. 3d at 1030 (stating that parties may use circumstantial evidence to prove adultery and setting the required standard of proof when a party uses *only* circumstantial evidence to prove adultery); *Nemeth*, 481 S.E.2d at 183 (noting that proof of adultery will generally be circumstantial "because adultery is an activity that takes place in private" and setting the appropriate evidentiary standard).

231. Kennedy v. Dep't of Revenue, TC-MD 111263C, 2012 WL 5077895, at *2 (Or. T.C. Oct. 18, 2012).

232. *Id.* at *2.

233. *Id.* at *5.

234. 298 So. 3d 502 (Ala. Ct. App. 2020).

235. *See id.* at 503 (quoting the couple's prenuptial agreement, which permitted the wife to recover damages only if, among other requirements, "adultery [wa]s proven by photographic, video, or audio recording(s), and not by any other means and specifically not by oral statements or testimony of any person").

> six Dollars ($4,166.67) with the first payment due on the first day of the first month following the entry of the judgment of divorce.[236]

The requirement of direct proof of adultery in the *Thacker* agreement directly contravenes Alabama divorce jurisprudence. As the Alabama Supreme Court explains:

> It is a fundamental principle of the law of divorce that direct proof of adultery by evidence of eyewitnesses is not required, for, on account of the secret nature of the act, it is seldom susceptible of proof except by circumstantial evidence.[237]

To invoke the penalty in *Thacker*, the wife had to prove adultery by more exacting evidentiary standards than ordinarily required in a divorce proceeding. A court certainly could decline to enforce such a heightened evidentiary rule on public policy grounds.[238] Indeed, the wife in *Thacker* argued that public policy rendered the evidentiary modification unenforceable.[239] The court, however, did not consider the wife's plausible public policy arguments.[240] Rather, the court determined that the evidentiary rule could not be severed from the penalty itself.[241] The court noted that the adultery provision was included at the wife's insistence, but the evidentiary rules were included at the husband's insistence.[242] In the court's view, the adultery penalty and the evidentiary rule were a quid pro quo for each other, and one could not be severed from the other.[243]

2. Adultery is not a basis for invalidating a marriage contract or a contractual spousal support or property award

Some litigants, unhappy with the terms of their matrimonial agreements, argue that the other spouse's adultery should invalidate

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236. *Id.* (third alteration in original).

237. *Ex Parte* Grimmett, 358 So. 3d 391, 395 (Ala. 2022) (citing Rudicell v. Rudicell, 77 So. 2d 339, 342 (Ala. 1955)).

238. *See* Paulson, *supra* note 227 (citing cases where courts refused to apply, due to considerations of justice, fairness, and uniformity, contract terms that sought to change evidentiary standards).

239. *Thacker*, 298 So. 3d at 507.

240. *Id.* at 508.

241. *Id.* at 507.

242. *See id.* at 503–04 (noting that the husband would only agree to the "$500,000 additional property-settlement provision" that the wife requested if the prenuptial agreement included "evidentiary limitations regarding proof of adultery and . . . an installment-payment provision").

243. *See id.* at 507 n.2, 508 (agreeing with the husband's argument that "the evidentiary limitation . . . is not severable from the right the wife seeks to establish").

all or a portion of the agreement, notwithstanding the absence of any express adultery provision.[244] Some of these arguments are couched in terms of unconscionability.[245] Courts have rejected these arguments, noting that matrimonial agreements solely exist to contemplate the financial consequences of divorce.[246] In other words, if the spouses desired an adultery penalty, they should have included one in the contract.[247]

Other litigants have pointed to the role of adultery in spousal support laws as a basis for invalidating certain contract provisions. The results of these arguments have been somewhat mixed. In *Maloy v. Maloy*,[248] for example, the husband unsuccessfully argued that the wife's adultery should preclude her from receiving a $5,000 payment, as agreed to in their premarital agreement.[249] The contested premarital agreement waived spousal support, but provided that the husband would pay $5,000 to the wife in lieu of court-ordered support.[250] The agreement did not address the issue of adultery.[251] The husband argued that the wife's admitted adultery should preclude the $5,000 payment in its entirety because, under the default state divorce laws, adultery precluded spousal support.[252] The court avoided considering the role that adultery might play in contractual spousal support awards

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244. *See* Noto v. Buffington, No. FA084031102S, 2010 WL 1565554, at *4 (Conn. Super. Ct. Mar. 22, 2010) (demonstrating the courts' reasoning that spouses guilty of adultery forfeit their marriage rights); Vanderbilt v. Vanderbilt, Nos. 11CA0103-M, 11CA0104-M, 2013 WL 1286012, at *7 (Ohio Ct. App. Mar. 27, 2013) (arguing that a prenuptial agreement was invalid because its terms permitted one spouse to engage in infidelity).

245. *See Noto*, 2010 WL 1565554, at *2 (determining that a prenuptial agreement is unconscionable because allowing a spouse protection from their own marital misconduct offends the standards of morality and marital fidelity); *Vanderbilt*, 2013 WL 1286012, at *10 ("a party may challenge the [otherwise valid] spousal support provisions contained [in a prenuptial agreement] by demonstrating that the terms related to spousal support are unconscionable at the time of the divorce.").

246. *See Noto*, 2010 WL 1565554, at *3 ("Premarital agreements are not necessarily made . . . to be fair to each party in the event of divorce."); *Vanderbilt*, 2013 WL 1286012, at *9 ("Because the terms of the agreement . . . are clear, this Court must look no further than the agreement itself and must give effect to the parties' intentions as expressed therein.").

247. *Noto*, 2010 WL 1565554, at *4; *Vanderbilt*, 2013 WL 1286012, at *9.

248. 362 So. 2d 484 (Fla. Dist. Ct. App. 1978).

249. *Id.* at 484–85.

250. *Id.* at 485.

251. *Id.*

252. *Id.*

by deciding that the trial court erred in "interpreting this provision as, in effect, a provision for alimony."[253] The court did not, however, explain what the $5,000 payment was if it was not spousal support.[254] Rather, the court explained that if the husband intended to condition the receipt of the $5,000 payment on the wife's freedom from marital fault, then he should have included language to that effect in the agreement.[255]

A line of Louisiana decisions shows how considerable inconsistency on this question may exist even within a single state. In *McAlpine v. McAlpine*,[256] the Louisiana Supreme Court seemed to approve of a prenuptial agreement where the spouses waived spousal support and, in exchange, the husband agreed to pay the wife a sum of either $25,000 or $50,000, depending on the length of the marriage at the divorce stage.[257] The prenuptial agreement stipulated that the wife was entitled to the payment regardless of her fault or need.[258] Yet, at least two subsequent cases involving postnuptial agreements viewed the issue differently. In both *Boudreaux v. Boudreaux*[259] and *Williams v. Williams*,[260] lower courts in Louisiana refused to enforce contractual spousal support provisions in postnuptial reconciliation agreements that required a spouse to pay support, regardless of the fault of the other spouse.[261] The reasoning in these cases is questionable in light of the earlier Louisiana Supreme Court decision in *McAlpine*, and other later decisions have rejected the approach of those decisions.[262]

III. SHOULD ADULTERY PENALTIES BE ENFORCEABLE?

Given the abhorrent roots of adultery in our legal system and changing social mores, adultery ought to be excised from American law. So long as it remains, however, some spouses are likely to continue

253. *Id.*
254. *Id.*
255. *Id.*
256. 679 So. 2d 85 (La. 1996).
257. *Id.* at 86.
258. *Id.*
259. 745 So. 2d 61 (La. Ct. App. 1999).
260. 760 So. 2d 469 (La. Ct. App. 2000).
261. *See* 745 So. 2d at 63 (explaining that a requirement for paying alimony even in instances of fault, such as adultery, would go against public policy); 760 So. 2d at 475 (discussing that it would go against public policy to require a party to pay periodic spousal support without consideration of their financial capabilities and needs).
262. *See* Aufrichtig v. Aufrichtig, 796 So. 2d 57, 62 (La. Ct. App. 2001) (rejecting the argument that post-divorce alimony violates public policy).

to demand adultery penalties in their marriage contracts. Even in jurisdictions where adultery may be considered at the divorce stage, or where adultery penalties have been previously permitted, there are viable arguments against enforcement. Courts have not adequately considered the viability of these arguments. In particular, the doctrine of unconscionability, the public policy of keeping the recently divorced off public assistance, and more general limitations on contractual and punitive damage awards offer viable defenses to the enforcement of adultery penalties. Each of these factors is considered below to demonstrate how they could be used as a basis to refuse to enforce an adultery penalty.

A. Unconscionability

Courts could refuse to enforce some adultery penalties on unconscionability grounds. The common law doctrine of unconscionability may render a matrimonial agreement invalid in any state,[263] other than Louisiana.[264] Matrimonial agreements may suffer from substantive unconscionability, procedural unconscionability, or both.[265] Assuming a matrimonial agreement meets the basic requirements of procedural conscionability, some adultery penalties may still run afoul of substantive conscionability concerns.[266] The viability of a substantive unconscionability attack on an adultery penalty depends, in part, on how the doctrine of unconscionability fits into a particular state's marriage contract laws and jurisprudence.[267]

In some states, substantive unconscionability is a stand-alone basis for invalidating a matrimonial agreement. For example, section 9(f) of the Uniform Marital and Premarital Agreements Act (the "UMPAA") provides:

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263. *See, e.g.*, Elizabeth Carter, *Rethinking Premarital Agreements: A Collaborative Approach*, 46 N.M. L. REV. 354, 369 (2016) [hereinafter *Rethinking Premarital Agreements*] (explaining that the doctrine of unconscionability permits courts to invalidate contracts or portions of contracts if they contain terms that no reasonable person would agree to be bound by).

264. CARTER, *supra* note 57, at 254.

265. Richard Craswell, *Two Kinds of Procedural and Substantive Unconscionability*, U.C. BERKELEY: L. & ECON. WORKSHOP 1–2 (2010) (defining substantive and procedural unconscionability).

266. *See, e.g.*, Balogh v. Balogh, 332 P.3d 631, 643 (Haw. 2014) (explaining that there are cases where a matrimonial agreement is so one-sided that substantive unconscionability provides grounds on its own for excluding contract terms).

267. *Id.* at 643–44 (noting the varying requirements and approaches to unconscionability).

> (f) A court may refuse to enforce a term of a premarital agreement or marital agreement if, in the context of the agreement taken as a whole[:] [(1)] the term was unconscionable at the time of signing[; or (2) enforcement of the term would result in substantial hardship for a party because of a material change in circumstances arising after the agreement was signed].[268]

This approach allows an agreement to be declared invalid due to *either* substantive or procedural unconscionability. Courts may deem adultery provisions substantively unconscionable and invalid in states taking this approach, as is explained below.

Other states require both substantive and procedural unconscionability. This is also the approach taken by the Uniform Premarital Agreement Act (the "UPAA").[269] Under the UPAA, a premarital agreement is not enforceable if "the agreement was unconscionable when it was executed" and there were certain other procedural deficiencies in the execution of the agreement.[270] In particular, a finding of unconscionability and a finding that the party challenging the contract either (1) did not receive "a fair and reasonable disclosure of the property or financial obligations of the other party;" (2) did not waive the right to receive such a financial disclosure; or (3) "could not have had[] an adequate knowledge of the property or financial obligations of the other party" will invalidate the contract.[271] In other words, substantive unconscionability alone is insufficient to invalidate a premarital agreement in UPAA states.[272] The substantive unconscionability must be accompanied by some specific procedural deficiency to invalidate the agreement. Some non-UPAA states employ a similar test.[273] However, not all UPAA states adhere to this approach. In adopting the UPAA, some states modified the language of the model law to retain substantive unconscionability as a stand-alone basis for invalidating a matrimonial agreement.[274]

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268. UNIF. PREMARITAL & MARITAL AGREEMENTS ACT § 9(f) (UNIF. L. COMM'N 2012).

269. UNIF. PREMARITAL AGREEMENT ACT (UNIF. L. COMM'N 1983).

270. *Id.* § 6.

271. *Id.*

272. *See* Carter, *Rethinking Premarital Agreements*, *supra* note 263, at 370 (clarifying that UPAA states require that a party establish unconscionability and that the party was not fairly on notice of the agreement's financial obligations prior to execution).

273. *See id.* at 371 (listing, for example, Connecticut, Iowa, Nevada, and Utah and other modified UPAA states).

274. *See id.* (discussing how UPAA states may refuse enforcement of marital agreements if they appear to be involuntary); *see also In re* Marriage of Shanks, 758

In states where substantive unconscionability is a stand-alone basis for invalidating a provision in the marriage contract, courts should apply the doctrine to some adultery penalties. An agreement is substantively unconscionable when it is "so one-sided as to shock the conscience of the court."[275] An agreement that is simply unfair or inequitable does not meet this threshold.[276] Rather, the one-sidedness must be egregious.[277] Some adultery penalties may meet this requirement. One could imagine that a provision that only applies to one spouse or that applies different standards of conduct to each spouse may fit that description. Likewise, adultery penalties that are excessive in terms of their amount might be deemed unconscionable.

Although few courts have considered whether an adultery penalty is unconscionable, courts have ample experience considering whether marriage contracts contain other substantively unconscionable terms.[278] To be unconscionable, courts generally require a finding that the agreement was severely economically one-sided.[279] For example, in *Bedrick v. Bedrick*,[280] the Connecticut Supreme Court found that changed circumstances rendered a postnuptial agreement unconscionable due to economic one-sidedness.[281] The couple divorced nearly two decades after the last amendment to their

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N.W.2d 506, 513–14 (Iowa 2008) (noting how the Iowa UPPA allows Iowa courts the ability to address unconscionability claims—outside of the scope of financial disclosures—by using "fairness reviews").

275. Lloyd v. Niceta, 284 A.3d 808, 821 (Md. Ct. Spec. App. 2022) (quoting Li v. Lee, 62 A.3d 212, 227 (Md. Ct. Spec. App. 2013)), *aff'd*, 301 A.3d 94 (Md. 2023).

276. *See* Bedrick v. Bedrick, 17 A.3d 17, 28 (Conn. 2011) (explaining that determination of unconscionability is based upon "whether enforcement of an agreement would work an injustice").

277. *See Marriage of Shanks*, 758 N.W.2d at 516 (explaining that courts cannot base their decisions upon financial inequalities, but rather upon a showing of harsh agreement terms).

278. *See, e.g.*, *Bedrick*, 17 A.3d at 28 (noting that the question of unconscionability is well established within the law); *Marriage of Shanks*, 758 N.W.2d at 513–14 (discussing how a review for unconscionability is more circumscribed than a review for inequality); Blue v. Blue, 60 S.W.3d 585, 590 (Ky. Ct. App. 2001) (considering the factors that render an agreement unconscionable).

279. *Compare* Grabe v. Hokin, 267 A.3d 145, 153–54 (Conn. 2021) (requiring a finding of a dramatic change in economic status to find unconscionability), *with Blue*, 60 S.W.3d at 590 (finding that because the financial status of the parties was disparate even before the marriage agreement, an increase in the assets of one party does not render the agreement unconscionable).

280. 17 A.3d 17.

281. *Id.* at 29.

postnuptial agreement.[282] The wife agreed to waive her rights to spousal support and a property division in exchange for a lump sum payment of $75,000.[283] At the time of divorce, the marital estate was worth $927,123.[284] The Court held that the monetary discrepancy was clearly unconscionable.[285] *Lane v. Lane*[286] is a similar case from the Kentucky Supreme Court involving a prenuptial agreement.[287] The prenuptial agreement in *Lane* waived spousal support and provided that each spouse's property would remain separate and not subject to division during a divorce proceeding.[288] The spouses had vastly different estates when the agreement was signed, and the disparity was even greater by the time of divorce.[289] Again, the court found the one-sidedness to be unconscionable.[290] Courts should apply the same standards to adultery penalties. If the outcome of the adultery penalty is comparable to a one-sided economic agreement, then the adultery penalty should be thrown out.

Lloyd v. Niceta[291] is one of the only cases to consider the merits of an unconscionability argument as applied to an adultery penalty.[292] The penalty in *Lloyd v. Niceta* was exceptionally large, $7 million.[293] Applicable Maryland law required findings of both procedural and substantive unconscionability to invalidate the agreement—a difficult standard.[294] The *appellate* court considered the question of unconscionability in some depth.[295] There were insufficient facts to support the husband's argument that the agreement was procedurally unconscionable.[296] The court explained that the $7 million penalty was

282. *See id.* at 21–22 (stating that the parties executed their final amendment in 1989 and sought divorce in 2007).
283. *Id.* at 22.
284. *Id.*
285. *See id.* (reasoning that the financial situations of the parties had changed drastically, which would make enforcement of the marital agreement unjust).
286. 202 S.W.3d 577 (Ky. 2006).
287. *Id.* at 578.
288. *Id.*
289. *Id.*
290. *Id.* at 580.
291. No. 33, 2023 WL 5604203, at *1 (Md. Aug. 30, 2023).
292. *Id.* at *1–2.
293. *Id.* at *1.
294. Lloyd v. Niceta, 284 A.3d 808, 821 (Md. Ct. App. 2022).
295. *Id.* at 821–22.
296. *Id.* Indeed, when each party engages competent counsel, it is unusual to see a procedurally unconscionable agreement. The court could have ended the analysis upon determining that the agreement was procedurally adequate.

not substantively unconscionable because it was not too one-sided when the couple's overall financial situation was considered.[297] The Supreme Court of Maryland likewise approved of the provision; however, the question of substantive and procedural unconscionability was not before that court on appeal.[298] The *appellate* court's decision presents a practical problem for drafting attorneys. Although the court ultimately held that the agreement was not unconscionable, the decision accepted the notion that an adultery provision could be unconscionable under the right factual scenario.[299] Realistically, it will be difficult, if not impossible, for a drafting attorney to know how large of a penalty is too large.

A penalty like the one in *Agulnick v. Agulnick*[300] is another likely candidate for an unconscionability argument.[301] The agreement provided that if the husband engaged in another affair, "that the wife would receive 80% of his future gross lifetime earnings from all sources, minus FICA, and 80% of all marital assets."[302] The husband also agreed to assume the entirety of certain liabilities and to "pay the wife her marital share of the value of his medical license."[303] The *Agulnick* court did not consider the enforceability of this provision. Such an extreme one-sided provision could, and probably should, be rejected on substantive unconscionability grounds in states where substantive unconscionability is a stand-alone ground for invalidating provisions in marriage contracts. While courts have held that adultery is not particularly outrageous in the modern era,[304] an agreement to forfeit 80% or more of a spouse's assets in the event of an affair does seem shocking.

Other aspects of adultery penalties may also run afoul of unconscionability notions, though jurisprudence on the issue is

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297. *Id.* at 825.

298. *See Lloyd*, 2023 WL 5604203, at n. 9 (describing the petitioner's other challenges rejected by the appellate court, which were not considered on appeal).

299. *See Lloyd*, 284 A.3d at 830 (finding that provisions regarding adultery have the potential to create fear in a marriage).

300. 136 N.Y.S.3d 462 (2020).

301. *Id.* at 466.

302. *Id.*

303. *Id.*

304. *See* Norton v. Hoyt, 278 F. Supp. 2d 214, 222 (D.R.I. 2003) (observing that an affair does not constitute outrageous conduct), *aff'd*, 407 F. 3d 501 (1st Cir. 2005); Quinn v. Walsh, 732 N.E.2d 330, 339 (Mass. App. Ct. 2000) (recognizing that an affair, even one intended to cause emotional harm, does not constitute outrageous conduct).

practically non-existent.[305] For example, agreements that penalize conduct that is not generally considered adultery under even the broadest view of adultery might be deemed unconscionable for intruding too far into a spouse's right to privacy.[306] An agreement that seeks to penalize a spouse for masturbating, having fantasies that are not acted upon, or simply viewing pornography may go too far in regulating private conduct.[307]

One-sided adultery penalties could likewise be deemed unconscionable on policy grounds. It seems patently unfair to subject one spouse to an adultery penalty but not the other spouse. Regulating one spouse's sexual life and not the other spouse's harkens back to the outdated and abhorrent notion that the wife is her husband's property.[308] Courts have not adequately considered unconscionability arguments with one-sided adultery provisions. For example, in *Adams v. Adams*,[309] the parties entered into a premarital agreement where each side waived all property and support claims.[310] Given the substantial disparities in the size of each spouse's estate, the waiver benefitted the husband.[311] In exchange for the waiver, the husband agreed to pay the wife $10,000 per year of marriage up to a maximum of $100,000 provided that the wife did not "become involved in a

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305. JoAnne Sweeny Dr., *Undead Statutes: The Rise, Fall, and Continuing Uses of Adultery and Fornication Criminal Laws*, 46 LOY. U. CHI. L.J. 127, 155 (2014) (discussing the expansion of alimony penalties to include cohabitating ex-spouses even after finalizing their divorce). *But see* Deborah L. Rhode, *Why is Adultery Still a Crime?*, L.A. TIMES (May 2, 2016, 5:00 AM), https://www.latimes.com/opinion/op-ed/la-oe-rhode-decriminalize-adultery-20160429-story.html [https://perma.cc/D5V4-DFQ2] (suggesting that adultery laws should reflect the rising public tolerance and lack of prosecution of adultery, yet it remains illegal in twenty-one states).

306. *See* Martin J. Siegel, *For Better or for Worse: Adultery, Crime & the Constitution*, 30 J. FAM. L. 45, 61–62, 64, 89–90 (analyzing the implications of the right to privacy on adultery laws, especially considering how broadly laws may classify adultery).

307. *See generally id.* (discussing the extent of a recognized right to privacy within marital affairs).

308. *See* Lynn v. Shaw, 620 P.2d 899, 901 (Okla. 1980) (reasoning that a husband's cause of action for adultery rests on the common law notion that he has a property right in his wife); Tinker v. Colwell, 193 U.S. 473, 481 (1904) ("We think the authorities show the husband has certain personal and exclusive rights with regard to the person of his wife . . . .").

309. 603 S.E.2d 273 (Ga. 2004).

310. *Id.* at 274.

311. *See id.* (stating that at the time they were married, the husband's assets were valued at $4,526,708 while the wife's assets were valued at only $30,000).

sexual relationship with another person during the marriage."[312] The agreement did not include any corresponding penalty for the husband's adultery.[313] When the couple divorced, the wife accused the husband of adultery.[314] The wife asked the court not to enforce the agreement on the basis of unconscionability.[315] In addition to the financial disparity created by the agreement, the wife argued vigorously in her brief to the Georgia Supreme Court that the one-sided adultery penalty was unconscionable.[316] The court was apparently unmoved by the wife's argument because, in upholding the agreement, the court largely ignored the one-sided adultery penalty, instead focusing its analysis on whether the financial disparity between the two was unconscionable.[317] Given the gendered history of adultery in our law, particularly as it has affected women, the court should have given the wife's arguments greater consideration.

B. Public Assistance

Many states impose a public assistance limitation on the enforceability of marriage contracts as a matter of public policy.[318] This limitation allows a court to modify the terms of a marriage contract where the agreement would leave a spouse reliant on public assistance.[319] Public assistance limitations reflect the notion that "the state's interest in not having the spouse become a public charge outweighs the parties' freedom to contract."[320] Both the UPAA and UPMAA codify this view to some extent. Section 6 of the UPAA provides as follows:

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312. Brief of Appellant at 6, *Adams*, 603 S.E.2d 273 (Ga. 2004) (No. S04F0841).

313. *Id.* at 10.

314. *Adams*, 603 S.E.2d at 274.

315. Brief of Appellant, *supra* note 312, at 6.

316. *See id.* at 10–12 (asserting that the agreement is unconscionable in multiple respects, most prominently shown in the one-sided nature of multiple provisions of the agreement).

317. *See generally Adams*, 603 S.E.2d at 273 (holding that a greater disparity at the time of divorce than was already present between the husband and wife at the time of the antenuptial agreement does not render such an agreement unconscionable).

318. *See* Rider v. Rider, 669 N.E.2d 160, 163 (Ind. 1996) (assessing how more states are codifying their interest in not providing for the spouse over their interest in parties' freedom to contract).

319. *See id.* (requiring spousal support notwithstanding an antenuptial agreement stating otherwise when one party is eligible for public assistance at the time of the divorce).

320. *Id.*

> If a provision of a premarital agreement modifies or eliminates spousal support and that modification or elimination causes one party to the agreement to be eligible for support under a program of public assistance at the time of separation or marital dissolution, a court, notwithstanding the terms of the agreement, may require the other party to provide support to the extent necessary to avoid that eligibility.[321]

Section 9 of the UPMAA contains a nearly identical provision.[322] An adultery penalty tied to spousal support could be declared invalid under this provision if the outcome was too financially ruinous to one of the spouses. However, few courts have even considered this language of the UPAA, much less applied it in the context of an adultery provision. In the appropriate case, however, this analysis could be used as a basis for refusing to uphold an adultery provision.

C. General Limitations on Liquidated Damage Awards.

General limitations on liquidated damage awards may provide the most compelling argument for refusing to enforce adultery penalties as a public policy matter; yet most courts have not considered the issue. They should. Regardless of how they are structured, contractual adultery penalties presumably try to achieve several goals: (1) to compensate the innocent spouse for the emotional and reputational harms caused by the other spouse's adultery; (2) to deter a spouse from cheating for fear of financial penalty; and (3) to punish a spouse for cheating. Thus, contractual adultery penalties seek to provide for the same types of damages afforded by the traditional amatory torts—compensatory and punitive damages.[323] Courts should consider refusing to enforce adultery provisions that seek to create contractual remedies for these awards.

A general rule of contract law is that parties may agree to liquidated damages provisions in a contract provided that "the amount agreed on is not unconscionable, is not determined to be an illegal penalty, and is not otherwise violative of public policy."[324] Adultery penalties tend to run afoul of all these limitations. As explained above, the size of a particular adultery penalty may be unconscionable and provide an

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321. UNIF. PREMARITAL AGREEMENT ACT § 6(b) (UNIF. L. COMM'N 1983).

322. UNIF. PREMARITAL & MARITAL AGREEMENTS ACT § 9(e) (UNIF. L. COMM'N 2012).

323. *See* discussion *supra* Section I.B.1 (exploring how damages for amatory torts were often rooted in antiquated views of women as men's property, valuing them based on their desirability).

324. 24 LORD, *supra* note 223, § 65:1.

independent basis for refusing to enforce the penalty.[325] Similarly, one-sided adultery penalties may likewise be unconscionable.

Most adultery penalties will also contravene one of the other two limitations on liquidated damages. Emotional distress damages are not generally permitted in breach of contract actions, particularly when there is no physical injury or illness.[326] Moreover, emotional distress damages stemming from breach of the marital obligation of fidelity have been widely rejected by American courts and legislatures for policy reasons.[327] There are, of course, some exceptions to this general rule. For example, emotional distress damages may be allowed for breaches that amount to tortious conduct for which punitive damages are allowed.[328] Adultery penalties seek to contractually stipulate the emotional damages stemming from a breach of the marital contract and its obligation of fidelity. As discussed in Section I.B.2, however, tort actions relating to hurt feelings stemming from adultery have been rejected by most American jurisdictions for public policy reasons.[329] Allowing contractual damages for emotional harms stemming from a breach of the marital obligation of fidelity only occurs when a written marriage contract seems incongruous with those overarching public policy concerns. Indeed, a spouse with a marriage contract is no more or less harmed by infidelity than a spouse without a marriage contract.

Moreover, the overwhelming trend in fault-relevant divorce states is to refuse to consider adultery for reasons of punishing a guilty spouse or rewarding an innocent spouse.[330] Courts repeatedly point to public policy concerns in rejecting the idea that adultery can be punished or that the non-economic harms of adultery should result in financial

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325. *See* discussion *supra* Section III.A (describing a prenuptial agreement that was deemed unconscionable by the court due to a significant wealth disparity between spouses that grew even more disparate by the time they sought a divorce).

326. 24 LORD, *supra* note 223, § 64:11.

327. *See* discussion *infra* Section I.B.2 (illustrating how courts frequently dismiss IIED suits related to adultery by relying on the abolition of amatory torts, establishing a public policy that emotional harms from adultery are not compensable through tort law, preventing litigants from circumventing this public policy with IIED claims).

328. *See* 24 LORD, *supra* note 223, § 64:11 (detailing exceptions to the general rule prohibiting emotional distress damages where the breach causes bodily harm or "serious emotional disturbance").

329. *See, e.g.*, Koestler v. Pollard, 471 N.W.2d 7, 11 (Wis. 1991) ("[S]uch wrongs as betrayal, brutal words, and heartless disregard of the feelings of others are beyond any effective legal remedy and any practical administration of law.").

330. *See In re* Marriage of Cooper, 769 N.W.2d 582, 586–87 (Iowa 2009) (discussing the reasons for moving to no-fault laws).

awards to the innocent spouse.[331] For better or worse, this public policy seems to be widely embraced by American courts, and it seems incongruous to allow spouses to thwart that public policy by contract.

Finally, adultery penalties likely constitute prohibited penalty provisions. Generally, liquidated damages provisions constitute illegal penalties when they are intended to punish or coerce compliance rather than to compensate for actual harm.[332] Yet, the primary purpose of most adultery penalties is clearly punitive and coercive. In seeking to punish and coerce, adultery penalties offend the most basic principles of liquidated damages. If a significant financial payout is required or forfeited due to adultery, it cannot reasonably be described as anything other than a prohibited penalty provision.

Lloyd v. Niceta is one of the only decisions considering the liquidated damages argument.[333] That opinion ignores the problematic history of adultery in the law, the repeal of the heartbalm torts, and the general unavailability of IIED damages in the divorce setting. In short, the opinion is wholly inadequate. As discussed above, that case involved the enforcement of a postnuptial agreement with a $7 million adultery penalty.[334] The Maryland Supreme Court refused to apply the traditional contractual analysis applicable to liquidated damages provisions in the marriage setting.[335] The court readily admitted that the provision intended to coerce the husband to remain faithful and to punish him if he failed to do so.[336] The court even agreed that the "lump sum provision would constitute an unenforceable penalty had the Agreement been a traditional common law contract, rather than a marital contract."[337] Yet, the court decided that the liquidated damages analysis was inapplicable because divorcing spouses are not entitled to compensatory damages for adultery or other emotional harms in the divorce setting.[338] Therefore, in the court's view, the effect of the $7

331. *See* discussion *infra* Part II (explaining that spouses are typically allowed to enter into marriage contracts on matters not contrary to public policy, and the enforceability of adultery provisions has sparked divergent opinions among courts—with one perspective deeming them unenforceable due to public policy concerns, while another permits such provisions under the broader freedom of contract theory).

332. 24 LORD, *supra* note 223, § 65:1.

333. No. 33, 2023 WL 5604203, at *7 (Md. Aug. 30, 2023).

334. *Id.* at *1–2.

335. *Id.* at *7–8.

336. *Id.* at *13.

337. *Id.* at *7.

338. *Id.* at *8.

million penalty was not a substitute for compensatory damages because compensatory damages are not available at divorce.[339] The adultery provision clearly attempted to give the wife the right to compensatory and punitive damages that she would not have otherwise had under the law.

CONCLUSION

The decision to marry involves taking on certain risks, the most obvious of which is that the marriage will end in divorce. Some couples seek to mitigate or plan for that risk by entering into a matrimonial agreement. While matrimonial agreements may be a good tool for mitigating risk generally, they have limits. If love, affection, and trust are insufficient to prevent a spouse from having an affair, a financial penalty probably will not accomplish that goal either. Yet, some spouses seek to impose penalties in the event of adultery to prevent the behavior and to penalize it when it happens anyway. Given the sordid history of the law's role in policing sexual mores and women's sexuality in particular, spouses should be hesitant to enter contractual arrangements inviting courts into their sexual lives. Moreover, sound policy and legal arguments suggest that courts should not enforce such intimate provisions relating to emotional harm.

339. *Id.*