

## COMMENT

### VIRTUAL ADULTERY: NO PHYSICAL HARM, NO FOUL?

*Kathryn Pfeiffer \**

*New forms of social media and virtual communication are changing the ways in which we meet new people and develop meaningful relationships. In today's world, you can skype a long-distance significant other or join an Internet chat room to find others who share a similar interest. While, in many ways, the Internet has facilitated our ability to interact with others unencumbered by geographical location or time zone, its unfettered reach has proved to be problematic for one relationship in particular—the marital unit. Studies show that more marriages are ending because of “virtual infidelity,” the term used to describe nonphysical behavior that adopts characteristics of a romantic relationship. This comment examines the cultural phenomenon of virtual infidelity against traditional divorce statutes, which only recognize physical infidelity as a fault-based ground for divorce. It ultimately advocates that the traditional definition of adultery be expanded to include “virtual adultery,” spousal infidelity that rises to the level of legally actionable conduct, as a fault-based ground for divorce.*

---

\* Law Clerk, Hon. Glen A. Huff, Virginia Court of Appeals. J.D., 2011, University of Richmond School of Law; B.A., 2006, Davidson College. This comment was a first-place winner of the 2011 McNeill Writing Competition sponsored by the McNeill Law Society of the University of Richmond School of Law. This comment benefited from the guidance of Meredith Harbach, Assistant Professor of Law, University of Richmond School of Law.

## I. INTRODUCTION

In 2007, Ric Hoogestraat's picture-perfect marriage to his partner, Tenaj—which included a house with a mortgage, pets, and pastimes such as riding together on his motorcycle—earned notoriety precisely for the normalcy it exemplified.<sup>1</sup> Their relationship, in fact, was anything but normal—because Tenaj was Ric's virtual wife whom he met and interacted with daily through a computer game—and Ric's *real* marriage was suffering.<sup>2</sup> His actual wife, Sue Hoogestraat, felt “widowed” by her husband's virtual life and did not expect him to return to her soon: “This other life is so wonderful; it's better than real life. Nobody gets fat, nobody gets gray. The person that's left can't compete with that.”<sup>3</sup> Although this type of behavior affects the marital relationship, the law does not consider it actionable conduct. With so much socially driven media available, however, it is difficult to draw a bright line between reality and fantasy. For example, an ABC News survey conducted in 2004 found that forty-two percent of women and twenty-five percent of men considered visiting websites with sexual content to be cheating.<sup>4</sup> These findings covered only passive Internet sites—they did not include interactive sites in which a spouse engaged with a third person, like Ric and Tenaj.<sup>5</sup>

While the traditional definition of adultery describes the physical infidelity of a spouse,<sup>6</sup> new forms of social media and virtual communication are shaping the way relationships (including extramarital physical and nonphysical relationships) are conducted. More communication takes place outside the confines of the marriage—even if still within the home.<sup>7</sup> New norms of interaction, such as the workplace relationship, are also becoming a source of

---

1. See Alexandra Alter, *Is This Man Cheating on His Wife?*, WALL ST. J., Aug. 10, 2007, at W1.

2. See *id.*

3. *Id.*

4. GARY LANGER ET AL., ABC NEWS PRIMETIME LIVE POLL, THE AMERICAN SEX SURVEY: A PEEK BENEATH THE SHEETS 23 (2004).

5. See *id.*; see also Alter, *supra* note 1.

6. See Christina Tavella Hall, *Sex Online: Is This Adultery?*, 20 HASTINGS COMM. & ENT. L.J. 201, 210–11 (1997).

7. See Karen S. Peterson, *Infidelity Reaches Beyond Having Sex*, USA TODAY, Jan. 9, 2003, at 8D (noting that cybersex and virtual affairs on the Internet are popular areas of interest among professionals who study spousal infidelity).

significant extramarital communication.<sup>8</sup> These trends raise new questions about the meaning of adultery.

There is a long tradition of protecting marriage by deterring behavior that could impair the marital relationship. Adultery constitutes the classic erosion of trust in a marriage—it “entails lying, the breaking of promises, and the infliction of emotional pain.”<sup>9</sup> “Virtual affairs” are emerging as a recognizable subset of infidelity, grounded in the idea that a nonphysical extramarital relationship can produce the same emotional intimacy of a sexual affair and cause the same type of harm to a marriage.<sup>10</sup> Commentators use the term “virtual infidelity” to describe nonphysical behavior that adopts one or more aspects of a romantic relationship and consequently creates a disconnect in the marriage.<sup>11</sup> Although virtual infidelity is a fairly new topic of legal discourse and has thus far earned more recognition as a cultural phenomenon than a legal claim,<sup>12</sup> it raises familiar policy questions about protecting the intimacy of the marital unit and insulating it from impairment.<sup>13</sup>

This comment considers whether virtual adultery should constitute actionable conduct in civil divorce litigation and proceeds in three parts. Following this introduction, Part II discusses the historical roots of adultery as a fault ground for divorce and its perpetuation of gender disparities. It then analyzes the application of adultery in the wake of no-fault divorce, including its emerging influence on civil divorce judgments. Part III discusses the intersection of social media and infidelity, evaluating the rise of emotional intimacy as an alternative to the traditional requirement of physical intimacy in the context of adultery. Part IV considers how the law should approach virtual infidelity as a potential subset of adultery.

---

8. *Id.*

9. Note, *Constitutional Barriers to Civil and Criminal Restrictions on Pre- and Extramarital Sex*, 104 HARV. L. REV. 1660, 1674 (1991) [hereinafter *Constitutional Barriers*].

10. Brenda Cossman, *The New Politics of Adultery*, 15 COLUM. J. GENDER & L. 274, 280 (2006).

11. See *id.* at 277. This comment uses the term “virtual infidelity” to describe spousal infidelity more generally and the term “virtual adultery” to describe virtual infidelity that may rise to the level of legally actionable conduct.

12. See Hall, *supra* note 6, at 203–04, 212.

13. See Lynn D. Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 BYU L. REV. 79, 120 (1991).

Ultimately, Part IV seeks to contribute to the discussion of whether the definition of adultery should extend to virtual infidelity, and if so, what approaches might be used to identify virtual adultery. It evaluates the harms caused by traditional adultery in comparison to the emergence of virtual infidelity, and asks whether their mutual roots in emotional intimacy merit similar remedial schemes. Ultimately, it suggests incorporating virtual infidelity into existing statutory fault considerations and deferring to judicial discretion to determine its weight on a case-by-case basis.

## II. APPLICATION OF ADULTERY AS A FAULT GROUND

### A. *Evolution of Fault-Based Divorce*

Divorce law in the United States largely derives from evolving models of marital dissolution in Europe.<sup>14</sup> The advent of Christianity, particularly Roman Catholicism, began to shape divorce legislation in third-century Europe.<sup>15</sup> The underpinnings of fault were evident in Emperor Constantine's constitution, which created gender-specific standards for dissolution: "The husband had the right to divorce his wife if she were an adulteress, a poisoner or a conspirator. The wife could divorce her husband if he were a murderer, a prisoner or a violator of graves."<sup>16</sup> This legislation sought a middle ground between the absolute prohibition of divorce desired by emerging Christian sects and the policy interest in providing at least some avenue for dissolution, no matter how narrow.<sup>17</sup>

The United States looked to models of fault-based divorce in establishing its own approach to marital dissolution.<sup>18</sup> From the seventeenth through the nineteenth centuries, the states uniformly prohibited a spouse from obtaining a divorce in the absence of a legally recognized fault ground.<sup>19</sup> Available fault

---

14. See Shaakirrah R. Sanders, *The Cyclical Nature of Divorce in the Western Legal Tradition*, 50 LOY. L. REV. 407, 421 (2004).

15. *Id.* at 409.

16. *Id.*

17. *See id.*

18. *See id.* at 421.

19. *See id.*

grounds generally included adultery, desertion, impotence, fraudulent contract, consanguinity, and bigamy.<sup>20</sup> Some jurisdictions also recognized cruelty, insanity, criminal behavior, and repeated substance abuse.<sup>21</sup> Although fault is no longer a prerequisite to divorce, many states still allow spouses to pursue a fault-based alternative and weigh fault as an important factor in allocating property and spousal support.<sup>22</sup>

### B. *Historical Application of Adultery as a Fault Ground*

Since the dual recognition of fault and no-fault grounds for divorce, evidence of adultery has consistently influenced divorce litigation outcomes.<sup>23</sup> Adultery as a fault ground derives largely from the impact of unbalanced gender roles on traditional marriage units.<sup>24</sup> The principle of coverture dictated that, once married, “the very being or legal existence of the woman [was] suspended.”<sup>25</sup> William Blackstone, in his commentary on coverture, characterized this transformation as a “civil death.”<sup>26</sup> As such, a woman’s legal identity was subsumed by her husband upon marriage, and her property transferred to him.<sup>27</sup> The husband, in turn, had a proportionate duty to protect his wife and pay any debts she incurred.<sup>28</sup> The notion that, through marriage, a hus-

---

20. *Id.* at 416, 421.

21. Adriaen M. Morse, Jr., *Fault: A Viable Means of Re-Injecting Responsibility in Marital Relations*, 30 U. RICH. L. REV. 605, 608–09 (1996).

22. Peter Nash Swisher, *Marriage and Some Troubling Issues with No-Fault Divorce*, 17 REGENT U. L. REV. 243, 259 (2004–2005); see Morse, *supra* note 21, at 614 (noting that thirty states have statutes that recognize both fault and no-fault grounds for divorce); see also LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* 20 (1985) (explaining that California’s new no-fault scheme created a ground for dissolution based on “marital breakdown” or a semantic variation of the term generally labeled “irreconcilable differences”).

23. Barbara Bennett Woodhouse, *Sex, Lies, and Dissipation: The Discourse of Fault in a No-Fault Era*, 82 GEO. L.J. 2525, 2532–33 (1994).

24. See *id.* at 2526.

25. Nehal A. Patel, Note, *The State’s Perpetual Protection of Adultery: Examining Koestler v. Pollard and Wisconsin’s Faded Adultery Torts*, 2003 WIS. L. REV. 1013, 1016–17 (2003) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 339 (Wayne Morrison ed., 2001) (internal quotation marks omitted)).

26. Suzanne A. Kim, *Marital Naming/Naming Marriage: Language and Status in Family Law*, 85 IND. L.J. 893, 917 (2010) (citing 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 339 (Wayne Morrison ed., 2001)).

27. See *id.* (citing J.G. FICHTE, *THE SCIENCE OF RIGHTS* 402 (A.E. Kroger trans., Harper & Row 1970) (1889)).

28. Patel, *supra* note 25, at 1017 (citing 1 WILLIAM BLACKSTONE, COMMENTARIES ON

band acquired not only a wife but also a collection—or “consortium”—of interests associated with the wife eventually led courts to recognize a marital right to “conjugal affection.”<sup>29</sup> This right legally granted a husband exclusive intimate dominion over his wife and an assurance of her fidelity to him.<sup>30</sup> As such, one spouse’s adultery, while not creating actual injury to the other spouse, would nevertheless intrude on the cloak of extended marital interests recognized by courts.<sup>31</sup> A wife’s infidelity constituted not only a wrongdoing against the marriage but also a breach of the inherent property contract that their marriage had created.<sup>32</sup>

Gender disparities persisted when adultery became a judicially recognized fault ground.<sup>33</sup> The ubiquity of patriarchal authority caused judges to favor husbands’ claims over wives’ and, in some instances, prohibited wives from bringing adultery claims at all.<sup>34</sup> Wives also faced harsher standards of fidelity. Some jurisdictions allowed a husband to bring a successful claim of adultery by proving that his wife had been unfaithful only once, while requiring that a wife prove that her husband had committed adultery *plus* another fault ground for divorce in order to prevail on an adultery claim against her husband.<sup>35</sup> Even if she did prevail, a wife risked economic and financial devastation by publicly denouncing her husband.<sup>36</sup> Not surprisingly, despite adultery serving as the exclusive fault ground for fifty percent of divorces between 1692 and 1786, the first woman to cite adultery in a divorce action did not occur until 1774.<sup>37</sup> A wife was further discouraged from exposing a husband’s adultery because he might respond with an accusation that she, too, had been unfaithful.<sup>38</sup> This type of allegation

---

THE LAWS OF ENGLAND 340 (Wayne Morrison ed., 2001)).

29. *Id.* at 1018 (quoting PROSSER AND KEETON ON THE LAW OF TORTS § 124, at 916 (W. Page Keeton et al. eds., 5th ed. 1984)) (internal quotation marks omitted); see Jeremy D. Weinstein, Note, *Adultery, Law, and the State: A History*, 38 HASTINGS L.J. 195, 217 (1986).

30. See Weinstein, *supra* note 29.

31. See *id.*

32. See *id.* at 202 (noting society’s recognition of adultery as an egregious offense that “invaded a husband’s ‘rights’ over his wife”).

33. See Meghan E.B. Norton, *The Adulterous Wife: A Cross-Historical and Interdisciplinary Approach*, 16 BUFF. WOMEN’S L.J. 1, 6 (2008).

34. See *id.* at 7.

35. See *id.* at 6 n.25 (citation omitted); see also 1 WILLIAM T. NELSON, A TREATISE ON THE LAW OF DIVORCE AND ANNULMENT OF MARRIAGE § 129, at 179–80 (1895).

36. Norton, *supra* note 33, at 7–8.

37. *Id.* at 6–7.

38. See *id.* at 7. Recrimination prevented parties from obtaining a divorce where the

could harm the wife's reputation, which in turn might impact her opportunity to obtain a favorable divorce judgment.<sup>39</sup> Whether or not it actually prevented adulterous behavior, the near certainty of economic ruin served as an indirect preventive mechanism for discouraging reports of adultery. Appearing early on in the courts' gender-disparate treatment of adultery allegations, the role of the states in discouraging adultery has had a long tradition.

States' efforts to deter adultery historically involved assigning varying degrees of criminality to adulterous acts.<sup>40</sup> Although criminal statutes did little to discourage the actual practice of adultery, they have not only endured but also encountered little resistance.<sup>41</sup> Legislators have resisted dismantling statutes that regulate consensual intimacy because the principles driving them have persevered despite the behavior having flourished.<sup>42</sup> States have also identified policy interests for retaining criminal adultery statutes, namely preserving social morality and providing faithful spouses with legal recourse.<sup>43</sup> However, few modern

---

court considered them both comparatively at fault. 27A C.J.S. *Divorce* § 137 (2011).

In an action for divorce, a person sued may recriminate and plead in defense the conduct of the plaintiff, and, if both parties are equally at fault, a divorce will not be granted. Accordingly, if the conduct of both parties has been such as to furnish grounds for divorce, neither of the parties is entitled to relief.

*Id.* Although the doctrine of recrimination was not universally applied, its limited application eradicated the possibility of a wife obtaining an economically favorable ruling based on her husband's offenses.

39. See Norton, *supra* note 33, at 7.

40. See Martin J. Siegel, *For Better or for Worse: Adultery, Crime & the Constitution*, 30 J. FAM. L. 45, 50–52 (1991–1992). Twenty states have criminalized a singular adulterous act, regardless of whether the infidelity continued after the first act; three states have criminalized cohabitation between a spouse and a third party but not the adulterous act itself; and one state has only criminalized repeated adultery. *Id.* at 50–51; see also Lawrence M. Friedman, *The Eye That Never Sleeps: Privacy and Law in the Internet Era*, 40 TULSA L. REV. 561, 568 (2005) (noting that some states have articulated statutory thresholds on the manifestation of adultery, criminalizing “open and notorious” adultery rather than “simple [discreet] adultery”) (internal quotation marks omitted).

41. Hillary Greene, Note, *Undead Laws: The Use of Historically Unenforced Criminal Statutes in Non-Criminal Litigation*, 16 YALE L. & POL'Y REV. 169, 173–74 (1997).

42. *Id.* at 173–74 & n.24; see Siegel, *supra* note 40, at 87 (explaining that states have identified certain continuing interests in curbing adulterous behavior, such as reducing illness and bolstering marriage). Although Siegel criticizes the validity of these rationales, he concedes there is a social impetus for maintaining them. *Id.* at 87–89; see Erik Encarnación, Note, *Desuetude-Based Severability: A New Approach to Old Morals Legislation*, 39 COLUM. J.L. & SOC. PROBS. 149, 167 (2005) (“[O]nce morals legislation is understood as serving a largely symbolic function, the judiciary may then preserve its symbolic elements while disarming its potentially harmful aspects.”).

43. Phyllis Coleman, *Who's Been Sleeping in My Bed? You and Me, and the State Makes Three*, 24 IND. L. REV. 399, 400–01 (1991); see DAN MARKEL ET AL., PRIVILEGE OR PUNISH: CRIMINAL JUSTICE AND THE CHALLENGE OF FAMILY TIES 136 (2009).

courts prosecute adultery in a criminal context, preferring instead to address it in the realm of civil law disputes.<sup>44</sup>

Though criminal adultery bans were rooted in protecting a husband's property interest in his wife—and enforcement of criminal bans has largely disappeared—contemporary rationales exist for punishing adultery in civil divorce actions.<sup>45</sup> Courts have identified an important policy interest in protecting the marital unit from infidelity.<sup>46</sup> According to one commentator, “extramarital intercourse often violates important promises, results in lies and deception, inflicts emotional pain, and can terminate or severely disrupt a marriage.”<sup>47</sup> One such disruption is the risk posed by physical infidelity of sexually transmitted disease or procreation.<sup>48</sup> Courts have also suggested that adulterous behavior can affect the welfare of children produced by the marriage because it endangers their “development and ability to experience a healthy, happy life.”<sup>49</sup> To the extent that a court believes a child's best interests have been threatened, it may factor adultery into its consideration of child custody as well as property and support awards.<sup>50</sup>

### C. *Modern Application of Adultery*

Although adultery often represents the classic fault ground for divorce, the burden of proving it may have impaired its effectiveness as a remedy for the harm it causes. As a baseline requirement, states define adultery as sexual intercourse taking place between a married person and an unmarried or married third party, with some states recognizing lesser degrees of sexual contact described in their respective statutes.<sup>51</sup> Most courts require

---

44. See generally Encarnación, *supra* note 42, at 152–53 (providing a detailed description of the principle of desuetude, which addresses “dead letter” laws).

45. See *Constitutional Barriers*, *supra* note 9, at 1679–80.

46. See *id.* at 1680.

47. *Id.* at 1677.

48. See Cossman, *supra* note 10, at 277.

49. Lynn D. Wardle, *Parental Infidelity and the “No-Harm” Rule in Custody Litigation*, 52 CATH. U. L. REV. 81, 83 (2002) [hereinafter *Parental Infidelity*]; see *Constitutional Barriers*, *supra* note 9, at 1679–80.

50. See *Parental Infidelity*, *supra* note 49, at 83; see also *Constitutional Barriers*, *supra* note 9, at 1679–80 (stating that for purposes of determining child custody, adultery should be a relevant factor only to the extent that the adulterous activity threatened the child's best interests).

51. See DOUGLAS E. ABRAMS ET AL., *CONTEMPORARY FAMILY LAW* 420–29 (2d ed. 2009)



proof of adultery by clear and convincing evidence,<sup>52</sup> and though parties may bring in circumstantial evidence,<sup>53</sup> many litigants are deterred from initiating adultery claims by the level of intrusion necessary to gather evidence against their spouses.<sup>54</sup>

With the emergence of no-fault divorce, the role of adultery in civil divorce litigation has arguably been displaced, but not replaced. Even in no-fault divorce proceedings, many state statutes allow courts to factor adultery into determinations of property distributions and spousal support, and some states even require courts to do so.<sup>55</sup> Thus, while evidence of adultery—or a comparable statutory fault ground—is not required in order to obtain no-fault divorce, it may influence the allocation of assets to the divorcing parties and child custody.<sup>56</sup> Although courts have declined to penalize a spouse's adultery by denying custody, they have acknowledged that adulterous conduct may raise “moral fitness” concerns, which are important in determining whether a spouse can effectively parent his or her child.<sup>57</sup> As such, adultery may serve an indirect punitive function in custody rulings.

---

(citing N.Y. DOM. REL. L. § 170(4) (Consol. 2008)); *see also* 49 AM. JUR. 3D *Proof of Facts* § 3 (1998).

52. ABRAMS ET AL., *supra* note 51, at 433; *see Morse, supra* note 21, at 609–10 (noting that some states require that a party satisfy only the least stringent preponderance of the evidence standard to prove adultery).

53. *See* 27A C.J.S. *Divorce* § 294 (2010).

Although facts and circumstances sufficient to prove adultery need not be such that an inference of guilt is the only possible conclusion that can be drawn from them, they must be such as to lead to the fact of adulterous intercourse, not only by fair inference, but as a necessary conclusion.

*Id.*

54. *See* ABRAMS ET AL., *supra* note 51, at 429 (“[S]pouses wishing to rely on adultery as a ground for divorce more often encounter evidentiary issues . . .”).

55. Woodhouse, *supra* note 23, at 2536 (“[P]erhaps because of history, fault plays a more complex set of roles in alimony than in property distribution. It may determine eligibility to receive alimony, liability to pay alimony, and the amount of the award.”).

56. *Id.* at 2528. In Virginia, for example, one spouse's adultery eliminates the innocent spouse's obligation of support unless “manifest injustice” would result from a bar to support. VA. CODE ANN. § 20-107.1(B) (Repl. Vol. 2008); *see id.* § 20-91; *see also Morse, supra* note 21, at 644. Vermont, on the other hand, defers to judicial discretion in weighing the effect of adultery on support allocations. VT. STAT. ANN. tit. 15, § 634 (1987).

57. *See Bower v. Bower*, 758 So. 2d 405, 409–10 (Miss. 2000).

## III. INTERSECTION OF SOCIAL MEDIA AND INFIDELITY

A. *The Expanding Scope of Infidelity*

The degree of physical infidelity required to constitute adultery has proved to be malleable depending on the court and the applicable statute. Some jurisdictions recognize that extramarital sexual acts other than intercourse may qualify as adultery.<sup>58</sup> Others have determined that same-sex affairs constitute adultery sufficient to bar the award of alimony.<sup>59</sup> One court has even held that for the purpose of adultery determinations, the appearance of infidelity outweighs any likelihood that no physical act occurred.<sup>60</sup> That court gave equal consideration to the manifestation of infidelity and the physical consummation of the affair, essentially giving weight to the effect of the wife's infidelity on the faithful husband rather than simply to the adulterous act itself.<sup>61</sup>

The notion of "virtual adultery," which also lacks a physical consummation, emerged in large part because of its ability to cause similar harms to the emotional component of the marriage. Professor Brenda Cossman suggests that the "violation of the promise of emotional and sexual exclusivity" resulting from the physical infidelity is the true harm to marriage, not the infidelity itself.<sup>62</sup> If the main harm is the broken verbal promise of monogamy—not the physical act—then adultery might describe any situation wherein a spouse contravenes the "emotional exclusivity" of the marriage.<sup>63</sup> The underpinnings of virtual adultery lie in what Cossman labels the "new infidelity," whereby increasing social outlets have created the opportunity to change how relation-

---

58. See, e.g., *Rosser v. Rosser*, 355 So. 2d 717, 719 (Ala. Civ. App. 1977); *Menge v. Menge*, 491 So. 2d 700, 701 (La. Ct. App. 1986).

59. *RGM v. DEM*, 410 S.E.2d 564, 567 (S.C. 1991). The court applied the reasoning of a Florida court that had found "no substantial distinction [between heterosexual and same-sex adultery], because both involve extra-marital sex and therefore marital misconduct." *Id.* (quoting *Patin v. Patin*, 371 So. 2d 682, 683 (Fla. Dist. Ct. App. 1979)) (internal quotation marks omitted).

60. *Nemeth v. Nemeth*, 481 S.E.2d 181, 184 (S.C. Ct. App. 1997) (determining that a "[w]ife's opportunity and inclination to commit adultery" by sharing sleeping quarters with a man who was not her husband satisfied the husband's burden of proof, even though a pre-existing medical condition may have prevented the wife from carrying out a physical affair).

61. See *id.*

62. Cossman, *supra* note 10, at 279.

63. See *id.* at 279–80.

ships are conducted.<sup>64</sup> The primary feature of this new infidelity, according to Cossman, is that it lacks any static definition.<sup>65</sup> It is used to describe extramarital relationships both in terms of *where* cheating occurs—in the workplace and online, for instance—and *what* behavior constitutes cheating.<sup>66</sup> For instance, this new infidelity can describe both a sexual romance in the office and an “emotional affair” with a colleague.<sup>67</sup> Rather than pinpoint a single way to cheat, the new infidelity describes how emerging social media have enabled spouses to intimately interact with others without straying physically.

Commentators point to the advantages of an intimacy that satisfies the same emotional cravings of an affair but without the same risks traditionally posed by adultery. Because health and reproductive issues are not at stake in the context of nonphysical affairs, Cossman suggests that the new focus becomes the emotional aspect of these relationships.<sup>68</sup> A 2004 ABC News survey showed that of the sixteen percent of adults polled who admitted to infidelity, thirty-three percent primarily wanted to satisfy an emotional void whereas forty-five percent did so purely for the physical affair.<sup>69</sup> Particularly in cases of online relationships, spouses can fashion the emotional affair they want without worrying about the risks of a physical affair.

Nonphysical affairs may also seem less harmful to the emotional stability of the marriage. According to psychiatrist Gail Saltz, “[w]e’ve all grown so used to watching, reading, and hearing sexually suggestive material that there’s no longer an obvious verbal or physical line we think we’re crossing.”<sup>70</sup> Saltz posits that emotional infidelity has flourished because “[p]eople enmeshed in nonsexual affairs preserve their deniability” and therefore suffer

---

64. *See id.* at 280.

65. *Id.* at 277.

66. *See id.* at 276–77.

67. *When Friendship Becomes an Emotional Affair*, TODAY WEEKEND EDITION (Aug. 11, 2006, 1:11 PM), [http://today.msnbc.msn.com/id/14287231/ns/today-today\\_weekend\\_edition/twhenfriendship-becomes-emotional-affair/#.TvA0xXP4H64](http://today.msnbc.msn.com/id/14287231/ns/today-today_weekend_edition/twhenfriendship-becomes-emotional-affair/#.TvA0xXP4H64). An “emotional affair,” according to Dr. Dale Atkins, “is about forming meaningful attachments with people other than your partner in ways that prevent your partner from having . . . deep emotional intimacy with you.” *Id.*

68. *See Cossman, supra* note 10, at 279.

69. LANGER ET AL., *supra* note 4, at 24.

70. Gail Saltz, *Could You Be Having an Emotional Affair?*, CNN LIVING (May 21, 2009), [http://articles.cnn.com/2009-05-21/living/o.having.emotional.affair\\_1\\_sharon-affair-marriage?\\_s=PM:LIVING](http://articles.cnn.com/2009-05-21/living/o.having.emotional.affair_1_sharon-affair-marriage?_s=PM:LIVING).

fewer feelings of culpability.<sup>71</sup> However, a variety of social commentary suggests that spouses often consider emotional affairs just as damaging—if not more so—than sexual infidelity.<sup>72</sup> Perhaps this is because the emotional affair intrudes most heavily on the communication aspect of marriage. Peggy Vaughan reasons that “[m]ost people . . . can recover from sexual infidelity more readily than from the fact that they were lied to.”<sup>73</sup> *Psychology Today*’s Michael J. Formica describes emotional infidelity as “any situation that creates or causes some degree of emotional unavailability on the part of one partner that interferes with one particular aspect of the relationship, along with the quality of the relationship as a whole.”<sup>74</sup> Despite “harmless” shared commonalities, emotional infidelity can develop when the majority of personal communication occurs with someone outside of the marriage, especially if the tenor of the communication tends to be aspirational rather than practical.<sup>75</sup>

Ironically, one of the consequences of the expanding scope of infidelity—beyond increased opportunities to cheat—may be that spouses are unintentionally unfaithful. For a spouse who subscribes to the traditional definition of adultery, an extramarital relationship that lacks a physical component is not an affair at all. Because emotional infidelity is grounded in a social rather than physical connection, emotional affairs are often rooted in friendship.<sup>76</sup> In eighty-two percent of affairs, the disloyal spouse cheats with someone who was first “just a friend.”<sup>77</sup> In other cases, a common bond cements the social relationship, such as a mutual work environment.<sup>78</sup> Based on these commonalities, the emotional adulterer may not even consider the behavior wrong.<sup>79</sup>

---

71. *Id.*

72. See Aaron Ben-Zeév, *Does Being True to Your Heart Imply Emotional Infidelity?*, PSYCHOL. TODAY BLOG (Sept. 8, 2008), <http://www.psychologytoday.com/blog/in-the-name-love/200809/does-being-true-your-heart-imply-emotional-infidelity>.

73. Denise Schipani, *Are You Emotionally Cheating?*, WOMAN’S DAY (Dec. 23, 2009), <http://www.womansday.com/sex-relationships/dating-marriage/are-you-emotionally-cheating-101955>.

74. Michael J. Formica, *Emotional Infidelity: When Is Cheating Really Cheating?*, PSYCHOL. TODAY BLOG (Sept. 7, 2008), <http://www.psychologytoday.com/blog/enlightened-living/200809/emotional-infidelity>.

75. See Heather Johnson Durocher, *The Affair You Don’t Know You’re Having*, REDBOOK, Aug. 1, 2007, at 97.

76. *Id.*

77. *Id.*

78. See Schipani, *supra* note 73.

79. See Formica, *supra* note 74.

### B. *The Role of Social Media in Facilitating Virtual Infidelity*

The prevalence of existing social media, such as workplace relationships and newer Internet-based vehicles of communication, has facilitated interactions outside of the marriage and provided additional fora for virtual infidelity.<sup>80</sup> Infidelity in both types of social environments struggles to gain legitimacy as a legal claim because, while spouses treat the intimacy in their interactions as authentic, they simultaneously downplay their extramarital relationships as either fictional or merely collegial.<sup>81</sup> However, a CBS News survey found that, as early as 2009, virtual infidelity was the catalyst for one-third of divorces.<sup>82</sup> This suggests that emotionally faithful spouses hardly view online dalliances and office intimacy as harmless interactions.

The breadth of available social media—e-mail, the workplace, and virtual worlds to name a few—has given spouses the autonomy to build extramarital relationships on their own terms. Internet users' ability to dictate the tone, subject matter, and privacy level of their online conversations allows them to also control what features they reveal about themselves and to divulge information relatively free of consequences.<sup>83</sup> Christina Tavella Hall suggests that “[t]echnologies abound which make interacting with others online as enticing as meeting them in real life, or more so. . . . All these technologies could be used in one way or another to experience a unique relationship.”<sup>84</sup> Some Internet games, for example, fabricate entire worlds wherein users create avatars of themselves and intermingle with other avatars.<sup>85</sup> In effect, these manufactured figures add an extra layer of separation between the computer user and his or her online actions. Yet from the nonparticipating spouse's perspective, virtual characters can seem less like a separate entity and more like an extension of the computer user. According to one spouse who met her husband in a virtual game world and subsequently found him “cuddling” with

---

80. Schipani, *supra* note 73.

81. See Aaron Ben-Ze'ev, *Is Chatting Cheating?*, PSYCHOL. TODAY BLOG (Sept. 5, 2008), <http://www.psychologytoday.com/blog/in-the-name-love/200809/is-chatting-cheating>.

82. Tatiana Morales, *A Look at Internet Infidelity*, CBS NEWS (Aug. 4, 2003), [www.cbsnews.com/stories/2003/08/04/earlyshow/living/caught/main566488.shtml](http://www.cbsnews.com/stories/2003/08/04/earlyshow/living/caught/main566488.shtml).

83. See Hall, *supra* note 6, at 214–17.

84. *Id.* at 216.

85. See Alter, *supra* note 1.

another avatar, the online persona's actions manifested the husband's impulse to cheat.<sup>86</sup> Psychologist David Greenfield suggests that more than simply enabling cheaters to cheat, the myriad opportunities for online infidelity have actually *induced* spouses to cheat.<sup>87</sup> For example, a Fox News survey suggested Facebook has made it possible for spouses to reunite with acquaintances—even former partners—in a casual setting.<sup>88</sup> Greenfield cites the opportunity to put oneself in a dating situation without the same risks as a face-to-face encounter as an attractive scenario, and suggests that spouses who would never attempt a physical affair might more comfortably try out an online affair.<sup>89</sup>

Other types of virtual infidelity, like office relationships, concentrate a particular type of social interaction within a finite space. Similar to Internet-based media, the cloak of a professional workplace environment may reduce inhibitions and facilitate different personas.<sup>90</sup> Virtual infidelity in the office may be particularly difficult to identify if a spouse does not realize that a non-physical office relationship has begun to impair the marital relationship.<sup>91</sup> The nature of the workplace may require employees to spend a significant amount of time together, so spouses may believe they are being faithful so long as they do not cross the boundary of physical intimacy.<sup>92</sup> Though the spouse in the workplace may experience more behavioral restraints than the spouse chatting on the Internet, both can use their surroundings to conceal the intimate connections they establish outside of the marriage.

---

86. See Cyndy Aleo-Carreira, *Is It Adultery if It Was in a Virtual World?*, PC WORLD AUSTRALIA (Nov. 18, 2008, 9:54 AM), [http://www.pcworld.idg.com.au/article/267757/it\\_adultery\\_it\\_virtual\\_world/](http://www.pcworld.idg.com.au/article/267757/it_adultery_it_virtual_world/).

87. *A Private Eye for Online Affairs*, CBS NEWS (Feb. 11, 2009, 8:34 PM) [www.cbsnews.com/stories/2003/07/30/tech/main565915.shtml](http://www.cbsnews.com/stories/2003/07/30/tech/main565915.shtml) [hereinafter *A Private Eye*] (explaining that the low cost, ease of use, and “anonymity of the Internet” has lowered the “threshold” for initiating affairs).

88. See *Facebook Is Driving the Divorce Rate Up, Says One Survey*, FOXNEWS.COM (June 2, 2010), <http://www.foxnews.com/scitech/2010/06/02/survey-shows-facebook-driving-divorce-rate/>.

89. See *A Private Eye*, *supra* note 87.

90. See *When Friendship Becomes an Emotional Affair*, *supra* note 67 (discussing a “common language” between coworkers).

91. See Peterson, *supra* note 7.

92. See Schipani, *supra* note 73.

C. *Crossing Over to Realism: Effects of an Online Affair on Two Marriages*

This section compares two marriages that suffered the effects of an online affair. In both circumstances, the husband initiated a virtual relationship via a computer game and never met the woman on the other end of the computer. Their wives' reactions to the affair differed drastically, however. These comparisons illustrate how the meaning of a virtual relationship can vary considerably between spouses.

In 2007, the *Wall Street Journal* observed Sue and Ric Hoogestraat's marriage through the lens of Ric's attachment to a virtual-world computer game.<sup>93</sup> The game, aptly named *Second Life*, provides users with their own avatars as well as various accessories and real estate available for purchase with U.S. dollars.<sup>94</sup> Married less than one year, Ric began spending anywhere from six to fourteen hours a day on *Second Life*, depending on his work schedule.<sup>95</sup> Sue, who declined to join him in the computerized world, was shocked to discover one day that he had acquired not only a virtual business and three-story house, but also a virtual wife.<sup>96</sup> Although neither avatar's human incarnation expressed a desire to the other to rendezvous in real life, Sue nonetheless felt betrayed.<sup>97</sup> Rather than eat meals or leave the house, Ric would log on to *Second Life*, where he would meet up with his avatar wife almost immediately.<sup>98</sup> The two avatars would then greet friends (avatars controlled by other users) and engage in virtual-world daily activities.<sup>99</sup> Back in the couple's home, Sue projected that her husband might spend years reenacting his youth on the computer while his actual life—and marriage—slipped away.<sup>100</sup>

In 2009, *Second Life* had an even more drastic effect on the marriage of a couple in England. According to Amy Taylor her husband's feelings for his avatar companion replaced those he felt

---

93. Alter, *supra* note 1.

94. *See id.*

95. *See id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *See id.*

for her.<sup>101</sup> Taylor had also joined Second Life, where the two held themselves out as a couple, and she “caught” her husband’s avatar being unfaithful on at least two occasions.<sup>102</sup> Although Taylor considered leaving her husband for his virtual infidelity she suggested it was he who eventually ended the marriage by confessing that he was in love with another avatar.<sup>103</sup> Eventually, his profile indicated he had become engaged once more through the online game.<sup>104</sup>

These two scenes demonstrate important contrasts in the meaning of an online affair to the Internet user, the appearance of the relationship to the Internet user’s spouse, and the potential for the new relationship to erode the marriage. In the first scenario, Ric insisted his online affair was simply a game and refused to accept that it had become an intrusion on his marriage, both to his physical relationship and to the emotional intimacy that he and his wife formerly shared.<sup>105</sup> The notion that he was committing infidelity was demonstrated more by the time he committed to his virtual partner—and diverted from his actual partner—than by an emotional connection with the woman controlling the avatar. Taylor’s husband, on the other hand, seemed to merge his virtual identity with his existing social relationships, making it possible for a new virtual partner to displace a concrete marriage. His example illustrates that the meaning a spouse attributes to an online relationship may be an important gauge of its impact on the marriage.

As indicated by Sue and Taylor, a spouse’s reaction to the other’s online affair might vary depending on the depth of the virtual relationship.<sup>106</sup> Even though Ric’s online gaming created a barrier

---

101. *After Virtual Affair, Real Divorce*, CBS NEWS (Feb. 11, 2009, 2:01 PM), [www.cbsnews.com/stories/2008/11/14/tech/main4606394.shtml](http://www.cbsnews.com/stories/2008/11/14/tech/main4606394.shtml). Taylor’s story correlates to a 2008 survey conducted by the Oxford Internet Institute analyzing the effect of Internet behavior on intimate relationships both before and after partners had met. *The Role of the Internet in UK Married Life: Survey Results from the Oxford Internet Institute*, UNIV. OF OXFORD (Apr. 7, 2008), <http://www.oii.ox.ac.uk/news/?id=258>. “Survey respondents said they would be ‘unhappy’ about their partner doing the following online with somebody else: falling in love (97%); having cyber-sex (94%); disclosing intimate details (92%); communicating relationship troubles to others (89%); sharing personal information about the other partner (88%); flirting (85%).” *Id.*

102. *After Virtual Affair, Real Divorce*, *supra* note 101.

103. *See id.*

104. *Id.*

105. *See Alter*, *supra* note 1.

106. *Compare id.*, with *After Virtual Affair, Real Divorce*, *supra* note 101.



to his marital relationship, he viewed the game almost as a building project.<sup>107</sup> Taylor's husband, on the other hand, allegedly treated the game as an alternate life. Because Taylor had joined Second Life as well, she interacted with her husband's dual personas and was therefore able to experience his virtual infidelity firsthand.<sup>108</sup> Although Ric did not cultivate new emotional connections, his absence from the marriage nevertheless deprived his wife of the emotional intimacy they formerly shared.

These two couples' experiences with virtual infidelity reiterate the potential difficulties in establishing a baseline for actionable virtual behavior. Although the depth of the virtual relationship and the faithful spouse's reaction may be important tools in this determination, neither is necessarily dispositive of virtual adultery. Yet these virtual relationships impose risks similar to traditional adultery—such as fabricating emotional connections that supersede (or even replace) the existing partnership—and can implicate similar policy concerns against diverting attention from the marriage.

#### IV. APPROACHES TO RECOGNIZING VIRTUAL ADULTERY

The contemporary policy justifications for adultery statutes—namely of insulating the marital unit and protecting family life—support the continued application of adultery to civil divorce judgments. Courts grant fault-based divorces, and/or make unfavorable spousal support and property awards on the basis of adultery in order to discourage this type of conduct and uphold established policy goals. Because virtual infidelity has begun to create similar harm to marriage—and trigger the same policy concerns—the current definition of adultery may not serve the interests it was designed to protect. Having discussed the similarity of harms virtual infidelity can produce in comparison to traditional adultery, the question becomes whether courts should recognize virtual adultery for remedial purposes in divorce proceedings. Deciding to recognize virtual adultery would raise an equally important question—how to gauge when harmful virtual behavior constitutes actionable virtual adultery.

---

107. See Alter, *supra* note 1.

108. See *After Virtual Affair, Real Divorce*, *supra* note 101.

There are at least two possible approaches to recognizing virtual adultery for remedial purposes. In the first approach, individual state legislatures may decide to establish bright-line rules regarding what types of virtual infidelity rise to the level of adultery for fault and other civil divorce purposes. A second approach acknowledges that virtual adultery deserves consideration in determining fault and other incidents of divorce, but rejects the use of bright-line rules to determine what specific behavior constitutes adultery—as opposed to traditional adultery statutes that impose baseline requirements such as sexual intercourse or other physical acts. Instead of defining virtual adultery in terms of specific conduct, the second approach would defer to judicial discretion to evaluate what constitutes adultery on a case-by-case basis. Conversely, in a status quo approach, state legislatures may decline to extend the legal definition of adultery to virtual infidelity on the basis that virtual infidelity is either too amorphous to merit a judicial remedy or sufficiently distinguishable from traditional adultery to deny the same remedies that are available for the latter. This section rejects the status quo approach and addresses the two approaches that would introduce virtual adultery into remedial schemes, ultimately advocating adoption of the discretionary approach.

#### A. *Rejecting the Status Quo Approach*

The advantage to adopting approaches that penalize nonphysical extramarital intimacy is that they recognize that emotional intimacy with someone other than a spouse can produce the same damage to the marriage as physical infidelity. Cossman posits that “emotional infidelity has become as much a violation of marriage as is sexual infidelity. Sex has become an *expression* of the underlying emotional intimacy.”<sup>109</sup> Another commentator suggests that “[a]dultery matters . . . because it erodes the intimacy between spouses. And if *this* is why adultery matters, then other erosions of spousal intimacy, other factors that similarly contribute to disconnection, should also justify divorce.”<sup>110</sup> Despite changes in the type of conduct that adultery encompasses, the policy interests in preventing it remain largely the same—

---

109. Cossman, *supra* note 10, at 280 (emphasis added).

110. Gary Chartier, *Divorce: A Normative Analysis*, 10 FLA. COASTAL L. REV. 1, 9 (2008).

namely, protecting the strength of marriage and the family. To continue to achieve these policy goals, judicial remedies must capture the new harms that cause the same damage. Emotional unfaithfulness can create the same destruction of trust consistently recognized as integral to the marital unit.<sup>111</sup> Following Cossman's reasoning, then, preventive policy measures should extend to the root cause of infidelity, not merely its manifestation.<sup>112</sup> Punishing virtual infidelity would simply compensate faithful spouses for the same emotional harms to the marriage that physical adultery already produces and public policy aims to deter.

Commentators who do not support legal recognition of virtual adultery as a fault ground suggest that the most substantial potential harms to the marriage caused by adultery are irrelevant to virtual affairs.<sup>113</sup> Hall posits that nonphysical affairs "bear only a fraction of the consequences which accompany actual adultery. Without physical contact, the possibility of an unwanted pregnancy or sexually transmitted disease is impossible."<sup>114</sup> Sue Hoogestraat and Amy Taylor might disagree with this comparison of potential harm. Even though the physical risks associated with traditional adultery do not translate to virtual adultery, this comment suggests that emotional affairs can inflict a comparable amount of harm on a marriage. Cossman adds that "[p]regnancy is no longer the central harm of adultery. Rather, adultery is now framed as a violation of the promise of emotional and sexual exclusivity."<sup>115</sup> Decreased physical risks of adulterous conduct do not lessen the breach of "exclusivity" that defines virtual infidelity.<sup>116</sup> Public policy already recognizes the importance of exclusive marital intimacy to protect marriages and families; adultery statutes only address the physical component of intimacy. Virtual adultery schemes would additionally address emotional infidelity, which currently has no legal remedy.

---

111. See Schipani, *supra* note 73.

112. See Gail Saltz, *You Don't Have to Have Sex for It to Be an Affair*, TODAY (Aug. 17, 2005, 9:13 PM), <http://today.msnbc.msn.com/id/8990045/ns/today-relationships/t/you-dont-have-have-sex-it-be-affair/#.TvA3RXP4H64> (suggesting that faithful spouses may consider physical and emotional affairs equally harmful to the marriage).

113. See Hall, *supra* note 6, at 204–05.

114. *Id.* at 220.

115. Cossman, *supra* note 10, at 279.

116. See *id.*

### B. *Bright-Line Rule Approach*

A bright-line rule approach to virtual adultery identifies specific nonphysical behavior that constitutes adultery in the context of divorce. This approach identifies virtual adultery when the nonphysical infidelity triggers the same policy goal of insulating the marriage. Since the physical component would not apply here, courts instead would look to whether the nonphysical infidelity impedes on the emotional component of the marriage. Regardless of the level of emotional intimacy achieved by the extramarital relationship, the key consideration is the extent to which it detracts from the emotional intimacy of the marriage. This determination pinpoints the types of nonphysical conduct that create the same emotional consequences as physical adultery, such as distrust of the unfaithful spouse. Rather than expanding the definition of adultery, this determination would fill a gap left by traditional adultery statutes that do not provide a remedy for the transfer of intimacy in the absence of a physical affair.<sup>117</sup>

The most apparent disadvantage to a bright-line rule approach is its potential to be over- or under-inclusive in defining adulterous virtual conduct. The difficulty in making rules for what degree of nonphysical conduct should be punished is foreshadowed even in current debates about the standards that should apply in determining traditional adultery. For example, in evaluating circumstantial evidence of adultery, courts have split on whether manifestations of adultery are sufficient for a faithful spouse to succeed on a fault-based divorce action. An Alabama court found that evidence of love letters did not provide sufficient proof of a husband's adultery.<sup>118</sup> Courts in both South Carolina and Louisiana found that a wife *had* committed adultery by sharing a bedroom with another man—even without proof that sexual intercourse had occurred.<sup>119</sup> Although the courts conducted their analyses to determine whether the circumstantial evidence against the spouse was sufficient to prove adultery, in doing so they evaluated whether certain conduct on the part of the accused

---

117. See VA. CODE ANN. § 18.2-365 (Repl. Vol. 2009) (stating that adultery involves “[a]ny person, being married, who voluntarily [has] sexual intercourse with any person who is not his or her spouse”).

118. *Maddox v. Maddox*, 553 So. 2d 611, 612 (Ala. Civ. App. 1989).

119. See *Bonura v. Bonura*, 505 So. 2d 143, 145 (La. Ct. App. 1987); *Nemeth v. Nemeth*, 481 S.E.2d 181, 184 (S.C. Ct. App. 1997).

spouse was inherently improper and suggestive of extramarital conduct—the same type of conduct that might harm the emotional trust in a marriage regardless of whether physical infidelity occurred.

The Louisiana court's standard for finding adultery was "the rejection of the spouse coupled with out-of-marriage intimacy."<sup>120</sup> "Rejection," which traditionally might have required an affirmative manifestation of intent to end the marriage, might today reflect Ric Hoogestraat's excessive gaming.<sup>121</sup> "Out-of-marriage intimacy," which traditionally required an extramarital sexual act, might today include Ric's virtual wife.<sup>122</sup> The established rule punishing *only* physical sexual acts is easiest to enforce, but may potentially overlook behaviors that nonetheless harm the faithful spouse.

Legal recognition of virtual adultery does carry a risk of engendering a windfall of actionable nonphysical behavior. Because emotional infidelity is inherently more subjective than physical infidelity, it is difficult to draw boundaries for improper conduct. This is both because "faithful" spouses may subscribe to different ideas of what constitutes infidelity and because "unfaithful" spouses may not be aware that they have crossed the line beyond acceptable extramarital conduct. This risk must be weighed against the policy interest in strengthening marriage and the judicial interest in compensating innocent spouses via property and spousal support allocations.<sup>123</sup>

Another concern is whether creating bright-line rules to punish virtual adultery adequately serves the policy interest in preventing marital harm. Contemporary justifications for punishing adultery focus on preventing externalities that impair the intimacy of the marriage—yet there is no judicial consensus on what level of nonphysical conduct begins to harm the marriage. The faithful spouse's reaction to the virtual relationship can be an important indicator of the harm that the infidelity has created. However, arbitrary rules of actionable nonphysical conduct would

---

120. S.B. v. S.J.B., 609 A.2d 124, 127 (N.J. 1992); see also *Bonura*, 505 So. 2d at 145 (limiting the court's holding to the facts of the case and suggesting an analysis of individual facts and circumstances in future cases).

121. See Alter, *supra* note 1.

122. See *id.*

123. See Swisher, *supra* note 22, at 258–59.

regulate the act itself, but not the broader impact of the behavior on the marriage. As such, a bright-line rule approach may not be helpful because it does not necessarily know what behavior to deter.

### C. *Discretionary Approach*

A discretionary approach to virtual adultery acknowledges that certain nonphysical, intimate conduct can constitute adultery and implicate the same policy concerns, while simultaneously recognizing that it is difficult to identify that conduct in a vacuum. Instead, its advocates suggest writing virtual adultery into statutory fault ground considerations for divorce and deferring to judicial discretion to evaluate the totality of the circumstances in determining fault. Virginia law, for instance, states that a court “shall consider the circumstances and factors which contributed to the dissolution of the marriage, specifically including adultery.”<sup>124</sup> A discretionary approach suggests placing virtual adultery within the totality of factors a state court applies in determining the cause of divorce, thereby allowing individual courts to recognize egregious instances of emotional infidelity while filtering out interactions that do not rise to the intimacy level of an inappropriate relationship.

The primary advantage in placing virtual adultery determinations within judicial discretion is that it recognizes the complexities of proving emotional intimacy under the traditional standard of clear and convincing evidence.<sup>125</sup> Although courts may consider reducing the standard of proof to a preponderance of the evidence, a lesser standard may not adequately address virtual infidelity either. The “ephemeral sphere of emotional or virtual infidelity”—which could involve such conduct as an online “proxy kiss”—would likely fail to satisfy any existing standard of proof for adultery.<sup>126</sup> Whereas an extramarital physical act may instantly trigger an adultery statute, courts cannot feasibly deter the series of small behaviors that may lead up to an emotional affair. An emotional affair, rather than initiating with a single physical catalyst, can build upon a continuing thread of ostensibly harmless

---

124. VA. CODE ANN. § 20-107.1(E) (Repl. Vol. 2008 & Cum. Supp. 2011).

125. See ABRAMS ET AL., *supra* note 51, at 433.

126. See Hall, *supra* note 6, at 221.

communication.<sup>127</sup> A discretionary approach would identify on a case-by-case basis the point at which emotional intimacy becomes sufficiently integrated into the extramarital relationship to impose on the marital unit.

Considering the relevant costs and benefits, a discretionary approach is ultimately a better solution than the alternative bright-line rule approach to address virtual adultery in the fault system. A discretionary approach best supports the policy rationale for punishing virtual adultery—that courts should deter extramarital emotional intimacy for the effects it can produce on the marital unit. Although it may incidentally accomplish this goal, a bright-line rule approach—like its statutory predecessors—seeks to punish particular acts without giving thought to how that conduct affects the marriage. This might leave the exact same statutory gaps currently in place, which compensate certain adulterous acts while failing to recognize others. Rather than deter spouses from seeking intimacy outside the marriage, bright-line rules merely add more behaviors to the list of actionable conduct—leaving the would-be unfaithful spouse free to engage in any type of emotional relationship not captured by the applicable fault scheme. A discretionary approach, on the other hand, looks to the compilation of behaviors that comprised the marital breakdown. It might also look to the faithful spouse as a barometer for determining the severity of the other spouse's conduct, recognizing the faithful spouse's contribution to sustaining the marriage after the affair. A discretionary approach considers the entirety of an emotional affair—as opposed to a single nonphysical act—in deciding fault. Although less consistent with current statutory schemes that require specific adulterous acts, a discretionary method more closely conforms to policy goals of containing intimacy within the marriage and deterring harmful extramarital interactions.

## V. CONCLUSION

Although deciding how (or whether) to craft a compensatory scheme for virtual adultery is not yet underway, this comment suggests that the increasing communication outside of the mar-

---

127. See Schipani, *supra* note 73.

riage has future implications for fault-based divorce as well as other incidences of divorce. Recognition of virtual adultery can make an important remedial contribution to existing adultery considerations by acknowledging that preserving emotional intimacy within marriage serves similar policy interests as safeguarding physical fidelity. If increases in the use of social media have enabled adulterous relationships to occur almost anywhere, statutory schemes should not be so limited. This comment acknowledges the difficulty in establishing bright-line statutory rules for compensating victims of nonphysical infidelity and suggests adopting a discretionary approach to incorporate virtual adultery into existing fault (and other) schemes. Transferring discretion to individual courts accomplishes the underlying policy interest in shielding marriages from the external harm—not just physical harm—that extramarital relationships can produce. Rather than adding unique behaviors disjointedly to an existing set of remedial schemes, a discretionary approach seeks to capture the nuances in behavior that characterize these new virtual relationships.