

Fordham International Law Journal

Volume 41, Issue 2

Article 4

REGINA A. LOUGHRAN MEMORIAL ISSUE

Punishing Passion: A Comparative Analysis of Adultery Laws in the United States of America and Taiwan and their Effects on Women

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ARTICLE
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*By Alyssa Miller**

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I. INTRODUCTION

You are married. You have been with your spouse for years and created a stable life with one another. But, like many couples, you and your partner start experiencing difficulties. You attempt to fix your problems for some time, but nothing helps. You turn to friends for support, but ultimately find solace in bearing your soul to another person. In a split second, you are consumed by emotions and consummate this new, forbidden relationship. You are guilty, crushed, but alive for the first time in years. *What happens next?*, you ask yourself. Forced to face the consequences of your actions, you may hardly think of what the law says about your choices. In many countries, however, this is at the forefront of a woman's mind. Throughout much of the world, criminal punishments for adultery range from fines to jail time to corporal punishment. Civil penalties may include loss of property, money, and custody of one's children. Cultural and social implications can further complicate matters of the heart as an adulterer can be publicly shamed or considered an outcast in a handful of countries. And, as a woman, prosecutions, penalties, and cultural demonization will fall harsher and disproportionately more often on you than on your male counterpart.¹

This Article will examine modern legal and cultural attitudes toward the act of adultery through the lens of two countries: the United States and Taiwan. Part II explores adultery laws from a historical standpoint, explaining their cultural underpinnings and evolutions to current law. Each country's adultery laws have evolved significantly since their inception, but critics argue that the rationales for the current laws—despite changes to make them facially gender neutral—stem from the same archaic gender norms that are no longer acceptable in either country. Part III will describe the real-life effects of these laws, specifically the social and legal ramifications on

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1. This Article concerns the legal and cultural distinctions between men and women in situations of adultery, as this is where the law drew its distinctions in the United States and Taiwan, and where there is a bulk of research. This Article does not explicitly describe the effects of adultery laws on people of differing sexual orientations or gender identities, though the conclusions drawn here may nevertheless be applicable to non-heterosexual and/or transgender people.

women in both countries. Importantly, the regulation of adultery in civil and criminal spheres has had disproportionately discriminatory effects on women who commit adultery against their husbands, or women with whom men commit adultery against their own wives.

Finally, Part IV will argue for the deregulation of adultery in the United States and Taiwan as a matter of gender equality. The proposal to deregulate demands a scrubbing of each country's laws to eliminate references to adultery. As will be explained in the subsequent sections, decriminalizing adultery and removing it as a heat of passion provocation to reduce homicide charges from murder to voluntary manslaughter are concrete ways to stop the direct discriminatory effects these laws have on US and Taiwanese women. In addition, changing both countries' laws may also initiate a cultural shift that reduces the indirect social repercussions adulterous women and mistresses suffer at higher incidence than adulterous men.

II. PAST AND PRESENT: ADULTERY IN SOCIETY

The legal systems of the United States and Taiwan differ considerably. Like roughly 150 countries, Taiwan employs a civil law system that enables strict application of its statewide code.² Alternatively, the United States is one of approximately eighty common law countries in which binding legal precedent created by judicial opinions gives rise to comparatively flexible interpretations of statutes.³ Thus, in Taiwan, legislators have the greatest power to

2. Piyali Siyam, *What is the Difference between Common Law and Civil Law?*, WASH. U. L. BLOG (Jan. 28, 2014), <https://onlinelaw.wustl.edu/blog/common-law-vs-civil-law/> [<https://perma.cc/Q4ZL-9QWE>] (archived Jan. 2, 2018); see also William Tetley, *Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)*, 60 LA. L. REV. 677, 683 (2000) (describing a civil law system). As civil law systems are generally "highly systematized and structured," it is noted that civil law courts often use broad principles and tend to ignore case details for the sake of consistency and exhaustiveness. This system attempts to create a legal climate that is "simple, nontechnical, and straightforward." Sabrina DeFabritiis, *Lost in Translation: Oral Advocacy in A Land Without Binding Precedent*, 35 SUFFOLK TRANSNAT'L L. REV. 301, 309-10 (2012).

3. Siyam, *supra* note 2; Janet H. Moore, *Cross-Border Litigation: Preparing for Cultural Nuances*, 63 THE ADVOC. (TEXAS) 38, 38 (Summer 2013) (explaining how the common law judiciary plays a powerful role in interpreting statutes and setting precedent). In this system, courts pay close attention to the details of each case to ensure consistency with prior case law, which expounds on or adds to the national or state code. The United States has a hierarchal court system, where higher courts of the same jurisdiction decide cases that become binding precedent for the lower courts. This gives judges the ability to mold statutes using myriad

create and define law, but in the United States the onus rests on legislators to generate statutes while judges (with the help of lawyers) flesh out law as it should be implemented.⁴ The following subsections provide a brief overview and history of adultery laws in Taiwan and the United States. Appreciation of the divergent legal systems in both countries is imperative to understand not only the influence of adultery laws on the countries' citizens, but also the influence of culture on adultery laws.

A. United States

Laws against adultery in the United States have deep puritan roots, stemming from England's ecclesiastical courts prior to founding the country.⁵ Since the colonial era, adultery in the United States was considered a wrong against morality and chastity, meriting civil and criminal consequences.⁶ In fact, Puritan colonialists in New England were so concerned with England's rampant "moral corruption," they made adultery with a married woman a capital offense.⁷ Most early state jurisdictions followed suit by criminalizing adultery, though not always as a capital offense.⁸ Prosecution of adulterers declined significantly after the eighteenth and nineteenth centuries; statutes went generally unenforced, and the discovery of an adulterous affair was occasionally used as blackmail, which led the

factors and sources, playing an important role in understanding how the law should be understood and applied. *See* DeFabritiis, *supra* note 2, at 305-08.

4. *See generally* DeFabritiis, *supra* note 2.

5. Jeremy D. Weinstein, *Adultery, Law, and the State: A History*, 38 *HASTINGS L.J.* 195, 227 (1986) ("Thus, Puritanism, and the absence of any ecclesiastical jurisdiction, led to the incorporation of sanctions against adultery in American criminal law[.]"); *see also* *United States v. Clapox*, 35 F. 575, 578 (D. Or. 1888) (discussing how American common law was used to address adultery because America did not have ecclesiastical courts); *Commonwealth v. Call*, 38 Mass. (1 Pick.) 509, 513 (1839) (discussing how American laws prohibiting adultery stem from England's ecclesiastical courts).

6. Gabrielle Viator, *The Validity of Criminal Adultery Prohibitions After Lawrence v. Texas*, 39 *SUFFOLK U. L. REV.* 837, 837 (2006); *see, e.g.*, Weinstein, *supra* note 5, at 225.

7. *See* Martin J. Siegel, *For Better or For Worse: Adultery, Crime & the Constitution*, 30 *J. FAM. L.* 45, 48 (1991) (explaining how Puritan colonialists made adultery a capital offense); *see also* Viator, *supra* note 6, at 842 (discussing lack of prosecution of adultery crimes and the American Law Institute's recommendation of decriminalization).

8. Viator, *supra* note 6, at 841; Weinstein, *supra* note 5, at 225.

American Law Institute to recommend the decriminalization of adultery across the board in 1962.⁹

However, moral opposition to adultery lived on in the law. Many states not only maintained their criminal adultery sanctions, but also created civil penalties for the act. For example, because a wife was considered her husband's property, adultery was a civil injury to an innocent husband¹⁰: having sexual relations with another man's wife was a trespass on his property despite whether the act was forced or consensual, as it was assumed that "respectable women" would never consent to be tainted by sexual impurity.¹¹ Alternatively, the common law was concerned with "foisting spurious offspring upon her unsuspecting husband" and the effects this would have on inheritance and property rights, illuminating how adultery put men at risk of raising and paying for a child not his own.¹² Thus, civil remedies to address these issues were available to husbands into the twentieth century¹³: claims of trespass,¹⁴ torts of outrage,¹⁵ and alienation of

9. MODEL PENAL CODE §213.6(3) (AM. LAW INST., Proposed Official Draft 1962) (note on adultery and fornication); Viator, *supra* note 6, at 841.

10. Viator, *supra* note 6, at 841-42; Weinstein, *supra* note 5, at 225; Phyllis Coleman, *Who's Been Sleeping in My Bed? You and Me, and the State Makes Three*, 24 IND. L. REV. 399, 402 (1991) ("Fidelity was essential to protect the husband's 'property' interest in his wife..."); *see also* McClure's Ex'rs v. Miller, 11 N.C.(1 Hawks) 133, 140 (1825) ("[In a case of adultery], the wife, who is a servant, *consents*, and yet her husband may have *trespass*; it may be answered that the case is one *sui generis*; the husband has, so to speak, a property in the body, a right to the personal enjoyment of his wife; for an invasion of this right the law permits him to sue as *husband*[.]"). The law did not care about the woman's consent to the sexual acts as the husband had an "interest" in her—her consent was considered "not competent." *See* Bedan v. Turney, 99 Cal. 649, 653-54 (1893) (discussing how consent is not a factor in considering whether sexual intercourse with one's wife is a trespass on the husband's property); *see also*, Egbert v. Greenwalt, 44 Mich. 245, 246 (1880) (discussing how a wife's consent to adultery is unimportant in a trespass claim by a husband against the wife's sexual partner or abuser).

11. *See* Joanna L. Grossman & Lawrence M. Friedman, *Elizabeth Edwards v. Andrew Young: Can He Be Held Liable for Contributing to the Failure of the Edwardses' Marriage?*, FINDLAW (Feb. 19, 2010), <http://supreme.findlaw.com/legal-commentary/elizabeth-edwards-v-andrew-young-can-he-be-held-liable-for-contributing-to-the-failure-of-the-edwardses-marriage.html> [<https://perma.cc/D5M5-RT98>] (archived Jan. 2, 2018) (noting that policies against adultery were aimed at "protecting delicate and innocent women from temptation and debauchery").

12. Viator, *supra* note 6, at 840-41 (quoting CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW § 210, 528-29 (15th ed. 1994)); *see also* State v. Lash, 16 N.J.L. 380 (N.J. Sup. Ct. 1838).

13. *See* Tinker v. Colwell, 193 U.S. 473, 485 (1904) (allowing a husband to prevail on a cause of action based on the idea that adultery with his wife is a "violation of the marital rights of the husband in the person of his wife...an injury to the person and also to the property rights

affection and criminal conversation¹⁶ gave husbands the opportunity to receive monetary damages from his wife's paramour.¹⁷ As time progressed, courts steered away from viewing sexual purity and the rights of husbands to their wives as legitimate causes of action, so over forty states instated statutory bars against these "amatory claims" (commonly known as Heart Balm Acts) against a spouse's paramour.¹⁸ Nonetheless, the contemplation of adultery as an injury to

of the husband."); *Oppenheim v. Kridel*, 236 N.Y. 156, 161 (1923) ("The statements that he had a property interest in her body and a right to the personal enjoyment of his wife are archaic unless used in a refined sense worthy of the times and which give to the wife the same interest in her husband."); *see also* *Coleman*, *supra* note 10, at 415 n. 72.

14. *See supra* note 10 and accompanying text.

15. *See e.g.*, *Arlinghaus v. Gallenstein*, 115 S.W.3d 351, 352 (Ky. Ct. App. 2003) (describing how, though adultery on its own is not grounds for liability, the existence of a special relationship and duty of care could make adulterous conduct "outrageous" and thus incur liability).

16. *See, e.g.*, *Saunders v. Alford*, 607 So. 2d 1214, 1215 (Miss. 1992) ("The elements of a cause of action have been recognized by some courts as: (1) wrongful conduct of the defendant; (2) loss of affection or consortium; and (3) causal connection between such conduct and loss."); *Fitch v. Valentine*, 959 So. 2d 1012, 1025 (Miss. 2007) (reiterating the elements of the tort of alienation of affections and its continued relevance); *Hutelmyer v. Cox*, 133 N.C. App. 364, 369-70 (1999) (describing the elements of alienation of affections).

17. *See generally* Grossman & Friedman, *supra* note 11; Fernanda Nicola, *What's Love Got to Do with It?: Stereotypical Women in Dispositionist Torts*, in *IDEOLOGY, PSYCHOLOGY, AND LAW* 662-72 (Jon Hanson ed., 2012).

18. Grossman & Friedman, *supra* note 11; *Heart Bam Torts & Alienation of Affection*, ARNOLD & SMITH PLLC, <https://www.arnoldsmithlaw.com/heart-balm-torts-alienation-of-affection.html> [<https://perma.cc/9NGX-A92E>] (last visited Jan. 2, 2018); *R.A.C. v. P.J.S.*, 880 A.2d 1179, 1192 (App. Div. 2005) *rev'd sub nom.* *R.A.C. v. P.J.S., Jr.*, 192 N.J. 81, 927 A.2d 97 (2007) (describing the Heart Balm Act, which bans claims of "criminal conversation, seduction, alienation of affections, and breach of a promise to marry."); *see e.g.*, MASS. GEN. LAWS ANN. ch. 207, § 47B (1985) ("Alienation of affection and criminal conversation shall not constitute an injury or wrong recognized by law, and no action, suit or proceeding shall be maintained therefor."); N.J. STAT. ANN. § 2A:23-1 ("The rights of action formerly existing to recover sums of money as damage for the alienation of affections, criminal conversation, seduction or breach of contract to marry are abolished from and after June 27, 1935."); *Doe v. Doe*, 358 Md. 113, 121, 747 A.2d 617, 621 (2000) (noting a husband cannot bring a tort claim against an adulterous wife for the same conduct that would have once been considered "criminal conversation," a tort abandoned for public policy reasons); Marjorie A. Shields, Annotation, *Action for Intentional Infliction of Emotional Distress Against Paramours*, 99 A.L.R. 5th 445 (2002) ("[T]he causes of action for alienation of affections and criminal conversation have been abolished, it is generally recognized that a plaintiff cannot mask one of the abolished actions behind a common-law label such as intentional infliction of emotional distress. However, if the essence of the complaint is directed to a cause of action other than one that is abolished, it has been found to be legally recognizable."); *Bailey v. Searles-Bailey*, 746 N.E.2d 1159 (2000) (explaining that though adultery alone is barred as grounds to claim intentional infliction of emotional distress, there may be severe emotional distress associated

a spouse is still relevant in the US legal system.¹⁹ Some states, such as North Carolina, still allow amatory claims or claims of negligent or intentional infliction of emotional distress to address a spouse's adultery, in which the adulterous spouse can be held liable for damages as well.²⁰ The laws are now defended as a "device to preserve marital stability," rather than a way to protect the chastity of women.²¹

Even in states that disallow such claims, courts have repeatedly acknowledged the emotional harm experienced from adultery.²² Thus, penalties for adulterous spouses represented a "victim-oriented approach" to addressing these injuries.²³ Though the definition of adultery varies slightly in each jurisdiction, it is a ground for divorce in thirty of the thirty-two states that continue to recognize a fault-based system.²⁴ Adultery as a ground for fault divorce was not

with discovering the couple's child was not his biological child, but born from an adulterous affair); *Quinn v. Walsh*, 732 N.E.2d 330 (2000) (describing how cases that do not meaningfully differentiate from claims of alienation of affection or criminal conversation cannot be brought as claims of intentional infliction of emotional distress).

19. See Michael Gilding, *Paternity Uncertainty and Evolutionary Psychology: How a Seemingly Capricious Occurrence Fails to Follow Laws of Greater Generality*, SAGE J. (Feb. 2009), <http://soc.sagepub.com/content/43/1/140> [<https://perma.cc/SCQ8-SA42>] (archived Jan. 2, 2018); Rebecca Adams, *Study Suggests Men and Women May View Cheating Very Differently*, HUFFINGTON POST (Jan. 13, 2015), http://www.huffingtonpost.com/2015/01/13/men-and-women-cheating_n_6462278.html [<https://perma.cc/T5YT-M93D>] (archived Jan. 2, 2018).

20. *Heart Balm Torts & Alienation of Affection*, *supra* note 18.

21. Grossman & Friedman, *supra* note 11.

22. See, e.g., *Oliverson v. W. Valley City*, 875 F. Supp. 1465, 1484 (D. Utah 1995) (discussing adultery's emotional costs); *S.B. v. S.J.B.*, 609 A.2d 124 (N.J. Super. Ct. Ch. Div. 1992) (describing how, despite the gender of a spouse's paramour, adultery is the act of "reject[ing] the other by entering into a personal intimate sexual relationship" with another person); see also *Coleman*, *supra* note 10, at 412 ("[F]aithful spouses may be injured if they discover their partners' dishonesty.").

23. See Brett R. Turner, *Justice Scalia's "Wild Ride": Lawrence v. Texas and the Constitutionality of Penalizing Adultery*, 17 NO. 7 DIVORCE LITIG. 109 (2005) ("Indeed, even as a matter of pure policy, the law of adultery is increasingly moving toward a victim-oriented approach. Only one set of measures penalizing adultery is applied sufficiently often to constitute a meaningful deterrent: provisions limiting marital property and spousal support awards to guilty spouses."); see also *Viator*, *supra* note 6, at 856 ("Adultery is not a 'victimless crime' in that it often involves injury to a spouse or children and the emotional costs incurred are often substantial.").

24. For example, compare *In re Blanchflower*, 834 A.2d 1010 (N.H. 2003) (holding that adultery, as statutory ground for divorce, does not include homosexual relationships), with *RGM v. DEM*, 410 S.E.2d 564, 567 (S.C. 1991) (holding that adultery does include homosexual relationships), and *S.B. v. S.J.B.*, 609 A.2d 124, 127 (N.J. Super. Ct. Ch. Div.

originally designed to punish a guilty spouse, but to be a “sanctioned excuse from one’s marriage vows” when an adulterous spouse breached the marriage contract and failed to meet his/her responsibilities as a marital partner.²⁵

The potential repercussions of an adultery-related fault divorce (or even a showing that one’s spouse was unfaithful in a no-fault divorce) were and continue to be largely negative toward the adulterous spouse, and even more toward an adulterous wife due to the nature of marital dependency in the United States.²⁶ First, depending on the jurisdiction, adultery may affect spousal support (alimony). In four states, adultery is a complete bar to alimony,²⁷ and some states use adultery as a factor in determining how much alimony

1992) (holding a wife’s lesbian relationship constituted “adultery,” so as to permit her husband to bring a cause of action for divorce). See also non-intercourse as grounds for adultery: *Rosser v. Rosser*, 355 So. 2d 717, 720 (Ala. Civ. App. 1977) (acts of fellatio); *Menge v. Menge*, 491 So. 2d 700, 702 (La. Ct. App. 1986) (oral sex). See ALA. CODE § 30-2-1(a)(2) (1989); ALASKA STAT. § 25.24.050(2) (1996); ARK. CODE ANN. § 9-12-301(5) (1993); CONN. GEN. STAT. ANN. § 46b-40(c)(3) (1995); DEL. CODE ANN. tit. 13, § 1505(b)(2) (1993); D.C. CODE ANN. § 16-904(b)(3) (1997); GA. CODE ANN. § 19-5-3(6) (1991); IDAHO CODE ANN. § 32-604 (1996); 750 ILL. COMP. ANN. STAT. § 5/501(a)(1) (1993); LA. CIV. CODE ANN. art. 103(2) (1993); MD. CODE ANN., FAM. LAW § 7-103(a)(1) (1991); MASS. GEN. ANN. LAWS ch. 208, § 1 (1987); MISS. CODE ANN. § 93-5-1 (1994); N.H. REV. STAT. ANN. § 458:7(II) (1992); N.J. STAT. ANN. § 2A:34-2(a) (1987); N.M. STAT. ANN. § 40-4-1(C) (1994); N.Y. DOM. REL. LAW § 170(4) (1988); N.D. CENT. CODE § 14-05-03(1) (1991); OHIO REV. CODE ANN. § 3105.01(C) (1995); OKLA. STAT. ANN. tit. 43, § 101 (2014); 23 PA. STAT. AND CONS. STAT. ANN. § 3301(a)(2) (1991); 15 R.I. GEN. LAWS § 15-5-2 (1996); S.C. CODE ANN. § 20-3-10 (1976); S.D. CODIFIED LAWS § 25-4-2(1) (1992); TENN. CODE ANN. § 36-4-101(a)(3) (1956); TEX. FAM. CODE § 6.003 (1997); UTAH CODE ANN. § 30-3-1(3)(b) (1995); VT. STAT. ANN. tit. 15, § 551(1) (1989); VA. CODE ANN. § 20-91(A)(1) (1996); W. VA. CODE § 48-5-204 (2001). Notably, since 2010, all 50 states permit “no-fault” divorces, allowing spouses to divorce without allocating blame on the other spouse. See N.Y. DOM. REL. LAW § 170(7) (1988); see generally *Townes v. Coker*, 943 N.Y.S.2d 823 (Sup. Ct. 2012).

25. Karen Turnage Boyd, *The Tale of Two Systems: How Integrated Divorce Laws Can Remedy the Unintended Effects of Pure No-Fault Divorce*, 12 *CARDOZO J.L. & GENDER* 609, 611 (2006); see also Harvey L. Golden & J. Michael Taylor, *Dueling Over the Issue of Fault: Fault Enforces Accountability*, 10 *FAM. ADVOC.* 11, 11-12 (1987).

26. See *infra* notes 27-33 and accompanying text. It is worth noting the burden of proof for adultery in divorce proceedings ranges from a preponderance of the evidence to clear and convincing evidence depending on the jurisdiction. See, e.g., *Sibley v. Sibley*, 693 So. 2d 1270, 1271 (La. Ct. App. 1st Cir. 1997) (clear and convincing); *Michael D.C. v. Wanda L.C.*, 497 S.E.2d 531, 535 (1997) (clear and convincing); *Crawford v. Crawford*, 633 A.2d 155, 159 (1993) (clear and convincing); *Perry v. Perry*, 390 S.E.2d 480, 481 (Ct. App. 1990) (preponderance); *Gilliam v. Gilliam*, 776 S.W.2d 81, 84 (Tenn. Ct. App. 1988) (preponderance).

27. West Virginia, Georgia, North Carolina, and South Carolina. See *Proof of Adultery as Grounds for Marriage Dissolution*, 49 *AM. JUR. Proof of Facts* 3d 277 §5 (1998).

to award a spouse.²⁸ Adultery may also influence the division of marital property.²⁹ Thus, an aggrieved spouse may receive the advantage of limiting support for the adulterous spouse if the adulterous spouse is the under-earner.³⁰ As women are more likely to be dependent spouses or in need of assistance after divorce, this fault-bar policy economically disadvantages women in divorce proceedings.³¹ Second, a wife's adultery was historically seen as proof of parental unfitness in child custody proceedings: if a mother's life is "dominated by the carnal desires of the flesh," it would influence the child's life and character.³² Though adultery no longer creates a "presumption of unfitness" in child custody matters, courts may still deny an adulterous spouse custody if the adultery had a detrimental effect on the children or through a showing that the adultery contributes to the parent's moral unfitness.³³

28. See e.g., MD. CODE ANN., FAM. LAW § 11-106(b)(6) (LexisNexis, current through Oct. 1, 2017, of the 2017 Regular Session of the Maryland General Assembly); VA. CODE ANN. § 20-107.1 (LexisNexis, current through the 2017 Regular Session of the General Assembly).

29. See e.g., *Halleman v. Halleman*, 379 S.W.3d 443, 452 (Tex. App. 2012) (noting "fault of the breakup of the marriage" as a factor in determining division of marital assets); *Smith v. Smith*, 433 S.E.2d 196, 221 (1993) *rev'd in part*, 444 S.E.2d 420 (1994) (noting that marital misconduct that dissipates or reduces the value of marital assets for non-marital purposes can be considered when dividing marital property); see also *In re Estate of Montgomery*, 528 S.E.2d 618, 620 (2000) (describing how a spouse may lose the right to administer the estate of his/her deceased spouse if he/she "lives in adultery"). *But see* AM. JUR. *Proof of Facts*, *supra* note 27; see e.g., *Childers v. Childers*, 640 So. 2d 108, 109 (Fla. Dist. Ct. App. 1994); *Newton v. Newton*, 667 N.Y.S.2d 778, 766 (N.Y. 1998); *Wilkerson v. Wilkerson*, 719 So. 2d 235 (Ala. Civ. App. 1998), *reh'g denied* (Apr. 17, 1998) and *cert. denied* (July 17, 1998).

30. See generally *Turner*, *supra* note 23 (discussing how penalizing adultery results in limiting marital property and spousal support awards to guilty spouses).

31. See *Turner*, *supra* note 23, at 7 (discussing the fault-bar policy, in which an adulterous spouse can be barred from receiving alimony, and how it has a disproportionate effect on wives because they are more likely to be the dependent spouses); see also ANN CRITTENDEN, *THE PRICE OF MOTHERHOOD* 152 (2002) (discussing how women are economically disadvantaged in divorce proceedings).

32. *Hanby v. Hanby*, 158 So. 727, 728 (Ala. 1935); see also *Ex parte Pankey*, 848 So. 2d 963, 973 (Ala. 2002) (Moore, C.J., dissenting) (opining that adultery creates a "presumption of [parental] unfitness").

33. See e.g., *Bower v. Bower*, 758 So. 2d 405, 412 (Miss. 2000) (describing adultery as a factor to consider when the conduct "manifests itself into the moral fitness of a parent to raise a child"); *White v. White*, 166 So. 3d 574, 586-87 (Miss. Ct. App. 2015) ("[A]dultery is a factor to be considered in evaluating moral fitness, though not given 'undue weight.'"); *Bamburg v. Bamburg*, 386 S.W.3d 31, 38 (2011) ("Evidence of an extramarital affair is but one factor the trial court is to consider in deciding what custody arrangement serves the best

Twenty states continue to keep adultery on the books as a criminal provision³⁴ with punishments ranging from a ten-dollar fine to felony charges,³⁵ but adultery is rarely prosecuted in the United States.³⁶ Nevertheless, the United States' de facto lack of criminal

interest of a child."); *Murphree v. Murphree*, 579 So. 2d 634, 636 (Ala. Civ. App. 1991) ("Before custody may be denied on the basis of [adulterous] behavior, there must be evidence showing that such misconduct is detrimental to the child."); *Moeller v. Moeller*, 714 S.E.2d 898, 902 (Ct. App. 2011) (reversing the trial court's decision to place custody with the father on account of the mother's adultery because there was "no evidence the [adulterous] relationship had any detrimental effect" on the children); AM. JUR. *Proof of Facts*, *supra* note 27. *But see* *Ex parte Pankey*, 848 So. 2d 963, 973 (Ala. 2002) (Moore, C.J., dissenting) (opining that adultery creates a "presumption of [parental] unfitness"); *Ex parte Walters*, 580 So. 2d 1352, 1353 (Ala. 1991) (concluding that the trial court giving custody to the husband based in part on the wife's adultery was "adequately supported by the record"); *Alonzo v. Alonzo*, 628 So. 2d 749, 749-50 (Ala. Civ. App. 1993) (affirming a custody determination in favor of a father primarily based on a mother's adultery despite admitting that "the mother is a good and caring mother").

34. States include Alabama, Arizona, Florida, Georgia, Idaho, Illinois, Kansas, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, New York, North Carolina, Oklahoma, Rhode Island, South Carolina, Utah, Virginia and Wisconsin. The offense is generally defined as sexual relations between a married person and a third party that is not his/her spouse. GA. CODE ANN. § 16-6-19 (West 2017); IDAHO CODE ANN. § 18-6601 (West 2017); N.Y. PENAL LAW § 255.17 (McKinney 1965); 1956 R.I. GEN. LAWS § 11-6-2; UTAH CODE ANN. § 76-7-103 (West 2017); VA CODE ANN. § 18.2-365 (1975). Some statutes provide for penalization of not only the married person, but also the third party; the third person may be prosecuted regardless of his/her marital status. ARIZ. REV. STAT. ANN. § 13-1408 (1977); FLA. STAT. ANN. § 798.01 (West 2017); MASS. GEN. LAWS ANN. ch. 272, § 14 (West 2017); MICH. COMP. LAWS ANN. § 750.29 (West 2017); MISS. CODE ANN. § 97-29-1 (West 2017); WIS. STAT. ANN. § 944.16 (West). State codes occasionally require a specific mens rea from the third party. 720 ILL. COMP. STAT. ANN. 5/11-35 (West 1961); KAN. STAT. ANN. § 21-5511 (West 2017). Several states necessitate cohabitation between the married and third parties. ALA. CODE § 13A-13-2 (1975); MISS. CODE ANN. § 97-29-1 (West 2017); OKLA. STAT. ANN. tit. 2, § 871-72 (West 2017); S.C. CODE ANN. § 16-15-60 (1976); N.C. GEN. STAT. ANN. § 14-184 (West 2017) (ruled unconstitutional in *Hobbs v. Smith*, No. 05 CVS 267, 2006 WL 3103008 at 1* (N.C. Super. Ct., Aug. 25, 2006)).

35. *See* MD. CODE ANN., Crim. Law § 10-501 (West 2017) (punishing adultery with a fine); MICH. COMP. LAWS ANN. § 750.29-30 (West 2017); OKLA. STAT. ANN. tit. 21, § 871-72 (West 2017); WIS. STAT. ANN. § 944.16 (West 2017); *see also*, Jenny Jarvie, *Life sentence for adultery? Could be / Furor in Michigan when appeals judge says that's exactly what state law means*, SF GATE (Jan. 24, 2007, 4:00 AM), <http://www.sfgate.com/news/article/Life-sentence-for-adultery-Could-be-Furor-in-2621946.php> (describing how first degree criminal sexual conduct includes sexual penetration involving a felony, and because adultery is a felony, the act "could result in life imprisonment"); Coleman, *supra* note 10, at 409 (arguing that adultery statutes should be repealed because police, prosecutors, and judges implicitly conspire to reject them by refusing to enforce them).

36. Viator, *supra* note 6, at 860 ("Despite statistics revealing that an overwhelming percentage of spouses commit adultery, those states that retain the prohibition almost never enforce it."); Ethan Bronner, *Adultery, an Ancient Crime That Remains on Many Books*, N.Y.

regulation does not imply a moral or cultural approval of adultery. In fact, it receives near unanimous disapproval from the public: ninety-one percent of Americans find married people having an affair “morally wrong,” a rate nearly twice as large as it was forty years ago.³⁷ Thus, the continued regulation of adultery acts primarily as “morals legislation” and is aimed, though ineffectively, at deterring immoral behavior.³⁸ States and supporters justify a continued prohibition of adultery as protecting innocent spouses from harm and protecting the public institution of marriage.³⁹ Adultery is still believed to harm the fabric of society and penalizing this behavior attempts to prevent such deterioration from occurring.⁴⁰ As will be

TIMES (Nov. 14, 2012), <http://www.nytimes.com/2012/11/15/us/adultery-an-ancient-crime-still-on-many-books.html>; see Coleman, *supra* note 10, at 409 (arguing that adultery statutes should be repealed because police, prosecutors, and judges implicitly conspire to reject them by refusing to enforce them).

37. Frank Newport & Igor Himelfarb, *In U.S., Record-High Say Gay, Lesbian Relations Morally OK*, GALLUP (May 20, 2013), <http://www.gallup.com/poll/162689/record-high-say-gay-lesbian-relations-morally.aspx>; see also, Hugo Schwyzer, *How Marital Infidelity Became America's Last Sexual Taboo*, ATLANTIC (May 23, 2013), <http://www.theatlantic.com/sexes/archive/2013/05/how-marital-infidelity-became-americas-last-sexual-taboo/276341/> [<https://perma.cc/C7SS-RCFG>] (archived Jan. 2, 2018).

38. *Lawrence v. Texas*, 539 U.S. 558, 599 (Scalia, J., dissenting) (noting adultery as one of the numerous crimes justified on moral grounds); Viator, *supra* note 6, at 859 (“[T]he overwhelming prevalence of adultery in our society proves that criminal prohibition is not a deterrent.”); Michelle Boorstein, *Va. Adultery Case Goes From Notable to a Nonevent*, WASH. POST (Aug. 25, 2004), <http://www.washingtonpost.com/wp-dyn/articles/A30306-2004Aug24.html> [<https://perma.cc/U3XF-JVN9>] (archived Jan. 2, 2018) (“[A]s far as general deterrence, it should now be widely known that adultery is a crime in Virginia.”).

39. Viator, *supra* note 6, at 856-58 (explaining state interests in criminalizing adultery through the harm principle and abuse of the institution of marriage); Coleman, *supra* note 10, at 400-01; Jolie Lee, *New Hampshire Senate votes to repeal anti-adultery law*, USA TODAY (Apr. 17, 2014, 4:39 PM), <http://www.usatoday.com/story/news/nation-now/2014/04/17/anti-adultery-laws-new-hampshire/7780563/> [<https://perma.cc/DG6V-6V4V>] (archived Jan. 2, 2018); see Jonathan Turley, *Adultery, in many states, is still a crime*, USA TODAY (Apr. 25, 2010, 3:29 PM), http://usatoday30.usatoday.com/news/opinion/forum/2010-04-26-column26_ST_N.htm [<https://perma.cc/PMP3-2433>] (archived Jan. 2, 2018) (“Social conservatives, however, insist that such laws are needed to back up moral dictates with criminal sanctions.”). While many outdated statutes remain on the books without question, it is the intention of this author to show that the negative effects of adultery regulation outweigh any positive moral implications.

40. JOYCELYN M. POLLOCK, *CRIMINAL LAW* 351 (Scott, 10th ed. 2013); Patrick Devlin, *Enforcement of Morals vs. Harm Principle*, VICE, CRIME, & AM. LAW, <http://web.uncg.edu/dcl/courses/viceCrime/pdf/m2.pdf> [<https://perma.cc/88JJ-UBYD>] (last visited Jan. 2, 2018) (“Society may not be able to make people be virtuous, but this does not mean we cannot punish vice. Adultery may involve consenting adults, but when it breaks up a marriage it is harmful to society. Even if the purpose of law is simply to protect society, then these behaviors

discussed in Part III, it is this moral disapproval conflated with the distinctly patriarchal legal history described above that causes continued discrimination toward adulterous women and mistresses in American society.⁴¹

must be restricted.”). *But see* Coleman, *supra* note 10 (noting how adultery laws fail to adequately deter and punish violators).

41. *See infra* Part II. Notably, since *Lawrence v. Texas*, many wonder whether the criminalization of adultery is constitutional at all. *Lawrence*, 539 U.S. at 558 (holding anti-sodomy laws unconstitutional because intimate consensual sexual conduct is a liberty interest protected by the 14th Amendment); *see* Viator, *supra* note 6, at 860 (“The Supreme Court’s recent ruling in *Lawrence v. Texas*, however, suggests that morality is no longer a sufficient justification for the intrusion into private life that an adultery prosecution would impose.”); Bronner, *supra* note 36 (considering the constitutionality of adultery laws with respect to the harm adultery causes spouses and children). Additionally, due to the recent Supreme Court opinion legalizing marriage between same-sex couples, some adultery statutes may be invalid as a matter of discrimination based on marital status (i.e., statutes prohibiting adultery between a “husband” and “wife” discriminates unfairly against heterosexual spouses, as same-sex spouses can never be implicated for such a crime). This argument has been successful at least once in repealing the crime of adultery. Citizens and lawmakers have pushed back, contending adultery laws disregard the right to privacy. One prominent example involves the prosecution of John Raymond Bushey. After admitting to adultery in a Virginia district court, he later withdrew his plea to work with the ACLU in challenging the validity of the adultery statute. However, he was unsuccessful. *See* John F. Kelly, *Virginia Adultery Case Roils Divorce Industry; Conviction Draws Attention to Little-Used Law*, WASH. POST, Dec. 1, 2003, at B1; Turley, *supra* note 39. Discussing the relationship between the privacy afforded to same-sex marriages and how this may apply to the context of extra-marital relationships, Viator states:

Because adultery involves a private sexual relationship between consenting adults, it implicates a similar liberty interest to that addressed by the *Lawrence* court. The Court recognized that liberty provides substantial protection to adults in decisions regarding their private sexual conduct. Arguably, the decision of an individual to commit adultery is such a decision—sufficiently similar to other personal choices regarding marriage, family, procreation, contraception, and sexuality as to fall within this protected zone of privacy. Furthermore, the choice of one spouse regarding how to address the adultery of the other seems an intimately personal decision regarding the marital relationship worthy of protection from state intrusion. Moreover, the mutual decision of a husband and wife to engage in a sexually non-monogamous marriage would seem to warrant protection as a private marital choice. In the majority of jurisdictions where adultery remains a crime, however, each of these scenarios is subject to state intrusion.

Viator, *supra* note 6, at 853-54. *See generally*, Coleman, *supra* note 10. Due to lack of prosecution and political will, decriminalization has been slow (if not resisted) in many states.

B. Taiwan

The overwhelming majority of Taiwan's population is composed of several generations of Chinese migrants.⁴² Though rule over the island changed hands several times in its history, traditional Confucian values dominate Taiwanese family culture.⁴³ Confucian teachings on appropriate social, political, and moral behavior pose marriage at the core of Taiwanese government: the duties of husband and wife are one of few "universal obligations."⁴⁴ However, Confucian priority on expanding the family tree also created discrepancies between Taiwanese wives and husbands: because failure to produce an heir was "the greatest offense against one's ancestors,"⁴⁵ men could legally take concubines while women's infidelity was heavily regulated.⁴⁶ The cultural pressure for men to reproduce allowed men to take as many concubines as was financially feasible,⁴⁷ but extramarital affairs were legally enforceable rationales for divorce and criminally sanctioned against adulterous wives⁴⁸:

42. ARLAND THORNTON & HUI-SHENG LIN, SOCIAL CHANGE AND THE FAMILY IN TAIWAN 2, 6 (1994) (noting that Chinese migrants to Taiwan brought "basic elements of historical Chinese culture" to the island and similarities remained constant into the 20th century). See also TAY-SHENG WANG, LEGAL REFORM IN TAIWAN UNDER JAPANESE COLONIAL RULE, 1895-1945 58 (2000).

43. THORNTON & LIN, *supra* note 42, at 2 (noting that Chinese migrants to Taiwan brought "basic elements of historical Chinese culture" to the island and similarities remained constant into the 20th century). See also Wang, *supra* note 42, at 58.

44. See generally LEONARD SHIHLIEN HSÜ, THE POLITICAL PHILOSOPHY OF CONFUCIANISM (1932); MILES MENANDER DAWSON, THE ETHICS OF CONFUCIUS 140-41 (1915); DORIS T. CHANG, WOMEN'S MOVEMENTS IN TWENTIETH-CENTURY TAIWAN 23-24 (2009) (noting that husband and wife is one of five types of human relationships, four of which are male-centered and dominated).

45. CHANG, *supra* note 44, at 24-25; WANG, *supra* note 42, at 59; THORNTON & LIN, *supra* note 42, at 44 (noting the "strong emphasis" on having children and the possibility of taking a concubine in response to a first wife's infertility); Chao-Ju Chen, *Mothering under the Shadow of Patriarchy: The Legal Regulation of Motherhood and its Discontents in Taiwan*, 1 NYU L. REV. 45, 48 (2006) ("Traditionally, it was legitimate to divorce a wife who failed in her mission to produce male offspring, and this failure would also entitle the husband to take concubines who would bear him children.").

46. LI-JU LEE, SEXUAL FREEDOM IN THE SHADOW OF MARITAL FAMILY: CONSTITUTION AND THE ADULTERY DECRIMINALIZATION CONTROVERSY IN TAIWAN (2014). See also YENNA WU, LI ANG'S VISIONARY CHALLENGES TO GENDER, SEX, AND POLITICS 41 (2014) (discussing modern supporters of the concubinage system).

47. WU, *supra* note 46, at 47 (discussing modern supporters of the concubinage system); THORNTON & LIN, *supra* note 42, at 44 (noting the "strong emphasis" on having children and the possibility of taking a concubine in response to a first wife's infertility). See also YUXIN

[C]riminal prohibition against adultery was based on the notion of women as property of their father and then their husband. In order to construct and maintain the patriarchal family and society, women's sexuality was heavily regulated by way of law as well as social norms. For women, sexual relation was only legally and socially permissible when it was with her husband. Women who committed adultery or non-marital sex were labeled immoral, shameful, and they were criminally condemned.⁴⁹

From childhood, young girls were trained to be loyal, sacrificial, and virtuous in the knowledge that wives were expected to remain faithful to their husbands even after death.⁵⁰ Confucian rites insisted women maintain chastity and tolerate a husband's infidelity, a dynamic critics label a sexual double standard.⁵¹

Perceptions of marriage in Taiwan transformed during the early 1900s as individualistic views of the family, newfound emphasis on interpersonal attraction, and decreasing rates of childbirth drew society away from traditional Confucian teachings and toward Westernization.⁵² Feminist discourse emerged to promote women's rights and status in the 1920s, eventually leading to a powerful thrust

MA, *WOMEN JOURNALISTS AND FEMINISM IN CHINA, 1898-1937* 274 (2010) (explaining the legal inconsistency that prohibited polygamy but tolerated concubinage).

48. Miles M. Dawson, *Rules of Conduct Enforced in China*, 23 *CASE & COMMENT* 541, 544 (1916) (listing adultery as a reason to get a divorce) [hereinafter *Dawson Rules*]; DAWSON, *supra* note 44, at 141 (listing adultery as a reason to get a divorce); Tom Ginsburg, *Confucian Constitutionalism? The Emergence of Constitutional Review in Korea and Taiwan*, 27 *L. SOC. INQUIRY*, 764, 787-88 (2002) (noting the Confucian roots of criminal adultery provisions); WU, *supra* note 46, at 39 (referring to a book, "Waiyu," on extramarital affairs).

49. LEE, *supra* note 46, at 7.

50. *Dawson Rules*, *supra* note 48, at 543 ("Once mated with her husband, all her life [a wife] will not change her feeling of duty to him; hence, when the husband dies, she will not marry again."); DON S. BROWNING, M. CHRISTIAN GREEN, & JOHN WITTE JR., *SEX, MARRIAGE, AND FAMILY IN WORLD RELIGIONS* 401 (2006); THORNTON & LIN, *supra* note 42, at 42 (stating that widows' expectation of faithfulness to her deceased husband was buttressed by legal codes requiring such lest she be economically penalized).

51. CHANG, *supra* note 44, at 25. See DEBORAH DAVIS & SARA FRIEDMAN, *WIVES, HUSBANDS, AND LOVERS: MARRIAGE AND SEXUALITY IN HONG KONG, TAIWAN, AND URBAN CHINA* 15 (2014) (noting "persistent sexual double standards for men and women" in Taiwan); Chen, *supra* note 45, at 47 ("In the Taiwanese society, the designated gender roles for a woman are, in chronological sequence, filial daughter, dutiful/chaste wife, and virtuous/loving mother.").

52. THORNTON & LIN, *supra* note 42, at 3; Wang, *supra* note 42, at 58; LEE, *supra* note 46, at 4.

toward equal criminalization of adultery in the 1930s.⁵³ Advocates posited that Article 239, the adultery provision in the Taiwanese penal code, was discriminatory on the basis of gender and criticized a legal system prohibiting polygamy and adultery while simultaneously tolerating concubinage.⁵⁴ In response, the Legislative Yuan (the lawmaking branch of the government)⁵⁵ revised the criminal provision in 1934 to ensure de jure gender equality.⁵⁶ Notably, one Judicial Yuan Interpretation (comparable to a judicial opinion in the United States) reveals that concubinage was still prevalent in 1976, though the court was quick to say the practice violated marital fidelity.⁵⁷

Ironically, some women argued that it simply did not make sense to punish men for adultery: “Even if [wives] know their husbands have illicit affairs, they have to pretend not to notice” lest they lose their husbands and consequently, their livelihood.⁵⁸ The concern for *what happens next* lingered past the push for gender equality in the 1930s and into the conversation on decriminalizing adultery in the 1990s.⁵⁹ Interestingly, some women’s groups balked at the idea of decriminalization, describing the penal provision as an asset to wives⁶⁰: many women preferred to stay married rather than pursue divorce in court because “traditional male centered values [were] still

53. LEE, *supra* note 46, at 7; see CHANG, *supra* note 44, at 4 (discussing the history of feminism in Taiwan); see also MA, *supra* note 47, at 274 (discussing gender discrimination in the Taiwanese penal code).

54. LEE, *supra* note 46, at 7; MA, *supra* note 47, at 274 (explaining the legal inconsistency that prohibited polygamy but tolerated concubinage).

55. For more information on the role of the Legislative Yuan in Taiwan, see *Functions and Powers*, LEGISLATIVE YUAN, REPUBLIC OF CHINA (TAIWAN), http://www.ly.gov.tw/en/01_introduce/introView.action?id=8 [<https://perma.cc/NDQ6-9NM6>] (last visited Jan. 11, 2018).

56. LEE, *supra* note 46, at 7; see also MA, *supra* note 47, at 274 (discussing gender discrimination in the Taiwanese penal code).

57. Judicial Yuan Interpretation No. 147 (1976), http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=147 [<https://perma.cc/DSS3-MB6X>] (last visited Jan. 11, 2018) (Justices of the Constitutional Court, Judicial Yuan: Interpretations 大法官解釋, English) (Taiwan Const. Ct. Interp.).

58. MA, *supra* note 47, at 276.

59. See *infra* notes 60-64 and accompanying text.

60. Irene Lin, *Decriminalization of adultery discussed*, TAIPEI TIMES (Jan. 3, 2000), <http://www.taipetimes.com/News/local/archives/2000/01/03/18080> [<https://perma.cc/779R-54QL>] (archived Jan 2, 2018) (discussing how criminalization helps women in divorce proceedings).

heavily embedded in the [then] current divorce laws.”⁶¹ Women had an approximate ten to twenty percent chance of retaining custody of their children thanks to a presumption of paternal custody,⁶² and received little to no financial support upon divorce despite having never worked outside of the home.⁶³ Thus, women found they could use the threat of a criminal charge against their adulterous husbands as a weapon to ensure financial support either by avoiding divorce or gaining a larger divorce settlement from Taiwanese men who would rather lose money or property than face the disgrace of a criminal record.⁶⁴

The argument for continued criminalization waned significantly as Taiwan progressed through the twentieth and into the twenty-first century, and women gained independence in the family.⁶⁵ After World War II and into the early 1960s, Taiwan’s agricultural economy evolved into an industrial one, overwhelming society with dramatic social change: large swaths of the population moved from rural areas into cities, breaking down extended family networks and

61. Li-Ju Lee, *Law and Social Norms in a Changing Society: A Case Study of Taiwanese Family Law*, 8 S. CAL. REV. L. & WOMEN’S STUD. 413, 413 (1999) (discussing the transformation of Taiwan into an industrial, modern society and how it has changed the family system and practices) [hereinafter *Lee Case Study*]; see Winnie Chang, *Unequal Terms*, TAIWAN TODAY (Nov. 1, 1993), <http://taiwaninfo.nat.gov.tw/ct.asp?xItem=100662&ctNode=124> [<https://perma.cc/VNR4-W8L3>] (archived Jan. 2, 2018) (“[T]he existing divorce law does not give enough protection to women on property rights after the divorce.”); Lin, *supra* note 60.

62. Judicial Yuan Interpretation No. 365 (1994), http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=365 [<https://perma.cc/S38V-FAEA>] (last visited Jan. 2, 2018) (Justices of the Constitutional Court, Judicial Yuan: Interpretations 大法官解釋, English) (Taiwan Const. Ct. Interp.) (last visited Nov. 10, 2017) (striking down Article 1089); Hung-En Liu, *Mother or Father: Who Received Custody? The Best Interests of the Child Standard and Judges’ Custody Decisions in Taiwan*, 15 INT’L J. L., POL’Y & FAM. 185, 186 (2001); *Lee Case Study*, *supra* note 61, at 413.

63. See generally Wendy Yang, *Is Recognizing the Monetary Value of Housework Sufficient in Achieving Gender Equality: Assessing Taiwan’s §1003-1 and §1018-1’s Potential Impact on Taiwan’s Road Toward Gender Equality*, WASH. COLLEGE OF L., <https://www.wcl.american.edu/index.cfm?LinkServID=73AC241F-BBF6-01A2-2E18828AFEC26EE1> [<https://perma.cc/L2GL-8C6B>] (last visited Jan. 2, 2018).

64. Laurence Eyton, *Victory for Taiwan Housewives*, ASIA TIMES. (June 11, 2002), <http://www.hartford-hwp.com/archives/55/611.html> [<https://perma.cc/S2Z4-G7TH>] (archived Jan. 2, 2018); Lin, *supra* note 60; DAVIS & FRIEDMAN, *supra* note 51, at 16 (“During divorce hearings, Taiwanese courts can use evidence of extramarital relationships to establish fault, and courts...can assign compensation to the non-blameworthy spouse.”).

65. *Lee Case Study*, *supra* note 61, at 434-45.

requiring more labor from women, a previously untapped market.⁶⁶ As women became increasingly economically independent, they gained “the money and freedom to end unhappy marriages.”⁶⁷ Additionally, Taiwan grew more liberal and democratic after martial law was abolished in 1987, so child welfare and women’s rights advocates fought to reshape Taiwanese family law to help those at a disadvantage within the traditional family structure.⁶⁸ Divorce proceedings became more expedient for women by means of a gender neutral custody law: the presumption of paternal custody, which was legally mandated in Taiwan’s Civil Code, was finally declared unconstitutional by Taiwan’s Grand Justices on grounds of equal protection in 1994 and abolished in 1996.⁶⁹ By 2008, custody determinations, now based on the “best interests of the minor child” standard, were awarded to mothers between forty and sixty percent of the time.⁷⁰ At last, criminalization was no longer the only tool women used to obtain an equitable divorce; fewer women felt forced to stay with their husbands in order to maintain financial support and access to their children, so fewer married Taiwanese women needed a criminal provision to tolerate unfaithful husbands.⁷¹

66. *Id.* (discussing the transformation of Taiwan into an industrial, modern society and how it has changed the family system and practices).

67. MICHAELA RYAN, TAIWAN 23 (2003); Lee, *supra* note 46, at 4; *Lee Case Study*, *supra* note 61, at 434-36.

68. *Lee Case Study*, *supra* note 61, at 436.

69. Judicial Yuan Interpretation No. 365, *supra* note 62 (striking down Article 1089); Liu, *supra* note 62, at 186; *Lee Case Study*, *supra* note 61, at 413. This statement should not be confused with stating that divorce proceedings are advantageous for women in general. On the contrary, as is the case in the United States, divorce tends to disadvantage women, who are more vulnerable and have fewer resources as compared to their husbands. Liu, *supra* note 62, at 218; Yang, *supra* note 63, at 21 (“[W]omen are often left financially disadvantaged and disempowered in marriage, especially upon divorce.”).

70. Fagui, Ziliaoku [Taiwan Civil Code], art. 1055-1 (listing the factors a judge should consider when deciding which parent should receive custody of their children in a divorce proceeding); see *Lee Case Study*, *supra* note 61, at 436; I-HSUN CHOU, MANDATORY DIVORCE MEDIATION IN TAIWAN: LEGAL REGIME, JUDICIAL ATTITUDES AND PUBLIC OPINIONS 19-20 (2011). This is a dramatic swing away from pre-1996 custody decisions, which favored the father eighty to ninety percent of the time. Ironically, though the movement toward a gender-neutral best interests of the child standard was spearheaded by women’s equality groups, the drastic shift from paternal preference to maternal preference is likely due to the gender-stereotyped role of women as more fit to be loving and caring parents. See Liu, *supra* note 62, at 207-08.

71. See Lena Fung Warmack, *Divorce Rate Rises as More Women Stop Tolerating Unhappy, Unfaithful Unions*, INT’L FAMILY LAW (2004), <http://www.international->

Despite this socio-cultural evolution, however, a revised adultery law was reaffirmed in 2002, without any mention of its effect on women: “A married person who commits adultery with another shall be sentenced to imprisonment for not more than one year; the other party to the adultery shall be subject to the same punishment.”⁷² In reviewing the statute, the Justices of the Constitutional Court explained criminalizing adultery as “essential in order to safeguard marriage, the family system, and the social order”⁷³; the provision was deemed proper for deterrence, to maintain respect for marriage, and to promote family values.⁷⁴ While recognizing the constitutional mandate to protect an individual’s freedom of sexual behavior, the Court reasoned that this freedom is subject to the restriction placed on it by marriage and the family system.⁷⁵ The Court ruled that traditional family norms must be regarded by every individual in society.⁷⁶

These rationales are not persuasive to a growing faction of Taiwanese citizens advocating for decriminalization.⁷⁷ Women’s groups that once advocated for continued criminalization now call for the opposite; for example, the Awakening Foundation, an

divorce.com/Taiwan:-Divorce-Rate-Rises [https://perma.cc/LNK5-MUAS] (last visited Jan. 11, 2018).

72. Criminal Code of the Republic of China, art. 239 (2016), *Zhonghua Renmin Gongheguo Fagui Huibian*; see also M. Bob Kao, *Time to Kiss Goodbye to Taiwan’s Adultery Laws*, THINKING TAIWAN (Mar. 2, 2015), <http://archive.is/GdZkE> (last visited Jan. 2, 2018).

73. Kao, *supra* note 72; Kuan Hsiao-wei, *Adultery law affects women more*, TAIPEI TIMES (Dec. 11, 2013), <http://www.taipetimes.com/News/editorials/archives/2013/12/11/2003578751> [https://perma.cc/JC3E-SLLP] (archived Jan. 2, 2018) (noting that the statute is “presented under the pretext of safeguarding marriages and families and protecting children”); see also *Taiwan’s Archaic Adultery Law*, ASIA SENTINEL (Jun. 19, 2013), <http://www.asiasentinel.com/society/taiwans-archaic-adultery-law/> [https://perma.cc/26TA-K2JJ] (archived Jan. 2, 2018) [hereinafter *Archaic Adultery Law*]; Lee, *supra* note 46, at 3.

74. 2002 Const. Ct. Interp. No. 554 (Const. Ct., Judicial Yuan Dec. 27, 2002) (Taiwan).

75. See *id.*; MA, *supra* note 47, at 276; *88% of Taiwanese in favor of keeping adultery illegal*, INQUIRER (June 13, 2015, 5:58 PM), <http://newsinfo.inquirer.net/698255/88-of-taiwanese-in-favor-of-keeping-adultery-illegal-poll> [https://perma.cc/ZJ47-SJ49] (archived Jan. 2, 2018) [hereinafter *Inquirer*]; Lee, *supra* note 46, at 10.

76. Lee, *supra* note 46, at 10.

77. Sophia Yang, *Taiwan advised to decriminalize adultery*, TAIWAN NEWS (Jan. 20, 2017), <https://www.taiwannews.com.tw/en/news/3078650> [https://perma.cc/WQ49-DBAM] (archived Jan. 2, 2018) (“For years, many local experts and women’s groups have been expressing support for the decriminalization of adultery, but the Ministry of Justice turned them down citing that there was ‘no consensus in society’ on this issue.”); see *infra* notes 78-81 and accompanying text.

organization at the forefront of Taiwanese feminist activism since the 1980s, said in 2000 that adultery decriminalization could not be effective until legal protection is better established for women.⁷⁸ Now, the Awakening Foundation endorses the abolishment of adultery laws in the criminal code.⁷⁹ Taiwan's Minister of Culture Lung Ying-tai also promotes decriminalization as the country is supposed to be in "a different era now."⁸⁰ Critics say the Legislative Yuan's reaffirmation of the adultery statute in 2002 "reassured current social norms of Taiwan society" and disregarded the global movement toward decriminalization, especially considering adultery continues to be prosecuted in Taiwan.⁸¹ However, continued criminalization is encouraged by the Ministry of Justice and the general public⁸²: 82.2 percent of Taiwanese citizens opposed decriminalizing adultery while only 16.8 percent supported abolishing the law.⁸³

Aside from the criminal provisions, civil remedies are virtually non-existent except through divorce proceedings. In Taiwan, a couple may divorce by mutual consent or by petitioning the court for a

78. Lin, *supra* note 60 ("Until legal protection is better established for women, we don't think the time is right to decriminalize adultery. At the very least, it serves as an effective weapon to force cheating husbands to offer more financial support to their divorcing wives[.]").

79. See *Married Family*, AWAKENING FOUNDATION, <https://www.awakening.org.tw/topic/category/30> [<https://perma.cc/X2V6-FD4S>] (last visited Jan. 11, 2018) (indicating the foundation advocates for the abolition of the criminal adultery law due to its discrimination against women).

80. Sun Xi, *Taiwan Argues over Decriminalizing Adultery*, ALL-CHINA WOMEN'S FEDERATION (May 14, 2013), <http://www.womenofchina.cn/womenofchina/html1/features/rights/15/5205-1.htm> [<https://perma.cc/F2AH-BEQQ>] (archived Jan. 2, 2018); *Archaic Adultery Law*, *supra* note 73; Lee, *supra* note 46, at 2.

81. Amy H. L. Shee, *Impact of Globalisation on Family Law and Human Rights in Taiwan*, 2 NAT'L TAIWAN U. L. REV. 21, 50 (2007); see also Chen Ping-hung & Chen Weihan, *Activists criticize adultery law, citing S Korean reversal*, TAIPEI TIMES (Mar. 5, 2015), <http://www.taipetimes.com/News/taiwan/archives/2015/03/05/2003612825> [<https://perma.cc/YLR8-HLB8>] (archived Jan. 2, 2018) ("The government should align itself with the global trends in decriminalizing adultery[.]"); *infra* Section III.C.

82. Xi, *supra* note 80; *Archaic Adultery Law*, *supra* note 73; Lee, *supra* note 46, at 2.

83. Kao, *supra* note 72; see also *Archaic Adultery Law*, *supra* note 73, at 1 (citing the 2013 poll asking whether citizens opposed or supported decriminalizing adultery); Inquirer, *supra* note 75 (reporting eighty-eight percent of Taiwanese respondents in a 2015 government-hosted poll opposed to the decriminalization of adultery).

divorce decree based on a spouse meeting certain criteria.⁸⁴ A divorce by mutual consent is completed almost entirely outside of the courtroom; as long as both spouses agree to get divorced, the couple has the power to negotiate the terms of their divorce, including child custody, child support, property division, and alimony, without the interference of a judge.⁸⁵ If both do not agree to divorce, a petition to divorce can be made based on one spouse's fault, which may include consensual sex with another person.⁸⁶ Successfully asserting a petition for divorce requires "substantial evidence of sexual intercourse," such as photographs of the spouse and the third party in bed together, which is often procured with the help of private investigators.⁸⁷ In successful petitions, a guilty spouse may face negative consequences. However, considering the difficulty of obtaining such evidence, most divorces actually caused by adultery will not be filed as such.⁸⁸ Additionally, considering approximately ninety percent of divorces are consensual, Taiwanese divorce law does not substantially affect adulterous spouses.⁸⁹

III. PRACTICAL EFFECTS AND CONSEQUENCES

The regulation of adultery has a myriad of legal and societal repercussions on women in Taiwan and the United States. The following sections explore three effects highlighted in recent literature and research: Section A will discuss the disparate social implications of adultery on women and men in both countries; Section B will

84. Civil Code Art. 1050, 1052 (2015) (Taiwan), <http://db.lawbank.com.tw/Eng/FLAW/FLAWDAT0201.asp?lsid=FL001351&beginPos=116> [<https://perma.cc/7LZS-PMDA>] (last visited Jan. 11, 2018).

85. Chou, *supra* note 70, at 18.

86. *Supra* note 84.

87. See Cathy T. H. Chen, Kai-Yuan Cheng, & Sih-Yan Lin, *Can Email Be Evidence for Adultery in Criminal Law Cases? A Philosophical and Legal Explication of the Court's Evaluation of Evidence through Inner Conviction*, 2 INT'L J. OF CYBER SOC'Y AND EDUC. 1, 4 (2009) (discussing elements of adultery and requirements for evidence); Chang, *supra* note 61, at 10; see also *Archaic Adultery Law*, *supra* note 73 (discussing how a private investigator may follow a spouse to collect evidence so as to pressure him/her to sign a *benpiao*, or an acknowledgement of guilt to the crime of adultery, in order to get a larger divorce settlement).

88. Chou, *supra* note 70, at 31 (describing the "unreasonable levels of evidence" required to prove adultery); Chang, *supra* note 61, at 10; see e.g., *Hard-on picture not proof of adultery: Taiwan prosecutor*, TOMO NEWS (Dec. 18, 2013), <http://www.tomonews.net/hard-on-picture-not-proof-of-adultery-taiwan-prosecutor-34648876924928> [<https://perma.cc/VDL5-MRKT>] (archived Jan. 3, 2018).

89. Chou, *supra* note 70, at 19.

explore the legal ramifications of adultery as a heat of passion defense on women in both countries; and Section C will explain the difference between prosecuting and convicting men and women for adultery in Taiwan. Finally, Section D will explain how changing the laws regulating adultery will help diminish these discriminatory socio-cultural effects on women in Taiwan and the United States.

A. Sluts and Studs: Social Implications of Adultery

As a woman, the social ramifications of being an adulterer or a mistress cannot be ignored. In both the United States and Taiwan, women face cultural shame unexperienced by their male counterparts.⁹⁰ Additionally, women are often expected to react to an adulterous husband in a reticent and accepting manner in sync with a patriarchal or traditional view on gender roles in relationships.⁹¹ The following sections flesh out these concepts in Taiwan and the United States.

1. United States

When infidelity is exposed, US wives and mistresses are often cited as suffering social disadvantages that outweigh those of their male counterparts: “Western cultural stereotypes are more forgiving of a man having recreational sex ([seen as a] stud) versus how we tend to view a woman doing the same ([seen as a] slut).”⁹² This is referred to as the cheating double standard,⁹³ exemplified by a variety

90. See *infra* Sections II.A.1 & 2.

91. *Id.*

92. Robert Weiss, *Why Women Cheat: 5 Reasons for Female Infidelity*, HUFFINGTON POST (Feb. 4, 2013, 11:25 AM), http://www.huffingtonpost.com/robert-weiss/women-cheating-5-reasons-for-female-infidelity_b_1936934.html [<https://perma.cc/3BPJ-D8L9>] (archived Jan. 3, 2018); Michael Castleman, *Marital Infidelity: How Common Is It?*, PSYCHO. TODAY (Oct. 15, 2009), <https://www.psychologytoday.com/blog/all-about-sex/200910/marital-infidelity-how-common-is-it> [<https://perma.cc/NU3J-XGB8>] (archived Jan. 3, 2018) (“But in our culture, men with multiple partners are often envied as studs, while similar women are dismissed as sluts.”); Tara Parker-Pope, *Love, Sex, and the Changing Landscape of Infidelity*, N.Y. TIMES (Oct. 27, 2008), <http://www.nytimes.com/2008/10/28/health/28well.html> (noting how men with more than one partner are typically seen as “virile” while women are considered “promiscuous”).

93. Demetria Lucas D’Oyley, *Why He Gets a Pass for Cheating and She Doesn’t*, THE ROOT (Dec. 26, 2013), <https://www.theroot.com/why-he-gets-a-pass-for-cheating-and-she-doesn-t-1790899479> [<https://perma.cc/V8FH-ND96>] (archived Jan. 11, 2018); Jill Filipovic, *The Hunt for “Becky With the Good Hair” Is Sexist and Everyone Needs to Stop*,

of celebrity scandals and repercussions affecting average US women.⁹⁴ For example, a recent case of marital misconduct involves pop star Beyoncé and her rapper husband JAY-Z. When Beyoncé exposed a scathing account of her husband’s infidelity through her 2016 album *Lemonade*, backlash was directed at accused mistress Rachel Roy via a slew of insults and threats on social media.⁹⁵ The abuse was enough to force Roy, a prominent fashion designer with millions of social media followers, to make her Instagram account private and cancel a scheduled appearance.⁹⁶ Other potential mistresses were also targeted in this “witch-hunt” for the woman Beyoncé alluded to in several songs.⁹⁷ Meanwhile, many noted that JAY-Z’s criticisms were comparatively far and few between.⁹⁸ This

COSMOPOLITAN (Apr. 27, 2016), <http://www.cosmopolitan.com/entertainment/celebs/a57582/becky-with-the-good-hair-hunt-is-sexist/> [<https://perma.cc/678B-S9ZN>] (archived Jan. 3, 2018) (“Married women have affairs too, and men sleep with married women, but you don’t hear the term ‘The Other Man’ in the popular lexicon.”).

94. See *infra* notes 95 to 114 and accompanying text.

95. Melody Chiu, *Rachel Roy: 5 Things to Know About the Designer Caught in the Lemonade Firestorm*, PEOPLE (Apr. 25, 2016, 5:05 PM), <http://www.people.com/article/rachel-roy-five-things-to-know> [<https://perma.cc/T653-EYG6>] (archived Jan. 3, 2018) (noting Beyoncé’s fans started a “witch-hunt” for the woman she alluded to in her new album); Alex Apatoff & Andrea Park, *Rachel Roy Denies She’s the ‘Becky’ Who Beyoncé Called Out in Lemonade: ‘There is No Truth to the Rumors’*, PEOPLE (Apr. 26, 2016, 8:40 AM), <http://www.people.com/article/beyonce-lemonade-rachel-roy-denies-becky-album> [<https://perma.cc/J856-PK3P>] (archived Jan. 3, 2018) (quoting Roy discussing the “hurtful and scary” comments made on her social media accounts).

96. Chiu, *supra* note 95; Emily Smith, Carlos Greer, & Emily Saul, *Rachel Roy’s cryptic post sparks Jay Z cheating rumors*, PAGE SIX (Apr. 24, 2016, 4:45 PM), <http://pagesix.com/2016/04/24/rachel-roys-cryptic-post-sparks-jay-z-cheating-rumors/> [<https://perma.cc/8JP5-2YM6>] (archived Jan. 3, 2018) (stating Roy made her Instagram account private after an onslaught of users responded to a post allegedly aimed at Beyoncé, which Roy later denied).

97. Chiu, *supra* note 95; Filipovic, *supra* note 93.

98. Filipovic, *supra* note 93 (“[I]t’s not [JAY-Z], largely, who’s getting attacked online, perhaps because we assume that men are sexually uncontrollable and it’s the collective duty of womankind to keep them in line. Men are, in fact, just as capable as women of making decisions about sex. And when they make bad decisions — decisions that hurt people or that violate the boundaries of their relationship — they are just as responsible.”); Jenna Mullins, *Beware the Beyhive: What Happens When the Good Intentions of a Fanbase Go Bad*, ENEWS (Apr. 25, 2016, 6:49 PM), <http://www.eonline.com/au/news/759656/beware-the-beyhive-what-happens-when-the-good-intentions-of-a-fanbase-go-bad> [<https://perma.cc/8ZMC-JWZN>] (archived Jan. 3, 2018) (noting how Beyoncé’s fans attacked Roy and her daughter, “not the man who also allegedly did the cheating”). This was noticed by several Twitter users: “why are people dragging Rachel and not Jay? Just wondering. Not defending her, but reject the double standard. [...] I’m not defending her, but Jay isn’t trending. Not here for homewreckers. But HE’s the one married.” (@melimel, Apr. 24, 2016, 1:14pm, 1:17pm); “I

can be compared to an event that occurred only one month before, in which R&B singer Kehlani Parrish was brutally harassed on social media for allegedly cheating on her boyfriend, basketball star Kyrie Irving, leading her to delete her Instagram account and attempt suicide.⁹⁹ In contrast to the response elicited from JAY-Z's adultery, the woman who allegedly cheated was berated to the point of extreme psychological distress while the male paramour, a former boyfriend, was euphemistically branded as a man "able to steal back a woman."¹⁰⁰

The infamous Bill Clinton and Monica Lewinsky scandal is yet another example of the social harms that befall women over men in adulterous situations: Lewinsky was cyber-bullied, called a "tramp, tart, slut, whore, bimbo, and...that woman," and still copes with the social, political, and emotional repercussions of performing sexual acts with a married man over fifteen years after the event.¹⁰¹ On the other hand, Clinton enjoys a political legacy that overshadows the conveniently-named "Lewinsky Scandal" and remains one of "America's Favorite Living Ex-Presidents"¹⁰² despite being

mean Jay Z is weak for not being able to control his d*** (: [...] stop blaming women for a man's action." (@MSP_Lexsiri, Apr. 24, 2016, 2:00pm, 2:01pm).

99. Aliya S. King, *Kehlani, Suicide, and the Dark Side of Social Media*, ESSENCE (Mar. 30, 2016), <http://www.essence.com/2016/03/31/kehlani-suicide-and-dark-side-social-media> [<https://perma.cc/R8VG-48ZB>] (archived Jan. 3, 2018); Esther Lee, *Kehlani Parrish, Singer, Attempted Suicide Amid Rumors She Cheated on NBA Boyfriend Kyrie Irving*, US WEEKLY (Mar. 29, 2016, 10:10 AM), <http://www.usmagazine.com/celebrity-news/news/kehlani-parrish-attempted-suicide-amid-rumors-she-cheated-on-nba-boyfriend-w200593> [<https://perma.cc/Y47M-PB2W>] (archived Jan. 3, 2018).

100. Beth Shilliday, *PartyNextDoor: 5 Things to Know About the Rapper in the Kehlani Cheating Scandal*, HOLLYWOOD LIFE (Mar. 28, 2016, 10:15 PM), <http://hollywoodlife.com/2016/03/28/who-is-partynextdoor-rapper-kehlani-cheating-scandal-kyrie-irving/> [<https://perma.cc/V4KV-2DHF>] (archived Jan. 3, 2018).

101. Monica Lewinsky, *The Price of Shame*, TED (Mar. 20, 2015), (https://www.youtube.com/watch?v=H_8y0WLM78U) (internal quotations omitted); see also Jessica Bennett, *Monica Lewinsky is Back but This Time it's on Her Terms*, NY TIMES (Mar. 19, 2015), http://www.nytimes.com/2015/03/22/style/monica-lewinsky-is-back-but-this-time-its-on-her-terms.html?_r=2 (discussing the implications of cyber bullying in Lewinsky's life as a result of her relationship with Bill Clinton).

102. Peter Coy, *Clinton and Elder Bush are America's Favorite Living Ex-Presidents*, BLOOMBERG (June 20, 2014, 3:29 PM), <http://www.bloomberg.com/news/articles/2014-06-20/clinton-and-elder-bush-are-americas-favorite-living-ex-presidents> [<https://perma.cc/HZY7-M494>] (archived Jan. 3, 2018); Steven Franklin, *What is Bill Clinton's presidential legacy?*, QUORA (Oct. 13, 2014), <https://www.quora.com/What-is-Bill-Clintons-presidential-legacy> (noting fourteen other positive contributions to the country before mentioning that his impeachment was a mistake); see also Russel L. Riley, *Bill Clinton: Impact and Legacy*,

impeached for lying about his adulterous conduct.¹⁰³ Arguably, Clinton's career as President of the United States is more significant than his adulterous affair, and some would say his legacy should not be irreparably tainted by an act of infidelity. However, even his wife, Hillary Clinton continues to receive attention and criticism for his actions despite her own prolific professional and political career: Democrats and Republicans alike set their crosshairs on Hillary during her 2016 presidential campaign, evoking both jokes and serious commentary about her ability to run the country based on her husband's adultery.¹⁰⁴ Even when the woman did not conduct the sexual act, she still received social backlash stemming from adultery.

The social implications on non-celebrity women who commit adultery (or those with significant others who commit adultery) are less politicized but strike a similar tone to those described above. For example, women are the primary focus of internet shame and degradation for being cheaters or mistresses in the United States.¹⁰⁵ "Revenge porn" is often used to expose a cheating ex-lover, and websites driven by submissions from spurned lovers are cluttered with intimate photos and personal details of women in far higher

UNIVERSITY OF VIRGINIA MILLER CTR, <http://millercenter.org/president/biography/clinton-impact-and-legacy> [<https://perma.cc/48BM-PJWN>] (last visited Jan. 3, 2018) (noting that Clinton's greatest downfall in the impeachment was never knowing "what might have been" had he not been vying for political survival).

103. *President Clinton Impeached*, HISTORY, <http://www.history.com/this-day-in-history/president-clinton-impeached> [<https://perma.cc/8W94-3VCD>] (last visited Jan. 3, 2018).

104. Emily Shire, *Here's How Monica Lewinsky Could Haunt Hillary Clinton's Campaign As More Than A One-Off Low Blow*, BUSTLE (Apr. 25, 2016), <http://www.bustle.com/articles/156761-heres-how-monica-lewinsky-could-haunt-hillary-clintons-campaign-as-more-than-a-one-off-low-blow> [<https://perma.cc/7DPR-WBNZ>] (archived Jan. 3, 2018); Michael Crowley, *Lewinsky Scandal Still Affects Clintons*, CBS (May 12, 2008, 12:28 PM), <http://www.cbsnews.com/news/lewinsky-scandal-still-affects-clintons/> [<https://perma.cc/C3TG-3D7P>] (archived Jan. 3, 2018); Interview with Hillary Clinton, BBC (July 3, 2014), <http://www.bbc.co.uk/programmes/b048033v> [<https://perma.cc/6FCS-FSQT>] (archived Jan. 3, 2018); Jane C. Timm, *The Monica Lewinsky jokes are back*, MSNBC (Apr. 30, 2016), <http://www.msnbc.com/msnbc/the-monica-lewinsky-jokes-are-back> [<https://perma.cc/BLJ6-CN4W>] (archived Jan. 3, 2018).

105. Kate Dries, *This Website Exposes the Woman Your Partner Cheated on You With*, JEZEBEL (Oct. 29, 2013, 7:00 PM), <http://jezebel.com/this-website-exposes-the-woman-your-partner-cheated-on-1454128297> [<https://perma.cc/HG4Y-RFL8>] (archived Jan. 3, 2018); Bennett, *supra* note 101 (quoting Gloria Steinem explaining how "sexual shaming...is far more directed at women than at men" in the context of adultery).

numbers than those of men.¹⁰⁶ Victims of revenge porn have increased risk of stalking, sexual harassment, physical attack, emotional distress, and anxiety and suffer decreased opportunities for employment, professional growth, and romantic relationships.¹⁰⁷ Hardly regulated by states' penal codes, these issues disproportionately burden women in situations of adultery-fueled revenge porn.¹⁰⁸

Additionally, US women are culturally expected to shoulder burdensome responsibilities when their husbands cheat: “[e]ntrenched social expectations of ethical superiority provide women with a script for how to act when betrayed.”¹⁰⁹ They are to remain Madonna-esque, reacting to infidelity with kindness, understanding, and virtuosity.¹¹⁰ In addition to repressing natural feelings of anger, US women are expected to stay emotionally stable.¹¹¹ If they do not, they are perceived as irrational, chaotic, and uncontrollable—a sentiment founded in a social hierarchy that criticizes female emotional expression in general.¹¹² These expectations inevitably restrict US women into internalizing their pain lest they be labeled “hysteric, shrew, nag, [or] harpy.”¹¹³ These expectations do not befall men in

106. Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 347-48 (2014) (“As revenge porn affects women and girls far more frequently than men and boys, and creates far more serious consequences for them, the eagerness to minimize its harm is sadly predictable.”); Cyber Civil Rights Initiative, *End Revenge Porn* (2014), <https://www.cybercivilrights.org/wp-content/uploads/2014/12/RP-Statistics.pdf> [<https://perma.cc/9MKZ-MEC7>] (last visited Jan. 3, 2018) (listing statistics about those affected by revenge porn).

107. Citron & Franks, *supra* note 106, at 350-54 (describing the effects of revenge porn on its victims); Cyber Civil Rights Initiative, *supra* note 106.

108. *See generally* Citron & Franks, *supra* note 106, at 345; Cyber Civil Rights Initiative, *supra* note 106.

109. LAUREN ROSEWARNE, CHEATING ON THE SISTERHOOD: INFIDELITY AND FEMINISM 44 (2009).

110. *Id.* at 43-44.

111. *Id.* at 45; Filipovic, *supra* note 93 (“Beyoncé, like many women before her, has decided to keep her marriage together through allegations of infidelity. She did so while also pointing to the fundamental unfairness of male sexual entitlement, of the expectation that she stay strong and silent beside her man.”).

112. Tracey E. Madden, Lisa Feldman Barrett, & Paula R. Pietromonaco, “Sex Differences in Anxiety and Depression: Empirical Evidence and Methodological Questions” in GENDER AND EMOTION: SOCIAL PSYCHOL. PERSPECTIVES 280 (Agatha H. Fischer e., 2000; ROSEWARNE, *supra* note 109, at 45.

113. ROSEWARNE, *supra* note 109, at 45.

similar situations and continue to burden US women despite strides forward in the fight for gender equality.¹¹⁴

2. Taiwan

Taiwanese women face social disadvantages and disproportionate expectations in response to adultery due to traditional notions of female sexuality. Socio-cultural standards of a woman's value are set at a high bar: to be *xianqi liangmu*, a dutiful wife and loving mother, is the ideal, and *chuanzong jiedai*, to produce a son to carry on the paternal family, is the goal.¹¹⁵ Women are expected to be chaste before and faithful during marriage; thus, some Taiwanese feminist advocates contend that women's expressions of eroticism are often morally smeared, especially considering unfaithful wives are seen as "sluts" when they are not obedient to their husbands in marriage.¹¹⁶ There is little social tolerance for women having multiple sexual partners.¹¹⁷ However, Taiwanese society maintains a cultural legacy of excused male adultery; women are commonly advised to be patient and endure her husband's adultery simply because it is not exceptional for men to have affairs.¹¹⁸ In fact, men reportedly cheat often in Taiwan, though the thought of a woman having an extramarital lover is unacceptable.¹¹⁹ Some justify excused male infidelity as a cultural presumption of a man's "natural promiscuity"¹²⁰; others blame Buddhism, Taiwan's major religion,

114. See generally *supra* notes 109-13.

115. Chen, *supra* note 45, at 48. But see Davis & Friedman, *supra* note 51, at 16 ("[M]arital infidelity for ordinary citizens rarely generates consequences in other domains of social and economic life, such as advancement in the workplace.").

116. CAROL R. EMBER & MELVIN EMBER, *ENCYCLOPEDIA OF SEX AND GENDER: MEN AND WOMEN IN THE WORLD'S CULTURES* 860, 864 (Vol. 2, 2003); *Married Family*, *supra* note 79; Hsiao-wei, *supra* note 73; see also *Crimes of Passion*, *SOUTH CHINA MORNING POST* (Mar. 18, 2005), <http://www.scmp.com/article/493201/crimes-passion> [<https://perma.cc/A3PG-W8P2>] (archived Jan. 3, 2018) (discussing stigma for women who commit adultery in a Confucian country).

117. David C. Schak, *Gender and Buddhism in Taiwan*, 3 *玄奘佛學研究* 第九期 145, 165-66 (2008).

118. Jui-Shan Chang, *Scripting Extramarital Affairs: Marital Mores, Gender Politics, and Infidelity in Taiwan*, 25 *MODERN CHINA* 69, 69 (1999) ("Women's tolerance of their husbands' extramarital activity [is] relatively high.") [hereinafter J. Chang]; EMBER & EMBER, *supra* note 116, at 864-65 ("The traditional concept of sexuality...allow[s] men to have several sexual partners before and after their wedding."); Chou, *supra* note 70, at 34.

119. Schak, *supra* note 117, at 166.

120. J. Chang, *supra* note 118, at 94.

which is lenient toward unfaithful husbands despite its general disapproval of adultery.¹²¹ Yet others insist that a husband's adultery is inconsequential as long as his wife consents and he is a capable and loving husband—a vestige of the cultural promotion of concubinage.¹²² As a result, men generally feel less guilty about cheating on their wives than women.¹²³

Furthermore, the fault and responsibility of a husband's infidelity in many ways fall on the wife.¹²⁴ A woman whose husband committed adultery is instructed to look in the mirror and consider how her own actions may have contributed to his behavior:

[W]hat could she do to rescue the situation[?] Could she improve her own attitude, temper or behaviour? Could she do more for her husband, make him feel that the home is a more pleasant place or that she is concerned about him in positive rather than negative ways?¹²⁵

The cultural fault of divorce also rests on a woman's shoulders despite her husband's adultery.¹²⁶ Reconciliation with a cheating spouse is encouraged for women specifically due to stigma felt after divorce, in which society blames the woman for not being an adequate enough wife and mother to keep the marriage together.¹²⁷ As a result, women reportedly suffer more emotional strife than men after discovering an extramarital affair, yet are expected to repress thoughts of anger, hatred, or revenge.¹²⁸ Additionally, economic and reputational hardships faced by women after divorce encourage wives to stay with their cheating husbands so another woman will not

121. Schak, *supra* note 117, at 165-66 (noting that in Buddhism, adultery is prohibited and regarded as wrong, but history and scripture “display a tolerant attitude toward men”); see also Linda Learman, *Modernity, Marriage and Religion: Buddhist Marriage in Taiwan* 129 (2005) (Ph.D. dissertation, Boston University).

122. Learman, *supra* note 121, at 75; Schak, *supra* note 117, at 166.

123. Wu, *supra* note 46, at 46 (stating how men often “find it easier to deal with their guilty feelings than women”).

124. J. Chang, *supra* note 118, at 94; Schak, *supra* note 117, at 166.

125. *Symposium on Present-Day Problem Number Three: The Buddhist View of the Problems Facing Women*, 18 當代問題座談紀實之三：佛教對女性問題的看法, Pumen Xuebao 18 (2006a); Schak, *supra* note 117, at 167.

126. Schak, *supra* note 117, at 165; Chou, *supra* note 70, at 34.

127. Schak, *supra* note 117 at 165; Chou *supra* note 70, at 34; Ryan, *supra* note 67 (noting that there is still a stigma attached to being a divorced woman despite increased independence and freedom to end unhappy marriages).

128. Schak, *supra* note 117, at 166-68.

benefit from the fruits of her labor building a home and family.¹²⁹ The logical result of these social expectations is a disparity between women and men who commit adultery, and also between men and women who experience their spouse committing adultery.

B. To Poke a Sleeping Bear: Adultery as Provocation

A phenomenon springing from the issue of adultery is the proliferation of heat of passion crimes, which generally mitigates the penalization of a person's violent (criminal) act when it is done in response to some "provocation" under the law.¹³⁰ One such legally recognized provocation is witnessing or discovering one's spouse committing adultery. As will be explained in the following subsections, this mitigation inevitably results in legal leniency for men who abuse or kill their wives as it is primarily used by husbands who respond violently to encountering a wife's adultery.¹³¹

1. United States

In the United States, women are killed by their significant others at higher rates than men: in 2015, ninety percent of female victims were murdered by men, and sixty percent were murdered by their husbands, ex-husbands, or boyfriends.¹³² In striking comparison, less than ten percent of male homicide victims were killed by women in total,¹³³ let alone an even smaller average of five to eight percent of

129. Chou, *supra* note 70, at 34-35. Men are also urged not to divorce, though this is certainly not a cultural mandate to discontinue an extramarital affair (opting to simply have two wives or families instead). *Id.*

130. *See infra* Sections II.B.1 & 2.

131. *Id.*

132. Violence Policy Center, *When Men Murder Women: An Analysis of 2015 Homicide Data* 3 (Sept. 2017), <http://www.vpc.org/studies/wmmw2017.pdf> [https://perma.cc/PX5P-PG72] (archived Jan. 11, 2018); Olga Khazan, *Nearly Half of All Murdered Women Are Killed by Romantic Partners*, ATLANTIC (July 20, 2017), <https://www.theatlantic.com/health/archive/2017/07/homicides-women/534306/> [https://perma.cc/F8SC-SJ63] (archived Jan. 3, 2018); *see* Donna K. Coker, Heat of Passion and Wife Killing: Men Who Batter/Men Who Kill, 2 S. Cal. Rev. L. & Women's Stud. 71, 71-72 (1992) (explaining emotional and psychological motivations behind violent reactions against an adulterous wife).

133. Federal Bureau of Investigation Department of Justice, *Expanded Homicide Data Table 6*, 2015 CRIME IN THE UNITED STATES (2015), https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/tables/expanded_homicide_data_table_6_murder_race_and_sex_of_victim_by_race_and_sex_of_offender_2015.xls [https://perma.cc/UH7H-QZKQ] (archived Jan. 11, 2018).

male victims estimated to have been killed by a girlfriend or wife.¹³⁴ Because spousal homicide and battering significantly increases when a spouse discovers or suspects sexual infidelity by a woman, US women are killed in disproportionately higher numbers than men in response to adultery.¹³⁵

A facet of US criminal jurisprudence that appears to endorse this behavior is a heat of passion defense in voluntary manslaughter doctrine: a defendant's murder charge may be mitigated to voluntary manslaughter, which carries a significantly smaller sentence, or even excused if the jury finds the defendant killed the victim in the "heat of passion."¹³⁶ California's penal code illustrates a typical definition of heat of passion:

A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed someone...in the heat of passion. The defendant killed someone...in the heat of passion if: The defendant was provoked; [a]s a result of the provocation, the defendant acted rashly and under the influence of intense emotion that obscured (his/her) reasoning or judgment; [and] [t]he provocation would have caused a person of average disposition to act rashly and without due deliberation, that is, from passion rather than from judgment.¹³⁷

Essentially, the court can find that a defendant murdered a person—i.e., all of the elements of murder are present—but will not convict the defendant of murder because his or her actions were incited by

134. Bob Miller, *Jealousy, Control And Murder: Men Killing Their Intimate Partners More Often Than Women*, SOPUSA (Mar. 17, 2014), <http://sopusa.net/jealousy-control-murder-men-killing-intimate-partners-often-women/> [https://perma.cc/QK6P-TXKP] (archived Jan. 3, 2018).

135. Ofer Zur, *Infidelity & Affairs: Facts, Myths and What Works*, ZUR INSTITUTE, <http://www.zurinstitute.com/infidelity.html> [https://perma.cc/H8B2-ULPG] (last visited Jan. 11, 2017); *Decriminalization of adultery and defenses*, UN WOMEN (2012), <http://www.endvawnow.org/en/articles/738-decriminalization-of-adultery-and-defenses.html> [https://perma.cc/VMZ9-SGW3] (last visited Jan. 3, 2018) (hereinafter UN Women); Coker, *supra* note 132, at 73.

136. California Criminal Jury Instructions, *511 Excusable Homicide: Accident in the Heat of Passion*, <https://www.justia.com/criminal/docs/calcrim/500/511.html> [https://perma.cc/8M9J-ZEYR] (last visited Jan. 3, 2018) (noting that the defendant must not have acted with intent, conscious disregard, or criminal negligence in order to be excused from the homicide).

137. California Criminal Jury Instructions, *570 Voluntary Manslaughter: Heat of Passion – Lesser Included Offenses*, <https://www.justia.com/criminal/docs/calcrim/500/570.html> [https://perma.cc/W4JG-ZMVF] (last visited Jan. 3, 2018). This is an example of a heat of passion defense from California; it is typical of those found in almost all other states.

“adequate provocation,” or a situation in which a reasonable person might be goaded into killing.¹³⁸ It is settled legal precedent that adultery is one such provocation that may be used in a heat of passion defense despite that it is the only provocation in which an actual or threatened physical assault is not required.¹³⁹ While the defense can be used by either spouse, in the context of adultery-related heat of passion crimes, it is most commonly used in proceedings involving the murder or assault of an adulterous wife; consequently, penal codes across the United States seem to sanction violent behavior by reducing the criminal charge for men who kill or harm their wives after discovering her in an adulterous act.¹⁴⁰ The roots of this gender disparity can be elucidated in several ways.

First, the prevalence of “legislative vagueness, discriminatory attitudes, and judicial discretion” in determining whether a defendant was in the heat of passion results in de facto gender discrimination despite a gender-neutral statute.¹⁴¹ The US legal system is often criticized for having a male bias, especially considering the underrepresentation of female judges and jurors.¹⁴² But male-oriented laws also contribute to gender stereotyping in cases involving heat of

138. *People v. Steele*, 47 P.2d 225, 239-41 (2002). See also *9.6 Manslaughter*, U. MINN. LIBRARIES, <http://open.lib.umn.edu/criminallaw/chapter/9-6-manslaughter/> [<https://perma.cc/7A3A-NZX4>] (last visited Jan. 3, 2018).

139. Other categories include mutual combat, false arrest, and violent assault. See Coker, *supra* note 132, at 71-73; Barret Broussard, *Principles for Passion Killing: An Evolutionary Solution to Manslaughter Mitigation*, 62 EMORY L. J. 179, 179 (2012) (“[S]exual infidelity remains a paradigmatic approach for mitigation.”); Adeyemi Oshunrinade, *Crime of Passion: Murder You Can Get Away With*, GLOBAL NEWS POST (Jan. 28, 2012), <https://san0670.com/2012/01/28/crime-of-passion-murder-you-can-get-away-with-by-adeyemi-oshunrinade/> [<https://perma.cc/NA6F-MBHT>] (archived Jan. 28, 2018) (“In most jurisdictions of the United States, it is settled principle of law that a husband who finds his wife in the act of committing adultery may be reasonably overcome by passion to kill either his wife or the lover. In such situation, he has not committed murder but rather voluntary manslaughter.”); *9.6 Manslaughter*, *supra* note 138.

140. Oshunrinade, *supra* note 139 (“In most jurisdictions of the United States, it is settled principle of law that a husband who finds his wife in the act of committing adultery may be reasonably overcome by passion to kill either his wife or the lover. In such situation, he has not committed murder but rather voluntary manslaughter.”). See generally Coker, *supra* note 132.

141. See UN Women, *supra* note 135; see generally Antonia Elise Miller, *Inherent (Gender) Unreasonableness of the Concept of Reasonableness in the Context of Manslaughter Committed in the Heat of Passion*, 17 WM. & MARY J. WOMEN & L. 249, 249-50 (2010).

142. A. Miller, *supra* note 141, at 249-50.

passion crimes.¹⁴³ Some have analyzed this phenomenon through a historical lens, comparing the differences between a man and a woman's "natural" responses to adultery. Tracing back to the concept of paternal uncertainty, a husband killing his wife in response to *sexual* infidelity is an evolutionary response to the male fear of investing in a child that does not carry his genetic lineage.¹⁴⁴ In the same vein, a wife killing her husband in response to *emotional* infidelity is an evolutionary response to female fear of a "disastrous loss of investment from those mates with whom they have decided to reproduce."¹⁴⁵ According to this critique, both spouses have equally passionate responses to infidelity rooted in the cultural and biological roles women and men have assumed throughout history, but only *sexual* infidelity is adequate provocation to invoke the heat of passion defense because men have been in charge of law-making for the entirety of US history:

Because men have traditionally been in power in Western culture throughout the development of the common law, (male) lawmakers would have been cognizant of the enormous distress caused by sexual unfaithfulness in the confines of relationships. That distress and shared sense of understanding find their roots in evolution. As a universal challenge faced by all men over the course of thousands of years, [... and] in a male-dominated legal system, mitigation for the frailty of human nature or the laws upon which human nature is constituted would incorporate *male frailties but not necessarily female ones*.¹⁴⁶

Additionally, in nearly all US jurisdictions, a husband who discovers his wife in the act of adultery, or sometimes even mere knowledge of adultery, can receive a mitigated sentence or charge for violent crimes because courts use a "reasonable man" standard to determine the appropriateness of a spouse's violent reaction to adultery.¹⁴⁷ The

143. *Id.*

144. Broussard, *supra* note 139, at 203; *see supra* Section I.A.

145. Broussard, *supra* note 139, at 203; *see also* Scott Haltzman, *Infidelity and how it Affects Marriage, Children and Families* (Interview June 10, 2013 at 11:00 AM), <https://thedianerehmsow.org/shows/2013-06-10/infidelity-and-how-it-affects-marriage-children-and-families> [<https://perma.cc/SHAN-NRGH>] (archived Jan. 3, 2018) ("Many people (particularly women) feel the emotional affairs can be just as damaging as physical affairs.").

146. Broussard, *supra* note 139, at 201-02 (*emphasis added*).

147. Aya Gruber, *Leniency as a Miscarriage of Race and Gender Justice*, 76 ALB. L. REV. 1571, 1592-93 (2013) ("Some assert that the whole notion of exoneration based on anger privileges masculinist belligerence over preferred feminine passivity."); WAYNE R. LAFAVE &

differences between a reasonable man and woman in the context of US culture are stark: “differential gender socialization” describes the phenomenon that men are socialized to be more aggressive in situations that invoke anger while women are not.¹⁴⁸ In cases of sexual infidelity, male aggression is deemed reasonable because a cheating wife is more shameful than a cheating husband; women, on the other hand, are “taught not to be surprised by male infidelity,” so a reaction of rage or violence is far less reasonable.¹⁴⁹ Thus, by excusing a reaction that is reasonable for men but not for women, the defense “primarily serves a masculine interest,” as the definition of “reasonable” is largely shaped by a person’s culture.¹⁵⁰

Some cases serve as telling examples of the prevalence of gender stereotyping in the use of heat of passion defenses. Kenneth Peacock was convicted of voluntary manslaughter and received a sentence of eighteen months in prison for killing his wife.¹⁵¹ Upon discovering her in bed with another man, Peacock spent multiple hours threatening her and consuming alcohol before finally pulling the trigger.¹⁵² Judge Robert E. Cahill, who sentenced Peacock, subsequently stated, “I seriously wonder how many men married five, four years would have the strength to walk away without inflicting some corporal punishment.”¹⁵³ The judge exemplified his male bias further when he admitted to believing Peacock’s actions were fully

AUSTIN W. SCOTT, JR., *CRIMINAL LAW* 656 (2d ed., 1986); ROLLIN M. PERKINS & RONALD N. BOYCE, *CRIMINAL LAW* 86-87 (3d ed., 1982) (explaining the “modern rule” using a reasonable person standard to determine the adequacy of a husband’s violent reaction to the adulterous information or act).

148. Emily L. Miller, *(Wo)manslaughter: Voluntary Manslaughter, Gender, and the Model Penal Code*, 50 *Emory L.J.* 665, 680-81 (2001); RHODA UNGER & MARY CRAWFORD, *WOMEN AND GENDER: A FEMINIST PSYCHOLOGY* 235, 736 (1992); Deborah W. Denno, *Gender, Crime, and the Criminal Defenses*, 85 *J. CRIM. L. & CRIMINOLOGY* 80, 92 (1994); ROSEWARNE, *supra* note 109, at 44.

149. A. Miller, *supra* note 141, at 270-71.

150. E. Miller, *supra* note 148, at 670; Unger & Crawford, *supra* note 148; Denno, *supra* note 148.

151. A. Miller, *supra* note 141, at 249; KATHARINE T. BARTLETT ET AL., *GENDER LAW AND POLICY* 363 (2014).

152. Tamar Lewin, *What Penalty for a Killing in Passion*, *NY TIMES* (Oct. 21, 1994), <http://www.nytimes.com/1994/10/21/us/what-penalty-for-a-killing-in-passion.html>; Karl Vick, *MD. Judge Taking Heat in Cuckolded Killer Case*, *WASH. POST* (Oct. 30, 1994), https://www.washingtonpost.com/archive/politics/1994/10/30/md-judge-taking-heat-in-cuckolded-killer-case/1a8d9744-6dee-4bd1-9abb-eb5f0a91c67c/?utm_term=.9b5e666e4611 [<https://perma.cc/PW3A-9HQT>] (archived Jan. 3, 2018).

153. A. Miller, *supra* note 141, at 249; BARTLETT ET AL., *supra* note 151, at 363.

justified by his wife's adultery and only sentenced him to prison time because it was legally required.¹⁵⁴ Alternatively, in a case involving a woman who killed her husband after confronting him and his mistress at a hotel, the wife was convicted of murder despite testimony saying she was "in a fog" and "blackout" from rage; the court even enhanced her sentence to the maximum of twenty years for using a deadly weapon (a car).¹⁵⁵ The prosecution and defense used female gender stereotypes such as "promiscuous" and "selfish spendthrift" for both the wife and the mistress to bolster their cases.¹⁵⁶ Most shockingly, in *People v. Chen*, a Chinese man moved to the United States and murdered his wife with a hammer after she admitted to having an affair.¹⁵⁷ Chen confessed to the killing, but contended that in Chinese culture a husband's wife committing adultery implicates weakness; because divorce is considered shameful, Chen argued, Chinese men commonly threaten to murder their adulterous wives.¹⁵⁸ The court decided this "cultural defense" was enough to mitigate a murder charge to a mere probationary sentence.¹⁵⁹ The decision has been lamented as "a means to protect men who have murdered their wives" based on the traditional perception of women as the family honor, and has never been overturned.¹⁶⁰ These examples show that cultural expectations of how a reasonable woman or man should act skew the United States' use of adultery as heat of passion provocation to the benefit men and the detriment of women.¹⁶¹

A final critique impugns the voluntary manslaughter doctrine in the context of adultery as a reinforcement of gender stereotypes

154. A. Miller, *supra* note 141, at 249; Bartlett et al., *supra* note 151, at 363.

155. BARTLETT ET AL., *supra* note 151, at 363.

156. *Id.*

157. Damian W. Sikora, Note, *Differing Cultures, Differing Culpabilities?: A Sensible Alternative: Using Cultural Circumstances as a Mitigating Factor in Sentencing*, 62 OHIO ST. L.J. 1695, 1695 (2001) (discussing the facts of *People v. Chen*); Taryn F. Goldstein, Comment, *Cultural Conflicts in Court: Should the American Criminal Justice System Formally Recognize A "Cultural Defense"?*, 99 DICK. L. REV. 141, 151-53 (1994) (discussing the facts of *People v. Chen*).

158. See Melissa Spatz, *A "Lesser" Crime: A Comparative Study of Legal Defenses for Men Who Kill Their Wives*, 24 COLUM. J.L. & SOC. PROBS. 597, 622 (1991) (describing Chen's legal defense).

159. Spatz, *supra* note 158, at 622 ("Chen's Chinese heritage created pressures that led him to kill his wife; it made him more 'susceptible to cracking under the circumstances.'").

160. *Id.* at 624.

161. See generally A. Miller, *supra* note 141, at 249.

similar to those held by domestic abusers.¹⁶² Donna K. Coker, a law professor who spearheaded research and analysis on the nature and effects of heat of passion defenses, uses patterns of domestic violence as a comparison to adultery-related heat of passion defenses, detailing how a man that batters his wife often blames her for provoking him into some violent behavior.¹⁶³ The abuser portrays his act as uncontrollable in response to the wife's disobedient or non-conforming conduct, implying she is deserving of his physical punishment.¹⁶⁴ The heat of passion defense follows a similar logic: by mitigating a murder to a voluntary manslaughter, the law "blames" the adulterer for provoking the spouse into some violent behavior, implying the adulterer is deserving of the resulting assault or killing.¹⁶⁵ The law, by asserting that the victim inspired the emotional state which resulted in violence, portrays the spouse's act as uncontrollable in response to the adulterer's "wrongful, illegal, and horrific act."¹⁶⁶ Thus, a batterer's rationale for his violence—that it is uncontrollable as a result of his wife's actions—"resonates with and is reinforced by the legal doctrine" because it minimizes the punishment (and thus, the cultural shame and disapproval) endured by the spouse for physically harming his adulterous wife.¹⁶⁷ Because the heat of passion defense is mainly used to benefit men who have discovered their wives committing adultery, critics contend mitigating these violent acts effectively enforces abusive gender stereotypes and a repressive social hierarchy.¹⁶⁸

162. See Gruber, *supra* note 147, at 1592-93 ("Some assert that the whole notion of exoneration based on anger privileges masculinist belligerence over preferred feminine passivity."). See generally Coker, *supra* note 132.

163. See Coker, *supra* note 132, at 84-85; see also E. Miller, *supra* note 148, at 686.

164. *Supra* note 163; Gruber, *supra* note 147, at 1593.

165. See Coker, *supra* note 132, at 71 (contending violent acts in response to adultery are both controllable and deterrable to a reasonable person, so allowing adultery as provocation defends those who choose to commit violent acts similar to domestic abusers); see also Gruber, *supra* note 147, at 1595-96 ("The identified problem is that the provocation defense, especially in its broad form, permits exoneration of those whose anger reflects, at least in part, repressive social hierarchy (i.e., sexism in domestic relations, homophobia, and masculinist violence).").

166. See Gruber, *supra* note 147, at 1593; 9.6 *Manslaughter*, *supra* note 138.

167. See Coker, *supra* note 132, at 128.

168. *Id.* at 71 (contending violent acts in response to adultery are both controllable and deterrable to a reasonable person, so allowing adultery as provocation defends those who choose to commit violent acts similar to domestic abusers); see also Gruber, *supra* note 147, at 1595-96 ("The identified problem is that the provocation defense, especially in its broad form,

2. Taiwan

Until the end of the Qing dynasty in 1911, a wife who beat or killed her husband in retaliation to domestic violence or adultery could be strangled, beheaded, or “executed by slicing.”¹⁶⁹ However, a husband could kill his wife and her paramour after catching them in the act of adultery and go without punishment.¹⁷⁰ Into the early twentieth century, the laws seemed to enforce the cultural tradition of a husband’s dominance and a wife’s subordination.¹⁷¹ While Taiwan does not codify such punishments today, a sentence for murder—usually the death penalty or life imprisonment—can be mitigated to under seven years of imprisonment with a heat of passion defense if the person killed while “justly angered.”¹⁷² The defense is not typically used for the benefit of women in the context of adultery, as critics have commented that it is often used to exonerate a husband who killed his wife after catching her in the act of adultery.¹⁷³ While there is little English-language information available regarding the use of heat of passion defenses in situations of adultery-related killings in Taiwan, research shows the incidence of domestic violence rises in situations of adultery.¹⁷⁴ In general, violence against women was listed by the US Human Rights Report as one of the gravest human rights challenges confronting Taiwan; nearly forty-two percent of Taiwanese women have experienced some type of violence, most of which were perpetrated by spouses or partners.¹⁷⁵ Though the actual effects of heat of passion defenses in Taiwan are beyond the

permits exoneration of those whose anger reflects, at least in part, repressive social hierarchy (i.e., sexism in domestic relations, homophobia, and masculinist violence).”).

169. Wu, *supra* note 46, at 47.

170. *Id.* at 41 (discussing traditional China’s legal codes).

171. *Id.* at 47 (discussing traditional China’s legal codes).

172. Taiwan Criminal Code arts. 271, 273 (2016), <http://law.moj.gov.tw/eng/LawClass/LawAll.aspx?PCode=C0000001> [<https://perma.cc/9Z8G-GVYU>] (archived Jan. 11, 2018) (providing the criminal provisions for murder and mitigation, respectively).

173. Sara L. Friedman, *Adjudicating the Intersection of Marital Immigration, Domestic Violence, and Spousal Murder: China-Taiwan Marriages and Competing Legal Domains*, 19 INDIANA J. GLOBAL L. STUD. 221, 239-40 (2012).

174. Wu, *supra* note 46, at 46.

175. Joy Lee, *41.5% of Women Fall Victims to Violence: Foundation*, CHINA POST (Jan. 18, 2013), <https://www.questia.com/read/1P3-2868322231/41-5-of-women-fall-victims-to-violence-foundation> [<https://perma.cc/3D87-2UMJ>] (archived Jan. 3, 2018); see Sam Sky Wild, *Violence shatters myth of domestic bliss*, TAIPEI TIMES (Feb. 26, 2014), <http://www.taipetimes.com/News/feat/archives/2014/02/26/2003584361> [<https://perma.cc/7PM4-THZP>] (archived Jan. 3, 2018).

scope of this research, Taiwanese women likely suffer physical retribution at higher rates than men as a result of committing adultery.

C. Policing the Bedroom: Prosecution and Conviction Rates for Women

While the imposition of criminal penalties no longer poses a meaningful problem for US women, adultery is still actively prosecuted and punished in Taiwan—over 600 individuals were convicted from 2010 to 2013.¹⁷⁶ The maximum punishment allowed for the crime of adultery is one year imprisonment, though most of those convicted receive sentences of fines or community service instead of going to jail.¹⁷⁷

Importantly, the criminalization of adultery in Taiwan disproportionately affects women on a prosecutorial level, which inevitably results in higher rates of convictions for women as well. An innocent spouse must file charges against the adulterous spouse and partner in order for a criminal proceeding to begin.¹⁷⁸ Though the majority of those in adulterous affairs are men,¹⁷⁹ the number of women convicted for adultery is considerably higher regardless of whether the woman is the adulterer or the mistress.¹⁸⁰ This is because women are significantly more likely to withdraw their complaints against their spouse than men.¹⁸¹ Government statistics show that fifty percent of women pressing charges against their husbands for adultery eventually drop those charges, as opposed to twenty-three

176. Lee, *supra* note 46, at 4-5

177. Taiwan Criminal Code Art. 239 (2013), <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/80254/112858/F-1444561515/CHN80254%20Eng.pdf> [<https://perma.cc/WUV8-NMMT>] (archived Jan. 3, 2018); Lee, *supra* note 46 (citing Letter from Judicial Yuan, re: Sentencing Statistics on Conviction of article 239 of the Criminal Code 2010-2013 (Mar. 27, 2014) (on file with author)); Lin, *supra* note 60 (noting how people are mainly fined rather than imprisoned when convicted of adultery).

178. *Archaic Adultery Law*, *supra* note 73 (“It is an offense prosecuted on complaint, which means that the case is closed as soon as the plaintiff drops the charge. In practice, that usually means unfaithful women are punished while cheating men walk free.”).

179. Xi, *supra* note 80.

180. *Married Family*, *supra* note 79.

181. Hsiao-wei, *supra* note 73; Inquirer, *supra* note 75 (“[D]iscriminatory applications [of the adultery crime] take women to court while sparing men, whose wives tend to drop charges.”); *Archaic Adultery Law*, *supra* note 73 (“It is an offense prosecuted on complaint, which means that the case is closed as soon as the plaintiff drops the charge. In practice, that usually means unfaithful women are punished while cheating men walk free.”).

percent of men doing so against their wives.¹⁸² Wives of adulterous men tend to drop charges because the husband is usually the economic provider of the family, but women are “dragged into court” by spurned husbands.¹⁸³ Married women who are accused and punished for adultery in Taiwan tend to be economically disadvantaged and are often domestic violence victims.¹⁸⁴ Additionally, women are not as likely to withdraw their complaints from their husbands’ paramours as they are from their husbands, leaving more women to be prosecuted for adultery.¹⁸⁵ In fact, the ability to press charges against a paramour is often used by wives as revenge against the mistress, resulting in more criminal convictions for women.¹⁸⁶ Critics contend the gender prejudice inherent in the way Taiwanese society views affairs causes a discrepancy in punishment, thus making a gender-neutral statute discriminatory in practice.¹⁸⁷

D. The Takeaway

The connection between the United States’ and Taiwan’s legal history and current social attitudes speaks to a larger truth about culture and the potential evolution of societal norms. Anthropologists observe that nature, norms, and law shape human behavior.¹⁸⁸ Both the United States and Taiwan codified laws to regulate adultery in more traditional eras of their histories, where lawmaking relied heavily on the influence of custom and heritage.¹⁸⁹ In traditional

182. Xi, *supra* note 80; Hsiao-wei, *supra* note 73.

183. Yang, *supra* note 77; *Archaic Adultery Law*, *supra* note 73.

184. Hsiao-wei, *supra* note 73.

185. *Id.* (discussing how the withdrawal rate of accusations lodged against a husband’s paramour is over twenty percent higher than the withdrawal rate of accusations lodged against the husband, making the discrepancy in punishment “discriminatory in practice, even though the prejudice is not written into the terms of the law”); see *Woman In Taiwan Faced 300 Years Jail For Affair Due To Island’s Harsh Adultery Laws*, NEWS.COM.AU, (Sept. 3, 2013), <http://www.news.com.au/world/woman-in-taiwan-faced-300-years-jail-for-affair-due-to-islands-harsh-adultery-laws/story-fndir2ev-1226709412816>.

186. *Archaic Adultery Law*, *supra* note 73.

187. Hsiao-wei, *supra* note 73.

188. *Lee Case Study*, *supra* note 61, at 425; see also Lawrence Lessig, *The Constitution of Code: Limitation on Choice-Based Critiques of Cyberspace Regulation*, 5 COMM. LAW CONSPPECTUS 181 (1997).

189. S. Langlois, *Traditions: Social*, INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL AND BEHAVIORAL SCIENCES (2002), http://www.cms.fss.ulaval.ca/upload/soc/fichiers/traditions_social.pdf [<https://perma.cc/HV6L-Z9UW>] (archived Jan. 11, 2018); Peter F.

countries, where the law mimics or codifies the informal social norms already existing in society,¹⁹⁰ criminalizing adultery could be seen as a codification of what was already socially penalized, and choosing to mitigate a murder committed by a husband in response to his wife's adultery was an imitation of what was already socially permissible.¹⁹¹ However, now that both the United States and Taiwan have evolved (or, are in the process of evolving) away from traditional societies, the continued regulation of adultery splays the sexist legal antiquities and patriarchal cultures of the United States and Taiwan, which perpetuate discrimination toward adulterous women, mistresses, and even female victims of adultery.¹⁹²

The United States and Taiwan are more susceptible now than ever to an evolution of social norms when brought about by legal change.¹⁹³ There is an assumption in modern Western legal culture that the law "would and should lead the social norm"; laws have the unique ability to alter, form, and control human behavior in countries like the United States.¹⁹⁴ While traditional Chinese legal cultures (like that of Taiwan) would usually imply the opposite, some analysts insist Taiwanese social norms will not change on their own, and that it is the government's role to institute policies and legislation despite difficulties doing so in the past so as to change the social norms that encourage discrimination or disparate treatment.¹⁹⁵ Thus, the opportunity for the United States and Taiwan to change the social norms surrounding women's infidelity through the deregulation of adultery is at least plausible, if not expected. The goal is not for society to perceive adultery as an acceptable act; infidelity, as noted

Drucker, *The Age of Social Transformation*, ATLANTIC (Nov. 1994), <http://www.theatlantic.com/past/docs/issues/95dec/chilearn/drucker.htm> [<https://perma.cc/A77P-2HPR>] (archived Jan. 3, 2018) (talking about how the US was a traditional society); see *supra* Section I.B.

190. For example, Imperial Chinese government reinforced the informal hierarchy of the family system by imposing formal penalties for those that did not comply. *Lee Case Study*, *supra* note 61, at 426; Yang, *supra* note 63, at 22.

191. For example, see *Lee Case Study*, *supra* note 61, at 426 (noting how adulterers were punished by the family or village before the government became involved).

192. See generally Lee, *supra* note 46; *Lee Case Study* *supra* note 61.

193. See *Lee Case Study*, *supra* note 61, at 432-36; see also Yang, *supra* note 63, at 22-23.

194. Yang, *supra* note 63, at 22; *Lee Case Study*, *supra* note 61, at 425-26.

195. Yang, *supra* note 63, at 28-29; Teemu Ruskola, *Law Without Law, Or Is "Chinese Law" An Oxymoron*, 11 WM & MARY BILL RTS. J. 655, 658 (2003).

before, can be detrimental and result in emotional turmoil and broken relationships. Rather, the legal objective to deregulate adultery should initiate the cultural goal: to view an act of infidelity the same whether conducted by a man or a woman.

IV. ARGUING FOR DEREGULATION

As both countries stand currently, social ramifications and expectations weigh heavily on adulterous women and mistresses while men in the same situations are excused or slapped on the wrist. For two governments that purport to concern themselves with equality of the sexes, this is unacceptable. Despite drastically different cultures, both the United States and Taiwan have the potential to change social norms surrounding adultery, thereby mitigating the cultural disadvantages facing adulterous women and mistresses, by choosing to deregulate it. As previously stated, deregulation aims to eliminate adultery from laws and binding precedent as a rationale for punishments, judgments, mitigations, defenses, or factors for consideration in the law. While supporters of maintaining these laws may argue the function outweighs the negative consequences, this Article posits the opposite.

A. Eliminating Adultery as a Heat of Passion Crime Provocation

Heat of passion defenses function to excuse violent reactions that any reasonable person might express if put in a similar situation.¹⁹⁶ But determining a defendant's psycho-physical response to discovering adultery is highly subjective, swayed by the judge and juror's personal perceptions, societal influences, and inherent biases.¹⁹⁷ Research points toward a significant gender disparity between those who benefit from the defense and those who do not, indicating a cultural prejudice embedded in the law that cannot be extracted without a concrete shift in voluntary manslaughter doctrine.¹⁹⁸

Arguably, this shift could manifest as a modification or loosening of current provisions so the defense is easier to invoke for

196. 9.6 *Manslaughter*, *supra* note 138.

197. *See supra* Section II.B.1.

198. *Id.*

women.¹⁹⁹ But this would bring a negative result for two reasons. First, further excusing the use of violence as an understandable and expected reaction to discovering one's spouse committing adultery is harmful from a public policy standpoint. People are expected to control their behavior despite strong emotions so as to not impulsively hurt others; this makes society a safer place. While mitigating violence stemming from an emotional reaction may be understandable when someone is physically assaulted or threatened (and the reaction from that physicality results in returning a physical assault), it creates a slippery slope to broaden the way a non-physical provocation can be used to mitigate murder. Tolerating the use of violence in the context of adultery sends the message that violent behavior is acceptable, or at least less unacceptable, when one feels betrayed, hurt, or angry.²⁰⁰ Because all people have and will feel betrayed, hurt, or angry at some point in their lives, it is imprudent to permit a non-physical provocation to mitigate homicidal behavior, let alone loosen its limitations so that more people may take advantage of it.

Second, as women are more often the victims of spousal homicide, providing more leniency to voluntary manslaughter doctrine would concurrently encourage and broaden its use for men that kill their wives.²⁰¹ This perpetuates the abusive cycle women fall victim to now and reinforces the gender stereotypes plaguing women in their current legal systems.²⁰² Some critics have even compared adultery-related crimes of passion with honor killings, a practice that draws widespread condemnation from the international community.²⁰³ A complete deletion of adultery as a provocation in heat of passion defenses would not only remove the direct discriminatory effects, but would also symbolize a cultural disapproval of violence, especially against women who do not conform to gender stereotypes.

199. A. Miller, *supra* note 141, at 273-75.

200. *Id.*

201. *Id.*

202. *Id.*

203. Anna Momigliano, *Honor Killing by Any Other Name*, *NATION* (Feb. 2, 2010), <https://www.thenation.com/article/honor-killing-any-other-name/> [<https://perma.cc/4WHS-HWF5>] (archived Jan. 3, 2018); Arsalan Iftikhar, *Honor Killings Are a Global Problem*, *TIME* (July 29, 2016), <http://time.com/4415554/honor-killing-qandeel-baloch/> [<https://perma.cc/P89R-4BDL>] (archived Jan. 3, 2018); Hillary Mayell, *Thousands of Women Killed for Family "Honor"*, *NATIONAL GEOGRAPHIC* (Feb. 12, 2002), http://news.nationalgeographic.com/news/2002/02/0212_020212_honorkilling_2.html [<https://perma.cc/C5P4-PUMS>] (archived Jan. 3, 2018).

B. Decriminalizing Adultery

The criminalization of adultery allegedly serves the function of deterrence and exemplifying moral disdain for infidelity within the confines of marriage.²⁰⁴ But a criminal sanction against extramarital sex is futile for this goal. Protecting marriage by penalizing adultery implies that the criminal sanction would either deter people from committing adultery, rehabilitate those marriages that have been broken by adultery, or both.²⁰⁵ Adultery criminalization does none of those things. For example, the criminalization of adultery does not serve as an actual deterrence to engaging in extramarital sex in either the United States or Taiwan.²⁰⁶ In the United States, adultery is reported to occur in between ten and sixty percent of marriages.²⁰⁷

204. Viator, *supra* note 6, at 856-59 (“[T]he overwhelming prevalence of adultery in our society proves that criminal prohibition is not a deterrent”; explaining state interests in criminalizing adultery through the harm principle and abuse of the institution of marriage); Boorstein, *supra* note 38 (“[A]s far as general deterrence, it should now be widely known that adultery is a crime in Virginia.”); Coleman, *supra* note 10, at 400-01; Lee, *supra* note 39; see Turley, *supra* note 39 (“Social conservatives, however, insist that such laws are needed to back up moral dictates with criminal sanctions”; noting how adultery laws fail to adequately deter and punish violators). While many outdated statutes remain on the books without question, it is the intention of this author to show that the negative effects of adultery regulation outweigh any positive moral implications. See POLLOCK, *supra* note 40; Maki, *supra* note 40 (“Society may not be able to make people be virtuous, but this does not mean we cannot punish vice. Adultery may involve consenting adults, but when it breaks up a marriage it is harmful to society. Even if the purpose of law is simply to protect society, then these behaviors must be restricted.”); Hsiao-wei, *supra* note 73 (noting that the statute is “presented under the pretext of safeguarding marriages and families and protecting children”); see also *Archaic Adultery Law*, *supra* note 73; Lee, *supra* note 46; No. 554, 2002, Justices of the Constitutional Court, Judicial Yuan, R.O.C., http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=554 [<https://perma.cc/24FX-Y29Q>] (last visited Jan. 3, 2018).

205. See generally Henry M. Hart, *The Aims of Criminal Law*, 23 LAW AND CONTEMP. PROB.401 (1958); *An Overview of the 5 Objectives of the Criminal Justice System*, ISFMA (Dec. 29, 2015, 12:00AM), <http://www.isfma.com/insider-report/an-overview-of-the-5-objectives-of-the-criminal-justice-system/> [<https://perma.cc/ME28-2MB7>] (archived Jan. 3, 2018); Jason W. Swindle, *The Five Objectives of Criminal Laws*, SWINDLE LAW GROUP (Jan. 18, 2014), <http://www.swindlelaw.com/2014/01/the-five-objectives-of-criminal-laws/> [<https://perma.cc/2WKP-RQZ8>] (archived Jan. 3, 2018).

206. See Coleman, *supra* note 10 (noting how adultery laws fail to adequately deter and punish violators).

207. There are obvious difficulties involved in obtaining accurate information concerning the prevalence of cheating in marriages. Most sources admit this at the outset. See John M. Grohol, *How Common is Cheating & Infidelity Really?*, PSYCH CENTRAL (2013), <http://psychcentral.com/blog/archives/2013/03/22/how-common-is-cheating-infidelity-really/> [<https://perma.cc/K576-FF29>] (last visited Jan. 3, 2018) (“[O]ver the course of your entire relationship, the chances of infidelity may rise to as much as 25 percent.”); *Facts and Statistics*

The fact that adultery goes mainly unprosecuted in the United States shows that the law is not persuading people to stop committing adultery.²⁰⁸ The prevalence of adultery in Taiwan is unknown, but according to aforementioned research it is evident that spouses, specifically husbands, continue to cheat on their significant other despite criminalization, and critics contend the continued criminalization of adultery cannot be successful in regulating or preventing extramarital sex.²⁰⁹ Of course, considering the private nature of sex generally, it is difficult to effectively “catch” a perpetrator, which in turn provides little legal incentive to *not* commit adultery. Despite general opposition to the concept of infidelity in both countries, people continue to do it and, more importantly, not be prosecuted nearly as much as the crime actually occurs.²¹⁰ Between a lack of prosecution in the United States, and requiring the victim to press charges against a spouse and/or paramour in Taiwan, any type of deterrence more plausibly derives from relational and moral repercussions of adultery rather than the legal ramifications.²¹¹ Criminalization does not play a significant enough role in deterring adulterous behavior to warrant continued penalization.

A more retributive function of the law is the most psychologically convincing rationale for the continued regulation of adultery, but it does not work towards the goal of protecting marriage.

about Infidelity, TRUTH ABOUT DECEPTION, <https://www.truthaboutdeception.com/cheating-and-infidelity/stats-about-infidelity.html> [<https://perma.cc/KRZ6-7R2U>] (last visited Jan. 3, 2018) (“It is estimated that roughly 30% to 60% of all married individuals (in the United States) will engage in infidelity at some point during their marriage.”); Castleman, *supra* note 92 (“Every year, 10 percent of spouses admit cheating.”); Meenakshi Chaudhary, *Major Effects of Extra-Marital Affairs*, ONLY MY HEALTH (Jun. 17, 2014), <http://www.onlymyhealth.com/major-effects-extra-marital-affairs-1332313120> [<https://perma.cc/78GR-VHX6>] (archived Jan. 3, 2018) (“According to a survey done by National Opinion Research Center, 17% of women in marital relationship have committed adultery while 25% of men have had extra-marital affairs. Also it is quite shocking that the number of married people cheating on their spouses is much higher than unmarried people cheating on their partner.”).

208. *See supra* Section II.C.

209. *See supra* Section II.A.2; Lee, *supra* note 46, at 4 (“Given such development, it would be a delusion to believe the existing adultery law could successfully regulate or prevent extramarital sex, especially when it is a weak and limited tool by design.”); *see also Lee Case Study*, *supra* note 61, at 434-46 (discussing the breakdown of traditional Taiwanese family structure to the result of greater individualization).

210. *See supra* Section II.C.

211. *See supra* Sections I.A. & II.C.

Criminal laws often aim to satisfy “the thirst for revenge, anger, and hate...that criminals ought to suffer in some way for their crimes.”²¹² This is particularly relevant in the case of adultery, where a spouse may feel hurt, anger, and the need for revenge after learning of a partner’s infidelity.²¹³ But penalizing a person’s relational faux pas with formal criminal proceedings does the opposite of protecting a marriage; the use of criminal law to bring about revenge or retribution is particularly damaging to the prospects of fixing or maintaining a relationship, which is ultimately many US and Taiwanese couples’ goals after learning of infidelity.²¹⁴ While looking to, for example, a counselor, parent, or community leader may be an appropriate authority to gain advice on how to mend a broken marriage, the criminal courts are the “wrong place” to find protection for the family.²¹⁵ For countries that defend their criminal sanctions on adultery by advocating to keep the family together and avoid divorce,²¹⁶ the law should be an avenue to encourage reconciliation rather than to destroy prospects of it. Thus, while repercussions of the criminalization of adultery serve the purpose of revenge for a particular victim, a criminal response is inappropriate when weighed against the governmental and public interest of maintaining and protecting marriages.

212. Swindle, *supra* note 205.

213. Howard Iken, *The Long Lasting Legal and Psychological Effects of Infidelity*, DIVORCED MOMS (Mar. 4, 2014), <http://divorcedmoms.com/articles/the-long-lasting-legal-and-psychological-effects-of-infidelity> [https://perma.cc/R2PE-94B4] (archived Jan. 11, 2018); Richard P. Fitzgibbons, *Marital Infidelity*, MARITAL HEALING (2015), <http://www.maritalhealing.com/conflicts/maritalinfidelity.php> [https://perma.cc/ZDQ3-2UKJ] (last visited Jan. 3, 2018) (discussing the psychological repercussions of discovering a spouse’s infidelity).

214. Elizabeth Bernstein, *Back to Happily Ever After*, WALL ST. J. (May 1, 2012), <http://www.wsj.com/articles/SB10001424052702304050304577376152391225734> (noting that between thirty and eighty percent of couples afflicted by an adulterous affair want to remain married); Warmack, *supra* note 71 (“Although divorce is growing in acceptance in Taiwan, it’s still not preferable, especially when it wrecks families, counselors say. ‘Even in our society, we don’t encourage divorce,’ said Lee of Warm Life. ‘We still want them to keep the family.’”).

215. *Archaic Adultery Laws*, *supra* note 73 (“When adultery happened in past eras, people would have looked for authority – someone powerful in the extended family or in the community, to sort things out. Hence, the main pattern of thought on the island is still the traditional one, meaning people wanting to protect their family look for authority – and in the wrong place, namely the criminal courts...”).

216. *See supra* Part I.

The criminalization of adultery is not only ineffective at serving both governments' ultimate moral goals, it is also discouraged by the international community. The United States is a UN Member State, and Taiwan, though not a Member State, often adopts or passes into law UN treaties and covenants, which holds the country legally bound to its provisions.²¹⁷ The United States signed²¹⁸ the Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW") and International Covenant on Economic, Social and Cultural Rights ("ICESCR"), and signed and ratified²¹⁹ the International Covenant on Civil and Political Rights ("ICCPR").²²⁰ Taiwan signed, ratified, and passed laws to make legally binding ICCPR and ICESCR,²²¹ and adopted CEDAW to be effective as

217. Yean-Sen Teng, *Who is Afraid of Human Rights? A Taiwanese Perspective*, in THE UNIVERSALISM OF HUMAN RIGHTS 167-68 (Rainer Arnold ed., 2013). The United Nations does not recognize Taiwan as a sovereign country; thus, it is unable to have UN Member State status. See Edward M. Gomez, *Taiwan seeks United Nations membership. China and the U.S. say: "No way!"*, SFGATE (Feb. 26, 2008), <http://blog.sfgate.com/worldviews/2008/02/26/taiwan-seeks-united-nations-membership-china-and-the-u-s-say-no-way/> [https://perma.cc/W2SA-BVP2] (archived Jan. 3, 2018).

218. Signing a UN treaty or convention expresses a "willingness of the signatory state to continue the treaty-making process." While it does not mean the Member State consents to be bound by the treaty or convention, it does require the State to refrain from acting in a way that would contravene the object and purpose of the instrument. *What is the difference between signing, ratification and accession of UN treaties?*, DAG HAMMARSKJOLD LIBRARY (Nov. 29, 2016), <http://ask.un.org/faq/14594> [https://perma.cc/TYM5-8HGZ] (archived Jan. 3, 2018) (hereinafter DAG HAMMARSKJOLD LIBRARY).

219. Ratifying a UN treaty or convention indicates a Member State's consent to be bound to a treaty or convention. DAG HAMMARSKJOLD LIBRARY, *supra* note 218.

220. *Convention on the Elimination of All Forms of Discrimination against Women*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/PAGES/ViewDetails.aspx?src=IND&mtmsg_no=IV-8&chapter=4&clang=_en [https://perma.cc/B94M-GNW3] (last visited Jan. 3, 2018); *International Covenant on Civil and Political Rights*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/PAGES/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-4&chapter=4&clang=_en [https://perma.cc/836Y-B2PY] (last visited Jan. 3, 2018); *International Covenant on Economic, Social and Cultural Rights*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/PAGES/ViewDetails.aspx?src=IND&mtmsg_no=IV-3&chapter=4&clang=_en [https://perma.cc/3MBQ-9PD3] (last visited Jan. 3, 2018).

221. Taiwan was a Member State until 1971, and thus was able to be a signatory on the Covenants in 1967. Wendy Zeldin, *Taiwan: Two International Human Rights Covenants Ratified*, LIBRARY OF CONGRESS (Apr. 15, 2009), <http://www.loc.gov/law/foreign-news/article/taiwan-two-international-human-rights-covenants-ratified/> [https://perma.cc/M7QR-528M] (archived Jan. 3, 2018); Flora Wang, *Legislature Ratifies UN Rights Treaties*, TAIPEI TIMES (Apr. 1, 2009), <http://www.taipetimes.com/News/taiwan/archives/2009/04/01/2003439900> [https://perma.cc/B7MX-HBWQ] (archived Jan. 3, 2018).

domestic law.²²² These commitments are significant because of their focus on gender equality as manifested through the law.

First, all Member States have the legal obligations to respect the equality between men and women as expressed in the UN Charter.²²³ ICCPR also prohibits and guarantees protection against discrimination on account of sex.²²⁴ ICESCR requires the protection of men and women from harmful stereotypes and prejudices, and ensures non-discrimination in practice despite gender-neutral laws,²²⁵ as cultural, economic, and social rights must be protected and enjoyed equally between men and women.²²⁶ CEDAW endows the greatest responsibility by demanding countries address social and cultural patterns of conduct that reflect the notion of “inferiority or the superiority of either of the sexes or stereotyped roles for men and women.”²²⁷ CEDAW requires countries to eliminate discrimination against women in all family and marriage-related issues, and to repeal all criminal provisions that discriminate against women.²²⁸ Though the General Assembly has not yet called for blanket decriminalization, the Working Group on the Issue of Discrimination Against Women in Law and in Practice specifically opposes the criminalization of adultery in all countries, basing its recommendation

222. Wendy Zeldin, *Taiwan: Law Implementing CEDAW Adopted*, LIBRARY OF CONGRESS (Mar. 31, 2011), <http://www.loc.gov/law/foreign-news/article/taiwan-law-implementing-cedaw-adopted/>; *Legislative Yuan passes UN convention on gender discrimination*, TAIWAN TODAY (May 23, 2011), <http://taiwantoday.tw/news.php?unit=2,23,45&post=1821> [<https://perma.cc/7VR8-VHBM>] (archived Jan. 3, 2018) (quoting the Minister of the Interior, saying, “With passage of the act, the government will work proactively to eliminate existing gender discrimination and promote gender equality”).

223. “We the peoples of the United Nations determined . . . to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small . . . ” UN Charter pmb1., <https://treaties.un.org/doc/source/docs/charter-all-lang.pdf> [<https://perma.cc/8ZLV-75LU>] (last visited Jan. 11, 2018).

224. UNHR Office of the High Commissioner, International Covenant on Civil and Political Rights, art. 26 (March 1976).

225. Comm. on Economic, Social, and Cultural Rights, General Comment No. 16, U.N. Doc. E/C.12/2005/4, ¶¶ 18-21 (Aug. 11, 2005).

226. International Covenant on Economic, Social and Cultural Rights, art. 3, art. 2 ¶ 2, 993 U.N.T.S. 3 (Dec. 16, 1966).

227. Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, art. 5(a), U.N.T.S. 1249.

228. *Id.*, art. 16 ¶ 1(c), art. 2 ¶ g.

for decriminalization on its disparate impact on women and enforcement of patriarchal oppression of women in families.²²⁹

The United States and Taiwan, which purport to support the equality of all people not only through their own constitutions²³⁰ but also via CEDAW, ICCPR, ICESCR, and (for the United States) the UN Charter, have an inherent responsibility to their citizens to uphold and encourage gender parity. The regulation of adultery through heat of passion defenses and criminalization offends this notion of equality when the laws discriminate against women, even if the laws are neutrally written. As mentioned before, changing laws would not only help eliminate the disproportionate effects these regulations have on women, but also the sexist cultural repercussions that befall women involved in situations of adultery.

V. CONCLUSION

The United States and Taiwan are two countries with dramatically different legal, historical, and cultural experiences. Yet still, the ramifications of adultery regulation on women are predictably similar. The United States' path through adultery regulation is rooted in dogmatic norms that evolved from direct sanctions into ancillary legal tactics that punish wives disproportionately in comparison to adulterous husbands. The lingering social repercussions on cheating women that rarely disturb men show that the United States simply has not overcome its gender bias in matters of adultery. Similarly, Taiwan's Confucian bedrock shaped the penal provision—and the discriminatory consequences—the country maintains today. Bias in prosecution and conviction rates mirror the cultural punishment women endure as a result of committing adultery.

229. Report of the Working Group on the issue of discrimination against women in law and in practice, U.N. Doc. A/HRC/29/40, ¶ 73(c)(v). (Apr. 2, 2015) (recommending the “[r]epeal [of] all laws that support the patriarchal oppression of women in families, such as...laws that criminalize adultery”).

230. U.S. CONST. AMEND. XIV (declaring that the states must provide all people equal treatment under the law); MINGUO XIANFA art. 7 (2005) (“All citizens of the Republic of China, irrespective of sex, religion, ethnic origin, class, or party affiliation, shall be equal before the law.”).

The number of countries that traverse the same path is not insignificant.²³¹ In many areas of the world, women who have been unfaithful to their husbands will be sentenced to physical and psychological torture or death.²³² In its continued regulation of adultery, the United States and Taiwan are in bed with these nations. Considering the negative implications of regulating infidelity, the United States and Taiwan turn a blind eye toward millions of women affected by adultery laws around the globe. Deregulation of adultery in all sectors of the law is the only way to ensure that discriminatory societal and legal consequences discontinue, so women can one day stop worrying about *what happens next*.

231. See paper produced by International Human Rights Clinic at Fordham University School of Law, 2015, on file with author.

232. *Id.*

