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Book Review



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Book Review: Adultery: Infidelity and the Law, by Deborah L. Rhode

Abstract

Despite being against the actual act of adultery, Deborah Rhode, the Ernest W McFarland Professor of Law and Director of the Center on the Legal Profession at Stanford University, makes a shockingly compelling argument for abolishing all laws that criminalize adultery in America. Rhode has written the first book of its kind—“the first comprehensive account of adultery and its legal consequences in the United States.” Weaving through various scenarios in which pro-adultery law arguments might be made, Rhode concludes that “laws governing adultery have grown more anachronistic.” Upon navigating the first few pages of Rhode’s book, one may prematurely dismiss her thesis; perhaps attributing the argument against punishing adulterers to an author with little respect for longstanding customs and traditions. However, Rhode does in fact take into account various traditionalist views, embraces them, and by the end of the book, convinces readers that notwithstanding the toxic essence of adultery, existing laws that criminalize adultery can be substantially harmful too.

Book Review

***Adultery: Infidelity and the Law*, by
Deborah L Rhode¹**HANA BELL²

DESPITE BEING AGAINST THE ACTUAL ACT OF ADULTERY, Deborah Rhode, the Ernest W McFarland Professor of Law and Director of the Center on the Legal Profession at Stanford University, makes a shockingly compelling argument for abolishing all laws that criminalize adultery in America. Rhode has written the first book of its kind—“the first comprehensive account of adultery and its legal consequences in the United States.”³ Weaving through various scenarios in which pro-adultery law arguments might be made, Rhode concludes that “laws governing adultery have grown more anachronistic.”⁴ Upon navigating the first few pages of Rhode’s book, one may prematurely dismiss her thesis; perhaps attributing the argument against punishing adulterers to an author with little respect for longstanding customs and traditions. However, Rhode does in fact take into account various traditionalist views, embraces them, and by the end of the book, convinces readers that notwithstanding the toxic essence of adultery, existing laws that criminalize adultery can be substantially harmful too.

Rhode begins with a comprehensive analysis of the legal history around adultery and its current state in the law. Very early on, Rhode begins to wrangle with the non-believers with her first argument against adultery laws. She writes that “[b]y the late nineteenth century, the most significant legal deterrent to

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1. (Cambridge, Mass: Harvard University Press, 2016).
 2. JD Candidate 2019, Osgoode Hall Law School.
 3. Rhode, *supra* note 1 at 1.
 4. *Ibid* at 184.

adultery was no longer criminal prohibitions, but rather a fault-based divorce system that punished an adulterous spouse through financial penalties and *denial of child custody*.⁵ She continues to persuade by explaining that adultery could be a factor in assessing “good moral character” in “employment and immigration contexts.”⁶ She elaborates that having an adulterous past even has the possibility of barring citizenship. Rhode sprinkles this chapter with an abundance of little-known facts and draws parallels between reality and pop culture to help readers visualize her descriptions of her interviewees’ experiences.⁷

Rhode occasionally generalizes, such as when she claims that “[f]or men, infidelity is rooted in the desire to mate with as many women as possible to ensure that their bloodline survives.”⁸ This all-encompassing statement fails to recognize that an adulterous affair could take place between two men, in which case there would be little room to find the motivation being bloodline survival. Rhode covers a broad range of topics within her book, most of which are covered further in depth in their own individual chapters.

Rhode draws readers in at the outset by making statements that entice readers to believe that adultery laws should be repealed, but also consistently reiterates that “disapproval of infidelity has increased” generally in the country.⁹ This leaves readers wondering, if the disapproval of infidelity has increased, why should the laws around infidelity decrease? This thought is strengthened when Rhode mentions that children can also be casualties of adultery. She writes that

[y]oung children need more time and attention, so they are particularly vulnerable to neglect. Older children are more likely to learn about the affair and to be forced to take sides or be drawn into parental conflicts. A child who carries a secret can ‘blackmail the unfaithful parent,’ which, experts note, is ‘an extremely destructive way for children to learn about power.’¹⁰

5. *Ibid* at 3 [emphasis added].

6. *Ibid*.

7. See e.g. Rhode’s references to the 1989 film, *When Harry Meets Sally* (*ibid* at 12), the Nora Ephron autobiographical film, *Heartburn* (*ibid* at 10), the 2015 novel, *Hausfrau* (*ibid* at 13), the British television series, *Mistresses* (*ibid* at 14), and Nathaniel Hawthorne’s novel, *The Scarlet Letter* (*ibid* at 33-34).

8. *Ibid* at 10. See also the general unsubstantiated statement “[m]en are more open to short-term sexual affairs than women and more often attribute their involvement to a need for sexual variety” (*ibid* at 13).

9. *Ibid* at 20.

10. See *ibid* at 19.

Apparently, “[d]espite this strong condemnation, most Americans ... agree that adultery should not be a crime.”¹¹ Rhode ends her introductory section on this perplexing paradox, inviting readers to flip the page to learn more.

In her first substantial chapter, Rhode discusses the history of adultery and why types of laws condemning it originally emerged. Seemingly, the gendered double standard that permeated divorce in the United Kingdom spread into the realm of adultery by default. In contrast to men, women were not allowed to choose when to divorce their husbands and this double standard then evolved to allow adultery as a grounds for divorce, only available to men, where a “husband encountered another man making love to his wife.”¹² From here, Rhode takes the discussion into the American South and slave mistresses. Analogous with the United Kingdom, most men from the late eighteenth to early nineteenth centuries who had adulterous affairs with their slave mistresses were untouchable—“the law looked the other way”—whereas husbands were simply “more successful when they alleged adultery” in the same circumstances.¹³ She writes about an adulterous mother whose “past actions trumped the fact that the father had been ‘inattentive to his child...[and,] on at least one occasion, struck the mother.’ In the court’s view, he still offered a more ‘proper environment’ for raising a child.”¹⁴ In each of the situations Rhode illuminates, the law hinders the wellbeing and safety of children. It also provides no solace to early feminism.

In her third chapter, Rhode delves deeper into the legal landscape of America. Rhode asserts that

[e]nforcement of criminal prohibitions has been infrequent, intrusive, idiosyncratic, and ineffectual, and should be unconstitutional. In employment cases, courts should not permit dismissals or demotions based on private sexual conduct, absent some demonstrable impairment of job performance. Nor should courts tolerate speculative and vexatious actions for criminal conversation and alienation of affection. Adultery should not influence alimony and custody awards, nor should it serve to reduce the punishment for deadly violence. None of these reforms should be seen as diminishing societal respect for marriage as an institution. Rather, they simply recognize the limits of law in policing fidelity, and the excessive costs of ineffectual attempts to do so.¹⁵

Rhode continues this argument throughout the chapter, despite reminding readers of the problems caused by adulterers. One strong reason readers may feel

11. *Ibid* at 22.

12. *Ibid* at 30.

13. *Ibid* at 41.

14. *Ibid* at 46.

15. *Ibid* at 61.

that adultery laws should remain is to ensure that a victim of adultery can be offered some sort of remedy for their emotional anguish. This was so with one case Rhode relies on. Dave Banks, an aggrieved adulteree in a well-publicized case, argued that if the courts used the adultery statute “all the time, maybe women or men would think twice about going and jumping in the sack and throwing away their marriage.”¹⁶ He then asks, “[h]ow do they get to pick and choose which laws they can and can’t enforce?”¹⁷ Rhode’s research shows that Banks’ situation is only one of many instances in which the adultery laws fail to follow through—prosecutors are simply reluctant to bring these claims to court.¹⁸ Rhode also brings to light the fact that adultery is legal in some states and illegal in others, making it even more contentious and confusing.¹⁹ She quotes Professor Paul Rothstein, who expresses the idea that the adultery laws are aspirational, “and set forth our finest ideals. If we believe in marriage, and if the cement of that is loyalty and fidelity within a unit, then adultery does threaten that.”²⁰ Again, Rhode has a response. She writes that “occasional, idiosyncratic enforcement does little to express those ideals, and it compromises public respect for the rule of law.”²¹

Rhode discusses public indecency laws and notes that, if the situation fits, victims of adulterous spouses can instead prosecute for public indecency. But if the hallmark of public indecency laws is to garner public concern over what seem to be private activities, how are adultery laws different? It seems the latter serve to protect the privacy and sanctity of marriage by frowning upon a third party imposing themselves on a private part of that marriage. By this logic, why should enforcement of adultery laws be so lackadaisical when public indecency laws are taken seriously? Rhode continues this section by discussing how the courts currently deal with adultery, citing how they stigmatize mothers as unfit based on adulterous pasts or allow husbands to freely commit murder purely because their wives were committing adultery.

Lately, it seems there is an improvement in how the legal system deals with adulterous pasts. Currently, Rhode writes, the courts are unlikely to deem a mother an “unfit custodian” simply based on adultery.²² Further, Rhode notes that the trend has evolved from excusing the killing of an adulterous spouse

16. *Ibid* at 64.

17. *Ibid* at 64.

18. *Ibid* at 63-65.

19. See chart, *ibid* at 62.

20. *Ibid* at 67.

21. *Ibid*.

22. *Ibid* at 83.

to reducing charges of murder to voluntary manslaughter.²³ This suggests an improvement, but Rhode brings out examples that demonstrate that courts are willing to go even further; they are reluctant even to reduce charges and are simply prosecuting fully without recognizing adultery as a defence to violent acts. Rhode recounts that a court in Massachusetts “declined to find that the wife’s admission of adultery constituted sufficient provocation” to reduce a charge to manslaughter.²⁴ Rhode concludes the subject by arguing that “[m]ore courts should follow this approach and decline to normalize deadly violence as a reaction to infidelity.”²⁵

Rhode’s next chapter looks at some outlier issues such as the military and consent. She gives an overview of sex in the military, setting out the very structured military standard for prosecuting adultery.²⁶ She notes that in the military, adultery is prohibited to “preserve good order and morale,”²⁷ maintain “popular respect and support,”²⁸ and allay a military spouse’s concern about “their partner’s fidelity,” given that military couples spend so much time apart.²⁹ She then transitions into a chapter on alternative lifestyles, and gives an introduction to polyamorous relationships and swingers.³⁰ However, these chapters, especially that on alternative lifestyles, make almost no mention of the legal landscape in this area and thus offer little to Rhode’s argument that adultery should be repealed.

Rhode then reviews sex and politics, telling stories of various political adultery scandals. She recounts Franklin D. Roosevelt’s hushed affair and notes that then, “[t]he only ground for divorce in New York was adultery.”³¹ During that time, the president’s affair could not be revealed publicly, and thus his wife Eleanor had to remain in her marriage to avoid her husband’s political ruin. Eleanor ended up finding companionship as well, although it is unconfirmed whether this relationship was in fact romantic. Rhode remarks that “[b]y all accounts, both Eleanor and Franklin benefited immeasurably from their relationships, in ways that enriched their political as well as their personal lives.”³² As saddening as this is, perhaps it was a situation in which the adultery laws saved the couple.

23. *Ibid* at 84.

24. *Ibid* at 85.

25. *Ibid* at 87.

26. *Ibid* at 93.

27. *Ibid* at 95.

28. *Ibid* at 96.

29. *Ibid*.

30. *Ibid* at 107.

31. *Ibid* at 128.

32. *Ibid* at 131.

Or perhaps, the couple thrived in *spite* of the adultery laws. As she relates their adulterous experiences, Rhode classifies them into categories such as “Love Affairs,”³³ “Womanizers,”³⁴ and “Hypocrisy.”³⁵ Her stories, particularly that of Bill Clinton,³⁶ remind readers that the presidential affair in Shonda Rhimes’ fictional drama *Scandal* is in fact not so far removed from reality as viewers often believe.³⁷

In the final chapter, Rhode discusses international perspectives on adultery, showing readers how dissimilarly adultery is viewed in various religious and cultural contexts. She notes that in “most societies, adultery is widely condemned,” but that “legal prohibitions are no longer viewed as the appropriate response.”³⁸ She recommends that the United States follow this trend of decriminalization.

Adultery: Infidelity and the Law is a comprehensive book that manages to convince even true skeptics of its thesis—that adultery should no longer be policed by the law. As the first book of its kind, it can be expected to invite further research and analysis in the area, as well as to provide a base for those looking to comment more deeply on its specific subtopics.

Adultery has long been the subject of TV drama and popular fictional entertainment. This keeps it relevant but ensures it is full of preconceived notions about its prevalence, its destructiveness, and how—or whether—it should be controlled. Rhode’s book shifts the lens on adultery from fiction to reality, and redefines readers’ understanding of the law’s relationship with it. It leaves us thinking about adultery in ways we never would have before.

33. *Ibid* at 128.

34. *Ibid* at 133.

35. *Ibid* at 146.

36. *Ibid* at 138.

37. ABC, “About Scandal,” online: <abc.go.com/shows/scandal/about-the-show> [perma.cc/P7Q4-UPYS].

38. Rhode, *supra* note 1 at 183.