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Sex Online: Is This Adultery

Christina Tavella Hall

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Sex Online:
Is This Adultery?

by
CHRISTINA TAVELLA HALL*

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Introduction

With the proliferation of computers during the last decade, a majority of the population has become comfortable with high-technology.1 Many people use the Internet2 as a research tool, meeting place, and primary mode of communication.3 Sending memos, letters, and even personal notes via e-mail has become the norm for many, both in Silicon Valley and beyond.4 For some, e-mail has even become an avenue for meeting people and pursuing romance. In January of 1996, the cyber-savvy world received a shock, as e-mail romance reached a new plateau in mainstream acceptance: An online affair became the subject of a divorce suit.

What began as an innocent flirtation between Diane Goydan of New Jersey, and a married man from North Carolina,5 became a passionate online affair conducted in private “chat rooms.”6 Steamy e-mails7 flew fast and furious between Ray,8 whose online moniker was “The Weasel,” and Mrs. Goydan, a suburban mother of two. Though the two lovebirds never met in person and never had any actual physical contact,9 the relationship began to permeate their lives. Mrs. Goy-

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While most adults used home computers primarily as work tools, the rich menu of opportunities the Internet brings into the home is changing all that. Now, many adults tap computers as an avenue to both work and play, spending a growing portion ... on personal e-mail or just surfing the Web.

Id.

2. The Internet is a world-wide network of computers and information. “The Internet is not a physical or tangible entity, but rather a giant network which connects innumerable smaller groups of linked computer networks.” ACLU v. Reno, 929 F. Supp. 824, 830 (E.D. Pa. 1996).

3. See Pat Craig, A Web of Seduction: Virtual Come-Hithers Can Lead to In-the-flesh Affairs, PITTSBURGH POST-GAZETTE, Mar. 12, 1996, at D1 (discussing the 93 million people currently holding e-mail addresses in the United States).

4. “Email is a computer-to-computer version of the postal service that enables users to send and receive messages.” SSI Medical Services v. State, 685 A.2d 1, 6 n.1 (N.J. 1995).


6. Jeffrey Gold, Explicit E-mail Isn’t Adultery Lawyers Say, RECORD, Feb. 8, 1996, at A5. For a more detailed description of how “chat rooms” work, see infra Part III.

7. The parties exchanged “proxy kisses and erotic fantasies.” Craig, supra note 3, at D1. One message sent on Christmas Eve described a raucous scene, “her stockings were hung/ By the chimney with care/ Her bra and his shirt/ were draped from a chair.” Andrew Bilen, Kiss of the Cyber Woman, OBSERVER, Feb. 11, 1996, at 8.

8. Mrs. Goydan’s alleged lover’s last name was not released to the popular press and Mr. Goydan’s complaint referred only to “the Weasel’s” online moniker.

dan spent hours online and began neglecting her job, family, and marriage. She knew the affair had to end, but her husband caught on to her virtual trysts. John Goydan noticed his wife's increased fascination with America Online ("AOL") and watched their monthly charges steadily increase. Finally, after seeing scraps of messages in the garbage, he took matters into his own hands. Mr. Goydan began monitoring his wife's online conversations with "The Weasel" and starting saving them on his hard drive. After eight months, Mr. Goydan confronted his wife with divorce papers. His grounds for divorce? Adultery.

Did Mr. Goydan have a valid claim? The trial court was not forced to decide this issue. However, his situation grows increasingly pertinent as our society becomes more infatuated with romance online. This technological phenomenon begs the question: How far

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10. Gold, supra note 6, at A5. Interestingly, AOL's posted "Rules of the Road" warn members not to "harass, threaten, embarrass or cause distress...to another member or user of AOL or another person or entity." Margaret Mannix, It's a Jungle Out There, U.S. NEWS & WORLD REP., Apr. 29, 1996, at 73 (emphasis added). However, AOL does not closely regulate what is said in chat rooms. See Rebecca Quick, Advertising: AOL Sponsors May Take Hits in Chat Rooms, WALL ST. J., Mar. 5, 1997, at B6.

11. The two spouses shared a single e-mail account, but had separate passwords. The scenario which led to Mr. Goydan's finding of his wife's "affair," and the evidence which resulted, raises many complex evidentiary issues which will not be addressed in this note.


13. Sullivan, supra note 9, at 14 (describing how Mr. Goydan had retrieved several "incriminating" e-mail messages from the hard drive of the couple's computer).

14. Gold, supra note 6, at A5.

15. In addition, Mr. Goydan's divorce claim included extreme cruelty. Craig, supra note 3, at D1. Mrs. Goydan promptly filed counterclaims of invasion of privacy, breach of New Jersey's wire-tapping laws, defamation of character and extreme cruelty. Gold, supra note 6, at A5. Based on a 1991 opinion by the New Jersey Supreme Court, it seems likely that Mrs. Goydan would have prevailed on the wire-tapping claim. M.G. v. J.C., 603 A.2d 990, 994-95 (N.J. Super. Ct. 1991) (opining that in an adultery suit where spouses live together, "a secretive taping of a spouse's calls...is an invasion in the most egregious fashion."). For a more detailed analysis of Mrs. Goydan's privacy interests, see Andru E. Wall, Prying Eyes: The Legal Consequences of Reading Your Spouse's Electronic Mail, 30 FAM. L.Q. 743, 744-52 (1996).

16. Eventually, Mr. and Mrs. Goydan reconciled and dropped all charges against one another. See Henry Gottlieb, High Drama, Low Expectations in 1996, 146 N.J.L.J. 1209, 1209 (1996).

17. See Growing Web Use, supra note 1, at B1 (noting "an Internet poll by Self-Help and Psychology, an online magazine, has drawn more than 100 responses by participants
should the law extend into cyberspace? Examining online infidelity and evaluating its place in the law requires an examination of the legal roots of divorce and, more specifically, adultery.

Looking back to the roots of common law, the advent of the concept of divorce was based in part on the problems which arose when one spouse had sexual relations with someone other than his or her lawful mate. Adultery remained a viable reason for divorce throughout the evolution of the American legal system. Then, with the advent of no-fault divorce in the 1970's and 1980's, many courts abolished the necessity of proving adultery (or any other fault-based grounds) as justification for divorce. However, in recent years, fault-based grounds have had a revival of sorts. In states that never fully codified no-fault divorce, and in other states where legislators are contemplating a return to "family values," fault-based grounds are again gaining popularity.

Should e-mail infidelity be included in modern adultery statutes? Or, in states which continue to employ fault-based divorce, should affairs via e-mail constitute adultery for legal purposes? This note explores the historical roots of these dilemmas in order to analyze this new intersection of technology and marriage. Based on historical criteria, this note concludes that courts are an improper venue for addressing online affairs. Instead, it recommends that this "evolution" in the use of technology remain an issue better left to individuals, their spouses, and perhaps, their online service providers.

Part I of this note explores the history of divorce in the law in order to evaluate online adultery as a valid ground for divorce. This section examines traditional fault-based grounds, their gradual evolution, and partial extinction in divorce law. The recent resurgence in fault-based divorce will be critiqued in light of the support this movement

who said they had e-mail affairs.

18. See Lawrence Stone, The Family, Sex and Marriage in England 1500-1800 33-34 (abr. ed. 1979) (discussing how divorce came about because of marital breakdowns, usually caused by adultery and evolved into a tool used by wealthy men to disentangle themselves from marriages which did not produce a male heir).


21. See Nancy Cleeland, No Fault Divorce on Horizon Again, SACRAMENTO, Jan. 1997, at 13 (discussing how legislative efforts to curb family break-ups is resulting in a trend towards fault-based divorce).

22. See Barbara Bennett Woodhouse, Sex, Lies and Dissipation: The Discourse of Fault in a No-Fault Era, 82 GEO. L.J. 2525, 2531 (1994) ("Fault is neither as outdated nor as invisible as we have made it seem.").
might offer complainants like Mr. Goydan. Part II focuses specifically on adultery as a fault-based justification for divorce. This section will look at the different definitions attached to adultery and the policy reasoning for these distinctions in order to place the Goydans’ situation in the proper legal context. This section also examines the increasing importance of emotional connections in modern-day marriages and how this characteristic might lead to changing ideas about adultery. Part III scrutinizes how these age-old doctrines work in conjunction with the tools and toys of cyberspace. By looking at the technologies available and their potential impact on marriages, the temptations which technology provides for the over-worked and under-sexed marital partner can be evaluated. Part IV highlights older divorce cases analogous to the Goydan case. By examining how courts addressed these non-traditional adultery cases, parallels can be drawn to courts’ possible treatment of virtual affairs in the future. In conclusion, the careful evaluation of these elements will determine that online affairs, though harmful, and perhaps, even fatal to marriage, are not “adultery” for legal purposes and should not be considered adequate grounds for divorce in a fault-based proceeding.

I
Divorce

Mr. Goydan’s complaint sought to take advantage of a highly evolved legal institution: divorce. The basis of this institution pre-dates printing, not to mention computers. The first divorces were granted by the English ecclesiastical courts in the Middle Ages. At that time the two main types of divorce were “absolute divorce” and

24. Jerry Adler et al., Sex in the Snoring 90’s, NEWSWEEK, Apr. 26, 1993, at 54 (discussing the results of recent sex surveys, sociologist Pepper Schwartz is quoted as saying, “(Married) people don’t have sex every week; they have good weeks and bad weeks. But they think, ‘I should be having sex more.’”).
26. This type of suit was created within the system of Canon Law, a legal system set-up in the twelfth, thirteenth and fourteenth centuries by the Romans. This system was centered around courts which based their laws and holding on religious beliefs. These type of courts were separate from English civil courts which handled financial matters. See generally SIR FREDERIC POLLACK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I (S.F.C. Milsom, ed., reprinted London, 1968) (1898).
divorce *a mensa et thoro*. The former allowed parties to remarry, and was granted only in the most extreme circumstances. The latter allowed spouses to live apart, but not to marry again. These types of separations paved the way for modern divorce, but bore little resemblance to its current incarnation.

In the nineteenth century, divorce began to evolve into something similar to current-day divorce. However, a distinction remained between marriages which were void (*void ab initio*) and voidable. Parties to a marriage which was declared void would be allowed an annulment. Thus, they were considered by the church never to have married and were allowed to seek another spouse. Grounds for declaring a marriage void included impotence, bigamy and incest. A voidable marriage afforded the parties less freedom. Parties were not allowed to re-marry and were stigmatized by society.

As the United States began to expand outside the colonies and society became increasingly secularized, divorce began to take a more recognizable form. Though divorce was generally still considered morally questionable by the 1800's, most states had divorce laws which roughly parallel the modern procedure. New Jersey, the Goydans' home state, enacted its first modern divorce law before the turn of the century. The principal distinguishing feature of divorce from this period until the late 1960's was the importance of the proper "grounds" for divorce. In order to be granted a divorce, one spouse had to present a specified reason why the court should dissolve the marriage in question. Appropriate grounds included adultery, cruelty, desertion, willful non-support, criminal conviction, drunkenness, drug-addiction, and insanity. In order for a divorce claim to succeed on any of these arguments, the plaintiff had to provide proof of the alleged fault. The other spouse could then rebut these claims with

28. The Matrimonial Causes Act, which was passed in Great Britain in 1857, allowed judicial divorce. This Act followed in the footsteps of legislation previously enacted in the United States. See FREIDMAN, supra note 19, at 181.
30. FREIDMAN, supra note 19, at 181.
31. All the New England states, New York and Tennessee also had divorce laws on the books. *Id.*
32. HOMER H. CLARK, JR., LAW OF DOMESTIC RELATIONS 327-58 (1968).
33. Proof of adultery in fault-based divorce included showing of opportunity and dis-
specified defenses. These defenses included recrimination, condonation, connivance, and collusion. Without proving one of these grounds and overcoming any defenses presented, a person could not be granted a divorce. However, if one spouse was found to be “at fault,” the rights regarding custody, property settlements, and alimony were heavily impacted. These same considerations shaped Mr. Goydan’s cause of action.

This resulted in harsh consequences for many women found “at fault,” some of whom were ill-equipped to support themselves, and were often shunned by society. Additionally, couples’ reticence to air their “dirty laundry” in a trial left many stuck in horrible marriages. For these reasons, and many others, a movement arose in the 1970’s and 1980’s towards a “no-fault” divorce. This procedure cast aside the traditional requirement of proving some “sin” by a marital partner. Instead, parties made a pleading of “irreconcilable differences” or “irretrievable breakdown.” When California first adopted the irreconcilable differences standard in 1969, the initial public outcry was deafening. Politicians, religious and community leaders saw this standard as the beginning of the collapse of the institution of marriage. However, in a slow and painstaking process,

position to commit the offense. This standard will be discussed in more detail in Part II, infra. This note will not address adultery as a criminal act.

34. Courts found recrimination when both spouses were determined to be at fault. Courts found condonation when one spouse was determined to have forgiven the other for any actions in question. Connivance is defined as the willful participation of one spouse in the other spouse’s wrongful conduct. Collusion barred a divorce if an agreement was found between spouses who were seeking a divorce. WEISBERG, supra note 29, at ch. 5, pp. 25-34.


36. Mr. Goydan sought custody of the couple’s two small children and a property settlement.


38. Barbara Bennett Woodhouse, Property and Alimony in No-Fault Divorce (II), 42 AM. J. COMP. L. 175, 175 (1994) (noting that almost all states allow couples to divorce in certain circumstances without a showing of fault).


42. WEISBERG, supra note 29, at ch. 5, pp. 35-36.
other states began to adopt this standard. Today, most states have some form of no-fault divorce.43

Mr. Goydan could have based his suit on a no-fault standard;44 however, he chose fault-based grounds for many of the reasons that still exist in several states.45 States generally fall into one of three categories in terms of their approach to divorce. The first approach, as seen in states including California, employs a completely fault-free standard. A second approach, as seen in many states,46 including New Jersey,47 uses no-fault divorce as one of the grounds for divorce. In these jurisdictions, traditional fault-based grounds of divorce which include adultery, cruelty and desertion can still be alleged.48 Finally, Missouri takes a distinctive approach to divorce by allowing no-fault divorce only upon mutual agreement of the parties.49 If no agreement is reached, the fault-based grounds can be used as a basis for divorce.50 This patchwork of legal theories shows the divergence of thought on the subject of divorce and the grip which fault-based grounds still has in the legal community. For the purposes of this note, the latter two jurisdictions are of primary interest.

Regardless of the so-called "no-fault revolution,"51 fault still plays a crucial role in almost all divorce cases in determining custody, property, and maintenance.52 A spouse found guilty of adultery, cruelty or some other fault, even in a no-fault state, is more likely to pay a higher amount of support and less likely to gain sole custody of any chil-

45. See Woodhouse, supra note 38, at 175.
48. Woodhouse, supra note 22, at 2532 (labeling these jurisdictions as "hedged no-fault" systems).
50. Id.
52. See Jana B. Singer, Alimony and Efficiency: The Gendered Costs and Benefits of the Economic Justification for Alimony, 82 Geo. L. J. 2423, 2425 (1994) (Asserting that maintenance, also known as "spousal support" or more traditionally as "alimony," became more problematic with the advent of no-fault divorce). See also Woodhouse, supra note 22, at 2528 ("Although fault plays a diminishing role in the right to exit an unhappy marriage, it still figures significantly in the economics of marriage dissolution.").
These were all considerations cited by Mr. Goydan's attorney as justification for his claim. Critics also argue that the perception that no one party is "at fault" in a divorce may do a disservice to many. Specifically, battered women and parties who have diminished funds due to the other spouse's support of an illicit affair, have been portrayed as deserving a greater share of property. Additionally, many observers feel that the wayward spouse deserves a greater degree of blame. For these reasons, many legal commentators and legislators have argued for the re-enactment of fault-based grounds in divorce cases.

The current political fascination with "family values" is also increasing interest in returning to fault-based grounds. As the sociological pendulum swings back towards "traditional" values, courts and commentators are more willing to "punish" unfaithful spouses, and less likely to grant divorces based solely on what are viewed as trivial differences. Due to this ideological retrograde, it seems unlikely that states which still employ fault-based divorce in some capacity are likely to adopt a fault-free stance in the near future. Whether these states should expand their definitions of fault to include adultery via e-mail depends on many variables. Many of these variables are shaped by aspects of cyberspace which the law has yet to address. Thus, in addition to perceptions about divorce, ideas about adultery and technology must also be considered.

53. See generally Woodhouse, supra note 22.
54. Craig, supra note 3, at D1.
56. Woodhouse, supra note 22, at 2529-30.
57. Weisberg, supra note 29, at ch. 5, pp. 52-60.
59. See Ellman, supra note 37, at 775 (discussing "the thread of modern family law scholarship that looks fondly on the law's role in vindicating moral values is naturally sympathetic to consideration of fault."). See also Carl E. Schneider, Moral Discourse and the Transformation of American Family Law, 83 MICH. L. REV. 1803 (1985).
60. This seems to contradict the reasons why many states enacted no-fault provisions initially. See Bigelow v. Bigelow, 308 N.Y.S.2d 618, 620 (1969) ("[T]he new divorce law is intended to eliminate frictional marriages.").
II
Adultery

"Thou shalt not covet thy neighbors' wife."61 The seventh commandment is viewed by many as the first adultery law.62 In fact, this biblical decree's emphasis on emotional sin, rather than the physical, could be viewed as support for more esoteric standards for adultery. Mr. Goydan argued that the law should condemn the spirit of adultery, whether via e-mail or hard copy, because of the effect this infidelity had on him emotionally, not because of the physical betrayal.63 However, this 90's twist on sin does not correspond to any codified secular law since Moses left the Mount.64

Early on, adultery was characterized as theft. Prior to the passage of the Married Women's Property Acts during the late nineteenth century,65 women were considered the "property" of their husbands. Thus, a man who committed adultery was convicted of theft.66 He was considered to have stolen from the woman's husband.67 Historically, the law harshly punished the wayward spouse for "lying"68 with another man's wife.69 The offender might suffer social ostracism, and in some situations, death.70

61. Exodus 20:17. A biblical definition of “Adultery” is “the lying with the wife of another man.” Deuteronomy 22:22. Support for the premise that the Bible condemns emotional as well as physical adultery is seen in Matthew 5:28, “everyone who looks at a woman lustfully has already committed adultery. . . .” Craig, supra note 3, at D1.

62. This premise may be incorrect, since evidence exists that early adultery laws were based on Ancient Roman laws of theft, which may have been meant to encompass this act. Weinstein, supra note 25, at 199-200.

63. Mr. Goydan also made a claim of extreme cruelty based upon his wife's “affair.” Gold, supra note 6, at A5.

64. Referring to the biblical story of Moses's presentation of the Ten Commandments. Weinstein, supra note 25, at 207 (discussing how prior to the spread of Christianity in England, during the eight and ninth centuries, adultery was considered a "wrong against the husband.").

65. WEISBERG, supra note 29, at ch. 3, p. 20.

66. This concept has its roots in Roman Law. Weinstein, supra note 25, at 238. It has since been completely abolished because of the modern idea articulated by one court in the following manner, “spousal love is not property subject to theft.” Fundermann v. Mickelson, 304 N.W.2d 790, 794 (Iowa 1981).

67. This might also help to explain why early divorce laws in England specified that the third party also be married, in order for adultery to have been committed. MICHAEL E. MAYER, DIVORCE AND ANNULMENT IN THE FIFTY STATES 4 (1967).


69. The double-standard which pervaded much of the law surrounding adultery from
As divorce became more widespread, adultery had to be defined in more concrete terms. In New York, where adultery was the only grounds for divorce until 1967, the elements of this crime were set-out succinctly as voluntary sexual intercourse of a married person with someone other than their spouse.\textsuperscript{71} In most states, in order to prove adultery in a divorce proceeding, the wronged spouse had to show both the opportunity and the disposition to commit this offense. These elements were often proven by “circumstance, implication, or espionage.”\textsuperscript{72} Unlike Mr. Goydan’s indisputable computer disks, evidence prior to the computer age took murkier forms: hotel registers,\textsuperscript{73} testimony of household help, venereal disease,\textsuperscript{74} or, in some cases, children who did not resemble their legal father.\textsuperscript{75}

In more recent times, divorce statutes commonly specify that adultery required “intercourse.” A 1967 legal textbook on the subject specified that adultery must include sexual intercourse:

‘Sexual intercourse’ involves the full and complete meaning of that term. Mere intimacies or ‘making out’ (as it is currently phrased), ‘necking,’ or ‘petting’ (so called in the author’s generation) are quite insufficient. There must be physical penetration by the male organ into the female to constitute adultery, even though emission is not necessary.\textsuperscript{76}

There are many critics of this literal standard.\textsuperscript{77} Christian fundamentalists and legal scholars argue that definitions of adultery should be expanded beyond traditional definitions.\textsuperscript{78} Despite these advocates, courts have been slow in extending the legal meaning of adultery.

Roman times on will not be addressed in detail. For more on this subject, see ANNETTE LAWSON, AN ANALYSIS OF LOVE AND BETRAYAL 41-43 (1988) (tracing bias against women in adultery laws from ancient times).

\textsuperscript{70} See STONE, supra note 18, at 396 (explaining the Puritan’s cruel treatment of adulteresses).

\textsuperscript{71} N.Y. DOM. REL. LAW § 170 (McKinney 1967).

\textsuperscript{72} MAYER, supra note 67, at 6.

\textsuperscript{73} See Lickle v. Lickle, 52 A.2d 910, 911-12 (Md. 1947) (holding maid's testimony and hotel registration on trips as providing clear and convincing evidence of adultery).

\textsuperscript{74} See JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF DIVORCE § 632 (Vol. II) (6th ed. 1881).

\textsuperscript{75} See RICHARD H. CHUSED, PRIVATE ACTS IN PUBLIC PLACES: A SOCIAL HISTORY OF DIVORCE IN THE FORMATIVE ERA OF AMERICAN FAMILY LAW 29 (1994) (noting cases of the birth of mixed-race children to white women as prompting divorce in slave-owning households).

\textsuperscript{76} MAYER, supra note 67, at 5.

\textsuperscript{77} See Michael J. Wreen, What's Really Wrong with Adultery, in THE PHILOSOPHY OF SEX 59 (Alan Soble, ed., 2d ed. 1991).

\textsuperscript{78} See Munro, supra note 9, at E1 (discussing opinions of religious personnel and other community members).
Cases have been spilt as to whether same-sex acts constitute adultery, although the modern trend seems to lean towards abolishishment of gender distinctions.

Over the past twenty years, case law has remained divided on whether a coital act is required for a finding of adultery. Some courts follow the British practice of considering non-coital acts adultery. For example, in *Bonura v. Bonura*, a Louisiana appellate court found Mrs. Bonura guilty of adultery despite the lack of sexual intercourse. Basing their holding on a broad interpretation of the state’s adultery law, the court determined that Mrs. Bonura’s kissing, hugging and foreplay constituted adultery, despite the absence of penetration. Despite Mrs. Bonura’s contention that sexual intercourse was needed in order to find adultery, the court held, “Louisana law and jurisprudence does not define adultery per se.... [Thus] we conclude that adultery, as grounds for divorce ... is not limited to actual sexual intercourse.”

Similarly in *Commonwealth v. Bucaulis*, the term “sexual intercourse” was found to encompass acts of “a variety of sexual conduct,” including oral sex. Though *Bucaulis* was not a divorce case, the court’s reasoning is applicable to this family law context. Holdings of this sort are seminal to the analysis of online affairs, where traditional sexual intercourse never occurs. However, in the aforementioned cases, there was physical contact of some sort, a fact which distinguishes the purely electronic caresses which Mrs. Goydan exchanged with “The Weasel.”

Mr. Goydan and his counsel argued that adultery should not be confined to the physical act, but that infidelity should encompass emotional and technological dalliances as well. This extension of traditional law may reflect the attitudes of many spouses, especially

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80. WEISBERG, *supra* note 29, at ch. 5, p. 11.

81. *Id.* See RAYDEN ON DIVORCE 182, ¶ 23, n. (b) (6th ed. 1953). *Cf.* Cundy v. Cundy, 1 W.L.R. 207 (1956) (holding that a flirtation and kissing was not sufficient to revive case of adultery).

82. 505 So.2d 143, 144 (La. Ct. App. 1987).

83. *Id.*

84. *Id.*


86. Langton, *supra* note 5, at 5 (quoting Richard Hurley, Mr. Goydan’s lawyer, “I know how the dictionary defines adultery, but technology has a way of changing definitions.”).
wives. Increased concern with emotional fidelity may be due to the waning of factors which historically stigmatized physical adultery: religious condemnation, and dilution of the inheritance due to "spurious offspring." With the general relaxation of the church's role in society, and the advent of cheap and effective birth control, these factors lack pertinence for many couples.

Conversely, the emotional aspects of marriage have endured throughout time. Some sociologists argue that this aspect of marriage has gained increasing importance in the last few decades. Thus, perhaps, the time has come for the law to prohibit more cerebral violations of the marital relationship. Would this, as Mr. Goydan seems to suggest, include only e-mail liaisons which progressed into physical meetings? Or could a rating system be created to address the level of intimacy in an online chat? How would video, audio, and other types of transmissions affect cases of this sort? In order to consider the implications of expanding divorce law in this way, the technology involved must be understood.

87. In a study by psychologist David Buss, 45% of women surveyed said that emotional betrayal was more upsetting than sexual betrayal, as opposed to 30% of men. Sharon Begley, Infidelity and the Science of Cheating, NEWSWEEK, Dec. 30, 1996, at 56.
88. See Weinstein, supra note 25, at 218.
89. See Lawson, supra note 69, at 41-49 (discussing the Western European custom of patrilineal inheritance as contributing to legal concerns that any children born were the biological offspring of their mother's husband, and thus, were deserving of property).
92. Despite the diminished role of the church in American society in general, many religious advocates are vocal in their disapproval of adultery, both physical and emotional. See, e.g., Munro, supra note 9, at E1 (quoting Russell Willingham of New Christian Ministries).
94. Langton, supra note 5, at 3 (Mr. Goydan's lawyer explains, "we know that in the course of transmissions, they would go into private rooms; we can only assume the next step.").
III
Technology

Technology has become such a pervasive force in our society, it is little wonder that spouses who are bored, dissatisfied, or just plain curious about the Internet have turned to their computers as a social outlet. The computer provides a fast, easy, and safe method by which relationships can be built. There are a myriad of options online for people to communicate and interact, some of which might lead to romance, as was the case with Mrs. Goydan. Here is a brief synopsis of a few of the most commonly used modes of online tete-a-tetes.

A. E-mail

E-mail, the common abbreviation for "electronic mail," is the form of electronic communication most similar to old-fashioned correspondence. The sender of an e-mail simply addresses any message to the private e-mailbox of the intended recipient, and it is sent via the Internet, a closed network, or a commercial online service. Since many people now have e-mail addresses provided by their employers, this is an accessible and easy-to-use tool. E-mail messages are also, for the most part, private, so timid users are not forced to face the critique of others who might be participating in a public electronic forum.

95. Edward Wenk, Jr., Techno-sin—With Every Scientific Advance Comes the Temptation of Sin, SEATTLE TIMES, Mar. 10, 1996, at B5 (arguing that with the development and increased use of technology there are negative effects, like child pornography on the Internet or hacker sabotage, which if left unchecked will supersede technology's positive impacts).

96. SHERRY TURKLE, LIFE ON THE SCREEN: IDENTITY IN THE AGE OF THE INTERNET 9 (1995) ("the computer offers us... a new medium on which to project our ideas and fantasies.").

97. Id. at 240, 244 (noting that virtual sex is a safe alternative to the real thing, and may provide a sexual alternative in an era plagued by sexually-transmitted diseases).

98. Id. at 21 (a variety of virtual worlds "from MUDs to computer bulletin boards allow people to generate experiences, relationships... that arise only through interaction with technology.").


100. Id. Popular commercial online services include America Online, CompuServe, Prodigy, and the Microsoft Network.

101. Craig, supra note 3, at D1 (explaining that experts agree that many "real-life affairs" begin with interoffice e-mail). Considering that over twenty million Americans now have an e-mail address provided to them by their employer, the office may become a hotbed for relationships. Larry O. Natt Gantt, II, An Affront to Human Dignity: Electronic Mail Monitoring in the Private Sector Workplace, 8 HARV. J. L. & TECH. 345, 348 (1995).
B. News Groups, Message Boards, and Forums

Analogous to electronic bulletin boards, messages sent to forums, message boards, or news groups (as they are labeled on the Internet), are "tacked-up" in a specific area online. These areas are usually labeled by different interests. Once a user has posted a note, the user can log-in later on to see who has responded to the posting.

C. Chat Rooms

Chat rooms are forums for electronic conversation, usually set-up by commercial online services. Since "chatting" occurs in real-time, chat rooms, like cocktail parties, can be quirky and outrageous, or slow and banal, depending on who is taking part in the conversation. Additionally, since this is a public setting, there is standard etiquette about how to participate. It is within this type of setting that Mrs. Goydan and "The Weasel" met. Shortly thereafter, they splintered off into a "private" chat room, the online equivalent of an intimate rendezvous.

D. Bulletin Board Systems

Bulletin Board Systems (BBS's) are a smaller and less expensive version of chat rooms which allow real-time conversation via the Internet. BBS's, like news groups or many chat rooms, are categorized for certain interest groups or subject matter. Because BBS's are not run for profit, they may be less polished and more confusing than commercial chat rooms.

103. News groups, message boards, and forums cater to every possible interest, ranging from car repair to foot fetishes to Republican politics. As of December 1996, four of the ten most popular news groups were sex-oriented. Craig, supra note 3, at D1.
104. "Chat-room discussions are often scatterbrained exchanges focusing on the lurid, the kinky and the just plain sophomoric." Quick, supra note 10, at B1. See also ARTHUR KROKER & MICHAEL A. WEINSTEIN, DATA TRASH: THE THEORY OF VIRTUAL CLASS 14 (1994) (the Internet "mirrors back to us the human condition in all its boredom and banality.").
106. Id. at 96-98.
107. Gold, supra note 6, at A5.
108. KINKOPH, supra note 99, at 11.
109. Id. at 84.
E. What's Next: Animation, Video-Conferencing, Virtual Reality

Due to the dizzying speed of computer innovation, the above list does not even begin to present a comprehensive synopsis of technologies which could be used to “cheat” in some way. The ever-increasing amount of new technology also creates a huge problem for courts. Those who are trained in the law can hardly be expected to knowledgeably evaluate every use of hardware and software.

Technologies abound which make interacting with others online as enticing as meeting them in real life, or more so. E-mail with graphics capabilities allow users to create animated representations of themselves, that can interact with other “characters” in a chat room, while users simultaneously type e-mails. Video conferencing allows people to see and talk with their correspondents whether they are in the next room or the next time zone. Developments in virtual reality allow computers to stimulate physical sensations in surreal environments. High cost and limited availability of technology are probably the biggest reasons why we have not yet seen all these products cited in divorce cases.

All these technologies could be used in one way or another to experience a unique relationship. In many ways online relationships mimic “real” affairs. Online interactions can be much more exciting than casual acquaintances. Users of online technologies cite a lack of inhibition and a feeling of intimacy with their online companions.

110. Conversely, these same technological innovations provide more ways for a suspicious spouse to catch an adulterer. See Gold, supra note 6, at A5 (quoting the chairman of the family law section of the New Jersey State Bar Association, “We’ve had many cases regarding interception of telephone conversations, and videotaping people who were in the act.”). All these practices present increasingly complex evidentiary issues for family law courts to decipher.

111. This phenomenon is not limited to the legal profession. With product life cycles averaging three months in the high-technology industry, a comprehensive understanding of all new technologies is virtually impossible.

112. TURKLE, supra note 96, at 13.


114. In 1994, a San Francisco couple used this technology in the world’s first “virtual reality wedding.” Bob Macintyre, Couple Transported to Virtual Matrimony, THE TIMES (London), Aug. 22, 1994. This event seems to suggest that virtual reality affairs can’t be far behind; however, the difference being that the marriage was legal because it was supplemented by a traditional marriage license and solemnization.

115. Mr. Goydan’s lawyer stated that, “computer networks like AOL and the Internet allow people to communicate so intimately that they can develop passionate relationships with people they’ve never met face to face.” All Things Considered (NPR radio broadcast, Feb. 12, 1996).
Many users feel comfortable discussing topics and feelings which they would be shy about mentioning face-to-face. The lack of physical proximity also makes deceptions easier to conceal. Gender, age and appearance are all fluid variables on the Internet.

Online interactions may also result in some of the same problems brought about by less virtual affairs. Users spend large amounts of time online rather than with their real life spouses. They may spend money on online charges, faster modems and advanced software, which could be spent on their spouse or household. Most importantly, real life spouses may feel ignored or shunned due to their partner's interest in a virtual affair. However, an online affair never raises questions of paternity or causes innocent spouses to be infected with sexually transmitted diseases.

Due to these distinctions, online affairs may not merit legal intervention. Though computer relationships inhabit a gray area of morality and family law, courts do not have a legitimate reason to become involved in this area. Exchanging e-mail does not result in consequences which raise a substantial government interest, despite the hurt feelings of spurned spouses.

IV
Case Studies

Mr. Goydan's charges broke new ground in the area of family law and in the area of technology. Existing case law does not provide a quick or easy answer for any court. In fact, New Jersey's adultery statute has never been used in a case where there was no physical contact. This leads us to examine adultery cases in which the defendant spouse's actions were not "adultery" in the traditional sense. Based on

117. TURKLE, supra note 96, at 210-11.
118. See Richard Barry, High Cost of Loving: Star-crossed or Wires-crossed? Richard Barry On Love in Cyberspace, THE GUARDIAN (London), Nov. 21, 1996, at 12 ("a spotty 18-year-old schoolboy can become a musclebound hunk from Baywatch.").
119. See Dan Parks, Growing Obsession: Internet Has Hold on Many, One Woman Left Spouse Over On-line Romance, MILWAUKEE J. SENTINEL, Apr. 22, 1996 at 1 (describing "Internet Addiction" as a documented sickness which is characterized by spending excessive amounts of time on the Internet and often leads to divorce).
120. Monthly charges for obsessive users can run into hundreds of dollars. KINKOPH, supra note 99, at 207.
121. Shellenbarger, supra note 1, at B1.
122. All Things Considered, supra note 115.
these cases, it seems unlikely that courts would expand the definition of adultery to Mrs. Goydan's affair.

In Maddox v. Maddox, Alabama's appellate court held that love letters alone do not constitute adultery.\(^{123}\) In this divorce suit, Mrs. Maddox accused her husband of adultery based on love letters which she found in his briefcase.\(^{124}\) The husband argued that the trial court's finding of adultery based on the letters was an abuse of discretion.\(^{125}\) The appellate court held that "[t]he letters do not show any adultery on the part of the husband, or even rise to the level of supplying evidence supporting a finding of adultery."\(^{126}\) Though the court did not define what might constitute the type of letter that could supply evidence, the opinion is unequivocal. In order to find adultery, the court required something more than love letters to prove the charge.\(^{127}\)

Love letters which merely act as supplemental proof that a physical act occurred are different from correspondence without this link. In Jonitz v. Jonitz, a New Jersey case, the court allowed love letters as evidence of adultery, when the letters were included along with a plethora of other evidence.\(^{128}\) The spurned Mrs. Jonitz offered a log of her husband's absences during the night, photographs of him with his girlfriends, theater ticket stubs, and other items, the piece de la résistance being a set of 16 consecutive love letters.\(^{129}\) In Jonitz, the court found the written documents valid evidence of adultery; however, it is clear that this evidence went toward proving that the husband and his paramours had been physically intimate.\(^{130}\) The love affairs in question were not based on the letters, but vice versa. Thus, the physical act of adultery was a factor distinguishing Jonitz from Maddox and in fact from the affectionate e-mails shared by Mrs. Goydan and "The Weasel."

However, in a recent New Jersey case, the dicta seems to open the door to the possibility for adultery convictions not based on a

\(^{124}\) Id. at 612.
\(^{125}\) Id.
\(^{126}\) Id.
\(^{127}\) Id. ("Proof to support the charge of adultery must be such as to create more than a suspicion. It must be sufficiently strong to lead the guarded discretion of a reasonable and just mind to the conclusion of adultery as a necessary inference.") See also Boldon v. Boldon, 354 So. 2d 275, 276 (Ala. Civ. App. 1978).
\(^{128}\) 96 A.2d 782, 785 (N.J. 1953).
\(^{129}\) Id.
\(^{130}\) Id.
physical act.\textsuperscript{131} In \textit{S.B. v. S.J.B.}, the court evaluated the importance of the effects of adultery on the other spouse, regardless of the physical acts undertaken:

All laws dealing with the termination of a marriage must first be looked at through the eyes of the injured spouse ... An extramarital relationship viewed from this perspective is just as devastating to the spouse irrespective of the specific sexual act performed by the promiscuous spouse or the sex of the new paramour.\textsuperscript{132}

This reasoning begins to open the doors for Mr. Goydan and other unfortunate spouses like him. However, since the case was decided based on the extramarital actual sexual act of the wife coupled with the rejection of the spouse, not her husband’s hurt feelings or emotional pain, it does not set a clear precedent.\textsuperscript{133}

\section{Conclusion}

Despite the very real side-effects of online affairs, traditionally the American legal system has based a finding of guilt on actions, not thoughts.\textsuperscript{134} A computer user flirting online may be thinking about committing adultery, but that does not meet the legal standard. However, other types of online crimes have been treated as if the same illegal action had been completed outside the virtual realm. Courts have held liable persons found guilty of hacking, defamation, plagiarism, and various other types of fraud perpetrated on the computer. What makes adultery any different? The difference is that with these crimes, courts are not delving into the emotional and sacrosanct realm of family law.

The historical roots of family law do not support “virtual” adultery as grounds for divorce. Though it is important that the law not stagnate, modernizing the law to encompass this type of infidelity

\begin{itemize}
  \item \textsuperscript{131} S.B. v. S.J.B., 609 A.2d 124, 126 (N.J. Super. 1992).
  \item \textsuperscript{132} Id.
  \item \textsuperscript{133} In \textit{S.B. v. S.J.B.}, the court held that the crux of adultery under the law was the physical act. The court decided that the homosexual affair of the wife was adultery within the meaning of New Jersey’s divorce statute. After tracing the roots of the meaning of adultery from biblical times, the court determined that homosexual activity constituted “carnal knowledge” and thus, adultery. In citing to both the criminal definition of “sexual penetration” and divorce cases where oral sex constituted adultery, the court based its holding on the existence of physical sexual contact between the accused spouse and her lover. Id. at 125-27.
\end{itemize}
would be extending the long arm of the law too far into citizen's private lives. The legislation of morality, though it has been undertaken by courts in the past, is something which should be avoided. The court's intervention in the areas of sexual activity and marriage should be limited only to the most egregious situations. Anything more would contradict our most fundamental notions of liberty.

Online affairs, to a reasonable extent, 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. Additionally, the limitations of the computer screen, despite cutting-edge technology, keep online affairs from threatening families and marriages to the extent which a real affair might. Thus, the state does not have a valid interest in condemning this activity.

This note has examined the implications of adultery between consenting adults. When both parties involved in an online chat are involved of their own volition and have reached the age of majority, the state has no substantial interest in monitoring their private conversation. In trying to set legal parameters in this area, the state intrudes on individual and to some extent, marital privacy.

Adultery as a fault-based ground for divorce is based on one spouse's physical intimacy with someone other than their marital partner. This definition should not be read broadly or explicitly ex-


136. See Palko v. Connecticut, 302 U.S. 319, 325-26 (noting rights "implicit in the concept of ordered liberty," which if sacrificed "neither liberty nor justice would exist.").

137. In a few bizarre cases; however, e-mail affairs have inflamed spouses to the point of violence. See Dan Parks, Growing Obsession, MILWAUKEE J. SENTINEL, Apr. 22, 1996, at 1 (reporting battery charge against husband who attacked wife due to online affair); Tim Standage, Connected: Putting Your Life Online - It's the Same Old Love Story, DAILY TELEGRAPH, Feb. 11, 1997, at 4 (reporting woman stabbed to death by husband because she exchanged e-mails with a radio talk show host).

138. However, the state may have a substantial interest in obscenity or pornography laws, issues of national security, or other variations on this scenario.

139. In discussing the privacy interests deemed to be protected by the United States Constitution (despite the absence of any mention of "privacy" explicitly in the document's text), courts have focused on two main areas. The first is an individual protection against the disclosure of personal information. Whalen v. Roe, 429 U.S. 589, 599 (1977). "This is most often described as 'the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.'" Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). The second type of privacy is the right to make certain important decisions and to engage in certain kinds of conduct. This allows individual autonomy in the areas of "marriage, procreation, contraception, family relationships, child rearing, and education." City of Sherman v. Henry, 928 S.W.2d 464, 467-68 (Tex. 1996).
expanded to cover the ephemeral sphere of emotional or virtual infidelity. E-mail is not physical intimacy, and absent major technological advancements it lacks many of the pitfalls which accompany infidelity. For this reason, in Mrs. Goydan's case, and in other incidences of online adultery, a “proxy kiss” is not just a kiss, it is less.140

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