

Marriage and Sexual Fidelity

PARTIAL DRAFT PREPARED FOR AALS MIDYEAR WORKSHOP ON Shifting Foundations in Family Law

Edward Stein*

I. Introduction

For a good part of this nation's history, the legal treatment of adultery has played a significant role in family law. Due to criminal prohibitions on fornication (sexual intercourse between unmarried people) and adultery (sexual intercourse between people, at least one of whom is married to someone else),¹ marriage was the exclusive context in which two people could legally engage in sexual relations. If you wanted to have sex without becoming an outlaw or an outcast, you married the person with whom you wanted to have sex.

Not only did the law of adultery play a role in channeling people into marriage, but adultery also played a central role in getting people out of marriages. Until the 1960's, in order to get out of a marriage, a person had to prove to a judge that his or her spouse had committed a statutorily-specified "ground" for divorce, that is an enumerated "wrong" that caused the breakdown of the marriage. The person asking the court to grant a divorce had to also prove that he or she was innocent of any wrongdoing that led to the breakdown of the marriage. At one time, adultery was an important ground for divorce and, in some states, even until surprisingly recently, one could *only* obtain a divorce by proving that one's spouse had engaged in adultery.²

Times have changed and adultery is no longer a crime in the majority of jurisdictions and, even in those twenty-two states³ in which it is a crime, it is rarely prosecuted.⁴ Further, every jurisdiction now allows for a path to divorce without the requirement of proof of fault⁵ but adultery continues to be a ground for divorce in the majority of jurisdictions.⁶

* Professor of Law and Director of the Gertrud Mainzner Program in Family Law, Policy and Bioethics.

¹ Note that the definition of these two crimes differs among the various states. [GIVE EXAMPLES.]

² Cites. Some states banned remarriage of the guilty party to a divorce. *See, e.g.*, *Cropsey v. Ogden* 11 NY 228 (1854); *West Cambridge v. Lexington* 1 Pic. 507 (Mass. 1823); *Barber v Barber*, 16 Cal. 378 (1860).

³ Alabama (adultery is a class B misdemeanor), Arizona (class 3 misdemeanor), Florida (second-degree misdemeanor), Georgia (misdemeanor), Idaho (felony), Illinois (class A misdemeanor), Kansas (class C misdemeanor), Maryland (misdemeanor), Massachusetts (felony), Michigan (felony), Minnesota (felony), Mississippi (misdemeanor), New Hampshire (class B misdemeanor), New York (class B misdemeanor), North Carolina (class 2 misdemeanor), North Dakota (class A misdemeanor), Oklahoma (felony), Rhode Island (petty misdemeanor), South Carolina (misdemeanor), Utah (class B misdemeanor), Virginia (class 4 misdemeanor), and Wisconsin (class I felony).

⁴ Cite. [Note that the exception is in military contexts.]

⁵ Cite.

⁶ Alabama, Alaska, Arkansas, Connecticut, Delaware, Georgia, Idaho, Illinois, Kansas (although Kansas does not explicitly list adultery as a ground, one ground is "failure to perform a material marital duty or obligation," KAN. STAT. ANN. § 23-2701(2), and case law has held that adultery is included under this language, *see, e.g.*, *Matter of Marriage of Sommers*, 792 P.2d 1005 (Kan. 1990)), Louisiana, Maine,

However, the law of adultery has not changed completely. Significantly, in some jurisdictions, the fact that one spouse has committed adultery may have important financial implications upon divorce or death of a spouse⁷ and may undermine the adulterous spouse's argument for custody of his or her child.⁸ Despite the changes in the law of adultery, adultery continues to have direct legal consequences.

Adultery also may have *indirect* legal consequences. When a state criminalizes a behavior but rarely enforces it, the legal consequences typically flow not from actual prosecutions for engaging in the behavior, but from legally-permissible sanctions that piggyback on the criminality of the behavior. For example, a police officer who commits adultery may be fired for "criminal activity" even if he or she is not prosecuted for adultery (or anything else).⁹ Or, a landlord may refuse to rent a home to a couple if they are committing the crime of adultery or the crime of fornication, even if they have not been convicted of those crimes or even prosecuted for them.¹⁰ Although such indirect legal consequences are less likely to occur today than they were say, thirty years ago, the existence of legal prohibitions continues to give rise to legal consequences beyond actual prosecutions: one could get fired from a job, refused housing, not get custody of a child, or be denied the opportunity to adopt a child because one has committed adultery.

Indirect legal consequences arise in the divorce context as well. Judges "equitably distribute" marital assets between divorcing spouses. A judge might give an adulterous spouse a smaller portion of the marital assets than she otherwise would even if she does not explicitly cite adultery as a factor in deciding what distribution is equitable. Another indirect legal affect concerns the validity of marital agreements upon divorce: it is not clear if a couple can voluntarily waive fault as a ground for divorce through a prenuptial or postnuptial agreement. This is especially surprising given the generally permissive attitude virtually every state has regarding such agreements: today, prenuptial and postnuptial agreements are widely enforced regarding the distribution of property, spousal support, and virtually any other economic matters.¹¹ Because adultery is an

Maryland, Massachusetts, Mississippi, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, and West Virginia.

⁷ See S.C. Code. Ann. § 20-3-130 (prohibiting award of alimony to a spouse who has committed adultery prior to either reaching a settlement agreement or the entry of an order dealing with spousal support and property distribution issues); N.C. Gen. Stat. Ann. § 50-16.3A (prohibiting award of alimony "[i]f the court finds that the dependent spouse participated in an act of illicit sexual behavior [defined to include "acts of sexual ... intercourse ... voluntarily engaged in by a spouse with someone other than the other spouse," § 50-16.1A(3)(a)] during the marriage and prior to or on the date of separation."); N.J. Stat. Ann. § 3A:37-2 (denying typical spousal inheritance rights to spouse who committed adultery).

⁸ See, e.g., 750 Ill. Comp. Stat. § 50/1(D)(j) (listing adultery as a ground for finding a person unfit to be a parent).

⁹ See, e.g., *Oliverson v. West Valley City*, 875 F.Supp. 1465 (D. Utah 1995); *Marcum v. McWhorter*, 308 F.3d 635 (6th Cir. 2002).

¹⁰ See, e.g., *Cooper v. French*, 460 N.W.2d 2 (Minn. 1990) (unmarried couple).

¹¹ CITE.

enumerated ground for divorce, some states will, it seems, view it as a violation of public policy to enforce an agreement that, in effect, waives adultery as a ground for divorce.¹²

The law of adultery has direct legal effects (relating to custody and distribution of property in case of divorce or death of a spouse), indirect legal effects (relating to, for example, effect on employment, housing, adoption, limiting the types of marital agreements couples can enter, and subtly influencing the distribution of marital assets upon divorce), and, because the law has expressive power, the existence of legal prohibitions and the associated legal consequences has *extra-legal effects* as well. States, through their laws, say what is good and bad. Even when a law is rarely used or never enforced, as long as people know (or believe) that the law punishes a behavior or takes a negative attitude towards it, the law is understood as the state expressing negative attitudes towards the behavior, thereby shaping social attitudes, pushing behaviors underground, keeping them secret. That adultery is illegal, that adultery is an explicit ground for divorce, and that prenuptial agreements that seem to allow adultery will not be enforced are all ways of the state saying that adultery is bad and that adultery undermines marriages. This helps keep extramarital sex “in the closet,” contributes to shame people feel when they or their spouse engages in adultery, and creates a stigma around marriages that are in any way non-monogamous.

Historically, part of the implicit justification for adultery laws related to gender. Adultery laws harnessed the power of criminal law and divorce law to protect wives from the philandering of their husbands at a time when men had much greater economic power and disproportional legal status. Similarly, adultery laws gave husbands extra assurance that their wives’ offspring were actually their offspring.¹³ But now that same-sex marriage is legal in thirty-seven states and the District of Columbia,¹⁴ marriage law is no longer tied to gender in the way that it once was.

Same-sex marriage makes the discussion of marriage and sexual fidelity more timely. Couples consisting of two men (whether married or not) are more likely than other couples to have “consensual non-monogamous” relationships, that is, relationships in which it is explicitly agreed that, at least in some circumstances, a partner can have sex with people other than his spouse/partner.¹⁵ Advocates of the legal recognition of same-

¹² See Part III *infra*, especially the discussion of *Boudreaux v. Boudreaux*, 745 So.2d 61 (La. App. 1999).

¹³ See *infra* Part III.

¹⁴ Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Iowa, Illinois, Indiana, Kansas, Maine, Maryland, Massachusetts, Montana, North Carolina, New Hampshire, New Jersey, New Mexico, Nevada, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Utah, Virginia, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. Depending on the outcome of *Obergefell v. Hodges*, No. 14-556 (argued 4/28/15) (US 2015), the number of states that allow same-sex couples to marry may increase to fifty.

¹⁵ See, e.g., Adam Fingerhut & Letitia Anne Peplau, *Same-Sex Romantic Relationships* in HANDBOOK OF PSYCHOLOGY AND SEXUAL ORIENTATION (Charlotte Patterson & Anthony D’Augelli, eds., 2012) (summarizing research on sexuality as showing that “one area of difference [among different sexual orientations] is the pattern of less sexual exclusivity among gay male couples”); Gabrielle Gotta et al., *Heterosexual, Lesbian, and Gay May Relationships: A Comparison of Couples in 1975 and 2000*, 50 FAM.

sex relationships have not focused on this difference between male-male relationships and other relationships (choosing—understandably—to focus on the *similarities* between same-sex and different-sex couples),¹⁶ but some opponents of such recognition have deployed this difference (unsuccessfully, for the most part) as an argument against same-sex marriage.¹⁷ For purposes of this paper, if it is true that male-male couples are more likely to have consensual monogamous relationships than male-female couples, now that same-sex marriage is an option, there will be more “open marriages” than there have been in the past making questions about adultery, marriage and fidelity more pressing.¹⁸

In this paper, I argue that the law should not, in general, be so focused on adultery any more. A crucial part of my argument is that the legal concept of adultery elides *infidelity* (having sex with a person other than one’s spouse when one’s spouse has *not* consented to it) and *consensual non-monogamy* (having sex with a person other than one’s spouse when one’s spouse has consented). In other words, some instances of adultery are not instance of infidelity, namely, when a couple has, in a sense, agreed not to be monogamous. What is the state’s interest in sexual fidelity for those couples who opt for consensual non-monogamy? What is the state’s interest in sexual fidelity for those couples who sometimes have *ménage à trois* or engage in other sorts of group sex activities,¹⁹ activities that qualify as adultery? What is the state’s interest in sexual fidelity between a couple one of whom is no longer able to engage in sexual activities due to injury or illness? I argue is no strong state interest here. Further, the law of adultery disincentizes *consensual non-monogamy* and, thereby, pushing adultery into the closet

PROCESS 353, 364-369 (2011) (finding that 44% of gay men in relationships, 5% of lesbians in relationships, 6% of heterosexual men in relationships, and 3% of heterosexual women in relationship “have discussed sex out of the relationship and decided that under some circumstances it is all right”); Colleen Hoff & Sean Beougher, *Sexual Agreements Among Gay Male Couples*, 39 ARCHIVES SEXUAL BEHAV. 774 (2010) (finding that 64% of gay male couples had agreements that “allowed sex without outside partners); Terri Conley et al., *A Critical Examination of Popular Assumptions about the Benefits and Outcomes of Monogamous Relationships*, 17:2 PERSONALITY & SOC. PSYCH. REV. 124 (2012); Garrett Prestage, et al., Trends in Agreements Between Regular Partners Among Gay Men in Sydney, Melbourne, and Brisbane, Australia, 12 AIDS & BEHAV. 513 (2008) (reporting that about 75% of “men with a regular partner had negotiated an agreement about sex within their relationship”); Michael LaSala, *Extradynamic Sex and Gay Male Couples: Comparing Monogamous and Nonmonogamous Relationships*, 85 FAMILIES IN SOC’Y: J. CONTEMP. SOC. SERVICES 405 (2004); S. E. Solomon, et al., *Money, Housework, Sex, and Conflict: Same-Sex Couples in Civil Unions, Those Not in Civil Unions, and Heterosexual Married Siblings*, 52 SEX ROLES 561 (2005).

¹⁶ cite

¹⁷ Cites.

¹⁸ If female-female couples are less likely to have consensual non-monogamous relationships than male-female couples are, it is possible that the rate of consensually non-monogamous marriages might decrease with the legalization of same-sex marriage even if male-male couples are more likely to have consensual non-monogamous relationships. See *infra* Part II for a discussion.

¹⁹ See, e.g., *Lovisi v. Slayton*, 539 F.2d 349 (4th Cir. 1976) (married couple charged with sodomy for jointly engaging in sexual activities with a third person was found to have waived their constitutional right to privacy when they let a third person into their marital bedroom); *R v. Labaye*, 3 S.C.R. 728, 2005 SCC 80 (Supreme Court of Canada 2005) (owner of a “swingers” club, where club members would engage in consensual group sex, among other activities, could not be convicted of “operating a bawdy house,” because the activities that took place in his club were not indecent).

and, perversely, encouraging infidelity. The law of adultery, while it aims in some sense to encourage monogamy, actually encourages infidelity, because monogamy is, practically speaking, an unattainable goal for many people.²⁰ Instead, I argue that the state no longer has any bona fide interest in making sure that married people only have sex with each other. Insofar as the state has an interest in the maintenance of “good” marriages and relationships, the state should encourage (or at least stop discouraging) open communication about sexual exclusivity and enforce (at least some) agreements that spouses make about such matters. Of particular relevance to this argument are studies that show people in consensual non-monogamous relationships are less jealous of their spouses/partners,²¹ more open and honest generally in their relationships,²² are more likely to practice safer sex than people who engage in *non-consensual non-monogamy*²³, or simply that there are no significant differences between couples who are monogamous and those who are not.²⁴ More generally, I argue that the state should not in general be concerned with adultery. Specifically, laws making adultery a crime should be repealed and adultery should be eliminated from divorce law in those states in which it continues to play a role.

This paper proceeds as follows. Part II of this paper defines and distinguishes among adultery, infidelity, non-monogamy, open relationship, polygamy, polyandry, and related concepts. Part II also discusses how common adultery, infidelity and non-monogamy are. Part III surveys the past and present legal frameworks surrounding the law of adultery (focusing on criminal law, divorce law and in the contracts of marital agreements) and reviews the arguments supporting them. The main work of the paper comes in Part IV. That Part argues that the state now lacks strong justifications for using the law to encourage monogamy per se and in fact that the law of adultery in the criminal law and divorce law contexts should be changed. Insofar as the state has any reasons for using the law to oppose adultery, these reasons are outweighed by privacy concerns generally and marital privacy more specifically. More specifically, Part IV discusses the

²⁰ See, e.g., CHRISTOPHER RYAN & CACILDA JETHA, *SEX AT DAWN: HOW WE MATE, WHY WE STRAY, AND WHAT IT MEANS FOR MODERN RELATIONSHIPS* (2010).

²¹ Conley, et al., *supra* note 15 at 130 (“jealously may actually be less severe, more manageable, or even non-existent among individuals in [consensual non-monogamous] relationships”); R. deVisser & D. McDonald, *Swings and Roundabouts: Management of Jealousy in Heterosexual “Swinging” Couples*, 46 BRITISH J. SOC. PSYCH. 459 (2007); R.J. Jenks, *Swinging: A Test of Two Theories and a Proposed New Model*, 14 ARCHIVES SEXUAL BEHAV. 517 (1985).

²² CITE

²³ Terri Conley, et al., *Unfaithful Individuals Are Less Likely to Practice Safer Sex than Openly Nonmonogamous Individuals*, 9 J. SEXUAL MEDICINE 1559 (2012).

²⁴ See, e.g., Fingerhut & Peplau, *supra* note 15; Conley, et al., *supra* note 15 at 136 (concluding that “for people who choose it, consensual non-monogamy may be equally as beneficial as monogamy”); Michael LaSala, *Monogamy of the Heart: A Qualitative Study of Extradysadic Sex Among Gay Male Couples*, 17 J. GAY & LESBIAN SOC. SERVICES 1 (2005); Michael LaSala, *Extradysadic Sex and Gay Male Couples: Comparing Monogamous and Nonmonogamous Relationships*, 85 FAMILIES IN SOCIETY: J. CONTEMP. SOC. SERVICES 405 (2004); G.J. Wagner et al., *Prevalence of Extradysadic Sex in Male Couples of Mixed HIV Status and Its Relationship to Psychological Distress and Relationship Quality*, 39 J. HOMOSEXUALITY 31 (2000); D. Blasband & L. Peplau, *Sexual Exclusivity Versus Openness in Gay Male Couples*, 14 ARCHIVES SEXUAL BEHAV. 395 (1985).

reasons distinguishing consensual non-monogamy and infidelity and the evidence that it consensually non-monogamy is at least as healthy a relationship strategy as monogamy. Adultery is, by all measures, rather common. For some people—namely those who are in consensual non-monogamous relationships of various sorts and others who are in situations in which sex with their spouse is not possible or practicable—adultery is not a reason to dissolve a marriage. Specifically, I argue that, insofar as states still have fault grounds for divorce, adultery should be eliminated as a ground for divorce. The arguments that traditionally have been thought to support adultery’s role in dissolving marriages are unsatisfactory today, due to both technological and normative changes. Although Part IV argues that there are good reasons to eliminate adultery as a ground for divorce, such arguments may not be persuasive to state legislators who may feel that such reforms to family law may appear pro-adultery, a position that many legislature might worry will be unpopular with the majority of their constituents. For this reason, Part V also offers a “second-best” alternative to eliminating adultery as a ground for divorce, namely, couples should be allowed to waive adultery as a ground for divorce either before or during a marriage (through a prenuptial or post-nuptial agreement). I argue that, even in jurisdictions where adultery remains a ground for divorce, individual couples should be allowed to opt out of having adultery as a ground for divorce. This would be appropriate for consensually non-monogamous couples as well as those who are polyamorous or those who want to remain married and yet do not want to or cannot have sex with each, but who want to remain sexually active. The article concludes in Part V.

Consider the following case: Constance and Deno Boudreaux were married for eight years when Constance filed for divorce in 1993. Deno wanted to try to work things out and save the marriage. His wife agreed to withdraw her divorce action if Deno would sign a post-nuptial agreement with the following terms: if Deno divorced Constance for any reason, he would pay her alimony of \$1,500/month. Deno signed the postnuptial agreement and Constance dismissed her suit for divorce. Four years later, Deno filed for divorce and asked the trial court to nullify the postnuptial agreement, which it did. On appeal, the Louisiana appellate court, said that “spouses are free to contract with one another before or during marriage as to all matters that are not prohibited by public policy” and went on to void the postnuptial agreement because an “agreement to pay alimony, regardless of fault—even adultery, is ... against public policy ...[because] [s]uch a contract would undermine the sanctity of marriage and would encourage the parties to approve adulterous conduct for a price.”²⁵ A premarital or postmarital agreement cannot repeal or amend the nature of marital obligations and, under Louisiana law, “married persons owe each other fidelity, support, and assistance”. For this reason, a pre- or post-nuptial agreement that facilitates adultery, even indirectly by attempts to limit, restrict, or discourage divorce on the grounds of adultery, will be unenforceable.

Following this logic, a court in such a jurisdiction would likely say that being able to file for divorce on fault grounds is an important public policy that spouses cannot waive in a prenuptial or postnuptial agreement. Although one can forgive a spouse’s adultery after the fact (condonation) or, in advance, consent to a particular act of adultery (connivance) and thereby prevent the forgiving or consenting spouse from filing for divorce on the ground of adultery, these common-law defenses to adultery, insofar as they have continuing vitality, seem limited to specific adulterous acts that are permitted or forgiven, not to consensual non-monogamy agreements generally.

DISTINGUISH FROM THE CLAIM THAT THERE IS A CONSTITUTIONAL RIGHT TO SEXUAL FREEDOM THAT APPLIES TO ADULTERY. THAT IS NOT MY ARGUMENT HERE. ALSO COMPARE TO LIZ’S THESIS IN POLYAMORY PAPER PERHAPS DO THIS IN A FOOTNOTE

MAP THE REST OF THE PAPER

I. HISTORY OF ADULTERY AS CRIME AND IN DIVORCE

From the founding of the United States, criminal law and family law combined to impose significant legal limits on sexual activity and to drastically limit opportunities for married people to get divorced. If you wanted to have sex (without violating the law), you had to get married and then limit your sexual activity to your spouse. Sex before marriage and sex with someone to whom you were not married were against the law and, when

²⁵ *Bourdreaux v. Bordreaux*, FILL IN.

prosecuted, were seriously punished. For example, in colonial Virginia, adultery was a capital offense (along with rape and sodomy).²⁶ BETTER TRANSITION

In the early decades of the United States, South Carolina did not allow divorce, but other jurisdictions did. The framework for divorce was for one spouse (the innocent spouse) to show that the other spouse (the guilty spouse) had committed a serious wrong that warranted releasing the innocent spouse from the marriage. South Carolina aside, jurisdictions allowed for different fault grounds. For example, in 1791, the New Hampshire legislature passed a law that allowed husbands and wives to seek divorce on the grounds of adultery, bigamy, incest, abandonment for three years, or extreme cruelty.²⁷ In contrast, it wasn't until the 1960, that New York allowed divorce for any ground besides adultery.²⁸

WHAT IS THE THEORY BEHIND THIS?

What was the justification for both criminalizing adultery and having adultery as a justification for the dissolution of a marriage? FIRST LOOK AT THE CRIMINAL LAW One historically strong justification is a religious and moral one. The Seventh Commandment says, "Thou shall not commit adultery." To enforce this moral rule, the state made it a crime to commit adultery. More practically, if sexual activity is limited to married couples, maternity and paternity are easy to establish.

Clear who was responsible for care of children.

Prevention of sexuality transmitted diseases.

Along with anti-miscegenation laws, kept the races separate.

Helped couples stay together- if marriage is the building block of society, we want to encourage people to marry and keep their marriages together. By limiting sex to marriage couple,

Protection of women

II. TWO TYPES OF NO-FAULT

some (but not all) jurisdictions, despite having no-fault pathways to divorce in their law of domestic relations, have retained fault grounds for divorce, including adultery. Consider the contrast between California's divorce law (which has only two "grounds"—"irreconcilable differences which have caused the irremediable breakdown of the marriage" and incurable insanity) and New York's which includes a true no-fault pathway (the relationship "has broken down irretrievably for a period of at least six months"), a pathway to divorce if the parties have been "living separate and apart

²⁶ Eskridge, *Dishonorable Passions* at 17.

²⁷ Hartog, p. 71.

²⁸ Cite to NY Family Law.

according to a separation agreement for a period of one or more years”, and the commission of an act of adultery.

III.

Blackman’s dissent in *Bowers*, 478 US , 186209 n.4 :

[4](#)

Although I do not think it necessary to decide today issues that are not even remotely before us, it does seem to me that a court could find simple, analytically sound distinctions between certain private, consensual sexual conduct, on the one hand, and adultery and incest (the only two vaguely specific “sexual crimes” to which the majority points, *ante*, at 2846), on the other. For example, marriage, in addition to its spiritual aspects, is a civil contract that entitles the contracting parties to a variety of governmentally provided benefits. A State might define the contractual commitment necessary to become eligible for these benefits to include a commitment of fidelity and then punish individuals for breaching that contract. Moreover, a State might conclude that adultery is likely to injure third persons, in particular, spouses and children of persons who engage in extramarital affairs.... Notably, the Court makes no effort to explain why it has chosen to group private, consensual homosexual activity with adultery and incest rather than with private, consensual heterosexual activity by unmarried persons or, indeed, with oral or anal sex within marriage.

White majority 478 US 195-96:

And if respondent's submission is limited to the voluntary sexual conduct between consenting adults, it would be difficult, except by fiat, to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the home. We are unwilling to start down that road.

You might want to look at the Canadian Supreme Court case holding that group sex among consenting adults is not indecent under the criminal code. I think Laura Rosenbury discussed it in one of her pieces. The case is *R v. Labaye* (2005).

Some random notes:

Evidence of infatuation for a particular person or evidence of a spouse’s generally adulterous inclination combined with a reasonable opportunity to satisfy that infatuation or inclination are enough to establish adultery. See, e.g., *Gillespie v. Gillespie*, 106 So. 869, 873-74 (Miss. 2013).

Relevant Defenses: connivance (consenting to or being involved with the ground for divorce, particularly adultery); collusion (agreement to commit the act which will support the ground for divorce); condemnation (forgiveness)

From Dan Savage, *American Savage* p. 23-

[A] man's wife informed him, ten years and two children into their marriage, that she not only wasn't interested in having sex with him anymore, she was never really that interested in having sex with him, or anyone else, in the first place. And she was done pretending.

"When we met she seemed very into sex," the unlucky guy write. "I thought we had a great connection. I'm not a selfish lover, I focused on her pleasure, and I do more than half of the housework and childcare. She tells me that I am not doing anything wrong, just that her libido is gone. She says she never really enjoyed sex, and she claims she doesn't miss it. She won't go into counseling. Any conversation about my getting my needs met elsewhere ends in tears. She gets upset when she catches me looking at porn or masturbating because it makes her 'feel guilty,' like she's 'doing something wrong.' It's been five years since I've had sex, and my choices right now boil down to leaving my wife (and my kids, which I don't want to do) and being seen as the bad guys, or cheating on my wife and actually being the bad guy..."

The advice I am supposed to give in cases like this...is of the Work Harder on Your Marriage and Do More Around the House variety....But let's say that this man is doing everything right to no avail. Let's say that his wife truly has no libido and never did...[M]y industry's go-to advice...[is] to tell him to do the "right" thing and get a divorce. Never mind the love, never mind the kids, never mind the expense, never mind the trauma. If he wants to have sex again—if this particular guy wants to masturbate in peace again!—he has to leave his wife and abandon his children.

What's the one thing I am not allowed to suggest? The one thing that might actually save this marriage, the one thing that might make it possible for this man to stay married and sat sane: *Get it elsewhere*. If I were to give that advice, and the letter writer were to follow it, I would also urge him to be discreet (don't humiliate your wife) and to be dishonest (don't make your wife cry by asking permission). But when I tell people who are trapped in sexless-but-otherwise-rewarding marriages to get it elsewhere—and urge them to show consideration by being discreet and compassion by being honest—an angry mob gathers under my window to chant "Cheating is never okay!"