

SEX OR LIES?
A RECONSIDERATION OF
ADULTERY LAWS

Adultery is prevalent in American marriage.¹ There is also substantial evidence that adultery often results in specific harms, such as divorce.² During the past half-century, however, many have argued for the abolition of the criminal regulation of adultery.³ These critics argue that adultery laws promote blackmail and extortion and are outdated, sexist, ineffective and an unconstitutional regulation of private consensual behavior. Many American states have followed the advice of these critics and abolished laws criminalizing extramarital sexual relationships,⁴ though almost half of the states maintain some sort of criminal adultery law.⁵

This essay endeavors to answer the following question: Is extramarital sexual activity ever justifiably regulated by the criminal law? If so, under what circumstances is it permissible to punish adulterous behavior?

This essay argues adultery should be criminalized under some circumstances. All of the critics mistakenly assume that the flaws of current adultery laws will be present in any adultery laws. This is a mistake. It is true that current adultery laws are flawed, and the critics point out many valid criticisms of these laws. Most of the flaws of current laws, however, may be remedied easily. For example, all existing American adultery laws punish extramarital sexual relationships without regard for the knowledge or consent of the spouse who is not involved in the extramarital relationship.⁶ Other laws punish adultery differently depending upon the gender of the offender. Adultery laws can be improved by eliminating distinctions based on gender and taking into account the consent or knowledge of the other offender.

There are valid reasons for criminalizing adultery. Parties that enter into a voluntary legal relationship usually must accept certain legal duties

which accompany that relationship, and a violation of those duties may be properly criminalized in certain circumstances. For example, securities laws appropriately criminalize the defrauding of investors and the federal mail fraud statute justifiably criminalizes misrepresentations made by public officials to their constituents. Likewise, sexual activity outside of marriage, when accompanied by misrepresentations to one's spouse which violate the legal duties of the marital relationship, should be criminalized.

States should not punish a spouse's sexual activity outside of marriage when that sexual activity occurs with the knowledge and consent of the other spouse. A state may, however, permissibly criminalize deception which accompanies adulterous behavior. The law should punish misrepresentations about extramarital sex where the extramarital sex did not occur with the knowledge or consent of the other spouse and where the adulterous behavior was not disclosed to the other spouse shortly after it occurred. The punishment of this crime, which I refer to as Adulterous Fraud, would address many of the same harms which current adultery laws are designed to prevent, without involving the policy or constitutional concerns of critics of current adultery laws.

Section I provides a brief overview of American adultery laws. Section II critiques current arguments in opposition to the criminalization of adultery and concludes that all of these theories inappropriately assume that the shortcomings of current adultery laws will be the same flaws of any adultery laws. Section III begins by analyzing the harms that are sought to be prevented by other laws that address deceptive conduct, such as securities fraud and "honest services" mail fraud. This section then concludes that harms created by such fraudulent conduct are a legitimate target for regulation by the criminal law. Section IV proposes the introduction of the crime of adulterous fraud, and explains why the arguments typically offered against the existence of adultery laws do not apply to adulterous fraud.

I. A BRIEF HISTORY OF ADULTERY LAWS IN AMERICA

Adultery laws used to be a part of a criminal law that outlawed all sex outside of marriage.⁷ In colonial America, fornication, sodomy and rape laws accompanied prohibitions on adultery, and fit together as a coherent whole.⁸ Early laws criminalizing adultery were justified as punishing an offense against morality,⁹ and less so as a violation of a husband's property right in his wife's body.¹⁰ The adultery laws of the colonies became the laws of the states, and until the late twentieth century, almost all American states had criminal adultery prohibitions.¹¹ Following the American Law Institute's removal of the crime of adultery from its Model Penal Code,¹² many states repealed criminal statutes which prohibited adultery or forni-

cation.¹³ Though adultery remains a crime in almost half of the states, the crime is rarely enforced.¹⁴

The laws that do remain vary greatly in their substance. Most states prohibit a single act of sex outside of marriage,¹⁵ though others require cohabitation or some other evidence of repeated adulterous behavior.¹⁶ Some states only prohibit adultery that is “open and notorious.”¹⁷ Some states require the consent of the spouse not involved in adulterous conduct in order to pursue a prosecution,¹⁸ although no state considers whether that spouse previously consented to extramarital sexual behavior by his or her spouse. Adultery is a misdemeanor accompanied only by a fine in most jurisdictions,¹⁹ though some states permit imprisonment for an adultery conviction.²⁰ Adultery is also a crime in all of the United States Armed Forces,²¹ where it is enforced much more often than in civilian courts.²²

Among the most interesting distinctions present in modern adultery laws are those that differentiate based on the gender or marital status of the individual involved. In most states, both the married and the unmarried partner may be convicted of adultery.²³ In some states, however, the unmarried male partner of a married female may be convicted of adultery, while the unmarried female partner of a married man is not guilty of any offense.²⁴ In Minnesota, the unmarried male partner of a married female may be convicted of adultery,²⁵ but “when any man and single woman have sexual intercourse with each other, each is guilty of fornication,” a offense subject to a smaller punishment than adultery.²⁶

As Section II will reveal, there are many problems with current adultery laws, including the inappropriate gender-based distinctions present in many statutes and the lack of regard for the consent or knowledge of the non-adulterous spouse.

II. A SURVEY AND CRITIQUE OF CURRENT THEORIES OPPOSING THE CRIMINAL REGULATION OF ADULTERY

This section explores the current arguments against the continued criminalization of adultery. Most of these arguments are based on policy considerations. Some of the following arguments, however, question the constitutionality of adultery bans, especially in light of the Supreme Court’s recent ruling in *Lawrence v. Texas*. Many of these arguments do offer valid criticisms of current prohibitions on adultery. These traditional arguments against the regulation of adultery do not apply, however, to the regulation of adulterous fraud. As will be discussed in further detail below, those who criticize adultery laws fail to consider how adultery laws could be improved so as to eliminate the constitutional concerns or policy considerations that worry these scholars.

A. Adultery Laws are an Obsolete Relic of a Property-Based Marriage System.

Many argue that adultery laws are an outdated legal concept, derived from a marriage system which regarded the women as the property of her husband, and thus regarded adultery as a violation of that property right.²⁷ According to the scholars, the continued existence of adultery laws represents the perpetuation of sexist notions of marriage.²⁸ These criticisms are valid, but only with respect to laws that discriminate on the basis of gender, such as the District of Columbia and Michigan statutes which provide that the unmarried male partner of a married female may be convicted of adultery (because this unmarried man has deprived the husband of his rights to his wife), while the unmarried female partner of a married man is not guilty of any offense.²⁹ Under these laws, patriarchal notions of marriage and the idea of the wife as the property of her husband are reinforced. This concern would also be valid if gender neutral laws were nonetheless enforced on a discriminatory basis.³⁰ The majority of the laws are gender neutral,³¹ however, and there does not seem to be any evidence that these laws are applied discriminatorily.³²

Even if a law's original justification may have been racist, sexist, or misguided, the same law may be justifiably enforced for other reasons. For example, rape laws have been justified on the grounds that they are necessary to the maintenance of the "marriage and sex 'market.'"³³ Many would find this characterization unwise.³⁴ Those who do not agree with this characterization may still justify the criminalization of rape for other reasons, such as the idea that rape is a violation of personal autonomy.³⁵ Likewise, the gender-based enforcement of adultery laws, based on the concept that a man has a property right to his wife's body may be an improper justification of adultery laws. Adultery laws may still be justified, however, on the grounds that, in certain situations, adultery accompanied by fraud or deception can cause specific harms within the family that are the appropriate target of criminal regulation.

The argument that adultery laws were created with improper motives does not mean that the laws cannot be justified on other grounds. A gender-neutral law that focused on fraudulent conduct accompanying adulterous acts, and not on the adulterous acts itself, would not implicate any of the concerns about notions of male property in female sexuality.

B. Adultery Laws are an Unconstitutional Regulation of Consensual Sexual Behavior.

For many years, scholars have argued that adultery laws, or any regulation on consensual adult sexual behavior, violates the Due Process Clause

of the Fourteenth Amendment.³⁶ This criticism has been applied to both state laws³⁷ and the United States military's adultery prohibitions.³⁸ These critics have made strong arguments that current adultery laws are an impermissible regulation of the right of privacy, especially after the recent Supreme Court decision in *Lawrence*.³⁹

Scholars have argued that adultery laws violate the right of privacy as established in *Griswold v. Connecticut*,⁴⁰ which held that prohibiting the sale of contraceptives to married persons violated the Due Process Clause. In *Eisenstadt v. Baird*,⁴¹ the Court held that the privacy rights established in *Griswold* applied to parties regardless of their marital status. This has led some scholars to conclude that *Griswold* and *Eisenstadt*, when read together, imply that adultery laws are an unconstitutional invasion of privacy. *Eisenstadt* and *Baird*, however, applied to the right to access contraception. The court held that "if the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion *into matters so fundamentally affecting a person* as the decision whether to bear or beget a child."⁴² Pre-*Lawrence*, it certainly was debatable whether the Court would ever hold that the decision to engage in extramarital sex is a matter "so fundamentally affecting a person" so as to prohibit governmental intrusion.

Following the Supreme Court's decision in *Lawrence*, which held that the regulation of consensual adult sodomy violated the Due Process Clause,⁴³ it seems that state bans on fornication and adultery, as they are currently constructed, may be declared unconstitutional. Fornication laws seem clearly impermissible as a regulation of consensual sexual behavior without any independent showing of harm.⁴⁴ Adultery laws, even as they are currently written, may survive constitutional scrutiny if a state could effectively argue that the protection of marriage and the prevention of emotional harm to spouses and children are important government interests, and that the criminalization of adultery may have some effect on these harms.⁴⁵ Adultery regulations could then pass constitutional muster as there would be a rational basis for the regulation.

Lawrence does, however, imply that many personal relationships which are based on sex may receive constitutional protection. Post-*Lawrence*, a court could find that adultery laws punish persons who are not monogamous and that the decision to not be monogamous is "a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals."⁴⁶ It also is possible that a court could conclude that non-monogamy is a "sexuality [which] finds overt expression in intimate conduct with another person...[and that] [t]he liberty protected by the Constitution

allows...[non-monogamous] persons the right to make this choice.”⁴⁷ Thus, as court could hold that the regulation of adultery criminalizes “non-monogamy” and is an unconstitutional intrusion into protected personal relationships.

Adultery laws, however, do not punish non-monogamy, but non-monogamy that occurs when one party is married. Unlike Texas’ sodomy law which “brands all homosexuals as criminals,”⁴⁸ adultery laws only punish sex that occurs outside of marriage after that party has made a voluntary decision to be married. Of course, it is also possible to argue that because there is a fundamental right to marry,⁴⁹ and, as discussed above, a court could determine that there is a fundamental right to have multiple sexual partners, then the regulation of adultery would prohibit access to the fundamental right of marriage for all non-monogamous persons. Adultery that does not occur with the knowledge or consent of the other spouse, however, represents a threat to the fundamental interests of marriage, not something which could be seen as in furtherance of it.

One commentator has even argued that the regulation of adultery would violate the Eighth Amendment.⁵⁰ In concurrence in *Bowers v. Hardwick*,⁵¹ Justice Powell argued that the Eighth Amendment might bar punishment in the particular case, where Bowers could have been imprisoned for twenty years.⁵² Most states, however, do not provide for prison sentences for adultery.⁵³ While this argument may be persuasive in states where prison time is a possible sentence, Eighth Amendment protection would likely only prohibit against grossly disproportionate prison sentences, and would not protect against minor fines accompanying misdemeanor convictions.

The constitutional arguments against the continued regulation of adultery are not without merit. These arguments, however, do not apply to the regulation of the fraud which often accompanies adultery. It certainly is possible to argue that there is a fundamental right to marry, and a privacy right to engage in sexual conduct with multiple partners (if this is determined to be a “sexuality [which] finds overt expression in intimate conduct with another person”⁵⁴). It is entirely implausible, however, to argue that there is a fundamental right to deceive or defraud.

C. Adultery Laws will be Abused, and will Result in Blackmail and Extortion.

Many have argued that the criminal regulation of adultery is unwise because it provides a great opportunity for blackmail and extortion.⁵⁵ While there does seem to be some truth to this claim,⁵⁶ there is a great danger of adultery blackmail regardless of whether or not adultery is illegal. If an

individual wishes to keep something secret, they may be willing to pay someone to do so, even if no criminal liability attaches. Furthermore, the fact that criminal adultery laws are so rarely enforced makes it even less likely that a threat to disclose the information would carry much more weight in a jurisdiction that did criminalize adultery than in one that didn't. The crime of adulterous fraud might alleviate the problem of blackmail because the law itself would provide an incentive for the spouse involved in extramarital sex to disclose her behavior to her spouse as doing so would eliminate the threat of criminal prosecution.

D. Adultery Laws do not Prevent Adultery.

One scholar has argued that prohibitions on adultery do not adequately address any of the specific harms they are designed to prevent.⁵⁷ Martin J. Siegel argues that states prevent adultery for one of two reasons: (1) preventing the spread of sexually transmitted diseases and the birth of illegitimate children and (2) preserving marriages and families.⁵⁸ According to Siegel, the criminalization of adultery is not an effective tool for preventing any of these harms.

1. *Adultery Laws do not Prevent the Spread of Sexually Transmitted Diseases and the Birth of Illegitimate Children.*

Siegel correctly concludes that adultery laws are over-inclusive if their purpose is to prevent the spread of disease or the birth of illegitimate children. Adultery laws fail to address the spread of disease because these laws do not discriminate between parties involved in long term relationships outside of marriage, and those who have many sexual partners, or between those who use protection against the spread of disease, and those who do not.⁵⁹ Adultery laws do not discriminate between those extramarital sexual experiences which are likely to lead to the transmission of disease and those which are highly unlikely to do so, and thus the criminal regulation of adultery seems a poor tool for preventing the spread of sexually transmitted diseases. Adultery laws also fail to address the problem of illegitimate children as the laws do not differentiate between the fertile and the infertile.

2. *The Criminal Regulation of Adultery Does Not Preserve Marital Relations or Prevent Betrayal*

Siegel then argues that if the goal of adultery laws is to preserve marital relations and prevent the betrayal of one spouse by another, then the laws are at once misguided, over-inclusive, and under-inclusive. According to Siegel, adultery laws are misguided if their goal is to preserve families, because, “it is impossible to believe that a criminal penalty imposed on one of the spouses would somehow benefit a marriage instead of representing the final nail in its coffin.”⁶⁰ Siegel then argues that adultery laws are over-inclusive because they assume that all spouses are harmed by the adulterous behavior of their spouse.⁶¹ Finally, Siegel argues that adultery laws are under-inclusive because they only are directed at a certain type of deceit or betrayal within marriage — sexual betrayal.⁶²

Siegel is correct that if a criminal penalty is in fact enforced, then it is more likely to harm the marriage relation than to help it. If the goal, however, is deterrence, then the existence of a criminal law which seeks to deter lying about adultery or otherwise defrauding the other spouse about extramarital sexual behavior could help to decrease the occurrence of deceitful adultery without putting further strain on the marriage relation. Siegel is also right to point out that adultery laws are over-inclusive. A crime of adulterous fraud, however, would overcome this problem because it would not allow the intrusion of the criminal law where one spouse was not harmed by the adulterous behavior of the other spouse.

Siegel is also correct that adultery laws do not include all types of spousal betrayal or deceit. It is possible, however, to justify the criminalization of fraud and deception which accompanies adultery without criminalizing other sorts of deceptive behavior in marriage. In explaining why blackmail is criminalized, Mitchell Berman argued for an evidentiary theory of blackmail. Berman argues that evidence that someone offered to receive payment in exchange for their promise to not disclose information which they could legally disclose is evidence of the morally blameworthy character of the actor.⁶³ According to Berman, conduct may be properly criminalized when (1) the conduct is likely to cause harm; and (2) the conduct is likely to be undertaken by a morally blameworthy actor.⁶⁴ Under this theory, the lies or deception which accompany adultery may be crimi-

nalized if we believe that such lies are likely to cause harm (they are); and that a person who tells such lies in accompaniment with adulterous behavior is likely acting with bad motives (they also are).

In the case of blackmail, a person disclosing illicit information to a third party may be acting with good or bad motives, such as wanting revenge (bad) or wishing to prevent or alleviate harm to a third party (good). In the same way a spouse who lies to their spouse about certain things, such as the amount of money in the bank, may be acting with bad motives (saving money so that they may leave their family) or good motives (wanting to surprise their family with a gift or attempting to protect funds for their children). With regards to blackmail, most believe that the disclosure of information accompanied by a promise not to disclose in exchange for payment offers substantial evidence to justify criminal punishment. Most also believe that evidence that someone has disclosed information that may have been damaging to another does not deserve criminal punishment (although that actor *might* also cause harm and *might* also be blameworthy). With adultery, evidence of financial deception or other lies or misrepresentations when accompanied by an extramarital sexual affair provide evidence that (1) the conduct is likely to cause harm; and (2) the actor is likely to be morally blameworthy. This can justify criminal punishment of adulterous fraud in a way that we might not be comfortable criminalizing other lies in the marital relationship.

III. CRIMES BASED ON DECEPTION AND MISREPRESENTATION

Once a fiduciary relationship exists between two parties, the criminal law may require disclosure and honesty between those parties regarding certain issues central to the fiduciary relationship. The federal mail fraud statute allows for the conviction of public or private officials who fail to provide their fiduciaries with their “honest services,” such as by failing to disclose the receipt of funds. Federal securities laws require that public companies disclose and certify certain business records. These laws require that once two or more parties have entered into a voluntary relationship, parties must disclose any information that could be a failure of the duties or responsibilities of that relationship.

A. “Honest Services” Mail Fraud

Section 1346 of the federal mail fraud statute provides that mail fraud may be accomplished by “a scheme or artifice to deprive another of the intangible right of honest services.”⁶⁵ Deprivation of “honest services” is usually demonstrated by evidence that the defendant breach a fiduciary

relationship with third party.⁶⁶ In the public sector, honest services mail fraud usually involves the bribery of a political official or the failure of a public official to disclose conflicts of interest.⁶⁷ A political party chairman may be convicted under Section 1346 for the failure to disclose the receipt of certain commissions from business persons.⁶⁸ The “dishonest” conduct need not be part of the public official’s regular duties in order to represent a deprivation of honest services.⁶⁹ There is no need to show intent to harm, only that the official acted in his own best interests, rather than only the best interests of those to whom he owes a fiduciary duty.⁷⁰ In order for a private party, such as a doctor, to be convicted under Section 1346, it must be shown that some actual injury or harm was contemplated by the schemer.⁷¹ For instance, the 8th Circuit overturned a doctor’s conviction for Section 1346 mail fraud where he received financial kickbacks from referring his patients to a single are hospital for surgery, etc., but where there was no evidence that he intended to, or did, deprive his patients of the best care.⁷² The law of honest services mail fraud seems to be directed at regulating those situations in which the actor owing the fiduciary duty to another has a criminally culpable mental state of either (1) intending to gain personal benefit (where there is a duty to act only in the best interests of your constituents/beneficiaries); or (2) intending harm.

B. Securities Fraud

Securities fraud laws attempt to protect investors in public companies by criminalizing certain misrepresentations or non-disclosures. Recently, the Sarbanes-Oxley Act⁷³ expanded the conduct for which a corporation or corporate officer may be held criminally liable. Rule 10b-5 of the Securities Exchange Act of 1934 makes it illegal to “(1) employ any device, scheme, or artifice to defraud, (2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made...not misleading, or (3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.”⁷⁴ Among the provisions added by the Sarbanes-Oxley Act is a requirement that all Chief Executive Officers and Chief Financial Officers certify the periodic financial reports of their companies.⁷⁵ Certifying a document which contains false information or omits information which must be included pursuant to the Securities Exchange Act of 1934, Section 13(a),⁷⁶ may result in a fine up to \$5,000,000 and a prison sentence up to 20 years.⁷⁷

C. Justification of the Regulation of Fraud-Based Crimes

Under Section 1346, individuals who owe a fiduciary duty to others may be prosecuted for violations of that duty. Under the Securities Acts, a corporation or corporate officer can be held criminally liable for a failure to disclose, or a misrepresentation of, certain information to shareholders or potential shareholders. Such behavior should be regulated by the criminal law because the parties have voluntarily entered into a relationship where it is clear that they owe a certain duty of care to another person. When an individual violates a duty with the purpose of either (1) gaining personal benefit; or (2) causing a loss to the other party, the harm to the fiduciary relationship, coupled with a culpable mental state, makes such behavior an appropriate target for criminal regulation.⁷⁸

IV. A PROPOSAL: THE CRIME OF ADULTEROUS FRAUD

Like stockholders and corporations, doctors and patients, and politicians and constituents, husbands and wives may owe certain duties to one another. In fact, certain states explicitly identify a duty for married persons to refrain from adultery.⁷⁹ The breach of a duty, when coupled by a culpable mental state (intent to defraud or deceive), is justifiably regulated by the criminal law.⁸⁰ Thus, this essay proposes the following adulterous fraud statute:

1. It shall be unlawful for any married individual:

- a) to intentionally make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made not misleading;
- b) when such statement is related to the concealment or misrepresentation of that individual's sexual activity outside of marriage; and
- c) where the spouses have not (i) previously consented to such behavior; or (ii) agreed that such behavior should not be disclosed.

2. It should be an affirmative defense that the spouse disclosed such behavior shortly after making a statement in violation of subsection (1).

Under this proposed statute, the harmful deception which often accompanies adultery could be punished, while all of the concerns posed by those who oppose the criminal regulation of adultery could be avoided.

A. Adulterous Fraud Does Not Criminalize Consensual Sexual Behavior.

Adulterous fraud would regulate deceptive behavior when it is accompanied by sex outside of marriage, not the sexual behavior that occurs outside of marriage itself. Thus, the concerns that, after *Lawrence*, the regulation of adultery would violate the Due Process Clause would not apply to the regulation of adulterous fraud. It may be true that non-monogamy is “a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminal.”⁸¹ It may also be true that there is a fundamental right to have multiple sexual partners, and that the regulation of adultery would prohibit access to the fundamental right of marriage for all non-monogamous persons. If these things were true, however, it would only present an argument for the extension of marriage to groups of persons rather than just heterosexual couples, not an argument against criminalizing fraud that accompanies sex outside of marriage. Though it is possible to argue that someone should be allowed to have multiple sexual partners and to marry them, there is no constitutional right to deceive your spouse into believing that he or she is in a monogamous relationship.

B. Adulterous Fraud would not Regulate Relationships which Occurred with the Knowledge or Consent of the Other Spouse.

There are marriages in America where extramarital sex is either permitted or encouraged for one or both spouses.⁸² “Open marriages” do not experience the same problems as other marriages, such as feelings of betrayal or ultimate divorce.⁸³ Those involved in polyamorous relationships do not seem to possess the jealousy about extrareationship affairs that most involved in monogamous relationships do possess.⁸⁴ Nonetheless, those involved in polyamorous relationships do not approve of relationships that take place outside of the polyamorous relationship without the knowledge and consent of the other parties to the relationship.⁸⁵ Thus, if group marriages were allowed, fraud which accompanies sex which occurred outside of that marriage without the knowledge and consent of the other parties should be punished on the same basis as the punishment of adulterous fraud within heterosexual marriages. While many may find open marriages distasteful or immoral, the harms that are present in a fraudulent and deceptive affair are not present in an open marriage.

C. The Creation of the Crime of Adulterous Fraud Would Promote Honesty in Marital Relationships.

If a spouse has a sexual partner outside of marriage and knows that revealing this conduct to their spouse could open them up to criminal liability, or at least to a less favorable outcome in the event of a divorce, then that spouse has a greater incentive to cover up the extramarital sexual relationship. If, on the other hand, the spouse is aware that by revealing their conduct they will no longer be subject to criminal liability, this will create an incentive to disclose the extramarital sexual conduct. This incentive to reveal will of course be balanced by counter incentive to keep the relationship secret, such as a desire to maintain the extramarital relationship or fear of the other spouse's reaction to the disclosure. Nonetheless, it seems that, at least in some circumstances, spouses will be honest about conduct that they might have otherwise kept secret.

It is generally assumed that honesty within a marriage is a desirable quality, and there are many laws that are structured so as to promote marital honesty. For example, under the laws of evidence in almost all jurisdictions, a spouse may prevent their spouse from testifying about confidential communications that occurred during marriage.⁸⁶ Some states have attempted to structure their property laws so as to promote honesty among spouses with respect to financial dealings.⁸⁷ Honesty is a valuable quality in all relationships because it allows parties to make decisions with full information, thus maximizing welfare.⁸⁸ A spouse who is aware of the deceitful conduct of his wife may make educated decision about the relationship and such knowledge may promote discussion of other problems in the relationship, perhaps improving the relationship in the long-term. This is not to argue that the disclosure of extramarital sex might not cause some couples unnecessary harm.⁸⁹ The proposed statute accounts, however, for couples who have mutually agreed that they would rather not know about their spouse's extramarital sexual behavior.⁹⁰

Punishing adulterous fraud, rather than just extramarital sex would eliminate the constitutional concerns presented by traditional adultery laws and would promote honesty between spouses. Adulterous fraud would punish the deception that often accompanies adultery without punishing extramarital sexual conduct that does not actually harm the marital relationship.

CONCLUSION

Existing critical theories identify severe flaws of current adultery laws. Among these flaws are the questionable criminalization of consensual adult sex without any further showing of harm and sometimes inappropriate distinctions based on the gender of the offenders. These critics, however, have all failed to consider whether and in what ways adultery laws could be improved. This essay has argued that the law should address the deception that usually accompanies adultery, not the sexual activity itself. This position is consistent with the punishment of fraud and corruption through crimes such as honest services mail fraud and securities fraud. Furthermore, punishing only adulterous fraud allows for couples to customize their own marriages and prohibits the intrusion of the criminal law, when both spouses are aware of the extramarital sex of one of the spouses and condone or even encourage that behavior.

The criminalization of the fraud that often accompanies adultery might lead to increased disclosure of extramarital sexual relationships, and thus could improve the marital relationship if it is still salvageable or allow parties to make an educated decision to end the marriage if the relationship is not able to be repaired. Adultery does create identifiable harms that are the appropriate target of regulation by the criminal law. Criminalizing adulterous fraud would help to prevent some of these harms while at the same time eliminating the concerns presented by traditional adultery laws.

NOTES

- 1 See, MARTIN J. SIEGEL, *For Better or Worse: Adultery, Crime & the Constitution*; 30 J. Fam. L. 45, n. and accompanying text (1991/1992) (page references not available online for this document) (noting that some studies have revealed that fifty percent of American husbands, and 30 to 40 percent of wives, have admitted to adultery).
- 2 See, F. PITTMAN, *Private Lies: Infidelity and the Betrayal of Intimacy* 37 (1989) (noting that the majority of the couples affect by adultery do divorce). See, also Nehal A. Patel, Note, The State's Perpetual Protection of Adultery: Examining Koestler v. Pollard and Wisconsin's Faded Adultery Torts, 2003 Wis. L. Rev. 1013, 1013 (noting that adultery often results in "tremendous emotional damage, loss of trust, troubling mental insecurities, decreased job performance, and financial insecurity (especially when adultery leads to divorces involving children)").
- 3 See, *e.g.*, Model Penal Code, § 213.6, at 435–37 (Official Draft and Revised Comments 1980) (removing the crime of adultery from the Model Penal Code and describing adultery laws as "dead-letter statutes" that necessarily cause an "invasion of privacy"); Siegel, *For Better or Worse*, 30 J. Fam. L. at 45 (cited in note 1) (arguing that adultery prohibitions are an unconstitutional violation of married individuals right of privacy).
- 4 See, *Cal. Penal Code* §§ 269a-269b (West 1955), repealed by 1975 Cal. Stat. ch. 71, §§ 5-6, 131, 133; Gen. Stat. Ann. §53a-81, repealed by 1991 P.A. 91-19, § 2; Iowa Code Ann. §702.1 (West 1950), repealed by 1976 Iowa Acts (66 G.A.) ch. 1245, ch. 4, § 526 (effective Jan. 1, 1978); Kan. Stat. Ann. § 21-908 (1964), repealed by 1969 Kan. Sess. Laws ch. 180, § 21-4701 (effective July 1, 1970); Ky. Erv. Stat. Ann. § 436.070 (Michie 1970), repealed by 1974 Ky. Acts ch. 406, § 336 (effective Jan. 1, 1975); Me. Rev. Stat. Ann. tit.17, § 101 (1964), repealed by 1975 Me. Laws ch. 499, § 5 (effective May 1, 1976); N.J. Stat. Ann. § 2A:88-1 (West 1969), repealed by 1978 N.J. Laws ch. 95, § 2C:98-2 (effective Sept. 1, 1979); Neb. Stat. Ann. §28-704, repealed by Laws 1995, LB 22, § 1; *N.D. Cent. Code* § 12-22-09 (1960), repealed by 1973 N.D. Laws ch. 117, § 4; Or. Rev. Stat. Ann. § 167.005 (1965), repealed by 1971 Or. Laws ch. 743, § 432; Pa. Stat. Ann. Tit., § 4505 (Purdon 1963), repealed by 1972 Pa. Laws No. 335 § 5; S.D. COMP. LAWS §§ 22-22-17, -18 (1967), repealed by 1976 S.D. Laws ch. 158, § 22-8; Vt. Stat. Ann. Tit. 13, §§201-202 (1979), repealed by 1981 Vt. Laws No. 223 (Adj. Sess.) § 24; Wash. Rev. Code Ann § 9.79.110 (1961), repealed by 1975 Wash. Laws 1st ex.s. ch. 260, § 9A.92.010 (effective July 1, 1976).
- 5 Twenty-four states and the District of Columbia criminalize adultery. See, Ala. Code 13A-13-2 (2004); Ariz. Rev. Stat. Ann. 13-1408 (2004); Colo. Rev. Stat. Ann. 18-6-501 (West 2003); D.C. Code Ann. 22-201 (2004); Fla. Stat. Ann. 798.01 (2004); Ga. Code Ann. 16-6-19 (2002); Idaho Code 18-6601 (2004); 720 Ill. Comp. Stat. Ann. 5/11-7 (2004); Kan. Stat. Ann. 21-3507 (2003); Md. Ann. Code, art. 27, § 3 (2003); Mass. Gen. Laws Ann. ch. 272, 14 (2004); Mich. Comp. Laws Ann. 750.29, 750.30 (2004); Minn. Stat. Ann. 609.36 (2003); Miss. Code Ann. 97-29-1 (2004); N.H. Rev. Stat. Ann. 645:3 (2003); N.Y. Penal Law 255.17 (McKinney 2004); N.C. Gen. Stat. 14-184 (2004); N.D. Cent. Code 12.1-20-09 (Supp. 2003); Okla. Stat. Ann. tit. 21, 871, 872 (2004); R.I. Gen. Laws. 11-6-2 (2004); S.C. Code Ann. 16-15-60, 16-15-70 (2003); Utah Code Ann. 76-7-103 (2004); Va. Code Ann. 18.2-365 (2004); W. Va. Code 61-8-3 (2003); Wis. Stat. Ann. 944.16 (West 2003).
- 6 Some jurisdictions do, however, require that a prosecution only occur at the initiation of the other spouse. See, *e.g.*, Ariz. Rev. Stat. Ann. 13-1408(B) (providing that "No prosecution for adultery shall be commenced except upon complaint of the

- husband or wife”); Minn. Stat. Ann. 609.36, subd. 2 (requiring that, “No prosecution shall be commenced under this section except on complaint of the husband or the wife, except when such husband or wife is insane, nor after one year from the commission of the offense”).
- 7 See, JOHN D’EMILIO & ESTELLE B. FREEDMAN, *Intimate Matters: A History of Sexuality in America* 27-38 (1989) (noting the stringent enforcement of laws prohibiting all extramarital sex in the American colonies).
 - 8 See, ANNE M. COUGHLIN, *Sex and Guilt*, 84 Va L. Rev. 1 (1998) (arguing that, in order to understand current rape doctrine, it is necessary to understand the traditional prohibitions of all extramarital sex).
 - 9 JEREMY D. WEINSTEIN, Note, *Adultery, Law and the State: A History*, 38 Hastings L. J. 195, 225 (1986).
 - 10 *Id.* In many areas, women and men who violated adultery laws were prosecuted with equal vigor, which cuts against the idea that adultery laws were just about male property rights in their wives. See, COUGHLIN, *Sex and Guilt*, 84 Va L. Rev. at 26-27 (cited in note 8).
 - 11 See, WEINSTEIN, Note, *Sex and Guilt*, 38 Hastings L. J. at 226 (cited in note 9).
 - 12 See, note 3.
 - 13 See, note 4 (listing the states that have repealed their adultery laws). See, also, WEINSTEIN, Note, *Adultery, Law and the State*, 38 Hastings L. J. at 226 (cited in note 9) (noting that the repeal of state adultery laws followed the American Law Institute’s recommendations).
 - 14 See, MELISSA ASH HAGGARD, Note, *Adultery: A Comparison of Military Law and State Law and the Controversy this Causes Under Our Constitution and Criminal Justice System*, 37 Brandeis L.J. 469, 469-70, 481 (1998-99) (noting that despite the fact that adultery is a crime in twenty-four states laws prohibiting adultery are rarely enforced); Siegel, For Better or Worse, 30 J. Fam L. at text accompanying notes 54 – 59 (page references not available online) (cited in note 1).
 - 15 See, Ariz. Rev. Stat. Ann. 13-1408; Colo. Rev. Stat. Ann. 18-6-501; D.C. Code Ann. 22-201; Ga. Code Ann. 16-6-19; Idaho Code 18-6601; Kan. Stat. Ann. 21-3507; Md. Ann. Code, art. 27, 3; Mass. Gen. Laws Ann. ch. 272, 14; Mich. Comp. Laws Ann. 750.29, 750.30; Minn. Stat. Ann. 609.36; N.H. Rev. Stat. Ann. 645:3; N.Y. Penal Law 255.17; N.D. Cent. Code 12.1-20-09; Okla. Stat. Ann. tit. 21, 871, 872; R.I. Gen. Laws. 11-6-2; Utah Code Ann. 76-7-103; Va. Code Ann. 18.2-365; W. Va. Code 61-8-3; Wis. Stat. Ann. 944.16.
 - 16 See, Miss. Code Ann. 97-29-1; N.C. Gen. Stat. 14-184; S.C. Code Ann. 16-15-60, 16-15-70.
 - 17 See, Fla. Stat. Ann. 798.01; 720 Ill. Comp. Stat. Ann. 5/11-7; Okla. Stat. Ann. tit. 21, 871.
 - 18 See, Ariz. Rev. Stat. Ann. 13-1408; Minn. Stat. Ann. 609.36; N.D. Cent. Code 12.1-20-09.
 - 19 See, WEINSTEIN, Note, *Adultery, Law and the State*, 38 Hastings L. J. at 226 (cited in note 9).
 - 20 See, Mass. Gen. Laws Ann ch 272 § 14 (providing for up to three years imprisonment for an adultery conviction); Mich. Comp. Laws Ann. §§ 750.29-750.30 (defining adultery as a felony).
 - 21 See, Uniform Code of Military Justice (“UCMJ”) art 4, 10 USC § 934 (2004). Article 134 provides that “Though not specifically mentioned in this chapter, all dis-

orders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces . . . shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.”

Though the UCMJ does not explicitly define adultery as a violation of the statute, the Manual for Courts-Martial, Ch VI ac 61 declares that adultery is a violation of §134, and that the elements of the offense are:

- 1) That the accused wrongfully had sexual intercourse with a certain person;
 - 2) That, at the time, the accused or the other person was married to someone else; and
 - 3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.
- (c) Maximum punishment. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year.

Id.

- 22 See, JAMES M. WINNER, Comment, *Beds with Sheets but no Covers: The Right to Privacy and the Military's Regulation of Adultery*, 31 Loy. L.A. L. Rev. 1073 (1998) (noting the continuing importance and prevalence of the punishment of adultery in the armed forces). This statute has been used to punish adultery on numerous occasions. For examples of adultery prosecutions, see *United States v. Green*, 39 M.J. 606 (A.C.M.R. 1994); *United States v. Perez*, 33 MJ 1050 (A.C.M.R. 1991) (noting that “adultery is a military criminal offense under Article 134, UCMJ”). Recently, at least one of the accused soldiers in the prisoner abuse scandals in Iraq was charged with adultery. See, Robert S. Greenberger and Neil King Jr., *Soldiers and Military Justice Will Be on Trial in Baghdad*, Wall St. J. B1 (May 19, 2004) (noting that Spc. Charles Graner Jr., was “charged with adultery, dereliction of duty, mistreatment of detainees, cruelty, assault, indecent acts and obstruction of justice. (emphasis added)”).
- 23 Only four states that prosecute adultery restrict the prosecution to the married partner. See, Colo Rev. Stat. Ann. 18-6-501; Ga. Code Ann. 16-6-19; D. Cent. Code 12.1-20-09; Va. Code Ann. 18.2-365.
- 24 D.C. Code Ann. 22-201; Mich. Comp. Laws Ann. §§ 750.29, 750.30.
- 25 Minn. Stat. § 609.36.
- 26 Minn. Stat. § 609.34.
- 27 See, EMILY L. MILLER, (Wo) *Manslaughter: Voluntary Manslaughter, Gender, and the Model Penal Code*, 50 Emory L. J. 665, 672 (2001) (discussing the traditional conception of
- 28 See, W. PAGE KEETON, *et. al.*, eds, *Prosser and Keeton on the Law of Torts* at 917 (5th ed. 1984) (arguing that “the idea that one spouse can recover for an act the other spouse has willingly consented to is perhaps better suited for an era that regarded one spouse as the property of another.” Though this comment refers to the enforcement of adultery through tort law, and not the criminal law, it is nonetheless representative of criticisms directed at the existence of adultery laws generally).
- 29 See, D.C. Code Ann. 22-201; Mich. Comp. Laws Ann. §§ 750.29-750.30.
- 30 I could not locate any evidence that adultery laws are applied discriminatorily. This is perhaps so because adultery laws are so rarely enforced.

- 31 See, notes 24–26 and accompanying text.
- 32 See, note 30.
- 33 See, RICHARD POSNER, *An Economic Theory of the Criminal Law*, 85 Colum. L. Rev. 1193, 1199 (1985).
- 34 See, e.g., MARGARET JANE RADIN, *Market–Inalienability*, 100 Harv. L. Rev. 1849, 1862–63 (1987) (criticizing Posner’s conception as unwise “universal commodification”).
- 35 See, EMILY C. SHANAHAN, *Stranger and Non-Stranger Rape: One Crime, One Penalty*, 36 Am. Crim. L. Rev. 1371, 1381, 1385 (1999) (citing the loss of sexual autonomy as one of the greatest harms of rape)
- 36 See, e.g., SIEGEL, *For Better or Worse*, 30 J. Fam. L. at 45 (cited in note 1); Note, Constitutional Barriers to Civil and Criminal Restrictions on Pre- and Extramarital Sex, 104 Harv. L. Rev. 1660, 1673–79 (1991) (arguing that criminal and civil regulation of adultery laws violate the Due Process Right to Privacy).
- 37 See, e.g., SIEGEL, *For Better or Worse*, 30 J. Fam. L. at 45 (cited in note 1).
- 38 See, e.g., KATHRYN R. BURKE, *The Privacy Penumbra and Adultery: Does Military Necessity Justify an Adultery Regulation and What Will it Take for the Court to Declare it Unconstitutional?*, 19 Hamline J. Pub. L. & Policy 301 (1997) (arguing that the regulation of adultery within the armed forces is unconstitutional). But see, Raul Esquivel, III, Implications of the Military’s Proscription of Adultery upon Individual Privacy, 47 Loy. L. Rev. 835 (2001) (arguing that the limitation of the regulation of adultery within the military to situations in which the behavior “prejudice[s] of good order and discipline in the armed forces or . . . discredit[s] upon the armed forces” provides for an important government interest, and thus does not violate the Due Process Clause).
- 39 Despite the validity of these arguments, it is important to note that it is unlikely that most adultery laws will ever be challenged in court, as they are rarely, if ever, enforced. See, RICHARD GREEN, *Griswold’s Legacy: Fornication and Adultery as Crimes*, 16 Ohio N. U. L. Rev. 545, 548 (noting the lack of prosecutions for adultery).
- 40 381 U.S. 479 (1965).
- 41 405 U.S. 438 (1972).
- 42 *Id.* at 453 (emphasis added).
- 43 123 S. Ct. 2472 (2003).
- 44 See, NAN D. HUNTER, *Living with Lawrence*, 88 Minn. L. Rev. 1103, 1112 (2004) (arguing that, after *Lawrence*, “fornication laws are now clearly impermissible”).
- 45 See, *Id.* (arguing that adultery laws may still be justified on the grounds of protection of marriage and prevention of emotional harm).
- 46 *Lawrence*, 123 S. Ct. at 2478. This essay does not argue that non-monogamy is a “a personal relationship that . . . is within the liberty of persons to choose without being punished as criminals.” *Id.* This essay only argues that a court could conclude that this is the case.
- 47 *Id.*
- 48 *Id.* at 2486.
- 49 See, *Loving v. Virginia*, 388 U.S. 1 (1967); *Zablocki v. Redhail*, 434 U.S. 374 (1978).
- 50 See, MELANIE C. FALCO, *The Road not Taken: Using the Eighth Amendment to Strike*

Down Criminal Punishment for Engaging in Consensual Sexual Acts, 82 N Car L. Rev. 723 (2004).

- 51 478 U.S. 186 (1986).
- 52 *Id.* at 197 (Powell concurring).
- 53 See, note 18.
- 54 LAWRENCE, 123 S. Ct. at 2478.
- 55 See, WEINSTEIN, Note, 38 HASTINGS L. J. at 226 (cited in note 9) (noting the opportunity for blackmail that results from the simultaneous criminalization of and lack of enforcement of adultery laws). The argument that the regulation of adultery begets blackmail is also offered in opposition to the reintroduction of the torts of alienation of affections and criminal conversation. See, *e.g.*, NEHAL A. PATEL, Note, 2003 Wis. L. Rev. at 1032-34 (cited in note 2) (noting the argument and then rejecting it); William R. Corbett, A Somewhat Modest Proposal to Prevent Adultery and Save Families: Two Old Torts Looking for a New Career, 33 Ariz. L. J. 985, 1012-13 (2001) (same).
- 56 JILL JONES, *Comment, Fanning an Old Flame: Alienation of Affections and Criminal Conversation Revisited*, 26 Pepp. L. Rev. 61, 74 (1998) (noting that many rely on the high incidence of settlement in civil adultery cases as evidence of the likelihood of extortion and blackmail).
- 57 See, SIEGEL, *For Better or Worse*, 30 J. Fam L. at text accompanying notes 232-273 (specific page references not available online for the document) (cited in note 1).
- 58 *Id.* at text accompanying note 232 (page references not available online). Siegel also argues that adultery laws are often justified on the grounds that they protect community morals. In this section, however, Siegel does not argue that adultery laws might not promote, or at least represent, community morality. Instead Siegel argues that the preservation of community morality is not a legitimate justification for the criminalization of behavior. Thus Siegel's argument about community morals falls outside the scope of this section. *Id.* at text accompanying notes 258-273 (page references not available online for this document).
- 59 *Id.* at text accompanying notes 234 –38 (page references not available online for this document).
- 60 *Id.* at note 247–48 (page references not available online for this document).
- 61 SIEGEL, *For Better or Worse*, 30 J. Fam. L. at text accompanying note 250.
- 62 *Id.* at text accompanying note 249 (cited in note 1) (noting that it is legal to “cheat” a spouse financial or emotionally in ways that have nothing to do with sex)
- 63 See, MITCHELL N. BERMAN, *The Evidentiary Theory of Blackmail: Taking Motives Seriously*, 65 U. Chi. L. Rev. 795, 877 (1998).
- 64 *Id.*
- 65 18 U.S.C. § 1346 (2004). Section 1346 was passed into law following a Supreme Court decision which held that the language of the mail fraud statute “clearly protects property rights, but does not refer to the intangible right of the citizenry to good government.” *United States v. McNally*, 483 US 350, 356 (1987).
- 66 NIRAV SHAH, *Mail and Wire Fraud*, 40 Am. Crim. L. Rev. 825, 834 (2003).
- 67 *Id.* at 835.
- 68 *United States v. Margiotta*, 688 F 2d 108 (2d Cir.1982) (holding that the Republican Committee chairman of Nassau county was guilty of Section 1346 for

- receiving undisclosed commissions from insurance companies in exchange for contracts with the state).
- 69 See, *United States v. Lopez-Lukis*, 102 F.3d 1164 (11th Cir. 1997) (holding that a scheme by an elected official to influence the election of another official violated Section 1346).
- 70 *Id.* at 1169 (providing that “the crux of the theory [of honest services] is that when a political official uses his office for personal gain, he deprives his constituents of their right to have him perform his official duties in their best interest.”)
- 71 See, *e.g.*, *United States v. Pennington*, 168 F.3d 1060, 1065 (8th Cir. 1999) (holding that there must be some showing of intended or actual harm which “in most business contexts,...means financial or economic harm”).
- 72 *United States v. Jain*, 93 F.3d 436, 441 (8th Cir. 1996). In *Jain*, there was evidence that the hospital to which Dr. Jain referred his patients was the best in the area, and thus his patients suffered no harm, and there was no evidence that he intended any. *Id.* at 439.
- 73 Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified at 15 U.S.C. § 7201).
- 74 17 C.F.R. § 240.10b-5 (2002).
- 75 18 U.S.C. § 1350 (2004).
- 76 15 U.S.C. § 78m (2004).
- 77 15 U.S.C. § 1350.
- 78 See, BERMAN, *The Evidentiary Theory of Blackmail*, 65 U. Chi. L. Rev. at 877 (cited in note 64) (arguing that “criminalization of conduct is *prima facie* justified when it is likely to cause harm and to be undertaken by a morally blameworthy actor”).
- 79 See, *e.g.*, La. Civ. Code Ann. art. 98 (West 2003) (“Married persons owe each other fidelity, support, and assistance.” The official comments provide that the term fidelity refers specifically to the “spouses’ duty to refrain from adultery.” *Id.* at cmt. b).
- 80 See, text accompanying notes 64 – 65.
- 81 LAWRENCE, 123 S. Ct. at 2478.
- 82 SIEGEL, *For Better or Worse*, 30 J. Fam. L. at text accompanying notes 79-87 (page references not available online for this document) (cited in note 1).
- 83 *Id.* at notes 84 – 85.
- 84 MAURA L. STRASSBERG, *The Challenge of Post-Modern Polygamy: Considering Polyamory*, 31 Cap. U. L. Rev. 439, 456-62 (2003) (noting that while there is some jealousy that exists in polyamorous relationships, especially when a new partner is brought into the relationship, this jealousy is often dealt with openly and does not have the same consequences as in monogamous relationships). See, *also*, ELIZABETH F. EMENS, *Monogamy’s Law: Compulsory Monogamy and Polyamorous Existence*, 29 NYU Rev. of L. & Soc. Change at *65-67, forthcoming 2004, working paper available online at <<http://www.law.uchicago.edu/academics/publiclaw/resources/58-monogamy.pdf>> (describing how those involved in polyamorous relationships try to embrace the emotion of “compersion,” “the empathetic pleasure in one’s partner’s sexual satisfaction”).
- 85 STRASSBERG, *The Challenge of Post-Modern Polygamy*, 31 Cap. U. L. Rev. at 540 (cited in note 85) (noting that the “polyfidelitous pledge to confine their love relationships to the members of the group exclusively...is a pledge that the individual will not act to enter into relationships with additional partners without the consent of the group”)

- 86 See, *e.g.*, CATHERINE B. SARSON, *The Child-Parent Testimonial Privilege*, 12 Georgetown J. Legal Ethics 861, 863 (1999) (noting that “few testimonial privileges are older and more widely accepted than the spousal privilege” and also noting that “Our common law has recognized this privilege since the very beginning of our legal system, based on the belief that we should provide for and encourage open and honest communication between husband and wife without imposing fear of compulsory disclosure of marital secrets”).
- 87 See, *e.g.*, C.A. Fam. App. § 5125 (West 2004) (providing that each spouse has the “obligation to make full disclosure to the other spouse of all material facts and information regarding the existence, characterization, and valuation of all assets in which the community has or may have an interest and debts for which the community is or may be liable, and to provide equal access to all information, records, and books that pertain to the value and character of those assets and debts, upon request”).
- 88 See, LYNN E. BLAIS, *Environmental Racism Reconsidered*, 75 N. Car. L. Rev. 75, 129 (1996) (noting that both neoclassical economic theory and civil republican theory rest on the assumption that increased information promotes positive outcomes).
- 89 See, BERMAN, *The Evidentiary Theory of Blackmail*, 65 U. Chi. L. Rev. at 821 (cited in note 64) (noting that some disclosures might “cause unnecessary misery” because “we may lack necessary information ‘about the prior distribution of moral rights and duties among the related parties’”).
- 90 See, proposed statute, § (2)(c)(ii), described on page 13.