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TED N. ECHOLS

Decriminalizing Adultery: An Unanticipated Step in Restoring the Value of Marriage

ABSTRACT

Cultures have long regarded marriage as an important element to society as it provides an environment for successful growth and development for the following generations. History demonstrates that governments have sought to protect and promote marriage. Protection comes in the form of prohibiting conduct that might fracture marriage relationships, and promotion occurs when governments exclusively provide benefits for married couples.

In the United States, most states have prohibited adultery—extramarital affairs typically done in secret. While most states originally outlawed adultery, the adultery jurisprudence landscape is changing. There is a growing trend among states to repeal their adultery laws. A leading reason is that most prosecutors are not prosecuting the crime, resulting in the community's failure to recognize adultery's criminality.

While lack of enforcement and ignorance of the law could justify a repeal, promoting marriage is a more compelling motivation for removing adultery from the criminal code. In addition, adultery as a criminalized act affects other bodies of law in a negative way that demonstrates a disregard for the value of marriage. Divorce law is the leading example.

Alimony is a form of support that a divorced spouse may receive from the other. In a state like Georgia, if one spouse cheats, alimony is no longer available to the cheating spouse. Yet the non-cheating spouse must prove that the other spouse cheated. How does one prove adultery? The answer arises in direct or indirect evidence.

The most common form of direct evidence is testimony. The prohibition against self-incrimination found in the Fifth Amendment to the United States Constitution serves as a barrier to obtaining testimony to prove an

affair. One testifying that he or she participated in the extramarital affair can bring the secret to light. However, the attorney of the non-cheating spouse cannot compel the participants to testify, because if the participants did testify, they are admitting to a crime. As a result, direct evidence may be hard to obtain.

Indirect evidence is difficult to use to prove a secret affair occurred. Caselaw reveals that circumstantial evidence is often of little value when trying to demonstrate events occurring behind closed doors. Because of the difficulty in obtaining direct and indirect evidence to prove adultery, the cheating spouse likely obtains alimony, and the non-cheating spouse is stuck with injustice.

Without criminalization, two outcomes occur—ease in proving adultery and financial and emotional relief for the non-cheating spouse, as the alimony framework no longer punishes him or her. Attorneys may utilize litigation tools to compel testimony when the Fifth Amendment no longer serves as a barrier. An attorney can easily expose the affair, and the purposes of other bodies of law are not frustrated. To best preserve marriage, states should repeal laws criminalizing adultery. When adultery is properly punished—the prospect of admitting the affair in a court room and possible elimination of one’s entitlement to alimony—greater deterrence occurs.

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ARTICLE

DECRIMINALIZING ADULTERY: AN UNANTICIPATED STEP IN
RESTORING THE VALUE OF MARRIAGE*Ted N. Echols*[†]

I. INTRODUCTION

History highlights the value of marriage. Marriage is recognized as the first, and most important, relationship between a man and woman.¹ It is designed for companionship,² procreation,³ and family development.⁴ In addition to being a fulfilling and a deeply satisfying core relationship, the family unit is the most efficient and effective model to support the overall development of the next generation without the need for excessive governmental aid or involvement. As a result, civil authorities and societies have traditionally recognized the value of marriage and have sought to protect and promote it.

Marriage is more than a mere contract or a casual commitment. Rather, it is a valuable, lifelong union between two people. Marriage is the most powerful relationship between two people—it has tied nations together and resolved bitter rivalries.⁵

Matrimonial history also highlights a common legal thread from ancient to contemporary civilizations. That thread is the need to protect the sacred relationship of marriage. Important unions always have enemies. Since the Accadian civilization in ancient Babylonia civilizations have long protected

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¹ See *Matthew* 19:4–6.

² *Genesis* 2:18–24.

³ *Genesis* 1:27–28.

⁴ See *Proverbs* 6:20–22.

⁵ The Treaty of Tours, which attempted to end the 100 Years War in 1444, was a peace agreement to resolve the dispute over the throne of France. SUSAN WISE BAUER, *THE HISTORY OF THE RENAISSANCE WORLD: FROM THE REDISCOVERY OF ARISTOTLE TO THE CONQUEST OF CONSTANTINOPLE 667* (2013). The Treaty included a provision of marriage between the niece of Charles VII, the French King, King Henry VI of England. *Id.* at 670.

marriage by regulating the ability to terminate a marriage and by prohibiting extramarital affairs.⁶ From the ancient Accadian civilization to contemporary people-groups, societies have punished the act of adultery because people have long recognized its destructive effect on marriages and the family unit.⁷

Likewise, the United States has long valued marriage and punished adultery.⁸ Strong societies protect what is valuable. However, the percentage of states that continue to prohibit adultery is gradually decreasing, and over the last half-century, adultery laws have quietly disappeared from criminal codes.⁹ Where adultery laws still exist in the current legal landscape, prosecutors are not enforcing them.¹⁰

There are a few possible explanations for the lack of enforcement. Perhaps current American culture devalues marriage or no longer appreciates the full contribution this union makes to a stable and prosperous society.¹¹ Under this theory, prosecutors elect to overlook adultery because society values less and less the relationship that adultery laws protect. Another contributing factor to the lack of enforcement may be the difficulty of proving the crime. The challenge of proving adultery occurs in two areas—the right against self-incrimination guaranteed by the Fifth Amendment to the United States Constitution,¹² and the difficulty of proving the adulterous affair by

⁶ Daniel E. Murray, *Ancient Laws on Adultery—A Synopsis*, 1 J. FAM. L. 89, 91 (1961).

⁷ *Id.* at 89.

⁸ See GA. CODE ANN. §§ 19-3-6, 16-6-19 (2021).

⁹ PAUL H. ROBINSON & TYLER SCOT WILLIAMS, *MAPPING AMERICAN CRIMINAL LAW: VARIATIONS ACROSS THE 50 STATES* 251 (2018).

¹⁰ *Id.* at 251.

¹¹ According to a Pew Research Center study completed in 2018, 53% of American adults are married, and 7% of the adult population is cohabitating with an unmarried partner. Juliana Menasce Horowitz et al., *Marriage and Cohabitation in the U.S.*, PEW RSCH. CTR. (Nov. 6, 2019), <https://www.pewresearch.org/social-trends/2019/11/06/marriage-and-cohabitation-in-the-u-s/>. The CDC compiled data from 2019 to formulate statistics on American marriages. *Marriage and Divorce*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/nchs/fastats/marriage-divorce.htm> (last visited May 4, 2021). In 2019, the marriage rate was “6.1 per 1,000 total population.” *Id.* The divorce rate was “2.7 per 1,000 population.” *Id.* The CDC also conducted a study relating to children born out of wedlock. *Unmarried Childbearing*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/nchs/fastats/unmarried-childbearing.htm> (last visited Mar. 2, 2021). According to the CDC’s 2019 data, children born out of wedlock amounted to 40% of all births. *Id.* A 2016 U.S. Census Bureau report stated that 69% of the children in the U.S. live in a two-parent household. *The Majority of Children Live With Two Parents*, *Census Bureau Reports*, U.S. CENSUS BUREAU (Nov. 17, 2016), <https://www.census.gov/newsroom/press-releases/2016/cb16-192.html>. The U.S. Census Bureau found that out of the remaining 31% households, 23% of those households were children living with their mother but no father. *Id.*

¹² U.S. CONST. amend. V.

circumstantial evidence, since affairs are typically done in secret.¹³

The difficulty in proving adultery also impacts other areas of the law, more specifically divorce law. In divorce law, alimony is an issue often at play as part of the property division and support issues.¹⁴ In many cases, a spouse can obtain alimony from the other spouse to support him or herself.¹⁵ However, in a state like Georgia, the state's law makes clear that if a spouse cheats on the other spouse, the cheating spouse is no longer able to obtain alimony.¹⁶ Thus, adultery may eliminate one's entitlement to support.¹⁷

However, the criminal nature of Georgia's adultery law largely frustrates the state's prohibition on alimony when adultery caused the divorce. Frustration arises as attorneys face a high degree of difficulty when attempting to prove adultery. The cheating spouse and sexual participant can plead the Fifth Amendment to avoid self-incrimination of the criminal act of adultery, allowing them to circumvent testifying about the adulterous act in open court as admissible evidence. If neither testimony nor circumstantial evidence can prove adultery, then a cheating spouse may still obtain alimony regardless of what the alimony law dictates.

However, if decriminalization of adultery occurs, then the Fifth Amendment no longer provides protection, and a party can admit direct testimony into a court of law. Proving the adulterous affair will remove the cheating spouse's ability to obtain alimony.¹⁸ Decriminalizing adultery will empower individuals to elevate marriage by making it easier for a litigant in a divorce proceeding to obtain and present evidence of the improper and destructive behavior of the cheating party. Possible further deterrence is achievable when the cheating spouse faces the prospect of having to testify about the extramarital affair openly in a court of law.¹⁹ Therefore, the answer is clear; a call to repeal adultery laws is necessary. An antiquated, unenforced law has little utility and is currently proving to devalue marriage because someone can cheat on his or her spouse and still receive alimony. This Article will provide evidence supporting the argument that adultery laws in Georgia, and other states that criminalize adultery, should be repealed to support the value of marriage.

¹³ See *Craft v. State*, 78 S.E. 776, 776 (Ga. Ct. App. 1913).

¹⁴ GA. CODE ANN. § 19-6-1 (2021); see *Naar v. Naar*, 827 S.E.2d 711, 712–13 (Ga. Ct. App. 2019).

¹⁵ *Naar*, 827 S.E.2d at 712; GA. CODE ANN. § 19-6-1(a) (2021).

¹⁶ GA. CODE ANN. § 19-6-1(b) (2021).

¹⁷ *Id.*

¹⁸ GA. CODE ANN. § 19-6-1(b) (2021).

¹⁹ While embarrassment may further deter someone from engaging in the affair, the measurable impact of the deterrent effect is outside the scope of this Article.

II. BACKGROUND

A. *The Origin of Adultery as a Punishable Offense at Common Law*

Marriage is a sacred union. It is more than vows at an altar or the cohabitation of two people. The power of marriage is difficult to describe but evident throughout the world's history. It has fused nation-states together and has mended bitter rivalries.²⁰ Most importantly, a marriage is the glue of the family unit. When a marriage fractures, the consequences are infamously painful on others. For example, children experience painful feelings and increased anxiety, and the divorce can force friends to pick sides.²¹

History reveals that civilizations have long recognized the value of marriage.²² This recognition takes many forms. One form includes a ruler utilizing marriage to increase his or her power across greater territories.²³ Another form includes the enactment of a law that explicitly encourages marriage.²⁴ Through ancient and contemporary jurisprudence, civilizations have enacted laws that prohibit an act which can easily fracture a marriage—adultery.²⁵

Undoubtedly, a relaxed perspective of adultery is more commonplace in today's society. Television shows, popular music, contemporary novels, and particular internet sites center on the intrigue of extramarital, sexual affairs. Society's acceptance of adultery is a relatively recent development in the

²⁰ See BAUER, *supra* note 5, at 667, 670.

²¹ See Brian D'Onofrio & Robert Emery, *Parental Divorce or Separation and Children's Mental Health*, WORLD PSYCHIATRY: OFF. J. OF THE WORLD PSYCHIATRIC ASS'N (Jan. 2, 2019), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6313686/>.

²² See Murray, *supra* note 6, at 89 (noting that after the introduction of marriage into society, adultery immediately followed causing lawmakers to enact laws prohibiting the conduct for several reasons, one of which includes the "destruction of the unity of a family").

²³ History is riddled with "personal unions." A personal union is when one ruler marries the child of another ruler to resolve a tense relationship or simply unify the territories. See BAUER, *supra* note 5, at 604–05. An example of a personal union is the marriage between Haakon, the king of Norway, whose reign began in 1355 A.D., and Margaret I of Denmark, a Danish princess. *Id.* at 605. The marriage unified the Norse and Danish and would lead to the couple's child becoming the ruler of the Danish and the Norse after the deaths of Margret I's father and Haakon. *Id.* The child lacked the capacity to rule on his own, so Margret I was the ruling regent. *Id.* As a result of the personal union, Margret I became the ruler of the three Scandinavian countries—Denmark, Norway, and Sweden. *Id.* at 607. This example is one of many in history that demonstrate the value of marriage, as it has provided an easy way to obtain greater power.

²⁴ GA. CODE ANN. § 19-3-6 (2021); DEBORAH L. RHODE, ADULTERY: INFIDELITY AND THE LAW 39 (2016).

²⁵ GA. CODE ANN. § 16-6-19 (2021) (proscribing adultery).

United States.²⁶ While the entertainment industry may have latched onto acceptance of illicit sexual intrigue, many state legislatures still wrestle with adultery.

The question of whether adultery laws protect the value of marriage centers on two determinations—first, whether criminal sanctions effectively deter adultery; and second, whether the lack of enforcement leads to the law's ineffectiveness and instead provides offenders with favorable, unanticipated side-effects. To answer these questions, an examination of the background of adultery laws is necessary. While most elected officials still pay lip service to the idea of valuing marriage, current legal trends cause some to question the political will to strongly encourage marriage. Local law enforcement and prosecutors' failure to initiate charges in adultery cases highlight this lack of political will.

The origins of adultery laws are ancient.²⁷ The English common law later adopted these antiquated laws,²⁸ which became the foundation of early American jurisprudence.²⁹ In early, colonial America, colonies enforced prohibitions against extramarital affairs.³⁰ However, as American jurisprudence evolved with cultural changes, the prohibitions on adultery relaxed to be nothing more than mere words on paper in the eyes of the charging prosecutor.³¹ While criminal prosecutors are less than eager to charge a person with infringing on the adultery prohibition, the divorcing spouse is more than eager to make use of the combination of the Fifth Amendment and the adultery law to avoid a sexually incriminating, damning testimony in his or her case against the other spouse in the context of a divorce proceeding.

1. The Ancient Roots of Adultery Laws

Civilizations enacted laws prohibiting adultery long before the Puritans or the English ecclesiastical courts did.³² For instance, many ancient codes contained laws punishing extramarital affairs.³³ In early Babylonia, when the

²⁶ RHODE, *supra* note 24, at 39.

²⁷ Murray, *supra* note 6, at 89–90.

²⁸ RHODE, *supra* note 24, at 25–26.

²⁹ *Id.* at 31.

³⁰ *Id.*

³¹ *Id.* at 39.

³² Murray, *supra* note 6, at 89.

³³ RHODE, *supra* note 24, at 24–25. Throughout the ancient world, most civilizations prohibited adultery. *Id.* But in some of those civilizations, a dichotomy existed as to the requisite punishment. *Id.* The dichotomy is found in the difference of gender. *Id.* Punishments changed on the basis of the gender of the perpetrator. *Id.* A husband

Accadian people dwelled there, an adulterous woman was cast into a river for committing adultery.³⁴ Because a woman subjected to the river meant death, Accadian law punished adulterous acts of women with the death penalty.³⁵ However, if the perpetrator was a man, the man paid a mere fine.³⁶

Later on, the Code of Hammurabi criminalized adultery.³⁷ The prescribed punishment was the death penalty, irrespective of the gender of the offender.³⁸ Death was imminent short of an act by the king.³⁹ The Assyrians also punished adulterous couples by death.⁴⁰ However, the Assyrians imposed various punishments if only one spouse was adulterous.⁴¹ When the wife engaged in an extramarital affair and the husband discovered it, he could kill his cheating wife and the man with whom she engaged sexually.⁴² The husband could also disfigure his wife and the other man.⁴³ A form of disfigurement involved the non-cheating husband mutilating part of his wife's face.⁴⁴

The early Hebrews also explicitly banned adultery.⁴⁵ In the Old Testament, Leviticus prescribes that "[i]f a man commits adultery with the wife of his neighbor, both the adulterer and the adulteress shall surely be put to death."⁴⁶ Similar to the Assyrians, any infringement of the adultery laws reaped catastrophic consequences regardless of the gender of the offender. Hebrew history reveals that the adulterer may suffer the punishment of death by fire if the sexual participant was a woman who was a daughter of a priest.⁴⁷

Historical accounts support the inference that the Greeks also prohibited

committing adultery against his wife did not receive the same punishment as if his wife was the adulteress. *Id.* This dichotomy continued under English common law, but in different forms. RHODE, *supra* note 24, at 24–26.

³⁴ Murray, *supra* note 6, at 91 (citations omitted).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Murray, *supra* note 6, at 92.

⁴¹ *Id.* at 92–93.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 94.

⁴⁶ *Leviticus* 20:10. The first five books of the Bible contain the Pentateuch which contains the history of the Hebrew people and summaries of their laws. The books include Genesis, Exodus, Leviticus, Numbers, and Deuteronomy.

⁴⁷ *Leviticus* 21:9.

adultery.⁴⁸ However, the Greek prohibition was different from that of other societies—it did not criminalize the adulterous conduct.⁴⁹ Rather, an early form of tort law provided relief for the victimized spouse.⁵⁰ The ancient Greeks relaxed their views on adultery by refusing to criminalize it but intended to still provide a remedy against the cheating spouse.

2. Adultery Laws and the English Common Law

The English common law transformed adultery laws to resolve some of the inequities ancient civilizations created. The transformation was definitional.⁵¹ For the most part, adultery laws under English common law punished sexual intercourse between a man regardless of marital status and a woman married to another man.⁵² Another transformation raised the bar for the prosecution of the crime—that adultery had to be “open and notorious.”⁵³

Christianity held a strong influence on society when courts were formulating the English common law.⁵⁴ The political power of the Christian church allowed for English ecclesiastical courts.⁵⁵ The church’s courts saw no difference in gender and equalized the punishment for a commission of illicit sexual relations outside of a marriage.⁵⁶ An equal approach to adultery laws did not remain once jurisdiction shifted from ecclesiastical courts to the civil and criminal courts of the English government.⁵⁷

Adultery underwent other changes, including how a victimized spouse could recover from the cheating spouse in tort law.⁵⁸ A tort existed to provide further punishment for adultery, providing a means of greater deterrence.⁵⁹ The tort, referred to as the “tort of criminal conversation,” permitted the husband to recover damages in civil court following his wife’s extramarital

⁴⁸ Murray, *supra* note 6, at 96.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ RHODE, *supra* note 24, at 25.

⁵² *Id.*

⁵³ *Id.* When Oliver Cromwell held power, he did not require the crime of adultery to be open and notorious. *Id.* Instead, it was considered as a capital offense. *Id.*

⁵⁴ *Id.* (“English common law followed Biblical definitions of adultery and prohibited sexual intercourse by a married woman with a man other than her husband.”).

⁵⁵ RHODE, *supra* note 24, at 26.

⁵⁶ *Id.*

⁵⁷ *See id.* at 27.

⁵⁸ *Id.* at 25–26.

⁵⁹ *Id.* at 25.

sexual escapades.⁶⁰

However, this tort introduced a new inequality. While the husband could recover damages, a wife could not similarly recover because she was viewed as her husband's property.⁶¹ Aside from being viewed as property, adultery laws treated women differently because of potentially greater consequences, like the adulterous woman giving birth to a child outside of marriage.⁶² The English were concerned that when women initiated and enticed adultery there would be a greater number of children born out of wedlock.⁶³ Therefore, in an effort to deter such behavior, the law treated women harsher than men.⁶⁴ While the early English's approach to adultery was severe, it demonstrates a recognition of the costs on society when children are not raised and nurtured in an intact family unit.

Adultery laws continued beyond English common law. The Puritan start to the American colonies ensured a prohibition of adultery, as the Puritans viewed adultery as a condition of a malignant heart rather than misplaced romanticism.⁶⁵ Currently, contemporary laws continue to reflect prohibitions on adultery but in a more minimized degree—a prohibition by appearance only with no functionality.

3. The Origin of Adultery as a Punishable Offense in the United States

The Puritanical start to the American colonies ensured the enactment of adultery laws.⁶⁶ The prohibition was criminal, not merely civil limiting justice to only damages as the sole form of recovery.⁶⁷ Criminal sanctions against extramarital affairs reflected the sentiment of the time—the government is a God-ordained instrument to encourage what is good and punish what is bad.⁶⁸ Sins were wrong in the eyes of God; they, therefore, were to be

⁶⁰ *Id.* at 25–26.

⁶¹ See RHODE, *supra* note 24, at 25–26.

⁶² *Id.* at 25, 28.

⁶³ See *id.*

⁶⁴ See *id.*

⁶⁵ Betty B. Rosenbaum, *Sociological Basis of the Laws Relating to Women Sex Offenders in Massachusetts (1620-1860)*, 28 J. AM. INST. CRIM. L. & CRIMINOLOGY 815, 815–16 (1938). The preamble to “An Act Against Adultery and Polygamy” passed in 1694 by the Massachusetts Bay Province states that “[w]hereas, the violation of the marriage covenant is highly provoking to God and destructive to families . . .” *Id.* at 830. The preamble is indicative of the Puritans’ recognition of the destructive nature of adultery. *Id.*

⁶⁶ RHODE, *supra* note 24, at 31–32.

⁶⁷ *Id.*

⁶⁸ *Id.* at 31–32.

punished under the law.⁶⁹ The violation had to bear hefty consequences to ensure compliance and curb temptation.

Jurisdictions varied on what conduct constituted adultery: “[A] majority of states defined the crime of adultery to require only a single act of extramarital sexual intercourse. However, some jurisdictions reflected English common-law requirements that adultery be open and notorious; others demanded cohabitation.”⁷⁰ Another variation existed in laws prohibiting promiscuous sexual activity—there were two offenses for the same conduct: fornication and adultery.⁷¹ Fornication was a lesser offense for a husband engaging in a sexual affair with an unmarried woman.⁷² However, a person committed the crime of adultery when a husband was involved with a married woman or when a woman engaged with any man other than her husband.⁷³

Punishments varied, such as a payment of a financial penalty, excommunication from the society, or lashes from the crack of a whip.⁷⁴ Public humiliation was another common punishment.⁷⁵ Nathaniel Hawthorne famously recorded this form of punishment in his work, *The Scarlet Letter*.⁷⁶ Hawthorne’s main character was a woman whom society

⁶⁹ *Id.*

⁷⁰ *Id.* at 33 (citing Gabrielle Viator, *The Validity of Criminal Adultery Prohibitions After Lawrence v. Texas*, 39 SUFFOLK U. L. REV. 837, 840 (2006)).

⁷¹ *Id.*

⁷² RHODE, *supra* note 24, at 33.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *See id.* at 33–34.

⁷⁶ *Id.* at 34 (citing NATHANIEL HAWTHORNE, *THE SCARLET LETTER* 241 (Ross C. Murfin ed., New York: Bedford / St. Martin’s 2006) (1850); MARY BETH NORTON, *FOUNDING MOTHERS AND FATHERS*, 264 (1996)). Hawthorne provides a descriptive perspective of the shame an adulteress endured under a punishment scheme premised on social condemnation:

[W]ith all the townspeople assembled and levelling their stern regards at Hester Prynne,—yes, at herself,—who stood on the scaffold of the pillory, an infant on her arm, and the letter A, in scarlet, fantastically embroidered with gold-thread, upon her bosom!

Could it be true? She clutched the child so fiercely to her breast, that it sent forth a cry; she turned her eyes downward at the scarlet letter, and even touched it with her finger, to assure herself that the infant and the shame were real. Yes!—these were her realities,—all else had vanished!

NATHANIEL HAWTHORNE, *THE SCARLET LETTER*, 41 (Stanley Appelbaum ed., Dover Publ’ns, Inc. 2014) (1850).

accused of committing adultery.⁷⁷ When she appeared in public, the law required that she wear an embroidered “A” on her garments to signify her sin of adultery.⁷⁸

Adultery laws evolved with time and the events that transformed the colonies into the United States of America.⁷⁹ For instance, “[w]ith the separation of church and state following the American Revolution, and the decline in the power of religious authorities, moral offenses became a less central concern.”⁸⁰ Some states did not prosecute adultery, while other jurisdictions prosecuted it sparingly.⁸¹ By the 1800s, few jurisdictions prosecuted the crime as the intersection of morality and the law gradually decreased.⁸²

4. The Contemporary Landscape of Adultery Laws

Adultery prosecutions continued to decrease in the twentieth century.⁸³ Following incredible hardship in the World Wars, the American sentiment towards extramarital sexual conduct was one of acceptance instead of animosity.⁸⁴ The acceptance of adultery as merely a part of life rather than immoral conduct requiring criminal sanctions was most evident when the American Law Institute, the organization behind the Model Penal Code, specifically called for repealing adultery statutes.⁸⁵ Culture changed what was a punitive legal system for adulterers to one of acceptance.⁸⁶

Currently, fewer and fewer states are recognizing adultery as a crime. Only twenty states now criminalize adultery.⁸⁷ Jurisdictions vary on the prescribed punishment for adultery.⁸⁸ In the majority of states that criminalize adultery,

⁷⁷ RHODE, *supra* note 24, at 34 (citing NATHANIEL HAWTHORNE, *THE SCARLET LETTER* 241 (Ross C. Murfin ed., New York: Bedford / St. Martin’s 2006) (1850); MARY BETH NORTON, *FOUNDING MOTHERS AND FATHERS*, 264 (1996)).

⁷⁸ *Id.*

⁷⁹ *Id.* at 35.

⁸⁰ *Id.*

⁸¹ *See id.*

⁸² *See id.*

⁸³ RHODE, *supra* note 24, at 38–39.

⁸⁴ *Id.* at 39.

⁸⁵ *Id.* at 38–39; Viator, *supra* note 70, at 842.

⁸⁶ *See* RHODE, *supra* note 24, at 39 (citations omitted).

⁸⁷ ROBINSON & WILLIAMS, *supra* note 9, at 251. States that impose criminal sanctions for adultery include Alabama, Arizona, Florida, Georgia, Idaho, Illinois, Kansas, Maryland, Michigan, Minnesota, Mississippi, Oklahoma, New York, North Carolina, Rhode Island, South Carolina, Virginia, and Wisconsin. *Id.*

⁸⁸ *Id.*

it is only a misdemeanor.⁸⁹ The remaining states treat the commission of adultery as a felony.⁹⁰ Regardless, punishing a person for engaging in sexual intercourse outside of one's marriage is decreasing in popularity, causing many state legislatures to repeal adultery laws.⁹¹ The push to eliminate any criminal sanctions for extramarital sex is evident in states repealing their adultery laws as recently as 2018 and 2019.⁹² Adultery laws have evolved from an offense so egregious that the court held the discretion to impose the death penalty to what is now a multi-jurisdictional movement to repeal the laws for acceptance of the same conduct.⁹³

5. From Its Origin to Now—Adultery in Georgia

The Puritan influence resulted in more adultery prosecutions in the northeast, like New England, rather than in the southern states.⁹⁴ A common explanation for this is that the South's agrarian economy and lifestyle removed the heightened scrutiny of people's conduct.⁹⁵ Christian churches had a greater geographical distance to cover when ministering; thus, scrupulous examination of conduct often kept in deep secret, like extramarital affairs, proved arduous.⁹⁶

⁸⁹ *Id.* The following states consider adultery to be a misdemeanor: Alabama (ALA. CODE § 13A-13-2 (2022)), Arizona (ARIZ. REV. STAT. ANN. § 13-1408 (2021)), Florida (FLA. STAT. § 798.01 (2021)), Georgia (GA. CODE ANN. § 16-6-19 (2021)), Illinois (720 ILL. COMP. STAT. 5/11-35 (2021)), Kansas (KAN. STAT. ANN. § 21-5511 (2021)), Maryland (MD. CRIM. LAW CODE ANN. § 10-501 (LexisNexis 2021)), Minnesota (MINN. STAT. § 609.36 (2021)), Mississippi (MISS. CODE ANN. § 97-29-1 (2022)), New York (N.Y. PENAL LAW § 255.17 (Consol. 2022)), North Carolina (N.C. GEN. STAT. § 14-184 (2021)), Rhode Island (R.I. GEN. LAWS § 11-6-2 (2021)), South Carolina (S.C. CODE ANN. § 16-15-60 (2022)), and Virginia (VA. CODE ANN. § 18.2-365 (2022)). *Id.* at 251.

⁹⁰ *Id.* at 251. The following states consider adultery to be a felony: Idaho (IDAHO CODE § 18-6601 (2021)), Michigan (MICH. COMP. LAWS § 750.30 (2022)), Oklahoma (OKLA. STAT. tit. 21 § 872 (2021)), and Wisconsin (WIS. STAT. § 944.16 (2022)). ROBINSON & WILLIAMS, *supra* note 9, at 251, 252 n.7.

⁹¹ See Sasha Ingber, *Utah Repeals 1973 Law That Criminalized Sex Outside of Marriage*, NAT'L PUB. RADIO (Mar. 29, 2019, 3:20 PM), <https://www.npr.org/2019/03/29/708042810/utah-repeals-1973-law-that-criminalized-sex-outside-of-marriage>; Jamie Halper, *Mass. House OK's Repeal of 19th-Century Law That Criminalized Abortion*, BOSTON GLOBE (July 18, 2018, 8:42 PM), <https://www.bostonglobe.com/metro/2018/07/18/mass-house-repeal-century-law-that-criminalized-abortion/U4oPFiiGzrFbonn5Int8wM/story.html>.

⁹² Ingber, *supra* note 91; Halper, *supra* note 91.

⁹³ Compare Murray, *supra* note 6, at 91, with ROBINSON & WILLIAMS, *supra* note 9, at 249–50, and RHODE, *supra* note 24, at 39.

⁹⁴ RHODE, *supra* note 24, at 34.

⁹⁵ *Id.*

⁹⁶ *Id.*

Early in Georgia's jurisprudence, adultery was a punishable offense resulting in jail time or a fine.⁹⁷ An old codification of Georgia laws, Cobb's Digest, reflected a major change in the middle of the nineteenth century.⁹⁸ The law required:

Any man and woman who shall live together in a state of adultery, or fornication, or of adultery and fornication; or who shall otherwise commit adultery, or fornication, or adultery and fornication, shall be severely indicted, and on conviction, such offenders shall be severely fined or imprisoned in the common jail of the County, or both, at the discretion of the Court: *Provided*, that the fine shall not exceed the sum of \$500, and the imprisonment shall not extend beyond the term of sixty days. But it shall at any time be in the power of the parties to prevent or suspend the prosecution and the punishment, by marriage, if such marriage can be legally solemnized.⁹⁹

The old Georgia law gave great discretion to the courts to determine the severity of one's punishment.¹⁰⁰ The court could order one offender to pay a fine while imprisoning another.¹⁰¹

Interestingly, the offender could rectify the wrong by marriage.¹⁰² The marriage exception reveals the values of the time. The Georgia Supreme Court's decision in *Cox v. Lanier* revealed that the policy behind the marriage

⁹⁷ *Cox v. Lanier*, 66 S.E. 799, 799 (Ga. 1909). The Georgia Supreme Court noted the adultery statute's exception:

[I]n the statute relating to the latter offense (referring to the adultery statute) it is provided that the prosecution may be stopped by the marriage of the parties or a bona fide continuing offer to marry on the part of the seducer, provided that he shall give bond for the maintenance and support of the female and her child or children, if any, for a period of five years, or if he be unable to give bond, that the prosecution shall not be at an end until he shall have lived with the female for five years.

Id. at 800.

⁹⁸ See generally William B. McCash, *Thomas Cobb and the Codification of Georgia Law*, 62 GA. HIST. Q. 9, 9–10, 13 (1978).

⁹⁹ Thomas R. R. Cobb, *A Digest of the Statute Laws of the State of Georgia, in Force Prior to the Session of the General Assembly of 1851, with Explanatory Notes and References; and Also, with Notices, Giving the Exposition of the Statutes, by the Supreme Court of the State*, 2 HISTORIC GA. DIGS. & CODES 814–15 (1851) (emphasis in original).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

exception was to promote marriage between a man and woman instead of the division that adulterous affairs so often cause.¹⁰³

Under contemporary law, the punishment for adultery is less severe. Currently, Georgia's law prohibiting adultery states: "[a] married person commits the offense of adultery when he voluntarily has sexual intercourse with a person other than his spouse and, upon conviction thereof, shall be punished as for a misdemeanor."¹⁰⁴ Georgia also retains a punishment for fornication.¹⁰⁵ Neither law states the marriage exception.¹⁰⁶ The law simply punishes adultery and fornication with a fine or up to a year in prison without any exception.¹⁰⁷

For many years, Georgia law allowed for the non-cheating spouse to recover from the other sexual participant in the affair through the tort of alienation of affections.¹⁰⁸ The non-cheating spouse has "[a] cause for alienation of affections accrues when there has been a loss of consortium. A loss of consortium has been defined as a loss of the love, society, companionship, and comfort of the wife or husband."¹⁰⁹ However, the Georgia legislature repealed the tort in 1979.¹¹⁰ The state legislature repealed all rights of actions for adultery, alienation of affections, and criminal conversations.¹¹¹ Notably, it retained the criminal prohibition against adultery.¹¹² Unlike many preceding legal systems, the punishment for infraction is the same irrespective of the offender's gender.¹¹³ Georgia is one of several states that prohibits extramarital sexual intercourse, but that number is ever decreasing.¹¹⁴

¹⁰³ Cox v. Lanier, 66 S.E. 799, 799 (Ga. 1909).

¹⁰⁴ GA. CODE ANN. § 16-6-19 (2021). Heterosexual and homosexual extramarital, sexual affairs are punished equally; therefore, the former inequalities based on gender do not currently persist. Owens v. Owens, 274 S.E.2d 484, 485–86 (Ga. 1981).

¹⁰⁵ GA. CODE ANN. § 16-6-18 (2021). "An unmarried person commits the offense of fornication when he voluntarily has sexual intercourse with another person and, upon conviction thereof, shall be punished as for a misdemeanor." *Id.*

¹⁰⁶ See GA. CODE ANN. §§ 16-6-18, 16-6-19 (2021).

¹⁰⁷ GA. CODE ANN. §§ 16-6-18, 16-6-19 (2021).

¹⁰⁸ Brown v. Hauser, 292 S.E.2d 1, 2 (Ga. 1982).

¹⁰⁹ *Id.* at 2.

¹¹⁰ *Id.*

¹¹¹ GA. CODE ANN. § 51-1-17 (2021).

¹¹² GA. CODE ANN. § 16-6-19 (2021).

¹¹³ GA. CODE ANN. §§ 16-6-18, 16-6-19 (2021).

¹¹⁴ ROBINSON & WILLIAMS, *supra* note 9, at 249, 251.

B. *The Purpose of Proscribing Adultery—the Value of Marriage*

With a working understanding of adultery laws, the “why” behind enactment is imperative to understand. What purpose underlies adultery laws? Simply put, adultery laws proscribe the conduct that can fracture a marriage—one spouse temporarily exiting the bounds of the civil union for sexual satisfaction.¹¹⁵

As evident throughout the history of adultery laws, civilizations have long valued marriage.¹¹⁶ Lawmakers recognize that adultery leads to divorce and domestic violence.¹¹⁷ However, if legislators repeal adultery laws, does the value of marriage change? Despite the historical and familial importance of marriage, does American society now believe that marriage is no longer valuable or needed for a prosperous society?

1. *Statistics of the Current American Perspective of Marriage*

The push to repeal adultery laws does not indicate that Americans disfavor marriage or no longer see the value in it.¹¹⁸ Americans are still marrying. A recent survey by Pew Research Center reveals that 50% of the American population that is eighteen or older is married.¹¹⁹ This percentage is down from 1990, when 58% of Americans were married.¹²⁰ The percentage for newly married couples may have faltered, but the rate of remarriage for couples following a divorce has increased in the past decade.¹²¹ The relevant statistics are not limited to only the 50% of Americans who are over eighteen years-old that are married. The statistics also reveal what the other 50% perceive about the importance of marriage. Why are they not marrying? What are their perceptions of marriage?

Only 14% of the unmarried population claim that they truly do not want to get married.¹²² The remaining 85% state that they either want to get

¹¹⁵ See RHODE, *supra* note 24, at 3.

¹¹⁶ See *id.* at 24–60.

¹¹⁷ See *id.* at 3.

¹¹⁸ See A.W. Geiger & Gretchen Livingston, *8 Facts About Love and Marriage in America*, PEW RSCH. CTR. (Feb. 13, 2019), <https://www.pewresearch.org/fact-tank/2019/02/13/8-facts-about-love-and-marriage/> (indicating that polls are showing Americans continue to marry).

¹¹⁹ *Id.*; Kim Parker & Renee Stepler, *As U.S. Marriage Rate Hovers at 50%, Education Gap in Marital Status Widens*, PEW RSCH. CTR. (Sept. 14, 2017), <https://www.pewresearch.org/fact-tank/2017/09/14/as-u-s-marriage-rate-hovers-at-50-education-gap-in-marital-status-widens/>.

¹²⁰ Geiger & Livingston, *supra* note 118.

¹²¹ *Id.*

¹²² Parker & Stepler, *supra* note 119.

married or are undecided.¹²³ The consistent theme for the unmarried individual who wants to be married but has yet to say “I do” is that the person has not found who he or she believes to be the right spouse.¹²⁴ These people constitute about 72% of the unmarried population.¹²⁵ The remaining unmarried population typically cite lack of finances and hesitancy to slow down and start a family as reasons for not marrying.¹²⁶ Therefore, while the statistics indicate less people are marrying today than thirty years ago, the statistics do not indicate that Americans no longer marry for lack of value found in marriage.¹²⁷

Therefore, the declining marriage rate is deceiving. A decline in marriages does not necessarily equate to the devaluation of marriage in American society. Many people who have not had the legal ability to marry for some part of history fight for the right to marry.¹²⁸ And those who are unmarried have yet to find the right person or remain unsure as to whether marrying is right for them in their present financial or personal situation.¹²⁹

2. The American Legal System’s Approval and Encouragement of Marriage

While statistics are helpful in attempting to quantify the general population’s perspective on marriage, the American legal system is a reflection that people, through their representatives in the state and federal legislatures, value marriage. Throughout states’ legal codes and the United States Code, provisions exist to protect and encourage marriages.¹³⁰ Under federal law, a few examples include provisions in the Internal Revenue Code providing favorable tax treatment to married couples¹³¹ and evidentiary rules and privileges protecting spouses from testifying against one another in a court of law.¹³²

¹²³ *Id.* The numbers do not add up to 100% for rounding purposes.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *See generally id.*

¹²⁸ *Obergefell v. Hodges*, 576 U.S. 644, 651–52 (2015).

¹²⁹ *See Parker & Stepler*, *supra* note 119.

¹³⁰ *See* I.R.C. § 121; *see also* GA. CODE ANN. § 19-3-6 (2021).

¹³¹ *See* I.R.C. § 121.

¹³² FED. R. EVID. 501 (“The common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege unless any of the following provide otherwise: the United States Constitution; a federal statute; or rules prescribed by the Supreme Court. But in a civil case, state law governs privileges regarding a claim or defense for which state law supplies the rule of decision.”). In *Wolfe v. United States*, the Supreme

A simple example of favorable treatment towards marriage is found in the Internal Revenue Code.¹³³ If a husband and wife sell their principal place of residence, they can exclude up to \$500,000 from income on their jointly filed tax return.¹³⁴ An unmarried, single filer can only exclude \$250,000.¹³⁵ For a married couple to utilize this favorable tax provision, they must meet three requirements: use, ownership, and a two-year gap between filing and the last time either spouse used the exclusionary provision.¹³⁶ However, Congress favors married couples even more because both spouses must use the property as their principal place of residence without using the exclusion in the past two years.¹³⁷ Yet, only one of them has to own the property.¹³⁸ Therefore, both spouses do not have to meet the requirements of the exclusionary provision.¹³⁹

The unmarried, single filer does not receive the same favorable tax treatment. Instead, the single filer must meet all three requirements to achieve eligibility for the income exclusion—use, ownership, and a two-year period from the last time that the person used the exclusion.¹⁴⁰ This is only one example of the tax code providing favorable treatment for married couples over single filers. Therefore, dissimilar treatment exists between the married and unmarried in American tax law.

Another example of the American legal system's favorable treatment of marriage arises in federal evidentiary rules. Federal¹⁴¹ and state¹⁴² evidentiary rules protect the communications between a husband and wife as

Court “recognized that a confidential communication between husband and wife was privileged.” *Blau v. United States*, 340 U.S. 332, 333 (1951) (citing *Wolfe v. United States*, 291 U.S. 7 (1934)). In *Hawkins v. United States*, the Supreme Court recognized the spousal privilege allowing for spouses to avoid having to testify against one another in court. *Hawkins v. United States*, 358 U.S. 74, 77–78 (1958).

¹³³ See I.R.C. § 121.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ I.R.C. § 121.

¹⁴⁰ *Id.*

¹⁴¹ See sources cited *supra* note 132.

¹⁴² GA. CODE ANN. § 24-5-501(a)(1) (2021) (“There are certain admissions and communications excluded from evidence on grounds of public policy, including, but not limited to, the following: (1) Communications between husband and wife . . .”). See generally GA. CODE ANN. § 24-5-503 (2021). “A husband and wife shall be competent but shall not be compellable to give evidence in any criminal proceeding for or against each other.” GA. CODE ANN. § 24-5-503(a) (2021).

confidential communications. This means that statements between a husband and wife that are intended to be confidential cannot be admitted as evidence in a court of law.¹⁴³

Evidentiary rules provide further protection for the spouses in a courtroom. The spousal privilege prevents spouses from testifying against one another in a criminal matter.¹⁴⁴ In *Hawkins v. United States*, a foundational case for the spousal privilege, the Supreme Court recognized that “[t]he basic reason the law has refused to pit wife against husband or husband against wife in a trial where life or liberty is at stake was a belief that such a policy was necessary to foster family peace”¹⁴⁵ In a later case, the Supreme Court stated that “[t]he modern justification for this privilege against adverse spousal testimony is its perceived role in fostering the harmony and sanctity of the marriage relationship.”¹⁴⁶

However, spousal privilege is not absolute. In *Hawkins*, the Supreme Court allowed for a spouse to testify if he or she voluntarily provides the testimony.¹⁴⁷ In *Trammel v. United States*, the Supreme Court modified the spousal privilege to vest the privilege in the witness-spouse.¹⁴⁸ The Court did so because it encouraged “marital harmony.”¹⁴⁹ After *Trammel*, spouses still had the right to assert spousal privilege and avoid testifying against one another in a court of law, but one spouse could voluntarily testify if he or she believed that the testimony must be heard regardless of what the other spouse on trial thought.

As the Supreme Court stated in *Hawkins*, the policy behind this privilege represents protection for the sanctity of marriage.¹⁵⁰ The law does not hinder a spouse in an abusive marriage from achieving justice for him or herself. The witness-spouse’s ability to waive the privilege encourages a marriage without abuse, as the abuser is aware that the victimized spouse may testify in court against him or her.

State legislatures have also demonstrated approval and encouragement for marriages. Specifically, Georgia has made efforts to promote marriage.¹⁵¹ In 1863, the state legislature enacted what is currently Georgia Code § 19-3-6. The statute states:

¹⁴³ See FED. R. EVID. 501; GA. CODE ANN. § 24-5-501 (2021).

¹⁴⁴ *Hawkins v. United States*, 358 U.S. 74, 77 (1958).

¹⁴⁵ *Id.*

¹⁴⁶ *Trammel v. United States*, 445 U.S. 40, 44 (1980).

¹⁴⁷ *Hawkins*, 358 U.S. at 77.

¹⁴⁸ *Trammel*, 445 U.S. at 53.

¹⁴⁹ *Id.*

¹⁵⁰ *Hawkins*, 358 U.S. at 77.

¹⁵¹ See GA. CODE ANN. § 19-3-6 (2021).

Marriage is encouraged by law. Every effort to restrain or discourage marriage by contract, condition, limitation, or otherwise shall be invalid and void, provided that prohibitions against marriage to a particular person or persons or before a certain reasonable age or other prudential provisions looking only to the interest of the person to be benefitted and not in general restraint of marriage will be allowed and held valid.¹⁵²

The statute explicitly states the lawmakers' intent to promote marriage.¹⁵³ As evidenced by the first sentence of the statute,¹⁵⁴ marriage is so important that the legislature encourages it and removes possible obstructions within reason.¹⁵⁵ The state legislature goes so far as to explicitly invalidate any private agreement that would possibly hinder someone's right to marry, short of that agreement being made on the basis of a valid and reasonable concern, like the age of a person wanting to marry.¹⁵⁶ Section 19-3-6 is only one indicia of Georgia's desire to promote marriage.¹⁵⁷

Another example includes a married couple's entitlement to interspousal tort immunity.¹⁵⁸ Interspousal tort immunity prevents one spouse from bringing suit against the other spouse for a personal tort.¹⁵⁹ However, "where the traditional policy reasons for applying interspousal tort immunity are absent, i.e., where there is no marital harmony to be preserved and where there exists no possibility of collusion between the spouses[,] interspousal immunity does not apply."¹⁶⁰ Therefore, Georgia attempts to protect spouses from discord in their relationship by barring lawsuits between them, unless the marriage is abusive.

The Georgia legislature, through legislation, favors married couples and widows over creditors in estate administration.¹⁶¹ Estate administration law provides means of ensuring a widow receives the property of his or her

¹⁵² GA. CODE ANN. § 19-3-6 (2021) (emphasis added); see GA. CODE ANN. § 19-3-7 (2021) ("The policy of the law being opposed equally to restrictions on marriage and to marriages not the result of free choice, all contracts or bonds made to hinder or to force marriage are deemed fraudulent and void.").

¹⁵³ See GA. CODE ANN. § 19-3-6 (2021).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*; GA. CODE ANN. § 19-3-7 (2021).

¹⁵⁶ GA. CODE ANN. §§ 19-3-6, 19-3-7 (2021).

¹⁵⁷ See GA. CODE ANN. § 19-3-6 (2021).

¹⁵⁸ GA. CODE ANN. § 19-3-8 (2021).

¹⁵⁹ Shoemake v. Shoemake, 407 S.E.2d 134, 134 (Ga. Ct. App. 1991).

¹⁶⁰ *Id.*

¹⁶¹ GA. CODE ANN. § 53-3-1(b)-(c) (2021).

deceased spouse.¹⁶² Under Georgia intestacy law, if one spouse dies without a will, the other spouse is considered an heir to the decedent's estate.¹⁶³ Even if there are children, the living spouse shall share the estate equally with the children to the extent that he or she does not have less than one-third of it.¹⁶⁴

Furthermore, once death undesirably extinguishes a marriage, Georgia provides a way for the living spouse to have access to the decedent's estate without undergoing the financially and emotionally exhausting probate process in § 53-3-1 of the Georgia Code. The probate court provides access to the living spouse upon the court granting a petition for year's support.¹⁶⁵ In this petition, the spouse will include all items that are necessary for a year's support.¹⁶⁶ If the court grants the petition, all title to the property vests in the living spouse.¹⁶⁷ Most importantly, when a court grants a petition for a year's support, the living spouse receives access to the deceased spouse's estate before any unsecured creditor.¹⁶⁸

The Georgia legislature prioritizes the widow or widower over creditors because it recognizes that one spouse may have relied on the other to provide for the family.¹⁶⁹ The living spouse has first access to ensure that he or she continues to live the life that person lived with the deceased spouse. The livelihood of the family and spouse and sympathy for the widow or widower outweigh the interests of the creditor no matter the amount or size of the debt. Only after the living spouse receives all that he or she may need for twelve months can the creditors begin knocking on the door of the estate to satisfy any debts owed.¹⁷⁰

The United States continues to value marriage. Statistics reveal that even while people are hesitant to marry early on in their lives, couples that were once formerly married are remarrying.¹⁷¹ Further, a Pew Research study indicates that while some people remain unmarried, their major contention

¹⁶² *Id.*

¹⁶³ GA. CODE ANN. § 53-2-1(c) (2021).

¹⁶⁴ *Id.*

¹⁶⁵ GA. CODE ANN. § 53-3-5 (2021). Georgia allows for widows and minor children to petition the court for year's support. *Id.* However, for purposes of this Article, the widow's accessibility to her husband's estate is only relevant.

¹⁶⁶ *Id.*

¹⁶⁷ GA. CODE ANN. § 53-3-9 (2021).

¹⁶⁸ GA. CODE ANN. § 53-3-1 (2021) ("Among the necessary expenses of administration and to be preferred before all other debts or demands, except as specifically provided otherwise in this chapter and notwithstanding any other provision of law to the contrary, is the provision of year's support for the *family*." (emphasis added)).

¹⁶⁹ *See* GA. CODE ANN. § 53-3-1(b)-(c) (2021).

¹⁷⁰ *Id.*

¹⁷¹ Geiger & Livingston, *supra* note 118.

is that they have yet to find the right life-partner or remain unsure of where they stand on it.¹⁷² Only a small group truly desires to avoid marriage.¹⁷³ While statistics are helpful, the American legal landscape provides further indications that lawmakers have long valued marriage. For instance, Congress demonstrated the value of marriage by providing favorable tax treatment in the Internal Revenue Code¹⁷⁴ and codified protection for spouses through testimonial privileges found in common law.¹⁷⁵ Additionally, the Supreme Court of the United States recognized that, as part of common law, spouses should not be pitted against one another as that would disrupt marital harmony.¹⁷⁶ The Georgia state legislature also values marriage by ensuring a provision for the surviving spouse, even if that means that a creditor has limited access, if any, to the estate.¹⁷⁷ With the history of adultery laws and the value of marriage that remains in American society, it is important to analyze the problems adultery laws create in American jurisprudence.

III. PROBLEM

Lawmakers enforce the interests of society by enacting laws that encourage or deter particular behavior. Where lawmakers perceive the danger of one kind of conduct, they will impose criminal sanctions to deter other individuals from partaking in the act. Deterrence is achievable only when the laws are enforced and offenders are punished.

Under American jurisprudence, society rigorously protects a person's right to avoid self-incrimination. Following the criminalization of a particular form of conduct, the Constitution provides protection for the offending person.¹⁷⁸ The person may "plead the Fifth." The Fifth Amendment provides a person the right not to incriminate him or herself.¹⁷⁹ In application, the police or prosecutor may interrogate a suspect, but the suspect can "plead the Fifth" and avoid self-incrimination.

The Fifth Amendment and adultery have an important intersection. In Georgia, because adultery is a crime, a person may choose not to testify that he or she had an extramarital affair to avoid self-incrimination. This is a powerful tool in the context of divorce proceedings.

¹⁷² Parker & Stepler, *supra* note 119.

¹⁷³ *Id.*

¹⁷⁴ See I.R.C. § 121.

¹⁷⁵ See sources cited *supra* note 132.

¹⁷⁶ *Hawkins v. United States*, 358 U.S. 74, 77 (1958).

¹⁷⁷ See GA. CODE ANN. § 53-3-1 (2021).

¹⁷⁸ U.S. CONST. amend. V.

¹⁷⁹ *Id.*

The inability to prove adultery can have a lasting impact. A spouse's ability to obtain alimony is affected by whether it can be proven that the spouse committed adultery.¹⁸⁰ If the spouse committed adultery, that spouse is no longer entitled to alimony.¹⁸¹ However, the Fifth Amendment provides protection for that spouse.¹⁸² Neither the cheating spouse nor the adulterer-partner will have to divulge that he or she engaged in an extramarital affair because, if the spouse testified, the spouse would self-incriminate. All the spouse must do is simply plead the Fifth Amendment. Therefore, the intersection of the Fifth Amendment and adultery is counteractive under the current law governing alimony and divorce law. A cheating spouse who violated the law can use that violation as legal protection to receive alimony even though they were not originally entitled to alimony because of the adulterous behavior.

Legislatures statutorily outlawed adultery to deter the behavior that so often fractures marriages. Criminalizing adultery effectively deterred the conduct in early American history when people were frequently tried and convicted for it. But now, few prosecutions for adultery occur. Prosecutors are weary of attempting to charge and prove the crime of adultery or, pessimistically, prosecutors are politically motivated to avoid enforcing the crime of adultery in view of their pending elections. As elected officials, they may believe that prosecuting an adulterous affair will alienate a large segment of the voting population. The lack of enforcement frustrates the law's purpose—deterrence.

The repeal of adultery laws is necessary because they are no longer serving their purpose. Although deterrence was the intended function of adultery laws, people are using the intersection of the Fifth Amendment and the criminalization of adultery to secure alimony that they are otherwise no longer entitled to while relishing in their constitutional excuse to avoid testifying about their unfaithfulness in open court. Another reason for the lack of enforcement is that without direct testimonial evidence, the prosecutor must use circumstantial evidence. Case law on adultery law reveals the difficulty in proving an act done in secret by circumstantial evidence. Therefore, a call to repeal the criminalization of adultery is necessary, as its ineffectiveness frustrates other areas of law.

A. *Intersection of Divorce and Adultery Laws*

An adulterous affair often leads to divorce. A common misconception is

¹⁸⁰ GA. CODE ANN. § 19-6-1(b) (2021).

¹⁸¹ *Id.*

¹⁸² U.S. CONST. amend. V.

that divorces are acceptable for any and every reason under the law. This is not true. The court will grant a divorce based on one of the grounds found in Georgia Code § 19-5-3.¹⁸³ The statute specifically authorizes adultery as an acceptable reason for divorce.¹⁸⁴

Divorces create tension and bitterness as property is separated and, in some cases, one spouse must continue providing financially for the other spouse, which is referred to as alimony.¹⁸⁵ In Georgia, lawmakers sought to discourage adultery, so the legislature enacted a law eliminating a spouse's ability to obtain alimony should a spouse commit adultery.¹⁸⁶ The policy underlying the law is to ensure that a spouse who has not worked can still maintain his or her lifestyle that the person enjoyed with the other spouse.

If one spouse commits adultery, the legislature deemed it just that the cheating spouse should not receive financial assistance from the non-cheating spouse.¹⁸⁷ To do otherwise would seem to condone the behavior and serve as a punishment to the non-cheating spouse. Unfortunately, non-cheating spouses sometimes have to provide alimony to the cheating spouse because of the Fifth Amendment and the criminalization of adultery.

¹⁸³ GA. CODE ANN. § 19-5-3 (2021). The statute provides:

The following grounds shall be sufficient to authorize the granting of a total divorce: (1) [i]nter-marriage by persons within the prohibited degrees of consanguinity or affinity; (2) [m]ental incapacity at the time of the marriage; (3) [i]mpotency; (4) [f]orce, menace, duress, or fraud in obtaining the marriage; (5) [p]regnancy of the wife by a man other than the husband, at the time of the marriage, unknown to the husband; (6) [a]dultery in either of the parties after marriage; (7) [w]illful and continued desertion by either of the parties for the term of one year; (8) [t]he conviction of either party for an offense involving moral turpitude, under which he is sentenced to imprisonment in a penal institution for a term of two years or longer; (9) [h]abitual intoxication; (10) [c]ruel treatment, which shall consist of the willful infliction of pain, bodily or mental, upon the complaining party, such as reasonably justifies apprehension of danger to life, limb, or health; (11) [i]ncurable mental illness. . . . ; (12) [h]abitual drug addiction, which shall consist of addiction to any controlled substance as defined in Article 2 of Chapter 13 of Title 16; or (13) [t]he marriage is irretrievably broken. Under no circumstances shall the court grant a divorce on this ground until not less than 30 days from the date of service on the respondent.

Id. (emphasis added).

¹⁸⁴ *Id.*

¹⁸⁵ GA. CODE ANN. § 19-6-1(a) (2021) (“Alimony is an allowance out of one party’s estate, made for the support of the other party when living separately. It is either temporary or permanent.”).

¹⁸⁶ GA. CODE ANN. § 19-6-1(b) (2021).

¹⁸⁷ *See id.*

Therefore, under the current color of law, the purpose of Georgia Code § 19-6-1(b) is frustrated.

1. Alimony

A married couple may not generate equivalent levels of income between the two spouses. Historically, a court grants alimony to one spouse who has proven they are dependent on the other spouse's income for support.¹⁸⁸ A basic understanding of alimony is essential to seeing the problematic intersection of Georgia's adultery law, the Fifth Amendment, and divorce law.

The Georgia Code defines alimony as “an allowance of one party's estate, made for the support of the other party when living separately.”¹⁸⁹ An award for alimony can be temporary or permanent in duration.¹⁹⁰ The court in which the divorce proceeding arises examines the circumstances surrounding the divorce and the reason for separating.¹⁹¹ The court then considers all the available evidence pertaining to the spouse's conduct.¹⁹²

An alimony award is based on “the needs of the party and the ability of the other party to pay.”¹⁹³ A common question arises as to whether the spouse likely paying alimony can adjust his or her assets to reflect a less amount than the spouse actually holds. Anticipating the problem, the Georgia state legislature outlawed “any substantial change in the assets of the party's estate” with exceptions for ordinary business transactions and good faith purchases.¹⁹⁴

The intersection of adultery and alimony occurs in Georgia Code § 19-6-1(b): “A party shall not be entitled to alimony if it is established by a preponderance of the evidence that the separation between the parties was caused by that party's *adultery* or desertion.”¹⁹⁵ Based on the plain reading of the statute, if the non-cheating spouse can prove by a preponderance of the evidence that the other spouse committed adultery, the cheating spouse is not

¹⁸⁸ See GA. CODE ANN. § 19-6-1(a) (2021); *Lloyd v. Lloyd*, 189 S.E. 903, 904 (Ga. 1937) (“The term [alimony] is derived from a Latin word which primarily meant to nourish; that is to supply the necessities of life. It was introduced into divorce proceedings by the early ecclesiastical courts of England . . .”).

¹⁸⁹ GA. CODE ANN. § 19-6-1(a) (2021).

¹⁹⁰ *Id.*

¹⁹¹ GA. CODE ANN. § 19-6-1(b) (2021).

¹⁹² GA. CODE ANN. § 19-6-1(c) (2021).

¹⁹³ *Id.*

¹⁹⁴ GA. CODE ANN. § 19-6-1(e) (2021).

¹⁹⁵ GA. CODE ANN. § 19-6-1(b) (2021) (emphasis added).

entitled to any alimony.¹⁹⁶ The language “preponderance of the evidence” is a legal term of art employed in the federal and states’ evidentiary rules meaning that a particular event is more than likely to occur.¹⁹⁷ Therefore, the non-cheating spouse need only prove that it is more than likely that the other spouse committed adultery.

Section 19-6-1(b) of the Georgia Code requires proof of a few elements by a preponderance of the evidence.¹⁹⁸ The attorney representing the non-cheating spouse must prove that the spouse accused of adultery or the other sexual participant were both married at the time of the sexual act.¹⁹⁹ The attorney does not have to prove that the offender is a particular gender.²⁰⁰ Homosexual or heterosexual extramarital sex is sufficient.²⁰¹ The attorney must also prove that the act actually occurred.²⁰²

Proof of marriage arises in three different ways. First, the attorney may show that the person’s family believes that the person is married.²⁰³ Second, the attorney may prove that it is the “general reputation in the community” that the person is married.²⁰⁴ And, finally, the attorney may show that the person lives with another individual as a spouse with the community recognizing them as married.²⁰⁵

Limited to the context of divorce, an attorney must prove the same elements at a low burden of proof.²⁰⁶ However, for a criminal case, the burden of proof is greater. The prosecutor must prove the elements of adultery not by a preponderance of the evidence but by the greatest standard in the law—beyond a reasonable doubt.²⁰⁷ Regardless of the burden of proof, the Fifth Amendment is a looming figure imposing a mammoth obstacle.

¹⁹⁶ *Id.*

¹⁹⁷ *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 622 (1993).

¹⁹⁸ GA. CODE ANN. § 19-6-1(b) (2021).

¹⁹⁹ *Hopgood v. State*, 45 S.E.2d 715, 716 (Ga. Ct. App. 1947) (citing *Tison v. State*, 53 S.E. 809 (Ga. 1906)).

²⁰⁰ *Allen v. State*, 316 S.E.2d 500, 502 (Ga. Ct. App. 1984).

²⁰¹ *Id.*

²⁰² *See* GA. CODE ANN. § 19-6-1(b) (2021).

²⁰³ *Miller v. State*, 72 S.E. 279, 280 (Ga. Ct. App. 1911) (citing *Drawdy v. Hesters*, 60 S.E. 451 (Ga. 1908)).

²⁰⁴ *Id.*

²⁰⁵ *Id.* (citing *Clark v. Cassidy*, 62 Ga. 407 (1879)).

²⁰⁶ *Id.*; GA. CODE ANN. § 19-6-1(b) (2021).

²⁰⁷ GA. CODE ANN. § 24-14-5 (2021).

2. The Impenetrable Wall of the Fifth Amendment

Proving adultery may be difficult, but if the prosecutor or attorney representing the innocent spouse in a divorce proceeding has admissible evidence sufficient to meet the burden of proof, one more obstacle remains—the Fifth Amendment. The Fifth Amendment specifically prohibits against self-incrimination.²⁰⁸ A cheating spouse cannot receive alimony following an adultery conviction.²⁰⁹ But if the spouse refuses to testify to adultery because of his or her Fifth Amendment right not incriminate oneself, the spouse may still lawfully obtain alimony.

a. “I plead the Fifth”

The Fifth Amendment is relevant in every criminal context. It is the basic provision of the Constitution that spells out the rights of a defendant in a criminal proceeding.²¹⁰ The Fifth Amendment is the home of due process, double jeopardy, protection against self-incrimination, and the Takings Clause.²¹¹

The relevant clause of the Fifth Amendment is the ardent prohibition against self-incrimination: “No person . . . shall be compelled in any criminal case to be a witness against himself[.]”²¹² This clause prevents an attorney, prosecutor, or law enforcement from forcing a person to testify against him or herself in a criminal case. The only way a person can incriminate him or herself is by volunteering the information.

Now, how does this clause relate to alimony? As noted above, Georgia Code § 19-6-1(b) specifically removes a spouse’s ability to obtain alimony if, by a preponderance of the evidence, the other spouse can prove that the spouse committed adultery or deserted the marriage.²¹³ Alimony can hinge on whether the attorney representing the non-cheating spouse can prove that an adulterous affair more likely than not occurred.²¹⁴

Because of the Fifth Amendment, the attorney representing the non-cheating spouse likely cannot prove the adulterous affair through the testimony of the opposing spouse or the individual with whom the cheating spouse sexually engaged. Neither the cheating spouse nor the other person involved in the affair will want to testify. The cheating spouse and other

²⁰⁸ U.S. CONST. amend. V.

²⁰⁹ GA. CODE ANN. § 19-6-1(b) (2021).

²¹⁰ U.S. CONST. amend. V.

²¹¹ *Id.*

²¹² *Id.*

²¹³ GA. CODE ANN. § 19-6-1(b) (2021).

²¹⁴ *Id.*

participant's hesitancy to testify in open court is reinforced once they realize their constitutional rights include a specific prohibition against self-incrimination. If either testifies, they would self-incriminate themselves by revealing their adulterous affair.

Therefore, while Georgia Code § 19-6-1(b) attempts to punish a cheating spouse for exiting the bounds of the marriage for sexual gratification, the Fifth Amendment largely frustrates the purpose of the laws.²¹⁵ The attorney for the non-cheating spouse must prove by a preponderance of the evidence that the other spouse actually committed adultery. He or she will likely have great difficulty in meeting that burden of proof when neither perpetrator is willing to discuss the act and has the constitutional right not to testify. If one participant testified, the person would self-incriminate. Therefore, while the purpose of punishing the adulterer by removing his or her access to alimony is commendable, the Fifth Amendment serves as an obstacle to the alimony law's execution.

b. Circumventing the Fifth Amendment with circumstantial evidence

An adulterous spouse may use the Fifth Amendment to avoid self-incrimination. However, without direct testimony, there are only limited tools available to prove adultery. One such tool consists of the attorney offering circumstantial evidence that can lead the jury to infer the adulterous act.

As noted above, an alimony proceeding requires the attorney to prove that only one person is married at the time of the affair.²¹⁶ To prove the marital status of each person, the evidence can be both direct and circumstantial.²¹⁷ Proving marriage by circumstantial evidence may take the form of the general reputation of the parties engaged in the adulterous affair.²¹⁸ Members of the community may testify as to whether it is their understanding that the adulterer or adulteress were married at the time.²¹⁹

The circumstantial evidence must provide a sufficient inference that the jury could find that the adulterer was married at the time of the affair. In *Craft v. State*, the Court of Appeals of Georgia found particular circumstantial evidence to be insufficient to allow for the inference of marriage.²²⁰ The court

²¹⁵ *Id.*; U.S. CONST. amend. V.

²¹⁶ *Hopgood v. State*, 45 S.E.2d 715, 716 (Ga. Ct. App. 1947) (citing *Tison v. State*, 53 S.E. 809 (Ga. 1906)).

²¹⁷ *Miller v. State*, 72 S.E. 279, 279 (Ga. Ct. App. 1911).

²¹⁸ *Id.* at 280.

²¹⁹ *Id.*

²²⁰ *Craft v. State*, 78 S.E. 776, 776 (Ga. Ct. App. 1913).

examined two pieces of evidence.²²¹ First, the prosecutor offered a statement made by the alleged adulteress a year prior to the alleged affair, in which she stated that she was married.²²² Second, statements from witnesses indicated that she lived with a man a year before the alleged crime occurred.²²³ The court held that these two offerings of evidence were insufficient to allow for an inference that she was married.²²⁴

The court's opinion provided no explicit reasoning.²²⁵ The court implicitly reasoned that the woman's statement the year prior to the alleged crime did not provide an inference that she was likely married.²²⁶ Even if she was married then, one statement does not prove that she was married at the time of the sexual engagement.²²⁷ Similarly, the court was dissatisfied with statements that witnesses made showing that the woman was living with a man a year prior to the act but he no longer lived in the town.²²⁸ There was no proof that the man was her husband, and no witness offered any additional information about the man.²²⁹ Therefore, circumstantial evidence failed to meet the requisite burden of proof.

Testimony from the cheating spouse and his or her accomplice in the extramarital affair is certainly the most direct evidentiary means to prove the affair. However, the Fifth Amendment's impenetrable wall extends beyond criminal prosecution and into the civil domestic court.²³⁰ The Court of Appeals of Georgia's decision and reasoning in *Craft v. State* demonstrates the difficulty of proving only one element of the crime of adultery by circumstantial evidence.²³¹ These two obstacles help explain a prosecutor's reluctance to charge this crime—the heightened difficulty to prove a violation

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.* (citing *Zachery v. State*, 64 S.E. 281 (Ga. Ct. App. 1909)).

²²⁵ *Id.*

²²⁶ *See Craft*, 78 S.E. at 776.

²²⁷ *See id.*

²²⁸ *See id.*

²²⁹ *See id.*

²³⁰ Some jurisdictions have imposed adverse effects on the party that pleads the Fifth Amendment in a divorce proceeding. Paul L. Feinstein, *Taking the Fifth: Ramifications of Abusing the Privilege*, DIVORCE MAG, <https://www.divorcemag.com/articles/taking-the-fifth> (Mar. 26, 2021). Feinstein notes that courts in recent cases have “held that the fact finder in a civil proceeding is entitled to draw an adverse inference against the party who refuses to testify.” *Id.* Other jurisdictions have limited recovery for the party that asserts the privilege or even forced the litigant asserting the privilege to either assert the privilege and drop the lawsuit or continue with the lawsuit without asserting the privilege. *See id.*

²³¹ *See generally Craft*, 78 S.E. at 776.

of the adultery law because of the Fifth Amendment and the largely insufficient circumstantial evidence.

B. *An Unenforced Prohibition*

Most prosecutors do not charge and fight to convict for the crime of adultery.²³² In most cases, gathering admissible evidence is extremely difficult. The difficulty in proving adultery and apprehension by the prosecutors to charge have served as obstacles to convicting offenders.²³³

Prosecutors bear a different burden than a family law attorney representing a spouse in a divorce proceeding. A criminal charge requires the prosecutor to prove all the elements of the crime beyond a reasonable doubt. Beyond a reasonable doubt is a high bar—there must be no reasonable doubt in the mind of the jury that the defendant meets the elements of the crime. Therefore, prosecutors bear this high burden to prove the crime of adultery beyond a reasonable doubt without the benefit of direct evidence in most cases.

In *Durden v. State*, the Court of Appeals of Georgia highlighted the difficulty prosecutors face in proving all the elements of adultery with circumstantial evidence. In *Durden*, the defendant, Jack Durden, was married with ten children.²³⁴ At times, he worked at the store owned by his second cousin, Murphey Durden.²³⁵ Murphey was married to Mamie.²³⁶ Jack visited Mamie regardless of whether Murphey was there or not.²³⁷ At trial, the community collectively testified that Mamie had a bad reputation.²³⁸

One night, the store owner across the street from Murphey's store saw that Jack parked his car in front of Murphey and Mamie's home.²³⁹ He walked over to investigate, and one of Murphey's children told him that Jack was not in the home.²⁴⁰ Mamie soon arrived at the door and stated that Jack was at the house, but that she needed help removing him from her backroom because of his drunken state.²⁴¹ The store owner walked into Mamie's home

²³² See RHODE, *supra* note 24, at 39.

²³³ See, e.g., *Craft*, 78 S.E. at 776 (holding that general statements from witnesses and the defendant's own statements relating to the existence of the defendant's marriage were insufficient to prove the defendant was married resulting in acquittal).

²³⁴ *Durden v. State*, 156 S.E. 294, 295 (Ga. Ct. App. 1930).

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Durden*, 156 S.E. at 295.

²⁴¹ *Id.*

to help, and he found Jack in a bed.²⁴² Jack commanded the store owner to leave.²⁴³ The store owner returned to his own store.²⁴⁴ Jack visited the store owner later that night and informed him that he was not drunk.²⁴⁵ Jack also told the store owner that he now knew more than anyone else about the relationship between Jack and Mamie.²⁴⁶ Jack requested the store owner not to tell anyone about the occurrence and that he perceived nothing wrong with visiting Mamie late at night.²⁴⁷ The store owner testified to all of this.²⁴⁸

The prosecutor not only provided the testimony of the store owner, but also of other witnesses.²⁴⁹ One witness stated that Jack compelled him to tell Mamie not to come to her own store because Jack's wife was shopping there at the time.²⁵⁰ Other witnesses testified that they would talk late at night or behind the store's counter and be "too close together to look good."²⁵¹ However, some witnesses testified that they had never seen Mamie engage in wrongful conduct.²⁵²

The Court of Appeals of Georgia provided a four-sentence response rejecting the evidence.²⁵³ The court stated that the prosecutor proved that Mamie had a bad reputation in the community.²⁵⁴ The court provided nothing else. The evidence was insufficient.²⁵⁵

The Supreme Court of Georgia provides another illustration in *Lightner v. State*.²⁵⁶ The defendant was a man traveling with his child and an accompanying nurse.²⁵⁷ The defendant spent the nights at private residences when travelling.²⁵⁸ All three people shared one bedroom "on two

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Durden*, 156 S.E. at 295.

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Durden*, 156 S.E. at 295.

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Lightner v. State*, 55 S.E. 471, 471 (Ga. 1906).

²⁵⁷ *Id.*

²⁵⁸ *Id.*

occasions.²⁵⁹ First, all three shared a bedroom containing two beds.²⁶⁰ The other time involved a sleeping arrangement including a pallet in the kitchen for the nurse and one bed in a bedroom for the defendant and the child.²⁶¹ The defendant insisted that the nurse and the child join him in the bedroom with only one bed.²⁶²

The trial court found him guilty of adultery.²⁶³ However, on appeal, the Georgia Supreme Court unanimously disagreed by reversing the trial court's verdict.²⁶⁴ The Supreme Court of Georgia's decision centered on how it viewed the evidence.²⁶⁵ The court reasoned: "[t]here is no direct evidence showing criminal intercourse between the defendant and the woman, and the circumstances are not such as to exclude every other reasonable hypothesis than that of the guilt of the accused."²⁶⁶ The circumstantial evidence proved the *possibility* of an extramarital affair, but it did not prove it beyond a reasonable doubt.²⁶⁷

These two cases illustrate the struggle that prosecutors and attorneys face when participating in divorce proceedings that involve alimony. The struggle is in the evidentiary standards. Proving the act of adultery is difficult when neither participating individual will testify and both have the right to refuse to testify under the Fifth Amendment of the United States. The other way to prove adultery is through circumstantial evidence, but as *Durden v. State* and *Lightner v. State* reveal, circumstantial evidence is difficult to prove.²⁶⁸ Therefore, the difficulty in meeting the criminal evidentiary burden—beyond a reasonable doubt—renders adultery laws largely unenforceable. This begs the question: Should the adultery law remain on the books when prosecutors are not charging perpetrators, and the law's existence is frustrating a non-cheating spouse's ability to benefit from the adultery exception to alimony?

IV. PROPOSAL

Because of a lack of enforcement, adultery laws do not accomplish the intended purpose of prohibiting and deterring extramarital affairs. Repealing criminal adultery laws will provide more opportunity to deter extramarital

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Lightner*, 55 S.E. at 471.

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Lightner*, 55 S.E. at 471; *Durden v. State*, 156 S.E. 294, 295 (Ga. Ct. App. 1930).

affairs. Decriminalizing adultery will remove the Fifth Amendment's barrier to obtaining direct evidence and also will allow the parties to better obtain the necessary evidence in domestic cases. Admissible evidence of the affair allows an attorney to utilize the alimony provision to ensure that the non-cheating spouse is not making payments to the cheating spouse. As a result, with the prospect of having to air one's dirty laundry of his or her sexual affair in the courtroom or lose out on alimony payments, repealing adultery laws will better deter extramarital affairs.

A. *Repealing Adultery as a Criminal Offense*

Section 16-6-19 of the Georgia Code states that the act of adultery is a crime and punishable as a misdemeanor.²⁶⁹ The statute's effect is not one the legislature intended. Rather, the current effect is its intersection with the Fifth Amendment for a cheating spouse to plead the Fifth Amendment and remain eligible to obtain alimony.

The lack of general and regular enforcement has another unintended consequence. Keeping an unused criminal offense on the books may tempt the prosecutor to use it only when politically expedient. When prosecutors enforce laws only for political gain or to punish political enemies, justice is not served.²⁷⁰

Without the criminalization of adultery, the cheating spouse does not have Fifth Amendment protection. More importantly, the absence of the Fifth Amendment means the person the cheating spouse sexually engaged with can no longer seek refuge from self-incrimination. This is vital to litigating alimony because the attorney representing the non-cheating spouse can subpoena the other sexual participant and require a testimony, statement, and other evidence to prove that the adulterous affair occurred.

Adulterous affairs often occur in secret. Publication of affairs rarely happens. As demonstrated by the Court of Appeals of Georgia and the Supreme Court of Georgia, because the affairs occur behind closed doors and in very intimate settings, extramarital affairs are difficult to prove with only circumstantial evidence and without direct testimony.²⁷¹ Therefore, if a subpoena or another litigation tool compels the sexual participant who is not a member of the marriage to testify, their direct testimony can serve as proof of the act.

Section 19-6-1(b) of the Georgia Code prohibits an award for alimony for

²⁶⁹ GA. CODE ANN. § 16-6-19 (2021).

²⁷⁰ ROBINSON & WILLIAMS, *supra* note 9, at 251.

²⁷¹ See, e.g., *Durden v. State*, 156 S.E. 294, 295 (Ga. Ct. App. 1930); *Lightner v. State*, 55 S.E. 471, 471 (Ga. 1906).

any spouse in a divorce proceeding that engaged in an adulterous affair.²⁷² This statute's purpose of punishing a cheating spouse is completely frustrated because it is easily circumvented in the current state of the law. However, if the Georgia state legislature repeals the criminal sanction imposed on adultery, the act can be more easily proven by a preponderance of the evidence. No longer will the cheating spouse be able to avoid his or her punishment. Repealing the law allows the alimony provision to carry out its intended purpose and operates as a greater deterrence to the destructive behavior than the current intersection of the Fifth Amendment, the adultery prohibition, and the restrictions on alimony.

B. *Repealing Does Not Equate to Encouragement of the Formerly Prohibited Conduct*

The lack of enforcement of adultery laws suggests that they are antiquated and impractical under current American jurisprudence. Regardless, opposition to repealing the laws exist. The leading counterargument is that a statutory prohibition of adultery is a representation of "moral condemnation of the conduct."²⁷³

This counterargument posits that criminalization of an act signifies society's perception that the act is unacceptable.²⁷⁴ Laws prohibiting adultery signify a rejection of extramarital affairs. The enforcement of the prohibition is irrelevant because the very existence of the law provides the appearance that the act is sufficiently illegal to be criminalized, and therefore, one should not engage in such conduct.²⁷⁵

However, when a crime's prescribed punishment is not exercised following the conduct, people begin to develop an understanding that the act must be acceptable.²⁷⁶ As a result, punishment no longer deters the people from the formerly unacceptable conduct. This reduces the statute to mere words on a page. "By representing adultery to be an offense, when in practice it really is not, is to risk having people assume that other offenses in the criminal code are similarly just 'pretend' offenses. Creating that kind of ambiguity tends to undermine the social influence of the criminal prohibition generally."²⁷⁷

If the purpose behind adultery laws is to provide the public with a mere appearance of rejection of adulterous conduct, then other institutions can

²⁷² GA. CODE ANN. § 19-6-1(b) (2021).

²⁷³ ROBINSON & WILLIAMS, *supra* note 9, at 251.

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ *See id.* at 251–52.

²⁷⁷ *Id.* at 252.

communicate that message.²⁷⁸ Many religious organizations condemn adultery and include marriage fidelity in their teaching. Common examples include a church sermon on a Sunday morning or a teacher's lesson in grade school.²⁷⁹ The risk of diluting criminal law as a whole is not worth it when other avenues for discouraging adulterous acts exist.

Furthermore, adultery laws are hardly discouraging the conduct. People may not be aware that adultery is criminalized, which is the likely result of prosecutors rarely charging a person with it. When prosecutors largely ignore a criminal statute, other dangers arise. A possible danger includes the prosecutor having the "ability to resurrect the rarely used statute—that may have never been intended to be used but was meant only to serve a symbolic function—in order to persecute a disfavored defendant."²⁸⁰

V. CONCLUSION

Georgia and many other states have long prohibited adultery.²⁸¹ However, the shift in American culture changes adultery jurisprudence. Many states have already repealed their adultery laws.²⁸² Others, like Georgia, punish adultery as a misdemeanor offense.²⁸³ The few remaining states punish the act as a felony.²⁸⁴ Yet, the prosecutors in the states with adultery laws still on the books very rarely charge anyone with the crime.

Prosecutions of adultery are rare. However, its use may arise in divorce proceedings. In Georgia, adultery is an acceptable means to petition for a total divorce.²⁸⁵ More importantly, it is a means for one spouse to disallow alimony for the other spouse. A court may deny an award for alimony simply because the spouse engaged in an extramarital affair. For one spouse to remove the other's ability to obtain alimony by adultery or to compel testimony that is embarrassing may deter adulterous behavior. Yet, to prove adultery in the civil context, the spouse must prove it by a preponderance of the evidence. While this standard is lower than the criminal burden of proof, beyond a reasonable doubt, the criminalization of adultery allows for the lower standard to be difficult to meet.

The difficulty in proving adultery lies in the Fifth Amendment and hard-to-find, strong circumstantial evidence. The Fifth Amendment gives a person

²⁷⁸ *Id.* at 251.

²⁷⁹ ROBINSON & WILLIAMS, *supra* note 9, at 251.

²⁸⁰ *Id.* at 252.

²⁸¹ See sources cited *supra* note 89.

²⁸² ROBINSON & WILLIAMS, *supra* note 9, at 249, 251.

²⁸³ GA. CODE ANN. § 16-6-19 (2021).

²⁸⁴ See sources cited *supra* note 90.

²⁸⁵ GA. CODE ANN. § 19-5-3(6) (2021).

the right to avoid self-incrimination.²⁸⁶ Every American has the right to avoid self-incrimination. Because adultery is typically an act that takes place in an intimate setting with only the perpetrators in the room, testimony from one of the sexual participants is vital to proving the act occurred. However, the Fifth Amendment provides an escape for both participants to avoid testifying.

As demonstrated by case law, circumstantial evidence proving that people engaged in an extramarital affair is difficult to obtain.²⁸⁷ It is hard to show that two individuals engaged in intercourse. Evidence that the participants slept in the same bedroom,²⁸⁸ or that a person was in the bed of another married person, are insufficient to prove that adultery occurred.²⁸⁹

Therefore, unenforced adultery laws are not discouraging extramarital affairs but are inhibiting other remedies. The laws are not accomplishing their intended purpose of prohibiting conduct that easily fractures marriages. Because of the adultery laws, people can engage in extramarital affairs without facing criminal punishment and retain their ability to obtain alimony. While adultery laws may have promoted marriage at some point in the laws' history, they are now merely words on a page indicating moral condemnation without promoting the valuable union of marriage.

²⁸⁶ U.S. CONST. amend. V.

²⁸⁷ See generally *Lightner v. State*, 55 S.E. 471, 471 (Ga. 1906); *Durden v. State*, 156 S.E. 294, 295 (Ga. Ct. App. 1930).

²⁸⁸ *Lightner*, 55 S.E. at 471.

²⁸⁹ *Durden*, 156 S.E. at 295.