Thus, the obvious next step would seem to be to repeal the adultery laws that exist in nearly half the states.[440] These adultery laws are rarely enforced,[441] but they always present the possibility of enforcement,[442] and they stand as emblems of the expectation of monogamy. And thus repeal may well be the most desirable path. But here we would do well to pause before proceeding, to consider two points. First, if the problem with the adultery laws is that they are coercive, then perhaps the solution is not to repeal the laws, but rather to amend them to eliminate their coercive element. In the language of contract law, we should consider turning these "immutable rules"—rules that the parties must accept as part of their agreements—into "default rules"—rules around which the parties can contract.[443] I explain this idea further below.

Second, if the aim is to encourage individuals to make affirmative choices, and to choose partners with compatible desires, then we should encourage conversations between partners and between potential partners. The question then becomes whether law might play an affirmative role in that process. More specifically, contract law principles suggest that modifying adultery statutes, rather than repealing them, is the best way to encourage those conversations. Under the principle of information-forcing default rules, one way to force conversations is to set the default at something other than what the parties would have wanted—in other words, to create a penalty for parties who are not explicit about what rules they want to govern their relationship.[444] In what follows, I first explain what it might mean to amend adultery statutes to make them default rules, then I use the idea of information-forcing default rules to consider the best way to set the adultery default rule. Finally, I conclude by considering whether the criminal law is the proper realm for this approach.

Adultery statutes, as currently written, are immutable rules. For example, the Massachusetts statute provides, "A married person who has sexual intercourse with a person not his spouse or an unmarried person who has sexual

440. *See supra* note 50.

441. *See supra* note 50.

442. For example, a prominent lawyer in Virginia, John R. Bushey, Jr., was recently convicted of adultery. *See* Kelly, *supra* note 50. Bushey has been joined in his appeal by the ACLU, which plans to challenge the constitutionality of the adultery statute in light of *Lawrence*. *See* John F. Kelly, *Va. Man Challenges State's Adultery Law; ACLU Joins Appeal, Cites Privacy Issue*, WASH. POST, Feb. 26, 2004, at B8.

443. *See, e.g.*, Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 87 (1989) ("The legal rules of contracts and corporations can be divided into two distinct classes. The larger class consists of 'default' rules that parties can contract around by prior agreement, while the smaller, but important, class consists of 'immutable' rules that parties cannot change by contractual agreement. Default rules fill the gaps in incomplete contracts; they govern unless the parties contract around them. Immutable rules cannot be contracted around; they govern even if the parties attempt to contract around them." (footnote omitted)).

444. *See generally id.*; Ian Ayres & Robert Gertner, *Majoritarian vs. Minoritarian Defaults*, 51 STAN. L. REV. 1591 (1999).

intercourse with a married person shall be guilty of adultery . . . ."[445] A married person who engages in extramarital sex in the relevant jurisdiction is guilty of adultery, regardless of any agreement by the parties to the contrary.[446] The problem, then, with these laws may not be that they exist, but that they interfere with the parties' ability to make their own agreements about sexual exclusivity.

Adultery statutes could instead be written as default rules. For instance, a statute could criminalize extramarital sex by married persons only if the spouses have agreed to require exclusivity, or only if they have not agreed to permit extramarital sex. In the language of the criminal law, the extramarital sex would be criminal adultery unless the other spouse gave his "consent."[447] Rape law might serve as a model here, with the caveat that the crimes of rape and adultery

445. MASS. GEN. LAWS ch. 272, § 14 (2000).

446. The closest these statutes come to a consent-based model is the four state statutes that condition prosecution on a complaint by the other spouse, but this is not the same thing as a defense of consent; the spouse could complain after the fact even if the adultery was agreed upon in advance, and nothing in the statutes permits the adulterer to offer that prior consent as a defense. *See* ARIZ. REV. STAT. ANN. § 13-1408(B) (West 2001) ("No prosecution for adultery shall be commenced except upon complaint of the husband or wife."); MINN. STAT. ANN. § 609.36(2) (West 2003) ("No prosecution shall be commenced under this section except on complaint of the husband or the wife, except when such husband or wife is insane, nor after one year from the commission of the offense."); N.D. CENT. CODE § 12.1-20-09(2) (1997) ("No prosecution shall be instituted under this section except on the complaint of the spouse of the alleged offender, and the prosecution shall not be commenced later than one year from commission of the offense."); OKLA. STAT. ANN. tit. 21, § 871 (West 2002) ("Adultery is the unlawful voluntary sexual intercourse of a married person with one of the opposite sex; and when the crime is between persons, only one of whom is married, both are guilty of adultery. Prosecution for adultery can be commenced and carried on against either of the parties to the crime only by his or her own husband or wife as the case may be, or by the husband or wife of the other party to the crime: Provided, that any person may make complaint when persons are living together in open and notorious adultery."). Note that the Oklahoma statute does not quite fit in this group since it provides for prosecution if the adultery is open and notorious and anyone complains, even if the spouse does not want to pursue the complaint. Note also the odd exception for insanity in the Minnesota statute, which suggests that it is the complaining spouse's insanity that is relevant.

In addition, it is worth noting that Rhode Island's statute might be deemed ambiguous in this regard because it specifically identifies "illicit" sexual intercourse by a married person as penalized. R.I. GEN. LAWS § 11-6-2 (2002) ("Every person who shall commit adultery shall be fined not exceeding five hundred dollars ($500); and illicit sexual intercourse between any two (2) persons, where either of them is married, shall be deemed adultery in each."). By the language of the statute, the second phrase could either be defining adultery to include only illicit adultery (i.e., secretive, perhaps even nonconsensual) or it could be expanding outward from the traditional definition of adultery to mean open and notorious extramarital sex by a married person.

447. The statute also needs to give content to the terms it uses, such as "sex" or "sexual intercourse." This is another matter for consideration. Ideally, parties could be urged to define sex in their agreements around it; where they have not done so, however, certain defaults would need to be available. I bracket this question, noting that the possibilities are numerous but that erotic physical intimacy seems to be one of the axes, if not the key axis, for most. *See* Christina Tavella Hall, Note, *Sex Online: Is This Adultery?*, 20 HASTINGS COMM. & ENT. L.J. 201, 211–13, 220–21 (1997) (discussing the views of various courts and commentators as to how broadly sex should be defined in the context of adultery as a fault-based ground for divorce, and concluding that the proper definition is "one spouse's physical intimacy with someone other than their marital partner" and "should not be read broadly or explicitly expanded to cover the ephemeral sphere of emotional or virtual infidelity").

are extremely different. Rape is a useful model, however, because it is a criminal legal category defined by the absence of consent. In a certain schematic sense, rape is sex minus consent.[448] Similarly, under a consent-based model of adultery statutes, adultery is extramarital sex minus consent. In the language of analogy, then, extramarital sex is to adultery as sex is to rape.

Consent is obviously a complex and contested concept.[449] There might be reason to wonder, in any particular case, if consent given to a spouse's extramarital sex is freely given.[450] But in the context of an adultery statute, the worst that happens if the consent was not freely given is that no prosecution occurs. Since there are few prosecutions under the current status quo, and the goal of a statute is to encourage open and honest communication rather than to prosecute adulterers, then some number of false positives on consent should not worry us in the way that it does in other contexts.

Before proceeding to explain the hypothetical scheme, I briefly pause to

448. The less favorable version of the equation would then be "sex = rape + consent." Both descriptions are schematic; different jurisdictions have different definitions of rape and numerous other terms for nonconsensual sex. *See, e.g.*, Stacy Futter & Walter R. Mebane, Jr., *The Effects of Rape Law Reform on Rape Case Processing*, 16 BERKELEY WOMEN'S L.J. 72, 78 (2001) (surveying states' varying definitions of rape). But to define rape as nonconsensual sex is not uncommon. *See, e.g.*, Katharine K. Baker, *Text, Context, and the Problem with Rape*, 28 SW. U. L. REV. 297, 302 (1999). As Baker points out, however, a great deal of cultural confusion surrounds the exact definition of nonconsensual (or consensual) sex. *Id.* (observing that thinkers as diverse as Catherine MacKinnon and Richard Posner seem to agree that rape and consensual sex are not so very different from each other).

449. *See, e.g.*, Baker, *supra* note 448, at 302–06. (citing sources on the ambiguities surrounding the concept of consent).

450. As a general matter, love might prompt people to agree to arrangements that they would not choose; whether this rises to the level of nonconsent is a complicated matter. More specifically, one context where genuine consent might be a concern is a heterosexual relationship in which the age and encumbrances of the partners lead to widely different statistical prospects of finding a new partner for the man as opposed to the woman. After divorce, women are much less likely to remarry than men, and the presence of children affects women's ability to remarry but not men's. *See, e.g.*, Amy L. Wax, *Bargaining in the Shadow of the Market: Is There a Future for Egalitarian Marriage?*, 84 VA. L. REV. 509, 546–50 (1998). "Although remarriage is popular among both sexes," Wax reports:

> [D]ata gathered in the late 1980s indicate that the remarriage rate for women aged 35–44 is about two-thirds the rate for men, with the ratio dropping to less than one-half for women over 45. . . .
>
> . . . [In addition,] women with children remarry at a lower rate than women without children, regardless of age of divorce. Children have no effect on remarriage for men. . . . [And], education is inversely correlated with the incidence of remarriage among divorced women.

Id. at 549 n.96 (citations omitted). One might worry that a woman, particularly above a certain age, would not feel she had a genuine choice about whether to accept a male partner's request for nonexclusivity, if she believed her prospects of finding another partner were inadequate. This concern would not obtain in many situations of course, and there would also be situations where the power was distributed differently among the parties. Moreover, as explained in the text, the context of considering criminal law sanctions should help to ease these worries to an extent, since her nonconsent means only that his extramarital relationship is not criminally punished, a result that would be the likely outcome under the status quo.

address several general matters. First, this article does not aim to raise or answer the question whether marriage should be viewed as a status, viewed as a contract, or abolished in favor of a contract-based system of private relations or an alternative model.[451] The principles of penalty defaults employed here were developed in the realm of contract law, but nothing about these principles inherently confines their application to contracts.[452] Second, as a thought experiment, this discussion need not resolve the matter of the specific harm that would warrant the intervention of the criminal law in this context; however, several possibilities present themselves. In the language of *Lawrence v. Texas*,[453] adultery may be understood as "an abuse of an institution the law protects,"[454] and this may be all the more true where adultery actually violates the trust of the relationship, as is the case under a consent-based model. In addition, to the extent that the state might punish adultery because of an "injury to a person,"[455] such a rationale seems more sensible if the crime targets only those who *actually* injure another person—i.e., only those individuals whose spouses did not consent to the adultery, as provided in the statutory schemes that follow. Third, the penalty should be imagined as slight, since the intended purpose here is not for the state to express condemnation of adultery, but merely for the state to encourage parties to make express agreements about the exclusivity or nonexclusivity of their relationships. A small fine seems most

451. *See, e.g.*, Katharine B. Silbaugh, *Marriage Contracts and the Family Economy*, 93 NW. U.L. REV. 65, 111–20 (1998) (discussing different legal understandings of marriage as a status or a contract); *cf., e.g.*, MARTHA ALBERTSON FINEMAN, THE AUTONOMY MYTH: A THEORY OF DEPENDENCY (forthcoming 2004) (manuscript at 66–69, 133–41, on file with author) (considering the implications of abolishing marriage as a legal category); Elizabeth S. Scott & Robert E. Scott, *Marriage As a Relational Contract*, 84 VA. L. REV. 1225 (1998); Shanley, *supra* note 120.

452. *See, e.g.*, Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027 (2002) (applying the idea of information-forcing default rules to statutory interpretation); Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159, 1189 (2004) (describing the general relevance of the concept of information-forcing default rules to contexts in which planners want to force people to make explicit choices); Ian Ayres & Katharine Baker, A Separate Crime of Reckless Sex (Feb. 4, 2004) (unpublished manuscript, on file with author) (applying the principle of information-forcing penalty defaults to propose the crime of reckless sexual conduct, i.e., having sex without a condom in a first-time sexual encounter, to which evidence of consent to the unprotected aspect of the sex would be a defense).

453. Lawrence v. Texas, 123 S. Ct. 2472 (2003).

454. *Id.* at 2478 (stating that, in reference to sodomy laws, "statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals. This, as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects."); *see also* Mary Anne Case, *Of "This" and "That" in* Lawrence, 2003 SUP. CT. REV. (forthcoming 2004) (manuscript at 54, on file with author) ("Like so much of the rest of the majority's prose, this passage is admittedly obscure, but my best guess is that the reference is . . . to something akin to the likely continuing validity of laws prohibiting bigamy and adultery, which can be seen as abuse of the institution of legal marriage even when extraordinary circumstances such as spousal consent allow the acts to take place 'absent injury to a person.'").

455. *Lawrence*, 123 S. Ct. at 2478.

appropriate,[456] and, since this is a thought experiment, perhaps we can imagine that the fine is borne only by the wrongdoer, rather than coming out of collective property. If that is unsatisfying to some readers, then perhaps a penalty such as a small amount of community service can substitute in the hypothetical. Finally, the fact that criminal adultery statutes are rarely enforced against civilians[457] is a useful background condition for this inquiry. The question here is whether, rather than being repealed or falling into desuetude, adultery statutes could and should be amended and reinvigorated in an affirmative effort to use law to encourage discussion in this area. The following statutory models aim to evaluate the potential utility of that idea.

In a consent-based model, a hypothetical amended statute might read as follows:

> Statute 1: A married person who has sex with a person not his or her spouse is subject to prosecution unless the married person's spouse has consented to the extramarital sex.[458]

Under this statute, someone is subject to prosecution for adultery only if his or her spouse had not consented to the extramarital sex. Though the question might arise as to whether the consent needs to be given *prior* to the acts, if the idea is to encourage conversations, rather than to have people surprised by their partner's acts, then the consent would need to be obtained beforehand.

The main difference between consent in this context and consent in the rape context is that the power of consent or nonconsent is bestowed on someone other than a participant in the relevant sex: In the adultery context, consent is the province of a third party. That is, one spouse has the power to transform the other spouse's criminal extramarital sexual behavior into legal sexual behavior through consent.

Because a third party must consent, the consent will, in most instances, not be contemporaneous with the sex. Thus, consent could be understood as a feature of the relationship—i.e., general permission that is given as part of the marital agreement. Alternatively, it may be understood as something closer in time to the nonexclusive sexual activity—i.e., permission that is given with regard to a particular extramarital sexual act or relationship. In a sense, then, there are two relevant time periods: the prenuptial period during which the relationship agreement is formed, and the postnuptial period leading up to the

456. *Cf., e.g.*, Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 593 (1996) (observing that the sanction of fines does not express a clear message of condemnation, in contrast to imprisonment).

457. *See supra* note 50.

458. In contrast to the Massachusetts statute, *see supra* text accompanying note 445, this statute does not criminalize the activity of the nonmarried participant in the adultery. This is a complicated issue separate from that of the individual participants in the relationship, and one I bracket for purposes of this discussion. In addition, on the complex question of the meaning of "sex" in such a statute, see *supra* note 447.

adulterous sex.[459] While the most heartache might be spared by conversation prior to marriage, concerns of "bounded rationality" and changed desires might make this difficult in many cases.[460] At the moment of marrying, when emotions and expectations are high, people may be peculiarly poorly suited even to recognize a possible future desire for nonmonogamy. As Pollock and Maitland famously observed, "Of all people in the world lovers are the least likely to distinguish precisely between the present and the future tenses."[461] As the Divilbiss example in Part III shows, an unforeseen adulterous or potentially adulterous affair may lead a couple to transition into a polyamorous relationship. The criminal law presumably should not interfere with the Divilbisses' decision to make this transition, even if they did not foresee it.

From this perspective, the statute should credit consent given at any point prior to the acts. Nonetheless, to encourage people to have these conversations prior to marriage, couples should arguably be permitted to give durable consent, through a marital agreement, to nonexclusivity. But, because a spouse should be able to consent to extramarital sex at any point up to the time of the sexual act in question (for the reasons discussed above), durable nonconsent should not be permitted. This is an asymmetry, but a defensible one, in light of a party's freedom to leave the relationship if he changes his mind and wants an exclusive relationship but cannot persuade his spouse to change the terms of their marital agreement.[462] The asymmetry tips away from prosecution in a sensible way:

459. Note that the model of contemporaneous (or nearly contemporaneous) consent, while allowing more flexibility over time, gives one spouse the power to control the other spouse's sexual options. This seems less consistent with the poly value of self-possession and more consistent with the principle of monogamy's law that jealousy trumps outside sexual desires and experiences. Introducing a notion of consent aims instead to undermine the absolute assumption that jealousy will exist and thus trump outside sex. Moreover, the alternative possibility created by the statute—of the parties agreeing at the outset to a rule that keeps the criminal law out or provides binding consent, at least with regard to criminal intervention—is therefore a more significant departure from the norm. But, because of the bounded rationality and signaling concerns discussed in the text, both temporal options for consent seem important.

460. *See, e.g.*, Brian H. Bix, *Choice of Law and Marriage: A Proposal*, 36 FAM. L.Q. 255, 270 (2002) (defining bounded rationality as "people's natural inability to calculate rationally or effectively about certain matters" and observing that "[t]here is some argument that the problem of bounded rationality might be particularly important for parties' bargaining about marriage"); Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 254–58 (1995) (arguing, on the basis of bounded rationality concerns, that courts should evaluate prenuptial agreements for "whether, in light of all relevant factors, the parties were likely to have had a mature understanding that the agreement would apply even in the kind of marriage scenario that actually occurred").

461. 2 SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW 368–69 (photo. reprint 1968) (2d ed. 1898).

462. This distinguishes durable consent in this context from durable consent in the context of rape, as does the third-party nature of the consent. Giving up one's power to withdraw consent to a spouse's extramarital sexual activity is not like giving up one's power to withdraw consent to sexual activity with oneself. No nonconsensual physical intrusion into the self is involved in the former; durable consent merely means here that the state will not intervene and criminalize the activity because one spouse has changed her mind.

that is, a person who enters a marriage on the premise of nonmonogamy cannot later be prosecuted for acting on that premise. The person can of course be reasoned with or left by her partner. A statute that expressly permits consent at either point in the relationship—prenuptial or postnuptial—might look like this:

> Statute 2: A married person who has sex with a person not his or her spouse is subject to prosecution unless the married person's spouse consented either to nonexclusivity as part of the marital agreement or to the particular extramarital sexual act.[463]

Statute 2 makes clear that consent may be given prior to or during the marriage, in a blanket or a situation-specific manner. The marital agreement may be imagined in any number of ways—as the spoken or unspoken understanding of the spouses (hard to enforce), as an optional written prenuptial (easier to interpret and enforce, but less easily created),[464] as a mandatory written agreement or perhaps even as boxes that spouses must check on their marriage license (easier to interpret and enforce, but raising concerns about paternalism, unless the parties have the option of checking a box indicating that they make no legal marital agreement about exclusivity).[465]

In one respect, Statute 2 is still coercive. Statute 2 omits an important alternative: the option of leaving the law out altogether. And this is arguably the option most people would want. The political trend has been toward repeal of adultery laws, such that fewer than half the states still have them and more are considering repeal, and the existing statutes are rarely enforced.[466] As a legal matter, adultery is typically of little consequence in the criminal domain.[467] To allow people the option of what the political status quo suggests they want, the statute might need to look more like Statute 3:

> Statute 3: A married person who has sex with a person not his or her spouse is subject to prosecution unless (1) the married person's spouse consented to nonexclusivity as part of the marital agreement, (2) the married person's spouse consented to the particular extramarital sexual act, or (3) the married person's spouse consented to excluding the criminal law from this realm of the marriage.

Statute 3 permits people to choose the option many or most probably want, thus making the option of contracting around the default more complete. Moreover, Statute 3 may obviate the concern that this statute, which attempts to improve individual welfare, paternalistically forces people to make a choice when they may wish not to choose.[468] Admittedly, Statute 3 still forces a choice, to the extent that it requires people to choose not to have the law involved. On the other hand, it does not force the more emotionally charged decision of whether the relationship will be sexually exclusive. The legal precedents for permitting people to opt out of the criminal law are less obvious than those for consent. Some practices with regard to prosecution of domestic violence might provide analogous models.[469] More abstractly, certain legal decisions permit people effectively to opt out of the criminal law. For instance, the decision to marry can make legal what would otherwise be criminal sex with a statutory minor.[470] Statute 3 may, therefore, be a viable statute, which brings together the consent and timing points from Statutes 1 and 2 and also permits people to opt into the current status quo.

The second step of the analysis is to determine the best way to set the default to encourage constructive conversation. The concept of information-forcing default rules, also called penalty defaults, is relevant here. Penalty default rules are an alternative to market-mimicking default rules. In the contracts context, a traditional approach to setting default rules for gaps in contracts has been to try to approximate what the parties would have wanted, in other words, to mimic the market.[471] Ayres and Gertner have importantly argued, however, that parties may be encouraged to reveal more information about their preferences by defaults set to something other than what the parties would have chosen.[472] That is, penalty defaults could encourage parties to share information, to negotiate over their preferences, and to close gaps in their contracts, because there is a penalty to declining to do so. Although Ayres and Gertner focus on efficiency as the primary factor in choices between penalty or

463. A number of questions arise about symmetry. For instance, should the state enforce asymmetrical exclusivity agreements, that is, agreements in which one spouse has permission to have extramarital sex and the other does not? Similarly, should one spouse's adulterous sex (with the consent of the other) create a form of implied consent to the other spouse's adultery, at least within a certain time period thereafter?

464. Though data on prenuptial agreements are hard to obtain because couples are not required to register the agreements, it is estimated that only five to ten percent of marrying couples sign premarital agreements. *See, e.g.*, HEATHER MAHAR, JOHN M. OLIN CTR. FOR LAW, ECON., & BUS., HARVARD LAW SCH., WHY ARE THERE SO FEW PRENUPTIAL AGREEMENTS? 1 (2003), *available at* http://www.law.harvard.edu/programs/olin_center/papers/pdf/436.pdf; Frantz & Dagan, *supra* note 102, at 80 n.12.

465. *See* Sunstein & Thaler, *supra* note 452, at 1189, 1194–95.

466. *See supra* note 50.

467. A general exception to this is the military context, where prosecutions for adultery occur with much greater regularity. *See, e.g.*, Winner, *supra* note 50, at 1073–74 (noting that the military actively enforces its adultery laws); Haggard, *supra* note 50, at 469–70 (noting that the military treats adultery "radically different[ly]" than in civil law, where it is "rarely enforced and seldom prosecuted").

468. *See* Sunstein & Thaler, *supra* note 452, at 1189, 1194–95.

469. *See, e.g.*, ELIZABETH M. SCHNEIDER, BATTERED WOMEN & FEMINIST LAWMAKING 184, 184–88 (2000) (discussing support and opposition among different feminist groups to "the courts' current practice of dismissing cases when the battered woman refuses to participate," and evaluating alternatives to this practice).

470. *See, e.g.*, William N. Eskridge, Jr., *The Many Faces of Sexual Consent*, 37 WM. & MARY L. REV. 47, 56 (1995) (noting that in Virginia, a minor of fourteen can retroactively consent to sex with an adult by marrying the adult (citing VA. CODE ANN. § 18.2-66 (Michie Supp.1995)).

471. *See* Ayres & Gertner, *supra* note 443, at 90–91 (citing authority for what the authors call the "would have wanted" approach).

472. *Id.* at 127–30.

tailored defaults,[473] they also note the relevance of the penalty defaults idea to noneconomic goals,[474] and subsequent work by them and others has built upon its implications in other contexts.[475]

In the context of adultery laws, if we assume that the current regime is what most people want, then an amended adultery statute needs to prescribe a default rule different from the status quo to force the expression of preferences. As discussed above, judging by the current nonenforcement of adultery laws in most contexts, we may reasonably conclude that complete legal indifference to extramarital sex is what most people want from the criminal law. Under the idea of information-forcing default rules, then, the theoretical adultery statute should set the default at something other than nonpunishment of adultery. The last statute discussed, Statute 3, seems to comport with this model.

The form of Statute 3 also seems to suggest a preference for exclusivity, in that it threatens to punish adulterers. This might align it with the move to create "super-marriage" through covenant marriage.[476] From the perspective of penalty default rules, however, the aim is not to compel a particular choice—exclusivity or nonexclusivity—but rather to encourage couples to choose one or the other. The statute is drafted to encourage the more informed party to reveal the information that that party might not otherwise reveal—that is, to encourage the party inclined towards extramarital sexual activity to reveal that inclination. Norms provide the exclusivity-seeking party with an incentive to express his view, but the non-exclusivity-seeking party has a disincentive to express her view. Thus, counterintuitively, the pressure of the law should go with the norm in order to encourage the nonnormative figure to voice the nonnormative intention. Remember, however, that we are imagining a very small penalty, such as a small fine, because the purpose is for the state to encourage discussion, not to express condemnation of adultery.

That said, we still might worry about drafting the statute to require people to opt out of criminally enforced exclusivity rather than requiring them to opt into it. We know that default rules are often "sticky."[477] That is, people may well fail to take the affirmative communicative steps required to opt out of

473. *See, e.g., id.* at 128.

474. *Id.* at 129–30 (discussing, as one example, Justice Scalia's penalty default approach to statutory interpretation in *Agency Holding Corp. v. Malley-Duff & Assoc.*, 483 U.S. 143, 157 (1987) (Scalia, J., concurring), where he applied it to the issue of statutes of limitations in RICO cases).

475. *See supra* note 452 (citing examples).

476. Covenant marriage statutes set stricter criteria for entering into and exiting marriage. *E.g.*, Steven L. Nock, Laura Sanchez, Julia C. Wilson, & James D. Wright, *Covenant Marriage Turns Five Years Old*, 10 MICH. J. GENDER & L. 169, 170–72 (2003). Three states have adopted covenant marriage statutes: Arizona, Arkansas, and Louisiana. ARIZ. REV. STAT. ANN. § 25-901 to -906 (West 2003); ARK. CODE ANN. § 9-11-801 to -810 (Michie 2003); LA. REV. STAT. ANN. §§ 9:272–9:274, 9:307 (West 2000).

477. *See, e.g.*, Sunstein & Thaler, *supra* note 452, at 1175–76; Ayres & Gertner, *supra* note 444, at 1598.

vulnerability to adultery prosecution, even if they and their spouse would both prefer nonexclusivity or at least nonprosecution.[478] Punishing such inaction with the criminal law seems harsh and might well have a normative effect opposite to that intended. That is, people might feel even more pressure to conform to norms of exclusivity.

In addition, information-forcing principles might encourage a different solution than that reached above. As Ayres and Gertner state in a very different context, "gap filling should grow out of one's substantive theory of why particular contracts are incomplete."[479] As discussed above, the person seeking nonexclusivity is more likely both to have private knowledge that we want her to communicate, and not to communicate it because of social pressure, among other things. But presumably she decides not to communicate a desire for nonexclusivity not because there is no later penalty to nonexclusivity or because the penalty is not great enough. To the contrary, the potential penalties for nonexclusivity are great. Her partner may be hurt, she may lose the relationship, and society may disapprove of her choice. In this way, lack of a penalty is not the problem, so further penalties are likely not the solution. And, in this context, penalizing the nonexpression means penalizing the nonnormative behavior as well. Thus, shifting the normative balance of power might be necessary to try to encourage the parties to exchange information more openly.[480] In order to encourage more open, less coercive conversations about exclusivity and nonexclusivity, then, the statute might need to adopt the nonnormative position, and require spouses to opt in to the normative position.[481]

A nonnormative statute also comports with an analysis of the parties' likely "propensity to contract around."[482] Because of normative pressure, bounded rationality, and the potential emotional costs of expressing a desire for nonexclusivity before marriage, we may expect more parties to be willing to contract around a nonnormative statute than a normative one. Lovers are quite inclined to express their eternal and exclusive love for one another, particularly at the time of marriage.[483] Thus, a statute that assumes nonexclusivity and

478. Concerns about the marrying couples not knowing about the adultery statutes and the possibility of opting out could, however, be addressed by providing informational booklets to parties who wish to marry or by requiring local clerks to inform parties directly. The latter approach has been used in the covenant marriage context, though with uncertain success. *See* Bix, *supra* note 460, at 270–71.

479. Ayres & Gertner, *supra* note 444, at 1592.

480. *Cf.* Ayres & Gertner, *supra* note 444, at 1592 (noting "the distribution of bargaining power" as a factor in whether a particular penalty default will lead to efficient contracting behavior).

481. This approach might also be understood to build on what we know about the effect of framing on people's choices. *See, e.g.*, Sunstein & Thaler, *supra* note 452, at 1179–80. Fewer people may be expected to opt out of a regime when the frame of the law comports with existing norms, in part because the law does not prompt them to think outside of the normative box.

482. Ayres & Gertner, *supra* note 444, at 1602.

483. *See supra* text accompanying note 461.

requires people to opt in to exclusivity may lead to more conversations and more relationship agreements that reflect what the parties want. An opt-in statute of this sort might be thus drafted:

> Statute 4: Any extramarital sex by a married person will be treated as consensual and therefore noncriminal unless (1) the married person and his or her spouse committed to exclusivity, enforceable through the criminal law, as part of their marital agreement, and (2) the married person's spouse did not consent to this particular instance of extramarital sex.

As discussed above, the parties may not give durable nonconsent to extramarital sexual activity, so the two requirements here are conjunctive, rather than disjunctive. Statute 4 should be information-forcing because it effectively penalizes the exclusivity-seeking spouse if he fails to discuss and reach prenuptial agreement with his spouse on exclusivity. The penalty if he fails to do so is not a criminal sanction, but rather, the express approval by the criminal law of his spouse's extramarital sex.

As a theoretical matter, then, Statutes 1 through 4 present models of what an information-forcing adultery statute might look like. Far-fetched as such a proposal sounds, the criminal law seems to offer certain advantages for thinking about how the principle of penalty defaults might play out as a conversation-forcing tool with regard to monogamy and its alternatives. First, criminal laws create the occasion for possible state intervention *during* a marriage, rather than only on its dissolution. Second, the automatic application of a criminal statute creates the occasion for law to affect the behavior of all marrying couples, not just the very few who are inclined to write premarital agreements.[484]

That said, the possible harms of using the criminal law in this way likely outweigh the benefits. The criminal law has the capacity to brand people, and sex-crime registries in some states force people to carry that branding with them throughout their lives.[485] Given the various reasons people may have for committing adultery, including the desire to end a failing relationship, or the desire to achieve satisfaction through surreptitious behavior, which both parties might want but could not do if the law forced them to speak up or face criminal prosecution, the state probably should not bring the force of law to bear on people who make certain choices in this domain.[486] Moreover, after *Lawrence*, the constitutionality of criminal adultery statutes is uncertain.[487] Ultimately, then, the criminal law should probably extricate itself from this realm.[488]

The principles of consent-based default rules might be applied in other contexts. For instance, a civil tort law could perhaps be structured to achieve the advantages of the criminal statutes explained above. The civil law of course raises its own host of complex problems, which deserve separate and sustained consideration. In addition, we might want to consider using these principles to try to urge discussion along the numerosity axis. As noted earlier, the adultery statutes reach only a narrow swath of the population affected by monogamy's law, and these laws primarily address only the exclusivity axis of monogamy. The principle that jealousy equals love and that loving relationships are therefore exclusive is, however, foundational to monogamy's law, and thus has framed the particular legal discussion here. In the interests of addressing the numerosity axis, though, another site for possible application of these principles might well be bigamy statutes. In states that prohibit bigamous cohabitation,[489] consent-based statutes might be used to encourage spouses to make agreements about their openness to future domestic partners. The topic of bigamy statutes also raises many complicated issues that deserve further attention. It is my hope that this article will help to prompt future work in these and other areas.

VI.
CONCLUSION

In conclusion, I wish to return briefly to two topics raised in the Introduction: the issue of same-sex marriage, and my invitation, drawing on Adrienne Rich, to monogamous-identified individuals to examine the idea of monogamy as a choice for themselves and for others. For same-sex couples who are now marrying,[490] and those who will marry in greater numbers in coming years, this may be a uniquely fertile time to think critically about the kind of intimate relationships they are forming. The present moment may someday be revealed as the end of an era, the end of a period in which same-sex couples were not subject to precisely the same pressures of compulsory monogamy as straight couples. Moreover, for everyone, regardless of relationship views or status, this monumental debate about marriage presses the question of the proper components—both practical and emotional—of intimate relationships. It is the hope of this article that everyone will take this opportunity to question

484. *See supra* note 464.

485. *See* Conn. Dep't of Pub. Safety v. Doe, 538 U.S. 1 (2003); Smith v. Doe, 538 U.S. 84 (2003). At least some states include relatively minor offenses, such as adultery and voyeurism, among those for which registration is required. *See, e.g.*, Abril R. Bedarf, Comment, *Examining Sex Offender Community Notification Laws*, 83 CAL. L. REV. 885, 888 (1995); Rick Kittel, *K.S.A. 22-4901 et seq.—Offender Registration in Kansas*, J. KAN. BAR ASS'N, June/July 2000, at 28, 36.

486. In addition, there may be an argument that promises of monogamy create the conditions for a kind of "efficient breach"—if parties tell one another that there is one thing the other person could do that would prompt an immediate breach of the relationship, parties can signal an ending to the relationship with that particular behavior alone. Moreover, in addition to adultery's potential to prompt the end (efficient or not) of many relationships that should come to an end, some have argued that adultery may create opportunities for significant experiences. *See, e.g.*, Kipnis, *supra* note 110, at 42. While the injured party may have an interest in preventing that result, the state's decision to side with that partner is more debatable.

487. *See, e.g.*, Lawrence v. Texas, 123 S. Ct. 2472, 2490 (2003) (Scalia, J., dissenting); *supra* note 442.

488. For additional reasons, see *supra* text accompanying notes 435–36.

489. *See supra* note 158.

490. *See supra* note 3.

monogamy "as a 'preference' or 'choice' . . . and to do the intellectual and emotional work that follows . . . ."[491] Monogamy may be both more of a choice and less of a choice than we think, but whether the paradox of prevalence persists in dictating our views of others' relationships is undoubtedly a choice. By depicting the ways that people frequently fail to achieve the ideal of compulsory monogamy, by tracing the ways that polyamorists openly embrace this failure rather than simply falling into it, and by beginning to imagine how the law might be used to encourage people to express monogamy-related preferences to their partners, this article has attempted to shed light on the practice of intimacy and on our conflicted relationship with monogamy's law.

491. Rich, *supra* note 1, at 648 (calling on women to question heterosexuality in this manner).