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## Monogamy's Law: Compulsory Monogamy and Polyamorous Existence

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# MONOGAMY'S LAW: COMPULSORY MONOGAMY AND POLYAMOROUS EXISTENCE<sup>1</sup>

ELIZABETH F. EMENS<sup>†</sup>

I. Introduction .....	278
II. Compulsory Monogamy .....	287
A. Monogamy's Mandate .....	287
1. The Western Romance Tradition .....	288
2. Stories from Biological Anthropology.....	294
B. Monogamy's Reality .....	297
1. The Failures of Supermonogamy .....	297
2. The Failures of Simple Monogamy .....	298
III. Contemporary Polyamory .....	300
A. Terms and Models.....	303
B. Relationships .....	309
1. A Woman with Two Husbands: April Divilbiss.....	310
2. A Four-Partner Family: Eddie Simmons.....	312
3. A Mormon Wife: Elizabeth Joseph.....	317
4. An Ethical Slut: Dossie Easton .....	318
C. Theory .....	320
1. Self-Knowledge .....	321
2. Radical Honesty.....	322
3. Consent .....	324
4. Self-Possession .....	325
5. Privileging Love and Sex.....	328
IV. The Paradox of Prevalence .....	330
A. Possible Factors in Response to Polyamory.....	331

1. This title borrows from Adrienne Rich. See Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, 5 SIGNS 631 (1980).

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B. The Problem of the Universalizing View of Polyamory .....	340
C. Alternatives and Implications .....	349
V. Dispositions: Sexual and Legal .....	354
A. A Dispositional Model of Poly and Mono Desire .....	355
B. The Role of Law: A Thought Experiment .....	361
VI. Conclusion .....	375

[O]ne reason monogamy is so important to us is that we are so terrorized by what we imagine are the alternatives to it. The other person we fear most is the one who does not believe in the universal sacredness of—usually heterosexual—coupledom.

—Adam Phillips<sup>2</sup>

## I.

### INTRODUCTION

Right now, marriage and monogamy feature prominently on the public stage. Efforts to lift prohibitions on same-sex marriage in this country and abroad have inspired people on all sides of the political spectrum to speak about the virtues of monogamy's core institution and to express views on who should be included within it.<sup>3</sup> The focus of this article is different. Like an "unmannerly wedding guest,"<sup>4</sup> this article invites the reader to pause amidst the whirlwind of marriage talk and to think critically about monogamy and its alternatives.

\* \* \*

If Senator Rick Santorum is right, then interesting times lie ahead. Before

2. ADAM PHILLIPS, *MONOGAMY* 98 (1996).

3. In addition to the option of religious marriage available to same-sex couples in various religions and denominations, civil marriage has recently become open to same-sex couples in the state of Massachusetts as of May 2004, *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003); *see also* Opinions of the Justices to the Senate, 802 N.E.2d 565 (Mass. 2004), two Canadian provinces, Ontario and British Columbia, since summer 2003, *see Tying the Knot*, *GLOBE & MAIL* (Toronto), July 15, 2003, at A9, and two countries at the national level: the Netherlands, since April 2001, *see Wet van 21 december 2000 tot wijziging van Boek 1 van het Burgerlijk Wetboek in verband met de openstelling van het huwelijk voor personen van hetzelfde geslacht* (Wet openstelling huwelijk), *Stb.* 2001, nr. 9 (Neth.), translated in Kees Waaldijk, *Text of Dutch Act on the Opening Up of Marriage for Same-Sex Partners*, in *LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS* 455, 455–56 (Robert Wintemute & Mads Andenaes eds., 2001); Belgium since early 2003, *see Note, Inching Down the Aisle: Differing Paths Toward the Legalization of Same-Sex Marriage in the United States and Europe*, 116 *HARV. L. REV.* 2004, 2004 (2003); and two Canadian provinces.

4. MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE* 83 (1999).

the Supreme Court struck down Texas's homosexual sodomy law in *Lawrence v. Texas*<sup>5</sup> in June of last year, Santorum warned that "[i]f the Supreme Court says that you have the right to consensual (gay) sex within your home, then you have the right to bigamy, you have the right to polygamy, you have the right to incest, you have the right to adultery. You have the right to anything."<sup>6</sup> No doubt, Santorum does not want the Court to make good his prediction.<sup>7</sup> His radical vision is instead an example of the oft-noted propensity of gay rights opponents to claim that same-sex marriage leads a parade of horrors such as polygamy.<sup>8</sup> Like Santorum, proponents of the Defense of Marriage Act ("DOMA")<sup>9</sup> in 1996 warned that same-sex marriage would lead to the legalization of incest,<sup>10</sup>

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

6. Sean Loughlin, *Santorum Under Fire for Comments on Homosexuality*, CNN.COM, at [www.cnn.com/2003/ALLPOLITICS/04/22/santorum.gays/](http://www.cnn.com/2003/ALLPOLITICS/04/22/santorum.gays/) (Apr. 22, 2003) (quoting interview by Associated Press with Sen. Rick Santorum, Apr. 21, 2003). The *Lawrence* Court did not frame the right at issue as the right to engage in gay sex, see 123 S. Ct. at 2478, but the result, from Santorum's perspective, was no doubt the same.

7. Santorum is not alone, however, in suggesting that polygamy could be the logical extension of the Court's decision. See, e.g., *Lawrence*, 123 S. Ct. at 2490 (Scalia, J., dissenting) ("State laws against bigamy, same-sex marriage, adult-incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of Bowers' validation of laws based on moral choices. Every single one of these laws is called into question by today's decision . . ."); Jeffrey Rosen, *How To Reignite the Culture Wars*, N.Y. TIMES MAG., Sept. 7, 2003, at 50 ("Taken to its logical conclusion, Kennedy's argument would seem to invalidate all moral restrictions on intimate associations that, it could be said, cause no harm to others—restrictions on polygamy, for example.").

8. See, e.g., George F. Will, *Culture and What Courts Can't Do*, WASH. POST, Nov. 30, 2003, at B7; see also Maura I. Strassberg, *The Challenge of Post-Modern Polygamy: Considering Polyamory*, 31 CAP. UNIV. L. REV. 439, 439 (2003) (noting conservatives' frequent use of analogies to polygamy when discussing same-sex marriage); WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 280 (1999) (same).

9. 1 U.S.C. § 7 (2000) ("In determining the meaning of any Act of Congress, . . . the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife."); 28 U.S.C. § 1738C (2000) ("No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship").

10. E.g., William Bennett, *Leave Marriage Alone*, NEWSWEEK, June 3, 1996, in SAME-SEX MARRIAGE: PRO AND CON 274, 275 (Andrew Sullivan ed., 1997) ("On what principled ground can Andrew Sullivan exclude others who most desperately want what he wants, legal recognition and social acceptance? Why on earth would Sullivan exclude from marriage a bisexual who wants to marry two other people? After all, exclusion would be a denial of that person's sexuality. The same holds true of a father and daughter who want to marry. Or two sisters. Or men who want (consensual) polygamous arrangements."); Hadley Arkes, *The Closet Straight*, NAT'L REV., July 5, 1993, reprinted in part in SAME-SEX MARRIAGE: PRO AND CON, *supra*, at 154, 157–58 ("But then, once the arrangement is opened simply to 'consenting adults,' on what ground would we object to the mature couplings of aunts and nephews, or even fathers and daughters—couplings that show a remarkable persistence in our own age, even against the barriers of law and sentiment that have been cast up over centuries?").

bestiality,<sup>11</sup> pedophilia,<sup>12</sup> and polygamy.<sup>13</sup> And rhetoric about polygamy featured prominently in the legal<sup>14</sup> and popular<sup>15</sup> debates surrounding the 1999 Vermont Supreme Court decision *Baker v. State*<sup>16</sup> and the 2003 Massachusetts Supreme Judicial Court decision *Goodridge v. Department of Public Health*.<sup>17</sup>

In response, proponents of same-sex marriage have not said, "So what?"; they have not defended polygamy or the other marginal practices in their opponents' parade of horrors. Instead they have chosen to distinguish same-sex marriage from multiparty marriage.<sup>18</sup> As David Chambers noted about the DOMA debates, "Neither side favored polygamy, and neither had any incentive to examine with greater care the actual history or practice of polygamy."<sup>19</sup> In

11. *E.g.*, Defense of Marriage Act: *Hearing on S. 1740 Before the Senate Comm. on the Judiciary*, 104th Cong. 22 (1996) (prepared statement of Gary Bauer, President of the Family Research Council) (claiming that legalizing same-sex marriage would mean there was no logical justification for prohibiting polygamy, nor would it be logically defensible to continue "the limitation of the [marital] relationship to human beings."); 142 CONG. REC. H7443 (daily ed. July 11, 1996) (testimony of Rep. Stephen Largent) ("What logical reason is there to keep us from stopping expansion of that definition to include . . . any other odd combination . . . ? [I]t does not even have to be limited to human beings, by the way. I mean it could be anything.")

12. *E.g.*, 142 CONG. REC. H7443, *supra* note 11; Arkes, *supra* note 10, at 157 ("If there is to be gay marriage, would it be confined then only to adults?")

13. *E.g.*, 142 CONG. REC. H7443, *supra* note 11 ("There really is no logical reason why we could not also include polygamy or any other definition to say, as long as these are consenting human beings . . ."); Arkes, *supra* note 10, at 157–58 ("If there is to be gay marriage, . . . [a]nd if men are inclined to a life of multiple partners, why should marriage be confined to two persons? . . . In traditional marriage, the understanding of monogamy was originally tied to the 'natural teleology' of the body—to the recognition that only two people, no more and no fewer, can generate children. To that understand of a union, or a 'marriage,' the alliance of two men would offer such an implausible want of resemblance that it would appear almost as a mocking burlesque. . . . The mockery would be avoided if the notion of marriage could be opened, or broadened to accommodate the varieties of sexual experience. The most notable accommodation would be the acceptance of several partners . . .").

14. *See, e.g.*, Brief of Amicus Curiae Take It to the People, *Baker v. State*, 744 A.2d 864 (Vt. 1999) (No. 98-032, 1009-97CNC), <http://www.vtfreetomarry.org/tipamicus.htm> (last visited Apr. 25, 2004); Brief of Amici Curiae Hon. Peter Brady et al. at 25–28, *Baker v. State*, 744 A.2d 864 (Vt. 1999) (No. 98-032, 1009-97CNC); Brief for Appellee at 73, *Baker v. State*, 744 A.2d 864 (Vt. 1999) (No. 98-032, 1009-97CNC).

15. *See, e.g.*, Jeff Jacoby, *Is Lawful Polygamy Next?*, BOSTON GLOBE, Jan. 15, 2004, at A15. Responding to a question about polyamory, Beth Robinson, lawyer for the plaintiffs in *Baker*, said that she has spoken all over Vermont about the decision and that polygamy "comes out every time." Beth Robinson, Panel on Same-Sex Marriage, Rebellious Lawyering Conference, Yale Law School (Feb. 16, 2002).

16. 744 A.2d 864 (Vt. 1999).

17. 798 N.E.2d 941 (Mass. 2003).

18. *See, e.g.*, WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 280–81 (1999); *infra* note 19.

19. David L. Chambers, *Polygamy and Same-Sex Marriage*, 26 HOFSTRA L. REV. 53, 60 (1997). Andrew Sullivan denied any common political ground between homosexuals and polygamists, establishing a clear hierarchy between them: "Indeed, few in the same-sex marriage camp have anything but disdain for [the] idea [of polygamous marriage]." Andrew Sullivan, *Three's A Crowd*, NEW REPUBLIC, June 17, 1996, reprinted in SAME-SEX MARRIAGE: PRO AND CON, *supra* note 10, at 279–80. Representative Barney Frank of Massachusetts declared: "[F]or

short, both sides in the debate over same-sex marriage seem to agree on one thing: whatever happens with gay marriage, multiparty marriage should remain impossible.<sup>20</sup>

This article aims to understand why, at a time of serious debate about the different-sex requirement of marriage (one *man* and one *woman*), eliminating the numerosity requirement (*one* man and *one* woman) is so widely agreed to be undesirable. The article approaches this question as part of the larger puzzle of why mainstream culture seems to accept the numerosity requirement of marriage without question, even while so many people practice alternatives to lifelong monogamy either secretly (adultery) or serially (divorce and remarriage).

A constitutional challenge to antipolygamy laws may well be foreclosed by the Supreme Court's decisions upholding criminal and civil sanctions on Mormon polygamy.<sup>21</sup> After *Lawrence*, however, some have speculated that

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those who pretend not to know the difference between a monogamous relationship between two human beings and polygamy, I must say that I think they debase [the] debate when they use that kind of analogy. Everyone knows the real difference." 142 CONG. REC. H7500 (daily ed. July 12, 1996). Representative Frank has since backed off of his claim about this "real difference." Meeting with OutLaws: The Lesbian Gay Bisexual Transgender Law Students Association, Yale Law School Faculty Lounge, in conjunction with Race, Values, and the American Legal Process (Feb. 23, 2002) (conference notes, on file with author).

20. I should note that I do not think that same-sex marriage will ineluctably lead to multiparty marriage. Our cultural commitment to the pair, the couple, the idea of total mutual love between two individuals, runs deep. See *infra* Part II. Moreover, to design multiparty marriage would be a complicated legal endeavor, and the state arguably has an efficiency interest in a status relationship in which each person names just one other as a partner for all relevant legal purposes. See *Mary Anne Case, What Stake Do Heterosexual Women Have in the Same-Sex Marriage/Domestic Partner/Civil Union Debates?* 37–38 (Feb. 3, 2004) (unpublished manuscript, on file with author).

21. See, e.g., *Davis v. Beason*, 133 U.S. 333 (1890) (rejecting a First Amendment habeas challenge to convictions for polygamists' attempt to register to vote and oath that they were not polygamists); *Murphy v. Ramsey*, 114 U.S. 15 (1885) (rejecting procedural challenges to the application of the Edmonds Act which denied polygamists the right to vote, even if they were only engaged in plural cohabitation); *Reynolds v. United States*, 98 U.S. 145 (1878) (affirming the criminal conviction of a Mormon for practicing polygamy and rejecting the argument that Congress's prohibition of polygamy violated the defendant's rights under the Free Exercise Clause); see also *Potter v. Murray City*, 760 F.2d 1065, 1069–70 (10th Cir. 1985) (rejecting a free exercise and privacy rights challenge to a police officer's termination for polygamy, on the grounds that *Reynolds* is still good law and that "protect[ing] the monogamous marriage relationship" is a compelling state interest); cf. *Romer v. Evans*, 517 U.S. 620, 634 (1996) ("To the extent *Davis* held that persons advocating a certain practice may be denied the right to vote, it is no longer good law. To the extent it held that the groups designated in the statute may be deprived of the right to vote because of their status, its ruling could not stand without surviving strict scrutiny, a most doubtful outcome. To the extent *Davis* held that a convicted felon may be denied the right to vote, its holding is not implicated by our decision and is unexceptionable." (citations omitted)); *id.* at 649–50 (Scalia, J., dissenting) (noting that "[t]o the extent, if any, that [*Davis*] permits the imposition of adverse consequences upon mere abstract advocacy of polygamy, it has, of course, been overruled by later cases. But the proposition that polygamy can be criminalized, and those engaging in that crime deprived of the vote, remains good law." (citation omitted)). But see, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 247 (1972) (Douglas, J., dissenting) (predicting that under the reasoning of the majority opinion "in time *Reynolds* will be overturned"); Keith E. Sealing, *Polygamists out of the Closet: Statutory and State Constitutional Prohibitions Against Polygamy Are Unconstitutional Under the Free Exercise Clause*, 17 GA. ST. U. L. REV. 691, 737–57 (2001)

antipolygamy laws are ripe for challenge.<sup>22</sup> It is not my purpose here to assess the constitutional arguments. My purpose is instead to try to explain why people are so opposed to multiparty relationships that the mere idea that such relationships might be included in the institution of marriage threatens efforts on behalf of same-sex marriage.

Perhaps because of this country's dramatic relationship to Mormon polygamy, when Americans hear the term "polygamy" or try to picture relationships of more than two, they typically think of traditional polygyny—one man in a hierarchical relationship to several wives.<sup>23</sup> But there is another model—called "polyamory" by its increasingly vocal practitioners—which in principle eschews hierarchy and which encompasses various models of intimate relationships of more than two people.

The lack of serious public debate about the numerosity requirement of marriage is echoed in the scant academic literature on polyamory.<sup>24</sup> Though some legal scholars mention the practice, the only sustained discussion of polyamorous relationships has focused on only one subset of these relationships.<sup>25</sup> The other prominent use of the word "polyamory" in legal writing has been as a catchall term for nearly any sexual or nonsexual relationship of three or more adults, including, for instance, the relationship between two lesbian parents and the gay male sperm donor for their child.<sup>26</sup>

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(arguing that laws forbidding polygamous marriage are unconstitutional under the Free Exercise Clause because marriage is a fundamental right and therefore religious polygamy is a hybrid situation requiring strict scrutiny under *Department of Human Resources v. Smith*, 494 U.S. 872, 881 (1990), or because current antipolygamy statutes and state constitutional provisions were enacted out of antipathy to a particular religion and substantially burden a central tenet of that religion while furthering no compelling governmental interest, under *Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 547 (1993)).

22. See, e.g., *Lawrence v. Texas*, 123 S. Ct. 2472, 2490 (2003) (Scalia, J., dissenting). A lawsuit was recently filed challenging the validity of Utah statutes criminalizing bigamy and other extramarital sex under *Lawrence v. Texas*. *Bronson v. Swensen*, No. 02:04-CV-0021 (D. Utah filed Jan. 1, 2004); see also Leonard Post, *Lawyers Square Off Over Polygamy Case*, NAT'L LAW J., Jan. 26, 2004, at 4.

23. See, e.g., *infra* text accompanying note 121.

24. Cf. Ariela R. Dubler, *In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State*, 112 YALE L.J. 1641, 1711–12 (2003) (noting that, "strikingly, while many politicians bemoan the rise of alternative family structures, alternatives posed in the nineteenth century by individuals and communities committed to challenging marriage's hegemony appear as extraordinary and radical today as they did in their own time. Deviations from the norm of monogamous marriage . . . remain as absent from the dominant contemporary landscape of intimate relations as they were in the late nineteenth century").

25. See Strassberg, *supra* note 8, at 451 (focusing on polyamorous group relationships that are sexually exclusive).

26. See Martha M. Ertman, *The ALI Principles' Approach to Domestic Partnership*, 8 DUKE J. GENDER L. & POL'Y, 107, 114–17 (2001) [hereinafter Ertman, *The ALI Principles*] (discussing PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (Tentative Draft No. 4, 2000)); Martha M. Ertman, *Marriage as a Trade: Bridging the Private/Private Distinction*, 36 HARV. C.R.-C.L. L. REV. 79, 124–25 (2001) [hereinafter Ertman, *Private/Private Distinction*]; see also *infra* note 134 and accompanying text.

But the practice of polyamory as “ethical nonmonogamy”<sup>27</sup> bears serious consideration at a moment when the terms and conditions of intimate relationships are such a focus of discussion. Polyamory is a lifestyle embraced by a minority of individuals who exhibit a wide variety of relationship models and who articulate an ethical vision that I understand to encompass five main principles: self-knowledge, radical honesty, consent, self-possession, and privileging love and sex over other emotions and activities such as jealousy.<sup>28</sup> Contrary to the common view of multiparty relationships as either oppressive or sexual free-for-alls, at least some set of individuals—polyamorists, or “polys” for short—seems to be practicing nonmonogamy as part of an ethical practice that shares some of its aspirations with more mainstream models of intimate relationships.

Nonetheless, as the same-sex marriage debate illustrates, most people in this country seem to think that sexual relationships among more than two people are beyond the political pale. This social hostility sustains various legal burdens on polyamorists, including two-person marriage and partnership laws, adultery and bigamy laws, residential zoning laws, and custody consequences.<sup>29</sup> Before confronting these legal issues, each of which deserves sustained attention, we need to understand the practice of polyamory and the opposition to it. Thus, while this article addresses the legal issue of adultery laws in Part V, the primary task of the article is to lay the groundwork for an ongoing discussion of the relevant legal, ethical, and social issues by seriously considering polyamory and its opposition.

The societal resistance to the idea of polyamory may merely be an artifact of historical associations with patriarchal polygyny, which could be partially or completely ameliorated by contemporary accounts of egalitarian polyamorous relationships or of polygynous unions where the women feel they benefit from sharing their wifely duties with other women.<sup>30</sup> Alternatively, resistance to the idea of polyamorous relationships may stem from other concerns, about practical inefficiency of such relationships, negative physical or psychological effects, the equality or sufficiency of love among multiple partners, or associations with other taboos such as incest or homosexuality. While any of these may contribute to mainstream responses to the idea of polyamory, as I discuss in Part IV, the article proposes that something else is also fueling that response.

I argue that a key reason for the opposition to polyamory is, somewhat paradoxically, the pervasive or potential failure of monogamy. This argument draws lessons from the theory and politics of homosexuality, which demonstrate

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27. *E.g.*, Lana Tibbetts, *Commitment in Monogamous and Polyamorous Relationships 1* (Spring 2001) (defining ethical nonmonogamy as “practicing extradyadic relationships with mutual consent among those involved”) (unpublished manuscript, on file with author), available at <http://www.prairienet.org/~star/polypaper.html>.

28. *See infra* Section III.C.

29. *See infra* text accompanying notes 430–35.

30. *See infra* Section III.B.



that the “universalizing” possibilities of a particular minority practice may drive allies away, rather than creating the conditions for solidarity through common ground.<sup>31</sup> Many people engage in nonmonogamous behavior; many more have nonmonogamous fantasy lives. Indeed, one might go so far as to say that it is the rare person whose sexual thoughts only ever involve his or her partner in monogamy. Paradoxically, this mainstream impulse to nonmonogamy helps to explain the position of multiparty relationships beyond the pale of the marriage debates. Rather than prompting outsiders to identify with polyamorists, the potential of nearly everyone to imagine him or herself engaging in nonmonogamous behavior leads outsiders to steel themselves against polyamory and to eschew the idea of legitimizing such relationships through law. This I call the paradox of prevalence.

A consideration of “poly” and “mono” identity, on a theoretical level, suggests that few people’s desires fall squarely into either camp. In theory at least, a completely poly disposition might be understood to involve not only desires for multiple sexual and domestic partners, but desires for one’s partner(s) to have multiple sexual and domestic partners. A person with this disposition would presumably be happier in nonmonogamous relationships, and perhaps happy *only* in nonmonogamous relationships. By contrast, a completely mono disposition might be understood to involve exclusive sexual and domestic desire for just one other person, as well as the desire for that person to have only oneself as a sexual and domestic partner. A person with this disposition would presumably be happier in—and perhaps happy *only* in—a monogamous relationship. Few people are likely to embody either disposition completely. Rather, most of us are probably a complex mix of desires, which results in our choosing, or ending up, living a poly or mono lifestyle. And it is my contention that many people simply end up promising monogamy, rather than actively choosing between monogamy and other possible relationship models, because of the many social and legal pressures towards monogamy.

Norms strongly urge people toward monogamy, and law contributes to that pressure in the various ways listed above, namely criminal adultery laws, bigamy laws, marriage laws, custody cases, workplace discrimination, and zoning laws. To the extent that at least some people may be happier in nonmonogamous arrangements, and others are not harmed by these arrangements, it would seem that laws should be changed to allow people to find their own path among monogamy and its alternatives. But the question of harms is complex, and each legal realm affecting choices about monogamy raises unique questions and could warrant an article unto itself. This article does not aspire to answer all of these complex questions. Rather, the purpose of the article is to help promote and frame a discussion by better understanding the practice of polyamory and the response to it.

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31. See *infra* Part IV.

In the interests of promoting discussion about monogamy and its alternatives, then, the article concludes with a thought experiment imagining how certain laws might themselves be used to promote discussion about some of these issues. Criminal adultery statutes are, in theory at least, a coercive enforcement of monogamy. Repealing these statutes might seem an obvious way—the natural starting point—to allow people to make their own choices about monogamy. Indeed, repeal may be the best possible result. But there is another possibility: instead of allowing these laws to fall into disuse, we might try to use them for an affirmative purpose. Specifically, instead of repealing these facially coercive laws, we might make them no longer coercive. In the language of contract law, we should consider making these immutable rules into default rules, that is, rules the parties can contract around.<sup>32</sup> This thought experiment allows us to imagine the possibility of law affirmatively encouraging people to discuss their desires with regard to monogamy or nonmonogamy.

In particular, using the idea of information-forcing default rules, I propose several model adultery statutes that might encourage partners to discuss and agree on relationship rules about sexual exclusivity, by criminalizing only *nonconsensual* adulterous sex. Ultimately, I conclude that the potential harms of using the criminal law in this manner probably outweigh the potential benefits. But in the process, the article considers how law might be used to encourage people to consider nonnormative alternatives. By presenting an experiment in using law to prompt dialogue in and around monogamy's most prominent institution,<sup>33</sup> the article aims to lay the groundwork for a broader cultural and legal discussion of the important, and largely neglected, subject of monogamy's alternatives.

This article is divided into six parts. Following this Introduction, Part II frames the article by contrasting the fantasy of monogamy with its reality, as both are expressed in the diverse realms of statistics, law, literature, and science. Part III offers a novel account of the contemporary practice and theory of polyamory by defining key terms, describing four accounts of polyamorous relationships, and outlining five principles that seem to capture the ethical vision

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32. See *infra* note 443 for a discussion of the term "contract around."

33. Even in theory, adultery laws affect only situations involving married couples—only those who *can* marry and also *choose* to marry—and they primarily regulate only exclusivity of sexual behavior. Monogamy's law, by contrast, affects more than just married people, and it encompasses many strictures along multiple axes—for instance, against fewer than one partner (singleness) as well as more than one partner (polygamy). The focus in the thought experiment on only one swath of the population, though self-conscious, is not intended to present marital nonmonogamy as the paradigmatic model. Rather, the decision to focus on adultery stems from the purpose of the experiment and the status of our laws and institutions. Marriage is the key institution of monogamy. Adultery statutes cleanly target the transgression of monogamy that most prominently defines monogamy—the rule that couples not have sex with anyone outside the couple. The thought experiment therefore asks whether a change in the design of the legal rules aimed at enforcing this rule with one swath of the population in this prominent institution of monogamy could conceivably be retooled to prompt discussions between partners about whether to embrace, reject, or modify that rule in their own relationships.

espoused by many polys. Part IV discusses various reasons people may be concerned about multiparty relationships, then draws on the theory and politics of homosexuality to argue that mainstream resistance to the idea of polyamorous relationships is driven in part by the near universality of nonmonogamous impulses. Part V puts forward a model for thinking about two narrow classes of individuals who might dispositionally desire either a mono or a poly lifestyle, interrogates why those with mixed desire might variously choose monogamy or polyamory, and then proposes a series of information-forcing adultery statutes that might encourage individuals and partners to make more affirmative choices about what kind of relationships they want to conduct. In conclusion, Part VI returns to an issue raised earlier—the same-sex marriage debate—to suggest that we view this historical moment, when same-sex couples begin to enter the institution of marriage, as a unique opportunity to question the mandate of compulsory monogamy.

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When writing about what she called “compulsory heterosexuality,” Adrienne Rich offered the following invocation to her readers:

To take the step of questioning heterosexuality as a “preference” or “choice” for women—and to do the intellectual and emotional work that follows—will call for a special quality of courage in heterosexually identified feminists but I think the rewards will be great: a freeing-up of thinking, the exploring of new paths, the shattering of another great silence, new clarity in personal relationships.<sup>34</sup>

Rich was criticized by some in the lesbian community for suggesting that those who were not actually lesbians, and who had no intention of living a sexually marginal lifestyle, could think in, and profit from, a lesbian perspective on heterosexuality.<sup>35</sup> Despite the possibility of this sort of criticism, this article similarly invites the reader to question the idea of monogamy as a choice, indeed as the only viable choice for many, and to engage in the work of thinking critically about its margins. Recognizing that readers may come to this point with varied experiences and views on monogamy, the article joins Rich in proposing that one need not change one’s sexual preferences or practices in order to learn and profit from a careful consideration of alternatives.

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34. Rich, *supra* note 1, at 648.

35. See, e.g., Gayle Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, in PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY 267, 301 (Carole S. Vance ed., 1992) (1984); Amy Goodloe, *Lesbian Identity and the Politics of Butch-Femme Roles*, at <http://www.lesbian.org/amy/essays/bf-paper.html> (1993); *infra* note 142.

## II. COMPULSORY MONOGAMY

For many, the fantasy of monogamy is different from its reality. In the normative fantasy, exclusive relationships of two people are the romantic ideal that we should and do strive for. At times, this ideal is realized, but at other times, desire and behavior betray that ideal. That people sometimes behave nonmonogamously is not a novel proposition, but the idea that love equals monogamy and jealousy equals love is so pervasive that it seems important to frame the overall analysis in the article with a brief and plain look at monogamy. This Part, therefore, uses statistical, legal, literary, and scientific sources to sketch the contemporary landscape of monogamy.

### A. *Monogamy's Mandate*

The institutions of monogamy loom large in this nation's social landscape. According to the 2000 census, sixty percent of Americans over eighteen are married,<sup>36</sup> and seventy-six percent of Americans over eighteen are or have been married.<sup>37</sup> In addition, seventy percent of those who divorce will remarry,<sup>38</sup> and over ninety percent of Americans say they want to marry.<sup>39</sup> These numbers sketch the contours of our drive toward monogamy's core institution.<sup>40</sup> A vivid picture of our romance with monogamy, however, requires richer sources. This section will adumbrate two prevailing discourses of monogamy: the western romance tradition and the scientific defense of monogamy.

36. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2000 47, tbl. 46 (2002) [hereinafter STATISTICAL ABSTRACT] (reporting data from 2000); see also David L. Chambers, *For the Best of Friends and for Lovers of All Sorts, A Status Other Than Marriage*, 76 NOTRE DAME L. REV. 1347, 1347 (2001); U.S. CENSUS BUREAU, HOUSEHOLDS AND FAMILIES 2000, CENSUS 2000 BRIEF 2 (2001) (reporting that 51.7% of households are "married-couple households"), available at <http://www.census.gov/prod/2001pubs/c2kbr01-8.pdf>.

37. See STATISTICAL ABSTRACT, *supra* note 36, at 47, tbl. 46.

38. David L. Weis, *Adult Heterosexuality*, in 3 INTERNATIONAL ENCYCLOPEDIA OF SEXOLOGY 1498, 1503 (Robert T. Francoeur ed., 1997), available at <http://www2.hu-berlin.de/sexology/>.

39. Patricia Donovan, *The Decline of the Traditional Family*, U. BUFFALO REP., Feb. 4, 1999, at 6 (quoting sociologist Lynn Magdol), available at <http://www.buffalo.edu/reporter/vol30/vol30n19/n7.html>.

40. Of course not everyone participates in this cultural norm, as the rest of this article discusses, and there is some indication that certain subpopulations, most notably gay men, may to some extent contain a counternorm in favor of open relationships. See, e.g., *infra* note 339 (citing two studies of gay male couples, more of which had agreed to sexually open rather than closed relationships). Commentators disagree as to whether the AIDS epidemic led to an increase in monogamous relationships among gay men. In addition, class and race, among other factors, affect norms and behavior surrounding monogamy. See, e.g., Christie D. Penn, Stacy L. Hernández & J. María Bermúdez, *Using a Cross-Cultural Perspective to Understand Infidelity in Couples Therapy*, 25 AMER. J. FAM. THERAPY 169, 169–70 (1997); Victoria Robinson, *My Baby Just Cares for Me: Feminism, Heterosexuality and Non-monogamy*, 6 J. GENDER STUD. 143, 155 (1997).

### 1. *The Western Romance Tradition*

Psychoanalyst Adam Phillips articulates a perplexing aspect of love—the idea that in friendship the lack of jealousy is a virtue, even a prerequisite to true friendship, but in erotic love the presence of jealousy is a virtue, even an emblem of true love. Phillips writes:

We may believe in sharing as a virtue—we may teach it to our children—but we don't seem to believe in sharing what we value most, our sexual partners. But if you really loved someone, wouldn't you want to give them the best thing you've got, your partner? It would be a relief not to be puzzled by this.<sup>41</sup>

Phillips offers a provocative answer to his own question: “Perhaps this is what friendship is for, perhaps this is the difference between friends and lovers. Friends can share, lovers have to do something else. Lovers dare not be too virtuous.”<sup>42</sup> In Phillips' formulation, jealousy is a form of selfishness, a vice it might be brave and generous to overcome. But Phillips sees that his view is uncommon and that in reality lovers indulge jealousy; he is puzzled by this. He hypothesizes that lovers act out of fear, implying that they fear loss through abandonment. Like Phillips, literary theorist Roland Barthes seems to valorize the rejection of jealousy: “‘When I love, I am very exclusive,’ Freud says (whom we shall take here for the paragon of normality). To be jealous is to conform. To reject jealousy (‘to be perfect’) is therefore to transgress a law.”<sup>43</sup>

Phillips and Barthes identify key aspects of monogamy: first, that jealousy is treated as evidence of love, and, second, that jealousy may be understood to define romantic love. Phillips highlights how friends and lovers are distinguished by their approach to sharing. Friends may share themselves and each other among many; lovers must possess one another.<sup>44</sup> This resonates with the romantic accounts of couples who were friends first and “discovered” their

41. PHILLIPS, *supra* note 2, at 15. Phillips' language of giving is perplexing here; it seems to imply that the partner is a possession available for transfer. In the context of Phillips' overall text, however, this gift metaphor is rare and thus seems to appear here to dramatize this particular question about generosity—as opposed to possessiveness—with regard to a beloved partner.

42. *Id.*

43. ROLAND BARTHES, *A LOVER'S DISCOURSE* 144, 145 (Richard Howard trans., 1979). Barthes's epigraph for the *Jealousy* essay is as follows: “‘A sentiment which is born in love and which is produced by the fear that the loved person prefers someone else’ (Littré).” *Id.* at 144.

44. See, e.g., Joan Iversen, *Feminist Implications of Mormon Polygyny*, 10 *FEMINIST STUD.* 505, 515 (1984) (quoting nineteenth-century critic of polygamy Fanny Stenhouse as saying that plural marriage must mean the loss of “true love” because “where there is no jealousy there is very little love” (citing MRS. T.B.H. STENHOUSE, *EXPOSÉ OF POLYGAMY IN UTAH: A LADY'S LIFE AMONG THE MORMONS* 75, 123 (American News Co., 2d ed. 1872); MRS. T.B.H. STENHOUSE, *TELL IT ALL: THE TYRANNY OF MORMONISM, OR, AN ENGLISHWOMAN IN UTAH* 213 (Praeger, 1971))); Kenneth L. Karst, *The Freedom of Intimate Association*, 89 *YALE L.J.* 624, 629, n.26 (1980) (noting that “friendship does not involve the degree of exclusivity that is present in other kinds of linkage between intimates”).

love only upon realizing their jealousy of one another's lovers.<sup>45</sup> A key distinction between friends and lovers, then, lies in the possessive aspect of romantic love, in the presumption that romantic love is possessive but platonic love is not. The operation of jealousy between partners may be understood as a related tenet of monogamy's law: that one partner's jealousy trumps the other partner's desire for extracouple sexual experience.

Of course nonsexual relationships do involve jealousy sometimes. And people, especially children, sometimes speak of having one "best friend." The difference between friendship and romantic relationships lies in the normative response to the two forms of jealousy. Jealousy of a friend's other friends is generally considered a problem for the one who is jealous, who should thus overcome the jealousy. By contrast, jealousy of a lover's other lovers is generally considered a problem for the one who inspires the jealousy, who should overcome the impulse to be unfaithful to the lover. Our toleration of sexual jealousy may be seen vividly in the criminal law of homicide. For centuries, sexual jealousy over adultery has been treated as adequate provocation to mitigate murder to voluntary manslaughter; indeed, rage over adultery is viewed by many courts and commentators as the paradigmatic case of adequate provocation.<sup>46</sup> As noted above, Phillips is puzzled by the divergence between friendship and romantic love along the axis of sexual possession.<sup>47</sup> But Barthes displays none of Phillips's wonder at the normality of jealousy. Drawing on Freud, Barthes states the situation simply: Monogamy is the law.<sup>48</sup>

This cultural law is reflected in a range of other legal contexts. The most obvious forms of monogamy's law today are proscriptions—against promiscuity,<sup>49</sup> adultery,<sup>50</sup> polygamy,<sup>51</sup> and singlehood<sup>52</sup>—against deviations

45. See, e.g., JANE AUSTEN, *EMMA* 407–08 (R.W. Chapman ed., Oxford Univ. Press 1966) ("Emma's eyes were instantly withdrawn; and she sat silently meditating, in a fixed attitude, for a few minutes. A few minutes were sufficient for making her acquainted with her own heart. . . . She touched—she admitted—she acknowledged the whole truth. Why was it so much worse that Harriet should be in love with Mr. Knightley, than with Frank Churchill? . . . It darted through her, with the speed of an arrow, that Mr. Knightley must marry no one but herself!"); *id.* at 432 ("[Mr. Knightley] had been in love with Emma, and jealous of Frank Churchill, from about the same period, one sentiment having probably enlightened him as to the other."); *WHEN HARRY MET SALLY* (MGM/UA Studios 1989) (conveying to the audience that the protagonists are more than friends through their jealousy over each other's dates).

46. E.g., Donna K. Coker, *Heat of Passion and Wife Killing: Men Who Batter/Men Who Kill*, 2 S. CAL. REV. L. & WOMEN'S STUD. 71, 72 (1992); Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 346 (1996).

47. See *supra* text accompanying note 41.

48. See *supra* text accompanying note 43. Adrienne Rich refers to the "[e]arly female indoctrinations in 'love' as an emotion" in western culture and the "[t]he ideology of heterosexual romance, beamed at [the young girl] from childhood out of fairy tales, television, films, advertising, popular songs, wedding pageantry . . ." Rich, *supra* note 1, at 645.

49. See, e.g., RICHARD A. POSNER, *SEX AND REASON* 302 (1992) (discussing promiscuity in homosexual men pejoratively and noting American disapproval of promiscuity); Roberta Cepko, *Involuntary Sterilization of Mentally Disabled Women*, 8 BERKELEY WOMEN'S L.J. 122, 160–61 (1993) (discussing the role of disapproval of sexual promiscuity in successful petitions for forced

sterilization of women). At least ten states and the District of Columbia penalize fornication. See D.C. CODE ANN. § 22-1602 (2001); IDAHO CODE § 18-6603 (Michie 2003); 720 ILL. COMP. STAT. 5/11-8 (2002); MASS. GEN. LAWS ANN. ch. 272, § 18 (West 2000); MINN. STAT. ANN. § 609.34 (West 2003); MISS. CODE ANN. § 97-29-1 (2003); N.C. GEN. STAT. § 14-184 (2003); N.D. CENT. CODE § 12.1-20-08 (2003); S.C. CODE ANN. § 16-15-60 (Law. Co-op. 2002); UTAH CODE ANN. § 76-7-104 (2002); VA. CODE ANN. § 18.2-344 (Michie 2003). These laws are occasionally enforced in certain contexts. See, e.g., Juhi Mehta, Note, *Prosecuting Teenage Parents Under Fornication Statutes: A Constitutionally Suspect Legal Solution to the Problem of Teen Pregnancy*, 5 CARDOZO WOMEN'S L.J. 121 (1998). Some believe that the presence of these laws on the books sends an important message of disapproval. See, e.g., Traci Shallbetter Stratton, Note, *No More Messing Around: Substantive Due Process Challenges to State Laws Prohibiting Fornication*, 73 WASH. L. REV. 767, 797 (1998) ("Keeping fornication statutes on the books and informing the public of their existence might not prevent fornication, but it will send a much needed message of social disapproval, driving this immoral conduct underground.").

50. See, e.g., *infra* note 112 and accompanying text. At least twenty-three states and the District of Columbia still have laws criminalizing adultery in some form. See ALA. CODE § 13A-13-2 (2003); ARIZ. REV. STAT. ANN. § 13-1408 (West 2003); COLO. REV. STAT. § 18-6-501 (2003); D.C. CODE ANN. § 22-201 (2001); FLA. STAT. ANN. § 798.01 (West 2000); GA. CODE ANN. § 16-6-19 (Harrison 1990); IDAHO CODE § 18-6601 (Michie 2003); 720 ILL. COMP. STAT. ANN. 5/11-7(a) (West 2002); KAN. STAT. ANN. § 21-3507(1) (2002); MD. CODE ANN., CRIM. § 10-501 (2002); MASS. GEN. LAWS ANN. ch. 272, § 14 (West 2000); MICH. COMP. LAWS ANN. § 750.30 (West 2003); MINN. STAT. ANN. § 609.36 (West 2004); MISS. CODE ANN. § 97-29-1 (1999); N.H. REV. STAT. ANN. § 645:3 (1996); N.Y. PENAL LAW § 2.55.17 (McKinney 2004); N.C. GEN. STAT. § 14-184 (2002); N.D. CENT. CODE § 12.1-20-09 (1997); OKLA. STAT. ANN. tit. 21, § 871 (West 2002); R.I. GEN. LAWS § 11-6-2 (2002); S.C. CODE ANN. § 16-15-60 (Law. Co-op. 2003); UTAH CODE ANN. § 76-7-103(1) (1999); VA. CODE ANN. § 18.2-365 (Michie 1996); W. VA. CODE ANN. § 61-8-3 (Michie 2000); see also John F. Kelly, *Virginia Adultery Case Roils Divorce Industry: Conviction Draws Attention to Little Used Law*, WASH. POST, Dec. 1, 2003, at B1, B8. Prosecutions for adultery are rare. See, e.g., Martin J. Siegel, *For Better or for Worse: Adultery, Crime & the Constitution*, 30 J. FAM. L. 45, 45 n.5, 53 nn.54-57 (1991-92); but cf. Kelly, *supra*. They are, however, vigorously pursued in specialized contexts such as the military. See Melissa Ash Haggard, *Adultery: A Comparison of Military Law and State Law and the Controversy This Causes Under Our Constitution and Criminal Justice System*, 37 BRANDEIS L.J. 469, 469-70, 476-77 (1998); James M. Winner, *Beds With Sheets But No Covers: The Right to Privacy and the Military's Regulation of Adultery*, 31 LOY. L.A. L. REV. 1073, 1073-74 (1998).

51. Forty-nine states and the District of Columbia have statutes criminalizing polygamy. See ALA. CODE § 13A-13-1 (1994); ALASKA STAT. § 11.51.140 (Michie 1983); ARIZ. REV. STAT. ANN. § 13-3606 (West 2001); ARK. CODE ANN. § 5-26-201 (Michie 2000); CAL. PENAL CODE § 281 (West 1999); COLO. REV. STAT. ANN. § 18-6-201 (2003); CONN. GEN. STAT. ANN. § 53a-190 (West 2001); DEL. CODE ANN. tit. 11, § 1001 (2001); D.C. CODE ANN. § 22-501 (2001); FLA. STAT. ANN. § 826.01 (West 2000); GA. CODE ANN. § 16-6-20 (Harrison 1990); IDAHO CODE § 18-1101 (Michie 1997); 720 ILL. COMP. STAT. ANN. 5/11-12 (West 2002); IND. CODE ANN. § 35-46-1-2 (West 1998); IOWA CODE ANN. § 726.1 (West 2003); KAN. STAT. ANN. § 21-3601 (1995); KY. REV. STAT. ANN. § 530.010 (Michie 1999); LA. REV. STAT. ANN. § 14:76 (West 1986); ME. REV. STAT. ANN. tit 17-A, § 551 (West 1983); MD. CODE ANN., CRIM. § 10-502 (2002); MASS. GEN. LAWS ANN. ch. 207, § 4 (West 1998); MICH. COMP. LAWS ANN. § 551.5 (West 1998); MINN. STAT. ANN. § 609.355 (West 2003); MISS. CODE ANN. § 97-29-13 (1999); MO. ANN. STAT. § 568.010 (2000); MONT. CODE ANN. § 45-5-611 (2003); NEB. REV. STAT. § 28-701 (1995); NEV. REV. STAT. ANN. 201.160 (2002); N.H. REV. STAT. ANN. § 639:1 (1996); N.J. STAT. ANN. § 2C:24-1 (West 1995); N.M. STAT. ANN. § 30-10-1 (Michie 1978); N.Y. PENAL LAW § 255.15 (McKinney 2000); N.C. GEN. STAT. § 14-183 (2000); N.D. CENT. CODE § 12.1-20-13 (1997); OHIO REV. CODE ANN. § 2919.01 (West 1997); OKLA. STAT. ANN. tit. 21 § 881 (West 2002); OR. REV. STAT. § 163.515 (2001); 18 PA. CONS. STAT. ANN. § 4301 (West 1983); R.I. GEN. LAWS § 11-6-1 (2002); S.C. CODE ANN. § 16-15-10 (Law. Co-op. 2003); S.D. CODIFIED LAWS § 22-22-15 (Michie 2003); TENN. CODE ANN. § 39-15-301 (2003); TEX. PENAL CODE ANN. § 25.01 (Vernon 2003); UTAH CODE ANN. § 76-7-101 (1999); VA. CODE

from what we might call “simple monogamy,” the idea of one partner at a time. The significance of this idea is reflected in countless contexts, for example, the Tenth Circuit’s statement in *Potter v. Murray City*,<sup>53</sup> upholding the termination of a police officer for bigamy, that “[m]onogamy is inextricably woven into the fabric of our society. It is the bedrock upon which our culture is built.”<sup>54</sup> In addition, there are signs that the marital requirement of sexual exclusivity is becoming ever more visible in the push toward same-sex marriage. In *Goodridge v. Department of Public Health*,<sup>55</sup> holding that the prohibition on same-sex civil marriage violates the state constitution,<sup>56</sup> the Supreme Judicial Court of Massachusetts expressly emphasized this aspect of the protected relationships. The opinion uses the word “exclusive” in some form six times.<sup>57</sup> For example, in its second sentence the court celebrated “[t]he exclusive commitment of two individuals to each other.”<sup>58</sup> This captures the essence of simple monogamy.

Condemnation of divorce, both historical and extant,<sup>59</sup> points us towards another, stricter model of monogamy: the fantasy of “supermonogamy.” Supermonogamy is the idea that only one “right” partner exists for each person. Though it pervades popular and high culture,<sup>60</sup> and hints of it may also be found

ANN. § 20-38.1 (2001); VT. STAT. ANN. tit. 13 § 206 (1998); WASH. REV. CODE ANN. § 9A.64.010 (West 2000); W. VA. CODE ANN. § 61-8-1 (Michie 2000); WIS. STAT. ANN. § 944.05 (West 1996); WYO. STAT. ANN. § 6-4-401 (Michie 2003).

52. See, e.g., Dubler, *supra* note 24; Arthur B. Shostak, *Singlehood*, in HANDBOOK OF MARRIAGE AND THE FAMILY 355, 365–66 (Marvin B. Sussman & Suzanne K. Steinmetz eds., 1987); Shari Motro, *Single and Paying for It*, N.Y. TIMES, Jan. 25, 2004, at WK15.

53. *Potter v. Murray City*, 760 F.2d 1065 (10th Cir. 1985).

54. *Potter*, 760 F.2d at 1070.

55. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

56. The court recently rejected the possible solution of civil unions. Opinions of the Justices to the Senate, 802 N.E.2d 565 (Mass. 2004).

57. *Goodridge*, 798 N.E.2d at 948, 949, 959, 961, 965, 969.

58. *Id.* at 948.

59. See, e.g., Herma Hill Kay, *From the Second Sex to the Joint Venture: An Overview of Women’s Rights and Family Law in the United States During the Twentieth Century*, 88 CAL. L. REV. 2017, 2081–83 (2000) (describing a “full-scale,” though ultimately unsuccessful, campaign in the late twentieth century to reverse the no-fault divorce revolution and comparing the campaign to late-nineteenth-century “condemnation of ‘easy divorce’”).

60. See, e.g., ANNE BRADSTREET, *To My Dear and Loving Husband*, in THE COMPLETE WORKS OF ANNE BRADSTREET 180 (Joseph R. McElrath, Jr. & Allan P. Robb eds., Twayne 1981) (1678) (“If ever two were one, then surely we. / If ever man were lov’d by wife, then thee. / . . . Then while we live, in love let’s so persever / That when we live no more, we may live ever.”); LINDA PERLSTEIN, NOT MUCH JUST CHILLIN’ 247 (2003) (quoting a seventh-grade Maryland girl as saying in an interview, “The one for you could be two years old right now, or ninety. My soulmate could have been Benjamin Franklin.”); The Platters, *Only You* (“Only you and you alone / can thrill me like you do / and fill my heart with love for only you. / Only you can make this change in me, / for it’s true, you are my destiny. / . . . You’re my dream come true / my one and only you.”); Lionel Ritchie, *Endless Love* (“My love, there’s only you in my life, / The only thing that’s right. / . . . Oh yes, you will always be, my endless love. / Two hearts, two hearts that beat as one. / Our lives have just begun. / Forever, I’ll hold you close in my arms, / I can’t resist your charms.”); cf. JANICE A. RADWAY, *READING THE ROMANCE* 122 (Univ. of N.C. Press, 1991)



in the *Goodridge* opinion,<sup>61</sup> the idea of supermonogamy is perhaps most vividly portrayed in a classical story, Aristophanes' tale of originary beings from Plato's *Symposium*.<sup>62</sup> "[I]n the beginning . . .," Plato writes in Aristophanes' speech, "[t]here were three kinds of human beings . . . male and female . . . [and] a third, a combination of those two. . . ."<sup>63</sup> These beings were "completely round, with . . . four hands each, as many legs as hands, and two faces, exactly alike, on a rounded neck . . . There were two sets of sexual organs . . ."<sup>64</sup> Offended by these beings' ambitions to attack the gods, Zeus split them in two to diminish their strength. The result was pitiable. The beings ran around looking for their other halves, which they clung to, "wanting to grow together" again.<sup>65</sup> "In that condition they would die from hunger and general idleness, because they would not do anything apart from each other,"<sup>66</sup> so Zeus took pity on them and moved their genitals around to the front. This allowed them consummation which in turn allowed them to "stop embracing, return to their jobs, and look after their other needs in life."<sup>67</sup>

Plato first digests this originary myth in a quiet, conclusory tone, observing, "This, then, is the source of our desire to love each other. Love is born into every human being; it calls back the halves of our original nature together; it tries to make one out of two and heal the wound of human nature."<sup>68</sup> He continues, "[e]ach of us, then, is a 'matching half' of a human whole."<sup>69</sup> Plato matter-of-factly offers this story as the origin of three types of beings, which to a modern eye look like gay men, lesbians, and heterosexuals, in terms of the sex of their desired object.<sup>70</sup>

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(reporting evidence that the most striking characteristic of female romance readers' favorite novels is their "resolute focus on a single, developing relationship between heroine and hero"); RUTHANN ROBSON, *SAPPHO GOES TO LAW SCHOOL: FRAGMENTS IN LESBIAN LEGAL THEORY* 115 (1998) (noting that "lesbian relationships are deemed subject to the same aspirations and expectations as the heterosexual romantic tradition that posits 'true love' and defined it as 'forever' and 'only'").

61. *Goodridge*, 798 N.E.2d at 961 ("[I]t is the exclusive and *permanent* commitment of the marriage partners to one another, not the begetting of children, that is the sine qua non of civil marriage." (emphasis added)).

62. PLATO, *SYMPOSIUM* 25–31 (Alexander Nehamas & Paul Woodruff trans., Hackett 1989).

63. *Id.* at 25.

64. *Id.*

65. *Id.* at 27.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. The story is of course much more complicated for a number of reasons. First, it is deeply questionable whether one says anything meaningful at all by applying these terms of sexual orientation to periods before their coining. Second, the particular complexities of Greek sexual desire and practices have been the subject of much dispute and commentary, and this passage from Plato has received particular attention for its ambiguity. See, e.g., David M. Halperin, *The First Homosexuality?*, in *THE SLEEP OF REASON: EROTIC EXPERIENCE AND SEXUAL ETHICS IN ANCIENT GREECE AND ROME* 248–52 (Martha Craven Nussbaum & Juha Sihvola eds., 2002). My purpose here is only to point up the salience of this story to a modern audience, such as the courtroom in

As Plato proceeds again and again to describe the emotional legacy of this prelapsarian state, the romantic intensity of his writing increases. "And so," he writes:

when a person meets the half that is his very own, whatever his orientation, whether it's to young men or not, then something wonderful happens: the two are struck from their senses by love, by a sense of belonging to one another, and by desire, and they don't want to be separated from one another, not even for a moment.<sup>71</sup>

The climax of the narratives is a fantasy of complete physical reunion, a powerful metaphor for supermonogamous romantic love, which merits lengthy quotation:

It's obvious that the soul of every lover longs for something else; his soul cannot say what it is, but like an oracle it has a sense of what it wants, and like an oracle it hides behind a riddle. Suppose two lovers are lying together and Hephaestus<sup>72</sup> stands over them with mending tools, asking, "What is it you human beings really want from each other?" And suppose they're perplexed, and he asks them again: "Is this your heart's desire, then—for the two of you to become parts of the same whole, as near as can be, and never to separate, day or night? Because if that's your desire, I'd like to weld you together and join you into something that is naturally whole, so that the two of you are made into one. Then the two of you would share one life, as long as you lived, because you would be one being, and by the same token, when you died, you would be one and not two in Hades, having died a single death. Look at your love, and see if this is what you desire: wouldn't this be all the good fortune you could want?"

Surely you can see that no one who received such an offer would turn it down; no one would find anything else that he wanted. Instead, everyone would think he'd found out at last what he had always wanted: to come together and melt together with the one he loves, so that one person emerged from two.<sup>73</sup>

Plato concludes with the question his story answers: "Why should this be so? It's because, as I said, we used to be complete wholes in our original nature, and now 'Love' is the name for our pursuit of wholeness, for our desire to be complete."<sup>74</sup>

It should therefore not surprise us that this story—which evades the possibility of polyamory (and of bisexuality)—would be the strategic choice of

Romer, see *infra* note 75 and accompanying text.

71. PLATO, *supra* note 62, at 28.

72. In Greek mythology, the "craftsman god." *Id.* at 28 n.27.

73. *Id.* at 28–29.

74. *Id.* at 29.

Martha Nussbaum for her testimony before the trial court in *Romer v. Evans*.<sup>75</sup> Plato's tale colorfully captures the potent fantasy of absolute monogamy, of supermonogamy, the vision of a unique and permanent bond between two individuals.

## 2. Stories from Biological Anthropology

Biological anthropologists, evolutionary psychologists, and other scientists of human and nonhuman animal behavior have offered various deterministic explanations for "human monogamy." The basic story follows the selfish gene into unexpected territory. Darwinian and other adaptive explanations of animal behavior might seem to argue against monogamy. That is, would not adaptive creatures seek to reproduce as much and as widely as possible, giving their gene pool the best chance of survival? This view has its adherents,<sup>76</sup> but various evolutionary scientists also offer explanations for why humans may pair up in order to promote the survival of their individual gene pools.<sup>77</sup> These types of explanations of human behavior have been much criticized; they are of interest here primarily as examples of the kinds of stories we tell in support of monogamy.

The basic story of adaptive monogamy is quality over quantity. Due to the relatively lengthy human gestation period and childhood,<sup>78</sup> the story goes,

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75. Martha C. Nussbaum, *Platonic Love and Colorado Law: The Relevance of Ancient Greek Norms to Modern Sexual Controversies*, 80 VA. L. REV. 1515, 1517–18 (1994). Nussbaum writes: On October 15, 1993, I found myself on the witness stand in a courtroom in Denver, Colorado, telling Colorado District Judge H. Jeffrey Bayless about Plato's *Symposium*. Because I had a very short time to testify as an expert witness, I focused above all on the speech of Aristophanes, which I had elsewhere argued to be one of the speeches in which Plato expresses views that he wishes his reader to take especially seriously. I told the court the story of how human beings were once round and whole—but now, cut in half for their overambitiousness, they feel a sense of lost wholeness and run about searching for their "other half." There are, Aristophanes tells us, three types of search, corresponding to three original species of human beings. There are males whose other half is male, females whose other half is female, and people whose other half is of the opposite sex. The speech describes the feelings of intimacy and joy with which the lost other halves greet one another, and describes the activity of sexual intercourse as a joyful attempt to be restored to the lost unity of their original natures. This is so no less for the same-sex than for the opposite-sex couples: in all cases, lovemaking expresses a deep inner need coming from nature, and in all cases the couples, so uniting, have the potential to make a valuable civic contribution.

*Id.* (internal citations omitted).

76. For a review of the scientific accounts that men are inclined to spread their seed as far and wide as possible, see Katharine K. Baker, *Biology for Feminists*, 75 CHI.-KENT L. REV. 805, 807–13 (2000).

77. See, e.g., SARAH HRDY, *MOTHER NATURE: A HISTORY OF MOTHERS, INFANTS, AND NATURAL SELECTION* (1999); DESMOND MORRIS, *THE NAKED APE: A ZOOLOGIST'S STUDY OF THE HUMAN ANIMAL* (1967); MATT RIDLEY, *THE RED QUEEN: SEX AND THE EVOLUTION OF HUMAN NATURE* (1993); ROBERT WRIGHT, *THE MORAL ANIMAL: THE NEW SCIENCE OF EVOLUTIONARY PSYCHOLOGY* (1994).

78. These features of humans are said to allow the development of "better brains," which are

women want the support and protection of men during this vulnerable period of child-bearing and child-rearing.<sup>79</sup> In addition, pairing with one provider helps females ensure the health, safety, and development of their offspring.<sup>80</sup> Thus, it is advantageous for females "to develop a pairing tendency."<sup>81</sup>

The male interest in monogamy is less clear, but writers offer three types of explanations of male monogamy.<sup>82</sup> The first type focuses on the males' relations with each other, interpreting monogamy's equal distribution of the sexual resources (i.e., women) as advantageous to cooperative hunting behavior among males,<sup>83</sup> or as the result of democratic progress by the less wealthy men who have a harder time obtaining a wife under a polygamous system.<sup>84</sup> The second type of explanation yokes the males' interests directly to the offspring, whom the males may want to protect or nourish in order to increase their chance of survival.<sup>85</sup>

The third type of explanation focuses on male-female relations. Here, the males may stay close to home to make sure no other male is impregnating the female, and thereby diverting her resources or those of the primary male.<sup>86</sup> Or, the males may be understood to develop pairing tendencies in order to be more

necessary to survival through hunting. MORRIS, *supra* note 77, at 63.

79. *Id.*

80. "Children with two parents may have had an educational edge over children with only one." WRIGHT, *supra* note 77, at 58–59.

81. MORRIS, *supra* note 77, at 64.

82. Certainly, the different versions of these stories have also been challenged. For example, Robert Wright roundly criticizes Desmond Morris's version of the pairbonding thesis in order to make room for his own thesis about political compromises among men leading to monogamy. See WRIGHT, *supra* note 77, at 55–58. The disagreements over the most compelling story are not central to my point, however, which is that the scientific study of human behavior has produced a wide array of explanations and justifications for human monogamy.

83. MORRIS, *supra* note 77, at 64. Morris argues that, "if the weaker males were going to be expected to co-operate on the hunt, they had to be given more sexual rights. The females would have to be shared out, the sexual organization more democratic, less tyrannical." *Id.* To facilitate this sharing of the women, "[e]ach male . . . would need a strong pairing tendency." *Id.*

84. RIDLEY, *supra* note 77, at 199 ("Once monogamous men had a chance to vote against polygamists (and who does not want to tear down the competitor, however much he might also like to emulate him?), their fate was sealed."); WRIGHT, *supra* note 77, at 98 ("[T]he most fortunate men still get the most desirable women, but they have to limit themselves to one apiece."). For an example of this type of reasoning reflected in an economist's predictions, see Christopher Westley, *Matrimony and Microeconomics: A Critique of Gary Becker's Analysis of Marriage*, 1 J. MARKETS & MORALITY, Spring 1998, at 72 (arguing that men might resort to violence in the face of shortages of women and a consequent dowry system under legalized polygyny).

85. RIDLEY, *supra* note 77, at 214 (citing a theory that male gibbons tend to be monogamous to prevent infanticide by other males).

86. See RIDLEY, *supra* note 77, at 213–14 (drawing on the behavior of non-human animals to explain male protection of the home base as a way to monitor the females and prevent them from engaging in sexual relations with other males). Even on its own terms, of course, something does not quite make sense in this story: in order to assure their paternity, men would not need to be monogamous themselves, they would merely need to ensure that the women they impregnated behaved monogamously. They would actually need to ensure only that the women they impregnated had sex only with them during the relevant time period.

sexually successful with the females who presumptively prefer males who will pair.<sup>87</sup> This account presents sociobiological explanations of human love and jealousy.<sup>88</sup> Under a refinement of this theory, males pair up because monogamy creates domestic bliss that is beneficial to offspring. Sarah Hrdy writes, "Monogamy reduces inherent conflicts of interest between the sexes. Her reproductive success becomes *his*, and vice versa, promoting harmonious relations between genetically distinct individuals striving towards common goals."<sup>89</sup> In sum, "[W]hen it works, children benefit."<sup>90</sup> Hrdy is clearly pleased to offer this explanation, because, she observes, "Sociobiology is not a field known for the encouraging news it offers either sex."<sup>91</sup> But Hrdy offers an abundance of sanguine stories. For "over evolutionary time, lifelong monogamy turns out to be the cure for all sorts of detrimental devices that one sex uses to exploit the other."<sup>92</sup>

Because compelling counternarratives about nonmonogamy are also told

87. WRIGHT, *supra* note 77, at 63 (observing that, in light of the possibility of male duplicity, "a woman's genes would be well served by her early and careful scrutiny of a man's likely devotion"). The females develop finely honed skills for detecting the tendency to fidelity, thus causing the males to become more faithful, and so on. *Id.* Of course, this may also lead the males to develop better techniques for deception. At this point, the monogamy story begins to unravel, and stories are told about the potential adaptiveness of human duplicitousness in sexual behavior.

88. With regard to love, "natural selection appears to have taken this cost-benefit calculus [of children benefiting from two parents well bonded] and transmuted it into feeling—in particular, the sensation of love." WRIGHT, *supra* note 77, at 59; *see also* MORRIS, *supra* note 77, at 64 ("The naked ape had to develop the capacity for falling in love, for becoming sexually imprinted on a single partner, for evolving a pair-bond."). With regard to jealousy, each sex has the interests portrayed above in gaining the exclusive attentions of another. Sociobiologists have traditionally understood jealousy as gendered. For example, drawing on the evolutionary account of monogamy as the result of female desire for stability and male desire for sexual access, Martin Daly and Margo Wilson hypothesized that male and female jealousy would differ: Males would fear sexual infidelity and females would fear emotional infidelity. In their study of male versus female responses to imagined sexual and emotional infidelity, Daly and Wilson found the answer they expected: Males exhibited increased physiological responses to the idea of sexual infidelity whereas women responded relatively more intensely to the idea of emotional infidelity. *See* WRIGHT, *supra* note 77, at 66–67 (citing Martin Daly, Margo Wilson & S.J. Weghorst, *Male Sexual Jealousy*, 3 ETHOLOGY AND SOCIOBIOLOGY 11 (1982)). Subsequent research has challenged this thesis, offering alternative explanations such as greater male excitement in response to sexual imaginings, relative to emotional imaginings, regardless of the infidelity component of the fantasy. *See* Christine R. Harris, *Psychophysiological Responses to Imagined Infidelity: The Specific Innate Modular View of Jealousy Reconsidered*, 78 J. PERSONALITY & SOC. PSYCH. 1082 (2000). Other research has suggested that differential excitement correlates with the subject's beliefs about the likely coincidence of sexual and emotional infidelity. *See, e.g.*, David A. DeStefano & Peter Salovey, *Evolutionary Origins of Sex Differences in Jealousy?: Questioning the "Fitness" of the Model*, in EMOTIONS IN SOCIAL PSYCHOLOGY: ESSENTIAL READINGS 150 (W. Gerrod Parrott ed., 2001). Regardless of the results as to sex differences, the notion of a selfish gene offers a view of jealousy as hardwired and adaptive. Even if jealousy "has outlived its [genetic] logic" in the day of contraception, this story supports the conclusion that "the basic impulse toward jealousy is very hard to erase." WRIGHT, *supra* note 77, at 67.

89. HRDY, *supra* note 77, at 231.

90. *Id.*

91. *Id.*

92. *Id.*

from an adaptive perspective,<sup>93</sup> the accounts outlined here are particularly interesting for their dogged pursuit of an “encouraging”—which is to say, monogamous—explanation of human sexual behavior. One can almost hear the sighs of relief emitted by evolutionary theorists when they can conclude that humans are basically monogamous,<sup>94</sup> and even better yet, when they can supply explanations of why this trait is part of human evolutionary “success.” Thus, Matt Ridley observes, “The nature of the human male, then, is to take opportunities, if they are granted him, for polygamous mating, and to use wealth, power and violence as means to sexual ends in the competition with other men—though usually not at the expense of sacrificing a secure monogamous relationship.”<sup>95</sup> Fortunately, it seems, the male interests in keeping the monogamous relationship secure—though less obvious than the female interests—outweigh his polygamous drive. And this is part of what makes humans special: “Even in the most despotic and polygamous moment of human history, mankind was faithful to the institution of monogamous marriage, quite unlike any other polygamous animal.”<sup>96</sup>

### B. *Monogamy's Reality*

This foray into the romantic and scientific story of monogamy leads us back to the data. The numbers on actual relationship behavior illustrate the gap between theory and practice.

#### 1. *The Failures of Supermonogamy*

The frequent failure of supermonogamy—the idea of one partner ever—is reflected in our high divorce rates. Rates of divorce in the United States have increased dramatically during the twentieth century,<sup>97</sup> and studies indicate that

93. See *supra* note 76.

94. RIDLEY, *supra* note 77, at 212 (“Even in the polygamous societies of pastoralists, the great majority of marriages are monogamous ones.”).

95. RIDLEY, *supra* note 77, at 206.

96. *Id.* at 207. Ridley does not want his readers to think that he is endorsing adultery:

By describing adultery as a force that shaped our mating system, I am not “justifying” it. Nothing is more “natural” than people evolving the tendency to object to being cuckolded or cheated on, so if my analysis were to be interpreted as justifying adultery, it would be even more obviously interpreted as justifying the social and legal mechanisms for discouraging adultery. What I am claiming is that adultery and its disapproval are both “natural.”

*Id.* at 219.

97. Weis, *supra* note 38 (citing E. Berscheid, *Emotion, in* CLOSE RELATIONSHIPS 110–68 (H. H. Kelley et al. eds., 1983)). Weis reports that the rate of divorce has leveled since 1980. *Id.* (citing U.S. DEP’T OF COMMERCE BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS: MARITAL STATUS AND LIVING ARRANGEMENTS (1985)); see also P.C. Glick, *Marriage, Divorce, and Living Arrangements: Prospective Changes*, 5 J. FAM. ISSUES 7 (1984); A.J. Norton & J. E. Moorman, *Current Trends in Marriage and Divorce Among American Women*, 49 J. MARRIAGE & THE FAMILY 3 (1987); Shostak, *supra* note 52, at 355).

forty percent of Americans get divorced<sup>98</sup> and that seventy percent of those who divorce remarry.<sup>99</sup> Various commentators have argued that serial monogamy may be seen as a form of polygamy,<sup>100</sup> but whether rightly called “polygamy,” serial monogamy belies the fantasy of one man and one woman forever bound in blissful supermonogamy. In order to conclude that the ideal of simple monogamy is frequently not achieved, as I do in the next Section, it is not necessary to resolve the question of whether serial monogamy is more like simple monogamy or like polygamy.

## 2. *The Failures of Simple Monogamy*

First, in light of the above discussion, it is worth noting that serial monogamy may lead to a kind of simultaneous parental nonmonogamy from the perspective of children. That is, parental recombinations over time may lead to plural parents in the form of blended families. A child may have a mother, a stepfather, a father, and a stepmother. So while the parents are creating horizontal relationships of only two at a time, the children may be acquiring horizontal parenting structures of more than two. Certainly in some cases serial monogamy leads to rejection by one parent of the entire family, including the children,<sup>101</sup> but in other cases serial monogamy is cumulative relationship-building, at least from the children’s perspective. Moreover, many couples must remain in constant contact even after divorce because of their mutual commitment to their children.<sup>102</sup> The prevalence of divorce and remarriage<sup>103</sup> creates this sort of structural and psychological deviation from the fantasy of the traditional monogamous marriage.<sup>104</sup>

98. Weis, *supra* note 38.

99. *Id.*

100. *See, e.g.*, Potter v. Murray City, 585 F. Supp. 1126, 1142 n.7 (D. Utah 1984) (noting that plaintiff, fired from his job as a police officer for practicing polygamy, had sought the admission during discovery that “the high rate of divorce in the United States has often turned today’s American familial relationships into a form of serial polygamy”), *aff’d*, 760 F.2d 1065 (10th Cir. 1985) (affirming district court’s rejection of plaintiff’s free exercise and privacy-based challenge to his termination); DAVID G. MAILLU, *The Whiteman’s Polygamy*, in OUR KIND OF POLYGAMY 29 (1988).

101. *See* Judith P. Stelboum, *Patriarchal Monogamy*, in THE LESBIAN POLYAMORY READER: OPEN RELATIONSHIPS, NON-MONOGAMY, AND CASUAL SEX 39, 44 (Marcia Munson & Judith P. Stelboum eds., 1999) (positing that “[s]erial monogamy, facilitating the rejection of one person for another, has resulted in the abandoning of children”)

102. *See, e.g.*, Joyce Davis, *Enhanced Earning Capacity/Human Capital: The Reluctance To Call It Property*, 17 WOMEN’S RTS. L. REP. 109, 131 (1996) (“The approximately sixty percent of divorcing couples who are parents of minor children cannot simply walk away from each other and begin their lives anew. Their parental relationship necessitates, or at least contemplates, an on-going relationship between them.”); Carolyn J. Frantz & Hanoch Dagan, *Properties of Marriage*, 104 COLUM. L. REV. 75, 111 n.161 (2004).

103. *See supra* text accompanying notes 97–99.

104. Such a deviation also occurs in alternative parenting relationships of more than two, such as two lesbian mothers and a male biological father who is involved in the child’s life, an example discussed by Martha Ertman. *See* Ertman, *Private/Private Distinction*, *supra* note 26, at

Second, and more importantly here, adultery occurs often enough to undermine even the idea of simple, serial monogamy—the idea that people have one sexual partner at a time.<sup>105</sup> “Researchers [of adultery in America] have reported lifetime prevalence rates from as low as 20 percent . . . to nearly 75 percent . . . .”<sup>106</sup> The most comprehensive study of American sexual behavior to date offers figures on the low end of that scale. The National Health and Social Life Survey, released in 1994, claims that approximately twenty percent of married women and thirty-five percent of married men have had adulterous sex,<sup>107</sup> and there is reason to think that levels of adultery among those studied are even higher.<sup>108</sup> The American data on adultery are consistent with those of other major western nations. Dr. Judith Mackay, Senior Policy Advisor for the World Health Organization, reports that “40% of sexually active 16–45 year old Germans admit to having been sexually unfaithful, compared with 50% of Americans, 42% of British, 40% of Mexicans, 36% of the French, and 22% of the Spanish.”<sup>109</sup> Bear in mind that these figures reflect only those subjects who admit to infidelity.

Not just a private dalliance, adultery is a regular player on the public stage. From presidents and politicians to actors and artists, those in the public eye dramatize the prevalence of nonmonogamy.<sup>110</sup> And where public figures succeed at monogamy, they may admit that this has not been their unswaying desire. Thus President Jimmy Carter, who managed to avoid the notorious adultery recently associated with President Bill Clinton, famously admitted to lusting “in his heart.”<sup>111</sup> Such an admission seems surprising in light of the widespread “normative consensus” among Americans about this form of extramarital sex: “A series of national surveys indicate that [adultery] has been

124–25.

105. See, e.g., Linda Fitts Mischler, *Personal Morals Masquerading as Professional Ethics: Regulations Banning Sex Between Domestic Relations Attorneys and Their Clients*, 23 HARV. WOMEN'S L.J. 1, 20 (2000); Martin J. Siegel, *For Better or for Worse: Adultery, Crime & the Constitution*, 30 J. FAM. L., 45, 55 (1991) (noting that “[h]alf of all husbands report having committed adultery” and that “[s]omewhere between a third to forty percent of all wives say they have been unfaithful”); see also *id.* at 55 nn.68–73.

106. Weis, *supra* note 38, at 1508 (citations omitted).

107. *Id.* at 1507.

108. The validity of the National Health and Social Life Survey has been called into question, particularly with regard to its data on counter-normative behaviors, because some of the subjects were interviewed in the presence of another person such as a family member. See *id.* at 1500–01 (citing I.L. Reiss, *Is This the Definitive Sexual Survey?*, 32 J. SEX RES. 77 (1995) (reviewing E.O. LAUMANN, J.H. GAGNON, R.T. MICHAEL & S. MICHAELS, *THE SOCIAL ORGANIZATION OF SEXUALITY: SEXUAL PRACTICES IN THE UNITED STATES*)).

109. Judith Mackay, *Global Sex: Sexuality and Sexual Practices Around the World*, Fifth Congress of the European Federation of Sexology, Berlin, <http://www2.hu-berlin.de/sexology/> (June 30, 2000).

110. See, e.g., Laura Kipnis, *Adultery*, in *INTIMACY* 9, 34–35 (Lauren Berlant ed., 2000) (discussing President Clinton's extramarital affairs); Mischler, *supra* note 105, at 18 n.84.

111. See Joy Singer, *For Better or for Worse: How the Law and Politics of Gay Marriage Affects Polys*, *LOVING MORE MAG.*, Winter 1996, at 4, 5. “Joy Singer” is a pseudonym.



consistently disapproved by 75–85 percent of the adult American population.”<sup>112</sup> Considered more closely, however, Carter’s admission speaks directly to the quandary of compulsory monogamy. The desire for nonmonogamy is so widespread, and the pressure to resist that desire so great, that for a politician to acknowledge it is for him to identify with Everyman (and likely Everywoman), and, at the same time, the politician’s resistance to nonmonogamous desire is the fulfillment of the fantasy that everyone must feel obliged to strive for, in spite of that fantasy’s frequent disappointment.

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This Part of the article has outlined the norm of monogamy from two perspectives: the ideals of simple monogamy, one partner at a time, and of supermonogamy, one partner ever. The discussion has highlighted, through statistics and vivid examples, the contours of these desires as well as the frequent gap between their ideal and their reality. The purpose of this Part has not been to portray monogamy generally as a failure; though common, monogamy’s failures are far from universal. The purpose has also not been to portray all aspects of monogamy; the aspirations and purported goods of monogamy have been discussed well and often by others. Rather, this Part has meant to frame the following discussion of nonmonogamy by calling attention to the pervasiveness of the fantasy of monogamy, by highlighting some of its forms and failures, and by acknowledging that its boundaries are policed by law and norms. The ideal of monogamy as satisfying and desirable, as the only path for true love—and of jealousy as a necessary, even defining, part of love—is so pervasive as to blind us, at times, to its operation as law.

### III. CONTEMPORARY POLYAMORY

Relationships among more than two partners may strike many people as “preposterous.”<sup>113</sup> As just discussed, however, monogamy often fails to achieve

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112. Weis, *supra* note 38, at 1507; see also Lynn D. Wardle, *Parental Infidelity and the “No-Harm” Rule in Custody Litigation*, 52 CATH. UNIV. L. REV. 81, 95 n.57 (2002) (“According to the Washington Post/Kaiser/Harvard Survey Project in 1998, eighty-eight percent of Americans believe that adultery is immoral, while only eleven percent find it morally acceptable.”).

113. See, e.g., Chambers, *supra* note 19, at 59 (emphasis added) (“First, [opponents of alternatives to heterosexual monogamous relationships] see them all as *preposterous*, as something barely imaginable in the world in which they live. Marriage just *is* the union of one man and one woman. And, second, they see these forms of union as moral equivalents, each *repellant*, each the appropriate province of the law to discourage or prohibit.”); see also Barbara Bergmann, *Becker’s Theory of the Family: Preposterous Conclusions*, 1 FEMINIST ECON. 1 (1995) (characterizing as “preposterous” Gary Becker’s theory of how polygamy might benefit women). For more discussion of Becker’s theory, see *infra* text accompanying notes 322–31. “Preposterous” could be understood as akin to “inversion,” an early term for homosexuality, in that preposterous means, in one sense, “contrary to the order of nature . . . monstrous,” as well as the now-rare, first sense of “having or placing last that which should be first; inverted in position or order.” OXFORD ENGLISH DICTIONARY (1993).

its goals. The failure of one model does not, in itself, make other models viable. But monogamy's frequent failure may give us reason to pause before dismissing as absurd the possibility of alternatives.<sup>114</sup> And as polyamory is not frequently in the public eye, we are rarely exposed to its reality.

This Part discusses the scope, terms, and structures of polyamory today. Since such skeletal information does little to enrich our understanding of a practice, this Part also portrays several polyamorous relationships. These portraits aim to capture something of the feeling and experience of living inside these relationships by weaving together structural aspects and mundane details. How much anyone can understand another's experience is a question beyond the scope of this article, but despite the sage advice that you have to "go there t[o] know there,"<sup>115</sup> this Part proceeds from the premise that words allow at least the possibility of seeing the world through the eyes of another. Finally, this Part discusses the ethical vision of polyamory, setting forth five ideas that I derive from writings by its practitioners.

Before proceeding to discuss polyamory, however, I want to address a certain confusion surrounding the term "polygamy." Charles Krauthammer has identified a key split in the responses to polygamy:

[I]f marriage is redefined to include two men in love, on what possible principled grounds can it be denied to three men in love?

This is traditionally called the polygamy challenge, but polygamy—one man marrying more than one woman—is the wrong way to pose the question. Polygamy, with its rank inequality and female subservience, is too easy a target. It invites exploitation of and degrading competition among wives, with often baleful social and familial consequences. (For those in doubt on this question, see Genesis: 26–35 on Joseph and his multimothered brothers.)

The question is better posed by imagining three people of the same sex in love with one another and wanting their love to be legally recognized and socially sanctioned by marriage.<sup>116</sup>

The distinction Krauthammer draws here is instructive. American ideas of

114. There are of course many alternatives to monogamy, including singleness and committed friendship, as well as polyamory. See, e.g., The Alternatives to Marriage Project, at <http://www.unmarried.org/> (last visited Apr. 25, 2004) ("The Alternatives to Marriage Project (AtMP) is a national nonprofit organization advocating for equality and fairness for unmarried people, including people who choose not to marry, cannot marry, or live together before marriage."). As discussed in the Introduction, this article focuses largely on polyamory and on the sexual exclusivity axis of monogamy.

115. ZORA NEALE HURSTON, *THEIR EYES WERE WATCHING GOD* 183 (Perennial Library 1990) (1937). As Hurston's character Janey spoke these words towards the end of a revealing work of fiction, however, the paradox of their content and context suggests they may be somewhat tongue-in-cheek.

116. Charles Krauthammer, *When John and Jim Say "I Do,"* TIME, July 22, 1996, reprinted in SAME-SEX MARRIAGE: PRO AND CON, *supra* note 10, at 282–83.

multiparty relationships are shaped by this country's historical experience with Mormon polygamy, and I would go so far as to say this is what most Americans think of first when they think of polygamy.<sup>117</sup> In addition, the image of polygamy as a Muslim practice undoubtedly adds to its negative public image, historically and also particularly in the wake of September 11, 2001.<sup>118</sup> Arguably, one reason Americans oppose multiparty relationships is that these relationships evoke the image of a man sanctioned by a patriarchal religious society to have many wives as emblems of his power or chosen status. There is some disagreement among scholars as well as polygynists as to whether this model is necessarily bad for women, as discussed later,<sup>119</sup> but certainly it is widely thought to be so.<sup>120</sup> Thus, as Congressman Barney Frank has said about why people oppose plural marriage, "First, it's almost always polygamy and not polyamory. So a lot of women don't like it."<sup>121</sup>

Frank's comment highlights a common problem of terminology. The term "polygamy" is often used to mean two different things: 1) marriage to more than one person, regardless of sex; and 2) the marriage of one man to more than one woman. As noted above,<sup>122</sup> the latter—one man with multiple wives—is specifically called "polygyny." Polygyny is the opposite of "polyandry," one woman with multiple husbands.<sup>123</sup> The elision of polygamy and polygyny is exemplified, with some acknowledgement of the confusion, by the *Oxford English Dictionary* definition of "polygamy": "Marriage with several, or more

117. Brigham Young first openly declared polygamy to be the doctrine and practice of the Mormon church in 1852, twenty-two years after the establishment of the church, and five years after the Mormons had settled in Utah. See IRWIN ALTMAN & JOSEPH GINAT, *POLYGAMOUS FAMILIES IN CONTEMPORARY SOCIETY* 28 (1996). The incorporation of polygamy into Mormon theology was based on a revelation Joseph Smith reported having on the subject in 1843. See *id.* at 27–28. The official Mormon church, the Church of Jesus Christ of Latter-Day Saints ("Church of LDS"), has denounced the practice since 1890. Altman and Ginat reported in 1996, however, that "approximately 20,000 to 50,000 Americans are currently members of Mormon fundamentalist religious groups and believe in the practice of plural marriage, or polygamy." *Id.* at 2.

118. See, e.g., *infra* note 121 (quoting Barney Frank on this point).

119. See *infra* text accompanying notes 322–31.

120. See, e.g., Mary Lyndon Shanley, *Just Marriage: On the Public Importance of Private Unions*, in JUST MARRIAGE (forthcoming Oxford Univ. P. 2004) (manuscript at 16, on file with author) (noting that "[m]any people are convinced that polygamy is profoundly patriarchal").

121. Meeting with OutLaws, *supra* note 19. The second reason Frank offered was that it suggests "promiscuity, unfaithfulness, foreignness." Finally, he noted that the animosity is likely to be greater in the wake of the attacks on the World Trade Center on September 11, 2001, because the "world's leading polygamists" are Muslims. *Id.*

122. See *supra* Part I.

123. See, e.g., William Safire, *A Polyandry Solution*, N.Y. TIMES, May 21, 2001, at A17. It is through the heterosexual assumption of marriage as including at least one man and one woman that the term "polyandry" (many men) could come to mean a group including any women at all; in other contexts, the term has been employed more literally to mean simply multiple men. See ALAN HOLLINGHURST, *THE SWIMMING-POOL LIBRARY* 20 (1988) ("This naked mingling, which formed a ritualistic heart to the life of the club, produced its own improper incitements to ideal liaisons, and polyandrous happenings which could not survive into the world of jackets and ties, cycle-clips and duffel-coats."). A parallel point could, of course, be made about "polygyny."

than one, at once; plurality of spouses; the practice or custom according to which one man has several wives (distinctively called *polygyny*), or one woman several husbands (*polyandry*), at the same time. *Most commonly used of the former.*"<sup>124</sup> To avoid this confusion, the article uses the term "polygamy" to mean several spouses, regardless of sex. It is, however, significant that polygamy commonly refers to a man with many wives. I agree with Frank that this tendency to conflate polygamy and polygyny is one reason that people object to the idea of multiparty relationships. To pry these concepts apart, this article offers several examples of multiparty relationships that are not structured by institutionalized patriarchy.

#### A. *Terms and Models*

No studies or surveys estimate the number of people currently engaged in polyamory, but the national organization Loving More reports a rate of 1,000 hits per day on its website and a circulation of 10,000 readers for its eponymous magazine.<sup>125</sup> Loving More provides the following general definition of polyamory:

Polyamory (many loves) is a relatively new word created for relationships where an adult intimately loves more than one other adult. This includes forms like open couples, group marriage, intimate networks, triads and even people who currently have one or no partners, yet are open to the possibility of more. . . . People who describe themselves as polyamorous (or poly) also usually embrace the value of honesty in relationships. They do not want to have affairs or cheat on a loved one and are dedicated to growing beyond jealousy and possession in relationships.<sup>126</sup>

This explanation conveys at least four things about polyamory. First, the word is "relatively new."<sup>127</sup> Like "homosexuality," it is a mixture of Greek (poly) and

124. OXFORD ENGLISH DICTIONARY 1382 (1993) (final emphasis added).

125. John Cloud, *Henry & Mary & Janet & . . . : Is Your Marriage a Little Dull?: The "Polyamorists" Say There's Another Way*, TIME, Nov. 15, 1999, at 90. The number of reported subscribers to *Loving More Magazine* suggests that a not insignificant number of people are practicing or considering polyamory, since there are presumably also people who have no connection with the organization but engage in the practice.

126. LOVING MORE, ABOUT POLYAMORY, <http://www.lovemore.com/aboutpoly> (last visited Apr. 24, 2004).

127. Marcia Munson and Judith Stelboum offer a brief account of historical antecedents to the term polyamory:

In the 1980s, the term "non-monogamy" was used to describe multiple concurrent sexual involvements. In the 1970s, after the release of Nena and George O'Neil's book *Open Marriage*, people referred to "open relationships." In the 1960s, the term "free love" described the uninhibited, outside-of-marriage sexual connections suddenly made possible with the invention of the birth control pill, and the new ability of medical science to treat all known sexually transmitted diseases (STDs). In the 1950s, sex outside of a monogamous couple relationship had simply been referred to as

Latin (*amor*).<sup>128</sup> Second, the hybridity of the word points to a feature of polyamory represented in this definition: the wide variety of relationships that fall within its ambit.<sup>129</sup> Third, the reference to polyamorous “people who currently have one or no partners” suggests that people not only practice polyamory, people can *be* “poly.”<sup>130</sup> Finally, the last two sentences point toward the philosophical interests of many of polyamory’s practitioners: polys have well-articulated views of relationships and beliefs about interpersonal ethics.<sup>131</sup>

There are different definitions and innumerable models of polyamory.<sup>132</sup> The primary definitional disputes about polyamory involve the delineation of its boundaries with regard to sex and to love.<sup>133</sup> In order to be poly, must a relationship involve sex among more than two, love among more than two, both, or neither?

With regard to sex, there is a dispute as to whether polyamory necessarily involves *sexual* relationships among more than two people. For instance, Martha Ertman has recently defined polyamory as incorporating all “relationships that include more than one participant” regardless of whether the participants are sexually involved with one another.<sup>134</sup> By privileging a very general definition

“cheating.” . . . Women who cheated were “loose.” Men, less likely to acquire STDs from heterosexual intercourse [than women], and not at all likely to become pregnant, were said to be “sowing wild seeds” when they had multiple sexual involvements.

Marcia Munson & Judith P. Stelbourn, *Introduction to THE LESBIAN POLYAMORY READER: OPEN RELATIONSHIPS, NON-MONOGAMY, AND CASUAL SEX*, *supra* note 101, at 1–2; *see also* DEBORAH M. ANAPOL, *POLYAMORY, THE NEW LOVE WITHOUT LIMITS* 5 (1997) (“The term *polyamory* was first proposed by Church of All Worlds founders Oberon and Morning Glory Zell to replace the awkward expression *responsible nonmonogamy*. Cyberspace conversations via the Internet and the World Wide Web popularized its use all around the world over the last several years and helped bring it into general usage.”). A sketch of historical antecedents to the concept of polyamory could extend further back, possibly including, for instance, the late-nineteenth-century utopian Oneida community. *See, e.g.*, Robinson, *supra* note 40, at 146.

128. “Homosexuality” comes from the Greek for same (*homo*) and the Latin for sex (*sexus*). *See* OXFORD ENGLISH DICTIONARY 115, 334, 345 (2d ed. 1989).

129. *See infra* text accompanying notes 150–63.

130. Not all polys agree with this proposition. *See, e.g.*, Elise Matthesen, *alt.polyamory Frequently Asked Questions (FAQ)*, at <http://www.faqs.org/faqs/polyamory/faq/> (last updated Apr. 25, 2004) (“[A]ccording to the philosophy of some folks, people aren’t polyamorous, although behavior can be. Some people find that approach useful, and others prefer to think of ‘polyamorous people.’”); *see also infra* Part IV. Moreover, the level on which someone *is* or *is not* poly is a matter of some dispute. *See id.*

131. *See infra* Section III.C.

132. For detailed descriptions of particular relationships, *see infra* Section III.B. For a vivid fictional account of three different forms of triads, *see* Tara Ayres and Doug Holtz’s play, *Loving More* (manuscript on file with author), which was performed by the Mercury Players Theatre at the Bartell Theatre in Madison, Wisconsin, during December 2003. *See also* Lue Allen, *Howdy, Partners: A New Play Argues for Multiple Lovers*, *ISTHMUS*, Dec. 12, 2003, at 24 (reviewing *Loving More*).

133. On the meaning of the term “love” in these debates, *see infra* text accompanying notes 143–46.

134. “While polyamory literally means ‘many’ and ‘love,’ the term does not impose additional conditions such as sexual relations.” Ertman, *Private/Private Distinction*, *supra* note

of polyamory—"all forms of multi-partner relating"—Maura Strassberg also appears to join with those polys who consider sex to be an unnecessary part of the equation.<sup>135</sup>

Among polys, there seem to be two impulses pushing towards the inclusion of nonsexual intimate relationships within the definition of polyamory. First, many polys oppose hierarchy and strict definitions.<sup>136</sup> Like that of "queers,"<sup>137</sup> the sensibility of many polys rebels against line-drawing and exclusion.<sup>138</sup> Polys are therefore inclined to include everyone within polyamory who wants to be included. Second, polys who oppose hierarchy or who have alternative definitions of sexuality may not want to define their nonsexual relationships as categorically different from their sexual relationships. They may not want to privilege certain relationships along the axis of sex. Thus, they may want to put all their loving relationships under the umbrella of polyamory.

By contrast, some writers posit that the term polyamory must incorporate sexual nonexclusivity. Deborah Anapol writes that "[o]ne thing [polyamorous] relationships have in common is that they are *both* sexual *and* loving . . ."<sup>139</sup> According to Marcia Munson and Judith Stelboun, "The term 'polyamory' literally means 'many loves.' While loving several people simultaneously is the reality of most people's lives, the term polyamory usually implies sexual involvement with more than one person."<sup>140</sup> For some polys, including sex within the term polyamory may be an important aspect of the term's signaling

26, at 124–25. Ertman also writes:

The term [polyamory] also includes arrangements with combinations of people who organize their intimate lives together, regardless of the extent of the arrangement's sexual elements. Thus, if a lesbian couple has a child by alternative insemination, using a gay man as a known donor to father the child, and the donor remains involved in the child's life, the arrangement is polyamorous. These three individuals love one another, or are bonded by the love for the child. The lesbian couple's relationship is romantic and sexual, and similar to marriage in that the couple lives together and jointly parents the child. The two biological parents, in contrast, are neither romantic partners nor even involved in the way that cohabitants and co-parents are.

*Id.* at 124.

135. Strassberg, *supra* note 8, at 444 (quoting Loving More's definition of polymory, at <http://lovemore.com/terms> (last visited Apr. 24, 2004)). Strassberg asserts that "the fundamental value of polyamory is relationship, particularly loving relationships," *id.* at 454, and supports this proposition with the assertion, without qualification, that "[t]he focus of polyamory is on 'having and maintaining loving relationships that may or may not be sexual,'" *id.* (quoting Loving More, <http://lovemore.com/faq>, at question #1).

136. See *infra* note 153 and accompanying text.

137. See Elizabeth F. Emens, *Queering Law?: A Queer Theory of Same-Sex Marriage* 5–7 (May 28, 2004) (unpublished manuscript, on file with author).

138. See *infra* note 153.

139. ANAPOL, *supra* note 127, at 6 (emphasis in original).

140. Munson & Stelboun, *supra* note 127, at 1. Cf. Matthesen, *supra* note 130 ("Polyamory means 'loving more than one.' This love may be sexual, emotional, spiritual, or any combination thereof, according to the desires and agreements of the individuals involved . . ."). *But see* Matthesen, *supra* note 130 (reporting one woman's opinion that polyamory "need not involve sex (although it often does)").

function: just as a straight person may not want to proposition or fall in love with a gay person, a poly person may wish to avoid propositioning a person who is not open to sexual nonexclusivity.<sup>141</sup> And some polys may feel that a definition of polyamory that does not contain sex is a kind of whitewashing or watering-down of this nonnormative practice.<sup>142</sup>

When love is considered, the dispute is inverted; must polyamorous relationships include multiparty *love*, or can they be primarily or exclusively about *sexual* nonmonogamy? “Love” is used loosely in these discussions because the focus of the dispute is negative; the question is whether a relationship can be poly without any love. For example, this issue is often framed in terms of whether polyamory includes “swinging,” or casual sex—that is, sexual involvement with multiple parties not necessarily based on love or intimacy.<sup>143</sup> In this context, then, “love” should be understood to mean some kind of emotional or intimate attachment beyond the sexual connection. On the one hand, Deborah Anapol emphasizes the role of sex and love together “with no separation between the sex and the love.”<sup>144</sup> She uses the term “sexualoving” to demonstrate the unity of the two, and insists that “we’re not talking about casual, indiscriminate sport sex.”<sup>145</sup> On the other hand, Marcia Munson and Judith Stelboun say that “‘polyamory’ includes many different styles of multiple intimate involvements, such as polyfidelity or group marriage; primary relationships open to secondary affairs; and casual sexual involvement with two or more people.”<sup>146</sup> With regard to both sex and love, then, polyamory may

141. See *infra* text accompanying notes 401–03.

142. Such a view might be compared to that of queers who criticize certain choices to desexualize the gay rights movement, see, e.g., WARNER, *supra* note 4, at 39–40 (“[W]e (or some of us, acting in the name of homosexuals) try to clean ourselves up as legitimate players in politics and the media. As a movement we resort to a temporary pretense: ‘We’re gay,’ we say, ‘but that has nothing to do with sex.’ And then, too often, this stopgap pretense is mistaken for the desired utopia. No more sex! Free at last!”), and to that of lesbians who reacted against Adrienne Rich’s formulation of the “lesbian continuum” as including straight women who resisted patriarchal society in a variety of nonsexual ways, because these lesbians felt that Rich’s lesbian-continuum idea trivialized the role of sex in lesbian lives and self-naming, see *supra* note 35 and accompanying text; see also Rich, *supra* note 1, at 648 (“I mean the term *lesbian continuum* to include a range—through each woman’s life and throughout history—of woman-identified experience; not simply the fact that a woman has had or consciously desired genital sexual experience with another woman.”); see also *id.* at 651 (“If we consider the possibility that all women . . . exist on a lesbian continuum, we can see ourselves as moving in and out of this continuum, whether we identify ourselves as lesbian or not.”).

143. The conflict over whether swingers “count” as poly can be seen in the slightly defensive or conflicted tone of some of the articles in *Loving More*. The author of one article, for example, tries to defend her open marriage as “poly enough,” although she and her husband have never engaged in what she calls “poly activity”: that is, they have never had secondary or additional primary partners. See Jasmine Walston, *Am I Poly Enough?*, *LOVING MORE MAG.*, Fall 1998, at 28, 28–29.

144. ANAPOL, *supra* note 127, at 6 (emphasis omitted).

145. *Id.*

146. Munson & Stelboun, *supra* note 127, at 2; see also Kevin Lano & Claire Parry, *Preface to BREAKING THE BARRIERS TO DESIRE: POLYAMORY, POLYFIDELITY, AND NON-MONOGRAMY—NEW*

therefore be understood to have a narrower definition and a broader definition.

Another dispute about the boundaries of polyamory concerns whether traditional polygyny, as practiced by, most prominently, fundamentalist Mormons, "counts" as polyamory. The sex-based hierarchy of traditional Mormon polygyny seems incompatible with the typical poly dedication to principles of equality and individual growth, causing some polys and commentators to exclude Mormon polygyny from the umbrella of polyamory.<sup>147</sup> In this article, one of the relationships profiled is a Mormon-type polygynous union, which none of the participants calls "polyamorous" but which blends elements of traditional hierarchy with modern feminist ideas of female solidarity, satisfaction, and work outside the home, according to the accounts given by the female participants.<sup>148</sup> By including this relationship, I do not mean to resolve the question of whether this relationship "counts" as polyamorous, but mean merely to present it as a lesser-known type of the polygyny that most people picture when they think of multiparty relationships.

Because the number of people in poly relationships has no theoretical limit, the models of poly relationships are also theoretically limitless. Some of the more typical models have specific names.<sup>149</sup> Definitions of these models often rely on the terms "primary relationship,"<sup>150</sup> "secondary relationship,"<sup>151</sup> and occasionally "tertiary relationship,"<sup>152</sup> although some polys object to the

APPROACHES TO MULTIPLE RELATIONSHIPS, at v, vi (1995) ("It is a point of contention in the poly community as to whether 'swinging' can be regarded as responsible non-monogamy—we think it can, provided that the choices made are negotiated and consenting.").

147. See, e.g., Strassberg, *supra* note 8, at 440–41 (describing some polys' rejection of traditional patriarchal polygamy); Maura Strassberg, *The Crime of Polygamy*, 12 TEMP. POL. & CIV. RTS. L. REV. 353, 355 (2003) (noting that some poly commentators exclude polygyny "from the polyamory umbrella due to its sexism and heterosexism").

148. See *infra* Section III.B.3.

149. For further discussion of polyamory's many terms, particularly those describing sexually exclusive groups, see Strassberg, *supra* note 8, at 444–65.

150. See, e.g., ANAPOL, *supra* note 127, at 7 ("Primary relationship. Lovers who are in a long-term, committed, marriage-type relationship are *primary partners*. Usually primary partners live together and share finances, parenting and decision making. Primary partners are not necessarily legal married, but they *are* bonded together as a family."); Matthesen, *supra* note 130 ("Primary—word often used in a hierarchal multi-person relationship to denote the person with whom one is most strongly bonded. In some cases this bond or commitment takes the form of legal marriage. As bigamy is not legal, the option of having two (or more) legally wedded primaries simultaneously is not currently practicable, though non-legal ceremonies may certainly be performed. In some cases 'primary' refers to the lover with the most seniority."). On the curious set of state laws that define bigamy merely by extramarital cohabitation, see *infra* note 158.

151. See, e.g., ANAPOL, *supra* note 127, at 7 ("Secondary relationship. Secondary partners may also have a long-term, committed sexualoving relationship. But usually they live separately, have separate finances and see themselves as close friends rather than immediate family. Secondary partners may take on roles in each other's families similar to those of cousins, aunts and uncles in an extended family of blood relations."); Matthesen, *supra* note 130 ("Secondary—follows from primary, in a hierarchal relationship, denotes a person with whom one is involved without the emotional, legal, or economic complexities and commitments of primary bonding.").

152. See, e.g., ANAPOL, *supra* note 127, at 8 ("Tertiary relationship. Lovers who spend time



hierarchy implied by these terms.<sup>153</sup> For example, according to Deborah Anapol, an “intimate network” comprises “several ongoing secondary relationships . . . . Sometimes all members of the group eventually become lovers. Sometimes individuals have only two or three partners within the group. The group can include singles only, couples only[,] or a mixture of both.”<sup>154</sup> The term “line marriage” identifies “a different form of familial immortality than the traditional one of successive generations of children”; rather, a line marriage is “a marriage that from time to time adds younger members, eventually establishing an equilibrium population (spouses dying off at the same rate as new ones are added).”<sup>155</sup>

A term such as “polyfidelity” clarifies the type of commitment among the parties, and is defined as “[a] lovestyle in which three or more primary partners agree to be sexual only within their family. Additional partners can be added to the marriage with everyone’s consent.”<sup>156</sup> The idea of polyfidelity brings us to a distinction between two aspects of polyamorists’ transgression of monogamy, what I call the “exclusivity” axis and the “numerosity” axis.

Criminal law helps us to see the distinctiveness and the importance of these two axes. “Exclusivity” refers to whether someone has sex with people outside a relationship. As in the common phrase “open relationship,” exclusivity concerns whether a relationship is “open” or “closed.” In the legal realm, adultery statutes target violations of the exclusivity norm.<sup>157</sup> By contrast, “numerosity” concerns how many people are in a relationship. From the perspective of monogamy, the basic question here is whether a relationship involves two individuals or more than two individuals. Thus, bigamy statutes target violations of numerosity norms.<sup>158</sup> Within polyamory, exclusivity and numerosity define aspects of

together only once in a while or for a brief time are *tertiary partners*. Their contact may be very intimate, but they are not an important part of each other’s day to day life.”)

153. Matthesen, *supra* note 130 (“Some people also don’t like the terms primaries and secondaries or the concepts behind the terms, preferring to have ‘a circle of equals’ as one poly person called it. Stef contributed the term ‘Non-hierarchical Polyamory’ for this kind of arrangement.”); *cf.* ANAPOL, *supra* note 127, at 8 (“While noting that “some polyamorous people object to the whole concept of hierarchies of commitment and rankings of love (as in the old Chinese practice of ‘number one wife’), varying levels of affinity can occur naturally. This diversity of form, along with the realization that identical forms may result from radically different dynamics, automatically creates a social environment different from our familiar homogeneous, avowedly monogamous culture.”).

154. ANAPOL, *supra* note 127, at 8.

155. Matthesen, *supra* note 130 (attributing the term to Robert A. Heinlein).

156. ANAPOL, *supra* note 127, at 9. This is the type of polyamory on which Maura Strassberg focuses her work. *See supra* note 8.

157. *See supra* note 50.

158. *See supra* note 51. Curiously, while both adultery and bigamy laws require the party at issue to be married, some bigamy laws do not require an additional marriage or even attempted marriage. In five states, the crime of bigamy covers mere extramarital cohabitation by a married person. *See* COLO. REV. STAT. § 18-6-201 (2003); GA. CODE ANN. § 16-6-20 (2003); R.I. GEN. LAWS § 11-6-1 (2002); TEX. PENAL CODE ANN § 25.01 (Vernon 2003); UTAH CODE ANN. § 76-7-101 (1999).

individual relationship models, such as polyfidelity, which might be understood as a sexually exclusive model analytically distinct from monogamous relationships primarily in the number of the participants.

Some relationship models are specifically defined by the number of participants. For example, an "open marriage" is a "nonexclusive couple relationship[]" in which the two "partners have agreed that each can independently have outside sexualoving partners."<sup>159</sup> A poly "triad" involves "[t]hree sexualoving partners who may all be secondary, all be primary, or two may be primary with a third secondary. It can be open or closed. A triad can be heterosexual or homosexual, but is often the choice of two same sex bisexuals and an opposite sex heterosexual."<sup>160</sup> Two different types of triads are further distinguished by the types of bonds among the three partners: "vees" and "triangles," each of which may be diagrammed as the figure that names it:

Vee—Three people, where the structure puts one person at the bottom, or "hinge" of the vee, also called the pivot point. In a vee, the arm partners are not as commonly close to each other as each is to the pivot.

Triangle (or equilateral triangle)—relationship where three people are each involved with both of the others. Sometimes also called a triad.<sup>161</sup>

As these examples indicate, diagrams may help to demonstrate the possible polyamorous configurations.<sup>162</sup> These are just a few of the poly models with specific names,<sup>163</sup> which are in turn only a small sample of the possible models.

### B. Relationships

This Section depicts several models of polyamory through four accounts of contemporary relationships. April Divilbiss, Shane Divilbiss, and Chris Littrell are in a polyandrous relationship; the details of their relationship became public during their unsuccessful lawsuit in 1999 to keep April's daughter in their home after she was removed by court order. Eddie, Adam, Amber, and Mike form an open four-person partnership, which Eddie was kind enough to take the time to discuss with me at length. Elizabeth Joseph has written about her positive experience as a career woman in a Mormon polygynous marriage. And Dossie

159. ANAPOL, *supra* note 127, at 8. Whether a sexually nonexclusive couple falls within the definition of polyamory is a question taken up in Part IV.

160. *Id.* at 9; *see also* Matthesen, *supra* note 130 ("Triads—three people involved in some way. Often used in a fairly committed sense, in some cases involving ceremonies of commitment, but also used simply to mean 'three people who are connected.' Example: 'Jodine, Mischa and Mickey are a FMM triad living in Excelsior.'").

161. Matthesen, *supra* note 130.

162. *See, e.g.*, RYAM NEARING, *Forms Responsible Nonmonogamy Can Take*, in THE POLYFIDELITY PRIMER (PEP Publishing 3d ed., 1992), *reprinted in* ANAPOL, *supra* note 127, at 9.

163. *See, e.g.*, Matthesen, *supra* note 130 ("Quads, pentacles, sextets and more: There are polyfolk who exist in multiple arrangements with more than three members. Geometry can get complicated, and creative nomenclature abounds.").

Easton has struggled to keep her relationships open to other sexual, loving experiences since she left an abusive partner several decades ago.

1. *A Woman with Two Husbands: April Divilbiss*

A 1999 Tennessee juvenile court case involved a custody dispute between a polyandrous threesome—a polyfidelitous vee—and the grandmother of their child.<sup>164</sup> The facts of the case, as well as relevant documents, became widely available because *Loving More Magazine* sponsored a campaign to raise money for the attorney's fees of the mother, April Divilbiss.<sup>165</sup>

In 1995, when April became pregnant, her child's biological father moved out of town with no forwarding address.<sup>166</sup> In 1996, April, newly a mother, married Shane Divilbiss, and Chris Littrell was the best man at the wedding.<sup>167</sup> By January 1997, April Divilbiss and Chris Littrell had fallen in love.<sup>168</sup> On Valentine's Day, April told Shane that she and Chris were in love.<sup>169</sup> Shane and Chris went to a restaurant and discussed the situation.<sup>170</sup> They realized that neither of them wanted to lose April, so in March 1997, all three moved in together.<sup>171</sup> April slept with Chris and Shane separately, and Chris and Shane were not sexually involved with one another.<sup>172</sup> According to one article, they tried a threesome once, but Chris ended the attempt.<sup>173</sup>

In November of 1998, when April's daughter was three, MTV aired a program about polyamory, and the triad went on television and talked about their relationship, saying that they considered themselves all married.<sup>174</sup> The day after the program aired,<sup>175</sup> the child's paternal grandmother, with whom she sometimes spent weekends, filed for removal of the child and for custody, on the

164. In the Matter of A.M., No. K1719 (Juv. Ct., Memphis and Shelby County, Tenn., Apr. 16, 1999) (decision on file with author).

165. Court documents and information about the fundraising campaign have subsequently been removed from the *Loving More* site. However, copies of documents from the *Loving More* website about the Divilbiss case are on file with the author. For much of the information that follows, see also Cloud, *supra* note 125.

166. Transcript, In the Matter of A.M., No. K1719 (Juv. Ct., Memphis and Shelby County, Tenn., Apr. 16, 1999) (Lane, J.) (conducting direct examination of Donna Olswing, the child's paternal grandmother).

167. Cloud, *supra* note 125, at 91.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.* at 90. ("No, the two guys don't go for each other; the triad tried a menage a trois once but stopped because Chris thought it was icky. Instead, they lived as man and wife and man, with April taking turns.")

174. Transcript, *In the Matter of A.M.* (No. K1719). The program was called "Sex in the '90s: It's a Group Thing." Cloud, *supra* note 125, at 90.

175. See Jim Gerard, *Three's Company; So Is Four or Five*, SALON, July 17, 1999, at <http://www.salon.com/health/sex/urge/1999/07/17/polyamory/print.html>.

grounds of April's immoral lifestyle.<sup>176</sup> The judge saw a video of the program and subsequently removed the child from April's care without regard to findings and procedures that April's lawyer claimed were required by the state.<sup>177</sup> In the months leading up to the hearing, there seemed to be some optimism among those involved that the case could be a kind of Stonewall<sup>178</sup> for the poly movement.

On April 16, 1999, the case was heard in the Juvenile Court of Memphis.<sup>179</sup> Prior to the hearing, four court-appointed experts reached the conclusion that the child had not been negatively influenced by her mother's lifestyle.<sup>180</sup> But the presiding judge, the Honorable Herbert Lane, rejected their findings, as well as April's constitutional claims.<sup>181</sup> After viewing the MTV program during a recess, he brought the trial to a close without permitting April to testify.<sup>182</sup> He said he understood the case already:

COURT: What I have got here is a young lady who has decided to have an alternative life style and the issue becomes is that life style, in fact, detrimental to this child. You know, parents oftentimes are called upon to make great sacrifices for their children. And when she was faced with that, when some guy came to her and said I'm in love with you too although you are married, you know, most people would have said, well, hey, I'm married; forget it. But, no, she decides, well, why not. I'll just—I'll have both of them. I can have my cake and eat it too. Well, parents can't do that. Parents have to set the correct examples for the kids. And part of the statute says that you have to be concerned with the moral upbringing of the child.<sup>183</sup>

He said the court must intervene on behalf of the child's best interests:

COURT: So here is how we are going to resolve this, folks: Custody of

176. Transcript, *In the Matter of A.M.* (No. K1719).

177. See Respondent Natural Mother's Motions for an Immediate Hearing, *In the Matter of A.M.*, No. K1719 (Juv. Ct., Memphis and Shelby County, Tenn., Apr. 16, 1999).

178. Gerard, *supra* note 175. The Stonewall riots, which took place when New York City police tried to close down the Stonewall Inn in Greenwich Village on June 27, 1969, are now popularly imagined to have been the birth of the lesbian and gay rights movement. *Introduction: Stonewall at 25*, 29 HARV. C.R.-C.L. L. REV. 277, 278 (1994).

179. See Transcript, *In the Matter of A.M.* (No. K1719).

180. Asa Hoke, *Asa's Updates* (Apr. 22, 1999) (on file with author); see also Cloud, *supra* note 125, at 91.

181. April filed a motion to dismiss alleging violations of her rights under the First, Fourth, Ninth, and Fourteenth Amendments, as well as Article I, § 8 of the Tennessee Constitution; a motion to dismiss the complaint "for wrongful deprivation of child without due process"; and "alternatively," a motion "to return child immediately as a result of findings of no harm." Transcript, *In the Matter of A.M.* (No. K1719).

182. *Id.*

183. *Id.*

the child is going to be placed with the Department of Children's Services with an extended visit in the grandmother's home until such time as the mother resolves her situation.<sup>184</sup>

Despite April's attorney's protests that April, Shane, and Chris were not all sleeping together, the judge concluded:

COURT: Now I am not about to put that child back into a situation where all three of these people are in the same bed. She has got a legal husband. Make a choice. It is just that simple.<sup>185</sup>

April did not appeal the decision.

The editors of *Loving More Magazine* offered me a number of explanations for April's decision not to appeal. Brett Hill, a coeditor of *Loving More Magazine*, said that they ran out of money and that the ACLU and other gay rights organizations "would not touch" the case.<sup>186</sup> Ryam Nearing, *Loving More Magazine*'s other coeditor, wrote to say that money was not a problem, but that the mother eventually gave up the legal fight and allowed her child to remain with the biological grandmother.<sup>187</sup>

## 2. *A Four-Partner Family: Eddie Simmons*

Eddie Simmons is part of a four-person partnership: "My family consists of myself, two other men, and a woman."<sup>188</sup> The woman and one of the men—Amber and Adam—have the oldest relationship of the group. At the beginning of their relationship twenty years ago, Adam told Amber that he was bisexual and hoped to have a relationship with a man as well. According to Eddie, at that time there was "no word 'polyamory' yet," though "these relationships have always been there."<sup>189</sup> Fifteen years ago, Eddie, who is also bisexual, met Adam and Amber through the bisexual community in the city where they live; they

184. *Id.*

185. *Id.*

186. E-mail from Brett Hill, Editor, *LOVING MORE MAG.*, to the author (Nov. 26, 2000) (on file with author).

187. E-mail from Ryam Nearing, Editor, *LOVING MORE MAG.*, to the author (Nov. 28, 2000) (on file with author).

188. Telephone Interview with Eddie Simmons (Nov. 28, 2000) [hereinafter Simmons Interview]. Eddie is open about his relationships and kindly took the time to speak freely with me about his family. He asked that I change the names in this piece, however, because other members of his family are open to varying degrees to their families and coworkers. The names in this Subsection are therefore fictional, though the individuals represented are not. The difficult issues surrounding the dilemma of whether to come out as poly are the focus of the fifteenth issue of *Loving More* magazine. For an overview, see the editors' introduction. Ryam Nearing & Brett Hill, *About This Issue*, *LOVING MORE MAG.*, Fall 1998, at 2, 2.

189. Simmons Interview, *supra* note 188.

have been together as a family since that time. Eddie, Adam, and Amber had no intention of expanding their family, but about three and a half years ago, they met a doctoral candidate named Mike who “adored the concept of our family” and wanted to become a part of it.<sup>190</sup> Mike first became “involved” with Eddie, then with Adam, and then Amber “got to know him.”<sup>191</sup>

“There are many flavors of polyamory,” Eddie says; “mine is only one.”<sup>192</sup> On the emotional level, “each of us [has] a relationship to the other three” and “each two has a relationship that is distinctly ours.”<sup>193</sup> Eddie, Adam, and Amber also have some history that Mike is not yet a part of, so to an extent, there are threes that also have distinct emotional relationships. On the sexual level, Eddie, Adam, and Mike all sleep together in various combinations, and they “all have outside sexual relationships that we disclose to each other.”<sup>194</sup> Eddie emphasized the importance of disclosing to outsiders that “they are not getting involved with someone with whom they are going to have a monogamous relationship.”<sup>195</sup> In Eddie’s words, Amber “is not poly, and is not bi,” but “she does not need the person she’s with to be the same way.”<sup>196</sup> On the legal level, Adam and Amber are married, “which was something they did to get health insurance basically.”<sup>197</sup> No one else in the family has legal ties, and no one else could be married under current U.S. marriage laws. For a while, Adam and Eddie considered having a “commitment ceremony.”<sup>198</sup> Eddie laughs, “My dad imagined that we were about to do something illegal, but of course we can’t get married anyway. His brain kind of tipped over. We can’t do polygamy because it’s not legal.”<sup>199</sup>

Though the “media loves sex,” Eddie (like many other polys<sup>200</sup>) reports that one of the biggest issues for polys is scheduling. Eddie says, “If you want to get rid of the press in a hurry, tell them that the big issue in your relationship is time management.”<sup>201</sup> Eddie’s family’s approach to time management has changed over the years: “It’s looked very different at different times.”<sup>202</sup> Currently,

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.* On a relevant variation in the legal definition of bigamy, see *supra* note 158. Eddie’s family has also had other law-related concerns about the arrangement. When his parents’ lawyer found out about the relationship, he “blew his top.” The lawyer said that Eddie’s parents need “to protect [their] son’s inheritance” from the “goldiggers.” *Id.*

200. See, e.g., Terry Brussel Gibbons, *Love on Schedule*, *LOVING MORE MAG.*, Summer 1997, at 18. The theme of this issue of *Loving More Magazine* is “Time Enough for Love?”

201. See Simmons Interview, *supra* note 188.

202. *Id.*

Eddie, Adam, and Amber live in the same apartment house—with Eddie in the apartment directly above Adam and Amber—and Mike lives in a nearby suburb. Eddie sees Adam and Amber “several times a week”; he and Amber “go out to lunch or coffee”; and he and Adam “have some time together on Sunday afternoon and evenings.”<sup>203</sup> Adam sleeps with Eddie on Sunday night and other times “depending on what’s going on.”<sup>204</sup> Mike and Adam spend Thursday evening and nights together, and they often have supper on Wednesday night. Sometimes they all “do things as a family on Saturday, or sometimes Sunday.”<sup>205</sup> Noting that poly relationships are a lot of trouble, Eddie observes, “In my experience, [all] relationships are very hard work if they’re going to last.”<sup>206</sup> In addition, he found monogamy to be not a “panacea” but a “bore.” He is quick to say that is “strictly a statement for myself.”<sup>207</sup>

Eddie says the reason the relationship has worked is that they are all people “who are a little older,” have different relationships and histories, and have “a clear sense of self.”<sup>208</sup> They are all “process queens.”<sup>209</sup> Therapy forms an important part of their lives. They are all in therapy, and they do family therapy. They all “come from a perspective that that’s a good thing to do, not just something you do because you’re in some kind of crisis.”<sup>210</sup> He talks about having met another poly family years ago who had one HIV-positive family member, and being impressed with the “amount of human resources they had.”<sup>211</sup> Eddie feels that two-parent families are not “a very good model” for raising children, and something like a kibbutz model would be better. He considers himself lucky: “I live in a city where there is an active poly community.”<sup>212</sup>

### 3. *A Mormon Wife: Elizabeth Joseph*

Elizabeth Joseph is a lawyer who lives in Big Water, Utah, with her husband Alex and his eight other wives.<sup>213</sup> She writes, “Polygamy, or plural marriage, as

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.* The term “process queen” describes someone committed to discussing and working out conflicts with other people—it comes from the use of the word “process” as a verb. The term is often used in a tone of fond self-mockery.

210. *Id.*

211. *Id.*

212. *Id.*

213. The sources for this Section are an article that Joseph published in the *New York Times* in 1991, Elizabeth Joseph, *My Husband's Nine Wives*, N.Y. TIMES, May 23, 1991, at A31, and an article that appeared in *Redbook* several months later, Mary-Lou Weisman, *The Tenth Wife*, REDBOOK, Nov. 1991, at 90. My description of Joseph’s polygynous family, like the other accounts of individual relationships in this Section, is written in the present tense, based on the

practiced by my family is a paradox. At first blush, it sounds like an ideal situation for the man and an oppressive one for the women. For me, the opposite is true."<sup>214</sup> She depicts her situation as bridging old and new: "While polygamists believe that the Old Testament mandates the practice of plural marriage, compelling social reasons make the life style attractive to the modern career woman."<sup>215</sup> In Joseph's eyes, monogamous women must make compromises to have it all:

Pick up any women's magazine and you will find article after article about the problems of successfully juggling career, motherhood, and marriage. It is a complex act that many women struggle to manage daily . . . . In a monogamous context, the only solutions are compromises. The kids need to learn to fix their own breakfast, your husband needs to get used to occasional microwave dinners, you need to divert more of your income to insure that your pre-schooler is in a good day care environment.<sup>216</sup>

By contrast, she sees polygamy as providing "a whole solution."<sup>217</sup> While it "offers men the chance to escape from the traditional, confining roles that often isolate them from the surrounding world," more importantly to Joseph, "it enables women, who live in a society full of obstacles, to fully meet their career, mothering and marriage obligations."<sup>218</sup>

Joseph describes the structure of her life in terms both warm and functional. She writes, "When I leave for the 60-mile commute to court at 7 A.M., my 2-year-old daughter, London, is happily asleep in the bed of my husband's wife, Diane. London adores Diane."<sup>219</sup> "When London awakes," Joseph continues, "about the time I'm arriving at the courthouse, she is surrounded by family members who are as familiar to her as the toys in her nursery."<sup>220</sup> According to an article by Mary-Lou Weisman published in *Redbook*, eight of the nine wives work full-time, and the ninth, Leslie, works part-time and gets paid by the others to babysit.<sup>221</sup> Elizabeth Joseph shares a home with another wife, Delinda, and in the evenings they usually eat "a simple dinner" together with their three kids: "We'd rather relax and commiserate over the pressures of our work day than

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state of her family at the time of the articles describing that family. A recent local news story indicates that Joseph's husband died in 1998 and that Joseph and the other wives went their separate ways; Joseph has been living as a single mother. Dawn House, *Sister Widows: Wives of Dead Polygamist Rebuild Their Lives*, SALT LAKE TRIB., Feb. 24, 2002, available at <http://www.polygamyinfo.com/plygmedia%2002%2029trib.htm>.

214. Joseph, *supra* note 213, at A31.

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. Weisman, *supra* note 213, at 92.



chew up our energy cooking and doing a ton of dishes.”<sup>222</sup> Joseph says with an air of solemnity, “Mondays, however, are different. That’s the night Alex eats with us.”<sup>223</sup> She describes these evenings as “special,” with the kids “excited” and “on their best behavior,” because these occasions come “only . . . once a week.”<sup>224</sup>

The sex, Joseph says, is by appointment rather than schedule. “If I want to spend Friday evening at his house, I make an appointment. If he’s already ‘booked,’ I either request another night or if my schedule is inflexible, I talk to the other wife and we work out an arrangement.”<sup>225</sup> She observes, “One thing we’ve all learned is that there’s always another night.”<sup>226</sup> She says the situation meets her needs:

Most evenings, with the demands of career and the literal chasing after the needs of a toddler, all I want to do is collapse into bed and sleep. But there is also the longing for intimacy and comfort that only he can provide, and when those feelings surface, I ask to be with him.<sup>227</sup>

According to Weisman’s *Redbook* article, there has been group sex in which “some, but not all, of the wives participated.”<sup>228</sup> Diane reported that group sex was initially “‘threatening,’ but then, in addition to pleasure, she found that the activity had the unanticipated effect of reducing sexual jealousy among the women involved.”<sup>229</sup> Joanna, another wife, told Weisman that “group sex is now ‘pretty much a thing of the past,’” and Weisman reports that the initial sexual jealousy among the wives has dissipated “now that everyone’s an old married couple.”<sup>230</sup> Weisman observes that “jealousy constellates around issues other than sex,” such as looks, fertility, brains, income, and youth.<sup>231</sup>

Despite any sexual or nonsexual jealousy, the wives appear to cherish their relationships with one another. Joseph describes with great satisfaction the simplicity and comfort of her home with Delinda.<sup>232</sup> According to Weisman, “Female friendship is the great reward that lies at the heart of polygamy.”<sup>233</sup> Joanna observes, “‘Women in monogamous relationships tell me that they find it

222. Joseph, *supra* note 213, at A31.

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. Weisman, *supra* note 213, at 102.

229. *Id.*

230. *Id.*

231. *Id.*

232. Joseph, *supra* note 213, at A31.

233. Weisman, *supra* note 213, at 104. Nineteenth-century writings in support of Mormon polygamy also celebrated this aspect of the relationships. See, e.g., Iversen, *supra* note 44, at 516–18 (reporting that “throughout the polygamy literature, one finds extraordinary stories and examples of cooperation among women”).

difficult to maintain their female friendships.”<sup>234</sup> By contrast, Weisman presents the friendship between Joseph and Delinda as “an extreme expression of the kind of love that can exist between wives.”<sup>235</sup> Weisman offers as an example Delinda’s decision to make a baby for Joseph, who was having trouble conceiving. This is how Joseph became the mother of London: Delinda conceived the child with Alex. “Lindi says she has no difficulty thinking of London as Eli[zabeth]’s child. ‘Giving London to Eli was the proudest thing I did,’ she says.”<sup>236</sup>

Alex is a former fundamentalist Mormon who broke off to start his own church.<sup>237</sup> According to Weisman, “Whatever their religious backgrounds, the invisible cord that binds these women to one another and to Alex in what some would call unholy matrimony is their extraordinary conviction that he is not just a husband—he is a god.”<sup>238</sup> Joseph’s article, by contrast, says little about religion. While some wives have apparently not liked the family arrangement (Alex has been divorced eight times, which Weisman notes “puts him about even with the national divorce rate”<sup>239</sup>), the current nine wives report satisfaction with sharing him. “Eli recalls with a shudder the taste of monogamy she got when she went away with Alex on a two-week trip. ‘Little things about him began to grate on my nerves. We ran out of things to talk about.’”<sup>240</sup> Although none of the wives has ever been in a monogamous relationship, “they are convinced that monogamy is monotony.”<sup>241</sup> Weisman concludes that “[a]ll nine wives are equally convinced that polygamy is God’s gift to modern woman.”<sup>242</sup> In her account, Joseph is more sanguine, saying, “Plural marriage is not for everyone. But it is the life style for me.”<sup>243</sup>

#### 4. *An Ethical Slut: Dossie Easton*

Dossie Easton, coauthor of *The Ethical Slut*,<sup>244</sup> describes her poly awakening and her current struggles to live a polyamorous lifestyle by

234. Weisman, *supra* note 213, at 104.

235. *Id.*

236. *Id.*

237. According to Weisman, Alex Joseph was born into the Greek Orthodox faith, then joined the Church of LDS as a young adult. Four years later, he joined the Fundamentalist Mormons, who still practice polygamy despite the teachings of the official Church of LDS. See *supra* note 117. Later, he broke off from the Fundamentalists and “founded his own church” because “he did not like the way they oppressed their wives and children.” Weisman, *supra* note 213, at 92.

238. Weisman, *supra* note 213, at 100.

239. *Id.*

240. *Id.* at 104.

241. *Id.*

242. *Id.*

243. Joseph, *supra* note 213, at A31.

244. DOSSIE EASTON & CATHERINE A. LISZT, *THE ETHICAL SLUT: A GUIDE TO INFINITE SEXUAL POSSIBILITIES* (1997).

explaining her thoughts during one painful night with her primary lover, whom Easton does not name but calls her “most beloved partner”<sup>245</sup> or simply her “lover.”<sup>246</sup> The night before, Easton had sex with her longtime friend, coauthor, and occasional sexual partner, Catherine. On this night, Easton’s primary lover, with whom she is in an expressly nonmonogamous relationship, is struggling to deal with her emotions about Easton’s liaison with Catherine. “My lover is late coming home,” Easton writes, “I hope she is all right—this morning she left in tears.”<sup>247</sup> Easton explains, “I am asking my lover to go through the fire for reasons most of the rest of the world consider frivolous if not downright reprehensible—I am asking my lover to suffer because I hate monogamy.”<sup>248</sup>

Easton rejected monogamy after a brutally possessive relationship:

I have hated monogamy for twenty-seven years, since I left my daughter’s violent father, fighting my way out of the door, bruised and pregnant, promising anything, promising I would call my parents for money, lying. After I escaped Joe he sent me suicide threats, and threatened murder—one time he almost found us and set fires around the house he thought we were still in.

Joe was very possessive. Initially I found this attractive, proof positive that he really cared about me. . . .

. . . .

. . . He would beat me, screaming imprecations, “You slut!” when another man looked at me.<sup>249</sup>

Although she was “perfectly faithful” to Joe, Easton says, “After I left, I decided he was right—I am a slut, I want to be a slut, I will never promise monogamy again. . . . I will never be a piece of property again.”<sup>250</sup> She describes her response to this experience in political and philosophical terms:

Joe made a feminist of me. A feminist slut. This was in San Francisco in 1969, so I decided to invent a new lifestyle. . . . I vowed to remain single for five years in order to figure out who I am when I am running my own life. I made a life creed out of looseness.<sup>251</sup>

Despite her commitment to nonmonogamy, Easton still has doubts about her choices, particularly during this difficult night with her lover: “Why did I insist on doing this? I’m in no way perishing from unfulfilled lust. I actually wasn’t

245. *Id.* at 11.

246. *Id. passim.*

247. *Id.* at 9.

248. *Id.*

249. *Id.* at 9–10.

250. *Id.* at 10.

251. *Id.*

even particularly horny, or salivating for Catherine and Catherine only.”<sup>252</sup> Catherine and Easton have had a sexual relationship as long as they have known each other; “that is part of how we write books, and how we are the dearest of friends.”<sup>253</sup> Easton writes that she and Catherine “have been patiently waiting to resume that relationship when my newfound and most beloved partner was ready.”<sup>254</sup> Easton’s optimism that her lover was ready stemmed from her lover’s growing comfort with nonmonogamy:

My lover has already conquered the terrors of group sex—tomorrow we will have another couple over for dinner and my birthday spanking, which she herself arranged with no egging on from me. She never was embarrassed at orgies, much to her own amazement. Within the last year she has had more new sexual experiences than possibly she had in the previous forty-eight years, and taken to it all like a duck to water.<sup>255</sup>

Thus, Easton’s lover seemed to be adjusting to nonmonogamy.

But this situation—“her lover having a date with one other person”<sup>256</sup>—was possibly too much for Easton’s lover. “She has trouble accepting me having sex that doesn’t include her, has trouble feeling left out, has trouble that we are doing it in our home this time, not neutral territory.”<sup>257</sup> Again, while waiting for her lover to express herself, Easton wonders if she has made a mistake, asking herself, “how could I hurt her like this?”<sup>258</sup> She further reflects on her reasons for choosing nonmonogamy:

When I decided to create my new way twenty-five years ago, I figured that I would never again take my security from my relationship, particularly not from the sexual exclusivity of my relationship. Joe had cheated on me, I knew that, it didn’t even bother me very much. I sort of expected it. I resented those cultural values that said that my sense of security and self-worth were contingent on the status of whatever man I managed to attract to me, as if I had no status of my own. So I vowed to discover a security in myself, the stable ground of my very own being, something to do, I thought, with self-respect and self-acceptance.<sup>259</sup>

Easton found love and support in the communal atmosphere of San Francisco of 1969. “I figured I would get my support from my extended family, my kinship network that consisted of everybody that I was connected to, through friendship,

252. *Id.* at 10–11.

253. *Id.* at 11.

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.* at 11–12.

communal living, coparenting, and/or sex. And it worked.”<sup>260</sup>

When her lover is finally ready to talk, the process is painful. “I listened,” Easton says, “This time I listened, without interrupting, trying only to let her know that I love her, I feel her pain, I am here for her—this is very painful. She is furious with me and I am not giving myself permission to defend myself, and I hurt.”<sup>261</sup> Easton explains:

This story has no tidy ending—we talked for hours, or maybe I listened, and I heard how difficult it was for her, how she felt invaded, how she felt her home was not safe, how she feared that my other lover would not like her, how she felt attacked by her and me both, how very much she feared I was abandoning her. We came to no pat little answers that make good stories for books—we just poured out anguish, and went to sleep exhausted. We woke up the next morning feeling better, but still not over it—the issue resurfaced occasionally for the next couple of days. The birthday party helped, a subsequent date with Catherine and her girlfriend and my lover and me helped, although it was difficult.<sup>262</sup>

Easton’s conclusion is tentative: “My lover and I are still in love, and still working on it. We are committed to this relationship, and to working through our differences with compassion for each other and ourselves. I am from time to time terrified that she will leave me, just because I hate monogamy.”<sup>263</sup>

### C. Theory

As the preceding narratives suggest, polyamory is not only a practice. For some, it is a theory of relationships. In an effort to organize and explain the contours of that theory, this Section sketches five principles espoused by contemporary polys. These principles, which I have extracted from a range of poly writings and comments, are presented by polys as both aspirational and descriptive. That is, experienced polys tend to present these principles as tools for making polyamorous relationships work (aspirational), based on their experience in and around functioning polyamorous relationships (descriptive). And the principles are aspirational in another way. They are offered by polys not only as functional tools for creating and sustaining intimacy among multiple people; they also represent an ethical vision of how those relationships should be conducted.

To my knowledge, there are no studies of the content of contemporary polyamorous relationships. For this and other reasons, such as the wide variety of poly relationships, my purpose in presenting these principles is not to say that poly relationships all successfully embody these ideas. Rather, my purpose is to

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260. *Id.* at 12.

261. *Id.* at 13.

262. *Id.* at 13–14.

263. *Id.* at 14.

show the seriousness with which some polys have considered the ethical and practical questions of how multiparty relationships should be conducted, and to convey some of the answers they have developed thus far.

These five principles come from no one source but instead represent my attempt to synthesize the content of many sources. The principles are self-knowledge, radical honesty, consent, self-possession, and privileging love and sex. These principles are of course not unique to polys; on the contrary, most of them are embraced by many monogamous couples. The poly privileging of more loving and sexual experiences over other activities and emotions, such as jealousy, is the most particular to polyamory, and the other principles have particular applications, meanings, and significance in the poly context. This Section considers each principle in turn.

### 1. *Self-Knowledge*

Self-knowledge is portrayed by polyamorists not only as valuable, but as necessary. In her foundational book, *Polyamory, the New Love Without Limits: Secrets of Sustainable Intimate Relationships*, Deborah Anapol outlines “Eight Steps to Successful Polyamory,” the first of which is to “Know yourself.”<sup>264</sup> This dictate operates on two levels. The first level involves understanding one’s own sexual identity. This no doubt comprises knowledge of one’s “sexual orientation” as we typically use the term—as in heterosexual, bisexual, or homosexual—but also, more importantly, it encompasses self-knowledge about one’s sexual identity with regard to monogamy. As discussed in Part IV, some polys embrace the view that you either are poly or you are not,<sup>265</sup> whereas other poly writings characterize monogamy and polyamory more as choices or constructed identities.<sup>266</sup> Regardless, whether they understand “poly” and “mono” identities as hardwired or chosen, polys call for an interrogation of one’s own identity.

Polys also value self-knowledge as the core structural component, and the daily substrate, of healthy, successful relationships. Understanding oneself and listening to one’s own feelings are vital to the process of working through the “baggage” of living in a monogamous world. Anapol instructs, as another of her eight steps to success, “Let jealousy be your teacher.”<sup>267</sup> Rather than deny the existence of emotions like jealousy, polys encourage an honest interrogation of these feelings. Individuals in any form of relationship may of course aspire to and attain self-knowledge. But polys, in order to do all that “processing,” have a

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264. ANAPOL, *supra* note 127, at 32. The other steps that Anapol identifies are as follows: heal yourself, replace guilt and shame with self-acceptance and love, open yourself to sexual energy, let jealousy be your teacher, choose a spiritual path, and look at the big picture. *Id.* at 31–48.

265. See *infra* notes 398–403 and accompanying text.

266. See *infra* notes 361–66, 403 and accompanying text.

267. ANAPOL, *supra* note 127, at 43.

particularly strong need for constant access to their feelings and desires.

## 2. Radical Honesty

The poly ethic of honesty also operates on two levels: a broader philosophical position and a daily practice of living. The structural critique may be understood partly as a reaction to the gap between the fantasy and the reality of compulsory monogamy. The judge in the Divilbiss case criticized April for her “immoral” response to a man’s attentions: “[W]hen some guy came to her and said I’m in love with you too although you are married, you know, most people would have said, well, hey, I’m married; forget it.”<sup>268</sup> In response, a poly might assert instead: “The judge has it wrong. Most people would have said, ‘Well, hey, I’m married, so we’ll have to keep this a secret.’”<sup>269</sup>

One theory of polyamory views the entire culture as basically polyamorous but dishonest about it. In the words of Deborah Anapol, “Lies, deceit, guilt, unilateral decisions and broken commitments are so commonplace in classic American-style monogamy that responsible nonmonogamy may sound like an oxymoron.”<sup>270</sup> The weak form of this claim is that serial monogamy is in a sense polyamory. That is, almost no one settles down with the first person she has sex with, no one is truly supermonogamous, and so everyone is really polyamorous. The stronger claim, however, is that many people are polyamorous in the sense that they feign simple monogamy while practicing nonmonogamy. They lie to their partners and to the world.<sup>271</sup> Thus, radical honesty is a philosophical and practical approach to living that involves admitting and embracing nonmonogamy. For many polys, honesty is so central to polyamory that they would object to the use of the term polyamory independent of honesty, protesting that honesty is a definitional element of polyamory. For example, one posting on a popular polyamory webpage says, “A great many people have secret affairs while they’re in a supposedly monogamous relationship. I think those people might have the potential to be polyamorous, but I do not think they are practicing polyamory.”<sup>272</sup>

Brad Blanton is a writer praised by some polys for his books on “radical honesty.”<sup>273</sup> His books outline a philosophy of absolute honesty and of honesty

268. For the full quotation, see *supra* text accompanying note 183.

269. *Cf.*, e.g., Stelbourn, *supra* note 101, at 44 (“In those cultures that regard monogamy as ideal, non-monogamy is widely practiced, secretly.”).

270. ANAPOL, *supra* note 127, at 3.

271. See MAILLU, *supra* note 100, at 29–32 (making this point in an argument for structural polygamy).

272. Matthesen, *supra* note 130 (quoting a post to the alt.polyamory newsgroup by Stef).

273. See Thomas Burgio, *Coming Out Going In: True Confessions of a Polyamorous Bodyworker*, *LOVING MORE MAG.*, Fall 1998, at 13, 13. Blanton’s books include BRAD BLANTON, *RADICAL HONESTY: HOW TO TRANSFORM YOUR LIFE BY TELLING THE TRUTH* (1997), and BRAD BLANTON, *PRACTICING RADICAL HONESTY: HOW TO COMPLETE THE PAST, LIVE IN THE PRESENT, AND BUILD A FUTURE* (2000) [hereinafter BLANTON, *PRACTICING RADICAL HONESTY*]. The “About

as a revolutionary way to improve oneself and the world. Radical honesty, Blanton tells us, "involves not denying or avoiding anything, particularly anger that comes from attachment to the one true way we all seem to come up with every fifteen seconds. It involves clearing our way back to contact with each other through honesty about what we think and feel and do . . ."274 Many of the examples of life changes made by participants in Blanton's workshops include spouses who admit their affairs, prompting the couples either to turn a failed marriage into a positive honest one275 or to split up and try to find new, more honest, relations elsewhere.276

Whether or not they particularly follow Blanton, polys tend to privilege honesty as the foundation of positive relationships. The Loving More mission statement names "honesty" and "openness" first among the bases of relationships.277 Likewise, Deborah Anapol encourages would-be polys to "[m]aster the art of communicating,"278 and warns of the dangers of keeping secrets:

My experience is that neither intentional communities nor intimate networks can survive, let alone thrive, without a free flow of information within their boundaries. A withhold is just as destructive in a group of intimate friends (whether or not they are sexually involved) as it is in a couple or a nuclear family and for the same reasons. Secrets and lies destroy intimacy, erode trust, create paranoia, and ultimately strangle the life out of relationships. And when sex and love are involved, nothing puts an end to passion more effectively than a withhold.279

Although radical honesty need not mean radical disclosure,280 a wide variety of

the Author" page at the back of Blanton's most recent book tells the reader:

I've been married 4 times and divorced 3 times, and am currently separated from my most recent wife. We were together for 21 years. We are on somewhat amicable terms and do not know yet whether we will divorce. I am currently sexually and emotionally involved with several women and they all know about each other, and some of them know each other. I have 5 kids ranging in age from 7 years old to 31 years old. I love them with all of my heart. They are the teachers to whom I am most grateful and from whom I have learned the very most. They continue to teach me.

BLANTON, PRACTICING RADICAL HONESTY, *supra*, at 343–44.

274. BLANTON, PRACTICING RADICAL HONESTY, *supra* note 273, at 338.

275. *E.g.*, *id.* at 24.

276. *E.g.*, *id.* at 25 ("A woman diagnosed by physicians with arthritis told the truth to her husband about an affair she had been hiding for a long time. They eventually split up, but her 'arthritis' went away. Her next relationship was one of more honesty, less pain and illness, and more creativity in a shared life together.")

277. LOVING MORE, *supra* note 126; *see also* text accompanying note 302.

278. ANAPOL, *supra* note 127, at 37.

279. Deborah Anapol, *Privacy: When Are Secrets Lies?*, LOVING MORE MAG., Fall 1998, at 9, 10. The author describes a "withhold" as "a judgment, an opinion, an emotional reaction which is not shared because of 'politeness,' fear of rocking the boat, or simply lack of consciousness." *Id.*

280. *See, e.g.*, *infra* text accompanying notes 293–95 (describing ways of thinking about



poly writings invokes honesty as a key principle for relationships.<sup>281</sup> As Eddie Simmons emphasized, a great deal of therapy and communication—the cherished tools of process queens—sustains his family.<sup>282</sup> For one contributor to *Loving More Magazine*, expressing her views on honesty is a key reason to be out as poly: “I love being in situations where it is respected that we are a group marriage. Those are my favorites. There I can really shine about my life’s primary focus, the legitimacy of polygamy and the absolute need for honesty in intimate relationships.”<sup>283</sup>

Of course, polys are not alone in recognizing the value of honesty. But a heightened emphasis on communication is highly characteristic of polys, and openness about nonmonogamy is the most distinctive aspect of poly honesty. Indeed, the latter commitment prompts polys to describe their honesty as “radical.” Note, however, that if society presumed nonmonogamy, then it might be radical to embrace and admit openly a commitment to monogamy. In this way, the radicalness of poly honesty is contingent.

### 3. Consent

Honesty is also something more than the transmission of information in polyamorous relationships. In this context, honesty forms the basis of consent. The ideal of consent—that partners in a relationship or a sexual encounter make an informed decision to participate in the relationship or the encounter, including knowing its polyamorous context—pervades poly writing, both implicitly and explicitly.<sup>284</sup> For instance, Dr. Joy Davidson presents “Negotiating and making agreements” as one of the key relationship challenges for polyamorous relationships, emphasizing that “each agreement is a reminder that consent is at the heart of successful poly relating” and that “consent must be given at an explicit and detailed level.”<sup>285</sup> From her perspective as a clinical psychologist

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privacy and disclosure within a relationship that aim to maintain boundaries between individuals).

281. See, e.g., Janet Kira Lessin, *The Perils and Pearls of Polyamory*, *LOVING MORE MAG.*, Fall 2000, at 26, 27 (“Pearl 6: Always be honest.”); EASTON & LISZT, *supra* note 244, at 61–62.

282. See *supra* note 209 and accompanying text.

283. The Dragon Bear Family, *A MultiPlex Perspective on Living Out*, *LOVING MORE MAG.*, Fall 1998, at 14 (quoting the portion labeled Poohtzen’s Perspective).

284. See, e.g., EASTON & LISZT, *supra* note 244, at 21–22; Tibbetts, *supra* note 27, at 1 (defining polyamory as “ethical nonmonogamy (practicing extradyadic relationships with mutual consent among those involved)”).

285. Joy Davidson, *Working with Polyamorous Clients in the Clinical Setting*, *ELECTRONIC J. OF HUM. SEXUALITY*, Apr. 16, 2002, <http://www.ejhs.org/volume5/polyoutline.html> (identifying, within a discussion of consent and relationship agreements, the following “issues often taken for granted in monogamy [that] require exhaustive processing in poly”: “Time and Resources: how much should be expended on whom?[] Sex: what type of sex is OK, with whom and under what circumstances? (i.e., male or female, casual, party, bdsm play w/ or w/o genital contact, penetration, etc.)[] Safer sex: medical issues, contraception[] Disclosure: how much sexual/emotional disclosure about other partners is desired; how much is too much?[] Relating to a lover’s other partners: to what extent? meet them before sexual activity occurs?[] Belongings and personal space considerations: i.e., ‘No, your lover can’t wear my bathrobe to get in and out of

who works with polyamorous partners, Singer also emphasizes the importance of distinguishing between “true consent” and “[c]oerced consent,” noting that “[t]herapists may see clients whose relationships reflect manipulation, dishonesty, or other dysfunctional patterns that are no more representative of healthy poly than healthy monogamy.”<sup>286</sup> Though individual poly relationships may not always embody true consent, this ideal is a vital part of the relationship models to which polys aspire.

Consent is also of vital importance in nonpoly relationships, of course. In a simple way, the poly emphasis on consent is another part of the poly critique of the secretive nonmonogamy practiced by some purported monogamists. But the poly attention to consent runs deeper than that. The prominence of the idea of consent also stems from the poly emphasis on freedom of choice about relationship norms and the importance of individual, rather than societal, relationship expectations. Because no one relationship model provides a blueprint for the number, shape, or type of bonds among individuals within and without poly relationships, polys must develop their own models through the agreement of the partners.

#### 4. *Self-Possession*

A number of prominent poly writers describe their embrace of polyamory as fueled by their insights about power and possessiveness in monogamy and by their desire for autonomy within their relationships. This aspect of polyamory builds in part on a feminist understanding of monogamy as a historical mechanism for the control of women’s reproductive and other labor.<sup>287</sup> Judith Stelbourn writes, “Feminist scholars state that the origins of monogamy have their source in patriarchal thinking. Viewed as the possessions of the male, women were used for barter and/or procreation. . . . Legitimacy of a child relates to acknowledgement of the child’s father, not to the child’s mother.”<sup>288</sup> In light of these accounts of the patriarchal origins and functions of monogamy,

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the hot tub,’ or, ‘Yes, it’s Ok if you and he make love in our bed.’[;] Integrating new partners with family and friends: if, when, how?[;] Parity: attaining relative equivalence in extra-dyadic relationships; addressing the ramifications of lack of parity[;] Veto Power: who has the right to say ‘no’ to a partner’s choice of another?”).

286. *Id.*; see also Strassberg, *supra* note 8, at 508 (expressing concern that partners in larger polyfidelitous relationships may be subject to coercive group practices).

287. See, e.g., ANAPOL, *supra* note 127, at 47 (“Monogamous marriage as we know it today is based on patterns established in Biblical times governing men’s ownership of women. In Biblical days the law prescribed that women be stoned to death for taking a lover, but men were allowed as many secondary wives or concubines as they could afford. For most of recorded history, the absolute authority of the husband over his wife has been taken for granted and male violence against disobedient wives has been considered natural and right.”); see also Robinson, *supra* note 40, at 144 (arguing that “institutionalized monogamy has not served women’s best interests. It privileges the interests of both men and capitalism, operating as it does through the mechanisms of exclusivity, possessiveness and jealousy, all filtered through the rose-tinted lens of romance.”).

288. Stelbourn, *supra* note 101, at 42.

Stelboum seeks to explain why so many contemporary lesbians adopt monogamy: "The implications of the historical prerogative of male inheritance have little relevance for the lesbian community, but the social values and behavioral modes of the dominant heterosexual community have been firmly implanted within most of the lesbian population."<sup>289</sup> In response, she offers several purposes of nonmonogamy in lesbian relationships, including as a political statement against the "confining heterosexual models of monogamy," and as "a way for two women to define autonomy within a coupled situation and avoid the intense bonding typical of some lesbian partners."<sup>290</sup>

In an essay aimed at helping couples lessen jealousy in their relationships, Marny Hall paints a similar portrait of polyamory as a useful way to create individual space and autonomy within primary relationships. As a general matter, she observes, new couples make decisions about what parts of their lives they will share and what they will keep to themselves. "When partners first get together, they may have different ideas about what is mine, yours, and ours. Time, money, even how many daydreams to share are up for discussion. . . . [Ultimately, f]or some couples, the 'us' pile is so huge it dwarfs both the 'me' and 'her' stacks."<sup>291</sup> Couples make similar, though often tacit, decisions about sex:

Acknowledged or not, many couples also have three sex stacks. There is ours, yours, and my sex. Private sex may consist of a favorite fantasy or a vibrator quickie after a girlfriend has gone to work. The erotic activities in one's private domain are not exactly secret. But just as we don't divulge the amount we paid for a pair of birthday earrings, we don't announce every time we [masturbate].<sup>292</sup>

But, she observes, the privacy about certain details of a partner's sexual self does not typically extend to encounters with other sexual partners. "Yet," Hall asks, "what if it did?"<sup>293</sup> Hall suggests that this approach would require "only [that we] consciously extend the usual cultural rules about privacy—the ones that already apply to our fantasies and our vibrator—to other sexual partners."<sup>294</sup> She describes several methods that couples use to create such privacy:

For example, some partners agree to being unaccountable to each other during certain specified periods of time. . . .

Still other partners prefer the information filter to be partial. In other words, they prefer to know about the existence of other sexual partners

289. *Id.* at 44.

290. *Id.* at 45.

291. Marny Hall, *Turning Down the Jezebel Decibels*, in *THE LESBIAN POLYAMORY READER: OPEN RELATIONSHIPS, NON-MONOGAMY, AND CASUAL SEX* 47, 53 (1999).

292. *Id.*

293. *Id.*

294. *Id.* at 54.

but want to be spared all the details. . . .

. . . .

Another couple consciously made information about outside sex optional. Each kept a brief log of her encounters with other women. Both partners' record books, which listed only names, places, and dates, were left on top of the bookcase—available for either to check if she so desired. One partner never checked the log. After a peek or two, the other stopped. . . .

. . . .

Eager to maintain a high level of privacy *and* intimacy—and avoid the schlep factor of crosstown apartments—[the partners in one couple] live in separate flats in the same building [and have been together] for ten years . . . .<sup>295</sup>

Thus, in these open relationships, the possibility of outside lovers helped partners resist the pressure (from either heterosexual tradition or the lesbian “U-Haul Syndrome”<sup>296</sup>) to merge into one being, and thus helped them preserve their own privacy and separateness. In her therapeutic practice, Hall views polyamory as more than just a means of strengthening or enhancing primary relationships. She also recognizes its potential to instigate transitions out of relationships when couples need to move on, as well its potential to create partnerships of more than two.<sup>297</sup>

For Dossie Easton and Deborah Anapol, realizations about the strictures of monogamy came through their experience or study of domestic violence. As described above, Easton devotes energy and emotion to preserving the independence made possible by polyamory because an abusive relationship opened her eyes to the control exerted in monogamous relationships.<sup>298</sup> Anapol, whose doctoral dissertation in clinical psychology focused on domestic violence, identifies connections between the possessive claims of monogamy and the cycles of abuse and violence in these relationships:

I married for the second time, trying to fit myself into the traditional mold with an ambitious, personable husband and a house with a white picket fence. He too had unfinished business with an old lover, but while continued friendships were acceptable to him, extra-marital love affairs were not. I was researching domestic violence for my doctoral dissertation . . . and was horrified to realize that the dynamics of domination, control, jealousy and dependency that I'd observed in

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295. *Id.* at 54–55.

296. Munson & Stelboun, *supra* note 127, at 3 (explaining the U-Haul Syndrome as “a long-joked-about tendency of lesbians to move in together on the second date”).

297. *See* Hall, *supra* note 291, at 55–59.

298. *See supra* text accompanying notes 244–63.

abusive marriages I was studying, existed, at a more moderate level, in my own marriage.<sup>299</sup>

These realizations were one factor which led Anapol to reject traditional monogamy and pursue polyamory as a way to exercise greater personal autonomy in her relationships.

### 5. *Privileging Love and Sex*

A crucial aspect of poly thinking, and the one most particular to polyamory, is the idea that when it comes to sex and love, more expression and experience may truly be better than less. One source of this philosophy is the various free love movements of the 1960s. The science fiction writer Robert Heinlein famously said, “Love is that condition wherein another person’s happiness is essential to your own.”<sup>300</sup> One poly writer asserts that, in light of Heinlein’s “foundational premise, jealousy and possessiveness become seen [by our community] not as symptoms of love, but as a pathology of insecurity.”<sup>301</sup> This idea, that more may be better, inspires the name of Loving More, as well as its mission statement, which explains that the organization has

[A] specific vision of relationships based on honesty, openness, respect for the individual, love as an infinite resource, the body and sexuality as sacred, and relationship as a path to personal & spiritual growth. In this vision, there’s room for more love, more intimacy, more possibilities, and more people.

Accordingly, there is also more responsibility and challenge: a deeply personal challenge to transform ourselves, our lives, and our world into a more loving and responsible place.<sup>302</sup>

Eddie Simmons expressed a similar idea when he talked to me about his realization some years ago that it is “very important to tell people” you love them, to tell them “now rather than later.”<sup>303</sup> For Eddie, AIDS created the conditions for that understanding. He knows that he loves many people, and he tells them so.<sup>304</sup>

The practice of “loving more” may also generate more resources of many kinds. Eddie suggested that he thought polyamory was a positive context in which to raise children because polyamory provides so many resources for

299. ANAPOL, *supra* note 127, at 123.

300. Oberon Zell & Morning Glory Zell, *Poly Advice: What Are Some of the Usual Objections Raised Against the Poly Lifestyle?*, *LOVING MORE MAG.*, Fall 1998, at 26, 26 (quoting, in the portion labeled “Oberon,” ROBERT HEINLEIN, *STRANGER IN A STRANGE LAND* (1961)).

301. *Id.*

302. *LOVING MORE*, *supra* note 126.

303. Simmons Interview, *supra* note 188.

304. *See id.*

caring.<sup>305</sup> Emphasizing the loving care her daughter receives while she is at work, Elizabeth Joseph describes polygyny as a “whole solution” to the modern woman’s juggling act.<sup>306</sup> Expressing a similar sentiment, psychotherapist Marny Hall highlights the “resource-intensiveness” of three triads that she interviewed:

When we think of threesomes, the metaphor of the third wheel—the unwanted extra—immediately comes to mind. After my exposure to these trios, however, the old metaphor never quite recovered its former potency. On the contrary, the extra wheel was usually an asset. Whenever a particular need arose, somebody was on hand to take care of it. For example, if someone was short of cash that week, someone else pitched in to cover household expenses. Ditto for emotional support, sexual energy, child care help, even companionship.<sup>307</sup>

When a community of people values the expression of love, polys would say, the benefits accrue to all its members.

Love and sex are of course widely valued. But poly relationships, to a greater extent than many monogamous relationships, privilege love and sex over other feelings and activities. Polys privilege love insofar as they tend to prioritize talking and other forms of creating and sustaining intimacy over other activities. They therefore devote much time to processing everyone’s feelings.<sup>308</sup> As Hall said of the trios she interviewed, “[T]he trios required more time for discussion about everything from hurt feelings to chores.”<sup>309</sup>

Polys truly seem distinct from most monos when it comes to sexual beliefs and behavior. Rejecting the law of monogamy that allows one partner’s jealousy to trump another’s outside sexual desires and experiences,<sup>310</sup> polys feel that jealousy should be overcome to make room for more sexual and loving possibilities.<sup>311</sup> Rather than assuming that a philandering partner should curb

305. See *id.*

306. See *supra* text accompanying note 217. Of course, there are other women with experience in polygynous marriages who paint a very different picture. See, e.g., Carmen Thompson & Celeste Fremon, *Memories of a Plural Wife*, GOOD HOUSEKEEPING, Mar. 1, 1999, at 118. Tapestry of Polygamy is a Salt Lake City-based organization “offer[ing] assistance to women and children leaving polygamy.” See *A Circle of Survivors: The Women Behind the Tapestry*, GOOD HOUSEKEEPING, Mar. 1, 1999, at 118. The group’s members “wear purple ribbons to symbolize their support of those still trapped in polygynous families.” *Id.*

307. Hall, *supra* note 291, at 58.

308. See, e.g., *supra* notes 209–10 and accompanying text.

309. Hall, *supra* note 291, at 58.

310. See *supra* text accompanying note 45.

311. See, e.g., ANAPOL, *supra* note 127, at 49–52 (“Jealousy can be a potent reminder, . . . letting us know we’re heading in the wrong direction, for jealousy is the opposite of love. . . . Nearly everyone in our monogamous society learns early in life that lovers have exclusive rights. We are conditioned to believe that if our beloved is interested in someone else, we may be replaced. But this expectation of loss is learned, not hard wired, in both men and women. Imagine a culture in which your partner’s attraction to another signified opportunities for greater pleasure and intimacy.”); RONALD MAZUR, *THE NEW INTIMACY: OPEN-ENDED MARRIAGE AND ALTERNATIVE*

her wandering impulse,<sup>312</sup> then, polys more often proceed from the assumption that the jealous partner should work through his jealousy. As discussed below, some polys report that they never feel jealous;<sup>313</sup> more typically, though, polys acknowledge jealousy and seek to understand and work through it. As noted earlier, Anapol advises, "Let jealousy be your teacher."<sup>314</sup> Some poly writers use the term "compersion" to describe a particular alternative or supplement to jealousy: "Compersion . . . [is the] feeling of happiness in knowing that others you love share joy with each other, especially taking joy in the knowledge that your beloveds are expressing their love for one another. The opposite of jealousy."<sup>315</sup> Polys generally aim to develop and expand their compersion, while understanding, working through, and getting past jealous responses. In this way, they reject the common belief that jealousy signifies love, and they invert the standard hierarchy that lets jealousy trump desires for extrarelational sexual experience.

#### IV.

#### THE PARADOX OF PREVALENCE

The previous discussion identified several elements of the puzzle of polyamory's place outside the political debate over marriage. First, the expectation of monogamy has a strong hold on this country's fantasies and institutions. Second, that expectation is widely unfulfilled. Third, for some people, polyamory exists as a viable relationship form with an articulated set of ethical aspirations. In light of all this, I return to the question posed at the beginning of this article: Why is the possibility that same-sex marriage might lead to multiparty marriage such an effective rhetorical scare tactic for the opponents of same-sex marriage? In this Part, I argue that the widespread resistance to the idea of marriage among more than two people is actually the result of monogamy's frequent failure. In a sense, the threat of polyamory stems from its apparent prevalence.

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LIFESTYLES 101 (1973) (offering a typology of forms of jealousy in order to help people overcome it and to "work toward eliminating it in relationships"); CELESTE WEST, LESBIAN POLYFIDELITY 112 (1996) ("It is important to emphasize that in polyfidelity jealousy is drained of the fierce poison of betrayal. Our jealousy is not embittered by broken monogamous vows. Since polyfidèles are committed to one another's sexual freedom, we can only assume that each woman, in acknowledging the right to her desires, may possibly act on them." (emphasis omitted)); *id.* at 136 ("The idea is to accept that your [jealous] feelings aren't so hot [and] to get on with your best purposes in life. Your attention may jump erratically back to jealousy, especially at first, but the mind's disc simply cannot hold two tracks at once . . .").

312. *Cf. supra* text accompanying notes 41–48.

313. *See infra* text accompanying notes 404–07.

314. *See supra* note 267 and accompanying text.

315. Los Angeles Poly Support, *What Is Polyamory?*, at <http://www.laps.org/whatpoly.html> (last visited Apr. 26, 2004); *see also* The Polyamory Soc'y, *Compersion Index*, <http://www.polyamorysociety.org/compersion.html> (last visited Apr. 26, 2004) (crediting the San Francisco Keristan Commune with coining the term).

Before explaining this argument, I consider in Section A some other possible reasons for outsiders' response to polyamory. I conclude that these reasons may contribute in some way to the response, but no one reason adequately explains it. Drawing on sexuality theory developed around homosexuality, Section B explains the distinction between universalizing and minoritizing conceptions of identity, locates polyamory as a universalizing discourse, and draws lessons from gay politics to explain how common ground with the mainstream could be a political liability for polyamorists. Section C presents a strand of poly thinking and writing that is minoritizing, and considers its implications for disagreements about the definition of polyamory.

#### A. Possible Factors in the Response to Polyamory

There must be some readers who, before reading this article, already believed polyamory to be a viable relationship model deserving the same public respect as monogamous dyads. And there may be a few readers who, not having heard of polyamory before, now believe that polyamorists deserve legal recognition and protection in all imaginable contexts, such as marriage, custody, and employment.<sup>316</sup> But I imagine these readers are few. Rather, I suspect that most readers have serious reservations about the idea of polyamory as an acceptable social practice, and would still hesitate to respond, "Why not?" or, "Who cares?" to conservatives' warnings that same-sex marriage will lead to legalized polygamy.<sup>317</sup> While Part III responded to the common perception that

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316. In a recent survey, responding polys reported that employment nondiscrimination was one of their three highest priority legal issues. See *infra* note 415. One lawyer contributor to *Loving More Magazine* suggests that talking about one's poly lifestyle might prompt a hostile environment sex harassment claim. Rita Risser, *Is It Harassment If You Say You're Poly?*, 1 BEST OF LOVING MORE 34 (1997). To prevent harassment claims, she advises that the "safe thing to do is say nothing and live your life in the closet." *Id.* at 35. But since most people are not "comfortable" being closeted, she lays out a "continuum of behavior from acceptable to unacceptable." *Id.* Speaking philosophically is most acceptable. She describes the least acceptable option as follows: "Most unacceptable is to volunteer sexual details, invite a co-worker to attend a workshop or party, or invite someone to join you and your partner for a threesome in the hottub." She adds, "It's probably not poly people who do this, but there are a number of cases with a threesome theme." *Id.* Based on my research, no federal or state cases support the claim that the suggestion of a threesome is, by itself, sufficient grounds for a successful harassment suit.

317. Contrast the response to the polygamy analogy—i.e., efforts by gay marriage proponents to distinguish the two and further efforts by conservatives to align the two—to the widespread response to Scalia's threat that *Lawrence* might lead to the invalidation of state laws proscribing masturbation, *Lawrence v. Texas*, 123 S. Ct. 2472, 2490 (2003) (Scalia, J., dissenting). See, e.g., Jan Glidewell, *Let States Unite People and Religions Marry Them*, ST. PETERSBURG TIMES (Fla.), Aug. 8, 2003, at 1 ("The degree of hysteria with which the recent Supreme Court decision striking down antisodomy laws is symbolized by the dissenting opinion written by Justice Antonin Scalia, who feared that the decision would legalize, among other horrors, masturbation. Come on. There's a state where masturbation is illegal? Where?"); Ampersand, *Passing Thought on Scalia's Dissent*, at [http://www.amptoons.com/blog/week\\_2003\\_06\\_29.html](http://www.amptoons.com/blog/week_2003_06_29.html) (June 30, 2003) ("You know, we live in a remarkable age when a member of the Supreme Court—the member who is probably the most admired by conservatives, who is often credited by left and right alike as one of the sharpest conservative minds in the nation—writes that the Court shouldn't have ruled Texas' anti-



polyamory is preposterous and trivial, this Section briefly discusses five further reasons for the negative response to the practice. Of varying plausibility, each of these deserves more sustained discussion than what follows. The purpose here is not to refute these criticisms and concerns. Instead, the purpose is to show why they cannot fully explain the largely negative response to polyamory.

First, some may think that a monogamous couple is the most efficient unit for family formation. For instance, some may expect a larger foundational unit to lead to shirking and excessive grabbing, as in a house of college students where everyone takes more than he or she contributes, so that important household work never gets done, dishes pile up, and so on.<sup>318</sup> To avoid these dead weight losses, the group may need to engage in a great deal of negotiating and monitoring, leading to high transaction costs.<sup>319</sup> Given the poly commitment to processing everyone's emotions, polyamory may generate disturbing visions of relationship by committee. But the efficiency arguments can also go the other way. Polyamorous households can benefit from economies of scale and specialization of labor.<sup>320</sup> And to someone who enjoys processing,<sup>321</sup> more conversation may not be a cost but a valued good.

Second, polyamory may prompt an egalitarian objection that the traditional form of polygamy involves one man dominating multiple wives.<sup>322</sup> From a feminist perspective, traditional polygyny looks like the archetype of the

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Sodomy law unconstitutional because such a ruling might get in the way of state laws outlawing masturbation. Why is Scalia worried about preserving the states' rights to outlaw masturbation? Why would anyone worry about that? It's masturbation, for pity's sake! Is there anywhere a less harmful action, with less reason for government concern, than masturbation?") (emphasis omitted); Roger L. Simon, *Was Antonin Scalia Auditioning For Saturday Night Live...*, at <http://rogersimon.com/archives/00000242.htm> (June 27, 2003) ("Was Antonin Scalia auditioning for Saturday Night Live... when he wrote in his dissenting opinion to yesterday's rejection of anti-sodomy laws by the Supreme Court that it might lead to the legalization of masturbation?!... Pretty funny, Antonin—you just might open SNL if you keep it up!") (emphasis omitted); *This Week with George Stephanopoulos* (ABC television broadcast, June 29, 2003) (statement of Fareed Zakaria) ("George, let me suggest to you this is the same slippery slope argument[—]how do you rule out things like bigamy or bestiality[?] And it's true, whenever [you] draw a line there's a danger of slippage. There's also, of course, danger of slippage on the other side. That is to say, if you say it is all right for state legislatures to make criminal private intimate acts between two gay men, shouldn't it also be all right for them to make criminal masturbation or [miscegenation], interracial sex? This is Kennedy's point in, in the Supreme Court majority opinion and Scalia, to his credit, is honest enough to [say] that, yes, he would like it to be all right and constitutional for states in America to say interracial sex is in fact banned and criminal. So, there's, there's a slippery slope on both sides of the argument.").

318. See Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1396 (1993).

319. *Id.*

320. See, e.g., Westley, *supra* note 84, at 71; *supra* text accompanying notes 214–24; see also Strassberg, *supra* note 8, at 503 (asserting that the economic efficiency of polyamorous relationships can make them financially difficult to exit); cf. Ellickson, *supra* note 318, at 1395 (noting the possible efficiencies of multimember households, including efficiencies of scale, specialization of labor, and increased dwelling space).

321. See *supra* note 209 and accompanying text.

322. See *supra* text accompanying note 121.

oppressive patriarchal family writ large.<sup>323</sup> But economists and legal scholars, as well as practitioners of polygyny such as Elizabeth Joseph, have made the opposite claim: polygyny may actually benefit women.<sup>324</sup> Gary Becker has argued that polygyny benefits women because their potential income is greater than it would be under monogamy.<sup>325</sup> Carol Rose and others have proposed that polygynous marriage could give women more market choice, so that no woman has to marry a "loutish" (lazy) man.<sup>326</sup> Relatedly, in light of the widespread imprisonment and impoverishment of African-American men, Adrienne Wing has suggested that some African-American women might prefer polygynous marriages to not finding an appealing husband at all.<sup>327</sup> Moreover, Bonnie

323. See, e.g., Bergmann, *supra* note 113; Iversen, *supra* note 44, at 518 (observing that "[o]ne cannot truly apply the term 'feminist' to the Mormon plural wives because feminism and patriarchal religion are incompatible"); Collin O'Connor Udell, *Intimate Association: Resurrecting a Hybrid Right*, 7 TEX. J. WOMEN & L. 231, 283 (1998); cf. SARAH BARRINGER GORDON, THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH-CENTURY AMERICA 47-49 (2001) (describing the popularity of comparisons between polygamy and slavery in nineteenth century novels and political rhetoric). This criticism overlaps with the argument that polygamy necessarily leads to despotism rather than democracy. See, e.g., Strassberg, *supra* note 8; Maura I. Strassberg, *Distinctions of Form or Substance: Monogamy, Polygamy and Same-Sex Marriage*, 75 N.C. L. REV. 1501 (1997); Udell, *supra*, at 283.

324. See *supra* Section III.B.3.

325. See GARY S. BECKER, *Polygamy and Monogamy in Marriage Markets*, in A TREATISE ON THE FAMILY 80, 81-104 (1991). But see Bergmann, *supra* note 113, at 145 (arguing that Becker's economic analysis must be "grossly incomplete" because it appears to prove a conclusion that "we know to be false"—that polygamy is better for women than monogamy); Westley, *supra* note 84, at 72 (arguing that Becker ignores various benefits of monogamy such as stability and nurturing and fails to recognize the potential pitfalls of a polygynous society in which poor men may resort to violence to obtain wives).

326. See, e.g., Carol M. Rose, *Women and Property: Gaining and Losing Ground*, 78 VA. L. REV. 421, 432 (1992) (pointing out that, under a system of one-man/one-woman marriage, some women will end up with "loutish" husbands who do not share in household duties, and observing that "even though they phrased it somewhat differently, some nineteenth-century Mormons thought that the [men's] greater propensity for loutishness was a pretty good reason for plural marriage, where the more cooperative [men] got lots of wives and the less cooperative ones presumably got none"); see also Julie Dunfey, "Living the Principle" of Plural Marriage: Mormon Women, Utopia, and Female Sexuality in the Nineteenth Century, 10 FEMINIST STUD. 523, 529 (1984) (reporting nineteenth-century Mormon women's praise of polygyny's potential for pairing the few "good men" with the many "good women").

327. Adrienne Katherine Wing, *Polygamy from Southern Africa to Black Britannia to Black America: Global Critical Race Feminism as Legal Reform for the Twenty-First Century*, 11 J. CONTEMP. LEGAL ISSUES 811, 858 (2001) ("In my view, African Americans today face conditions in which *de facto* polygamy can flourish. A disproportionate number of our men are unavailable for marriage—due to early death, imprisonment, high unemployment, and intermarriage. More of our young women have obtained higher educations than the young men. Socially, we as Black women, like most women, have been reared to want men of an equal or higher social status. We have also been socialized to prefer our own men, to men from other racial/ethnic groups. A wealth of well employed and educated Black women seek a small pool of 'suitable' men. The net result is that the few men have a surplus of women from which to select. They can be either *de facto* polygamists or womanizers. They can have children with multiple women and support none of them. Since the Civil Rights movement, more black men than women have taken advantage of the opportunity to date or marry outside the race, an act that could have resulted in a lynching in the past. The net result is that only 39% of Black women are married, compared to 60% of white

Honig has urged that the institution of polygamy can sometimes create conditions for solidarity among women, whereas monogamy "isolates women from each other and privatizes them."<sup>328</sup> Feminist arguments therefore may cut both ways.<sup>329</sup> And even if multiparty relationships may sometimes be detrimental to women, particularly in their traditional polygynous form, this must not be true in all cases; as discussed earlier, some polyamorists specifically embrace the practice of nonmonogamy as part of a feminist commitment to self-possession.<sup>330</sup> In this light, feminist objections cannot entirely ground the opposition to multiparty marriage, unless one is also inclined to oppose marriage altogether on the ground that its traditional form oppresses women.<sup>331</sup> And even this sort of feminist opposition to marriage would not necessarily explain a negative response to the idea of nonmarital relationships of more than two.

Third, the negative response to polyamory may also stem from the view that these relationships are not physically or psychologically healthy. Polyamory may inspire concerns about sexually transmitted diseases (STDs).<sup>332</sup> Like other sexually active people, polyamorists face risks that a partner is infected, and to the extent that polys have more partners than people in couples, they might have more cause for concern about STDs than some sexually active people. On the other hand, in a polyamorous subculture that aspires to honesty about sexual practices, informed communication about sexual health may be particularly valued,<sup>333</sup> and the social consequences of lying about sexual behavior and sexual

women, and 67% of Black children are born out-of-wedlock compared to 25% of white babies. In the U.S. Constitution, Blacks were counted as three-fifths of a person for representation purposes. Today, some lonely women remain ready to have a much smaller piece than three-fifths of a man." (footnotes omitted)).

328. Bonnie Honig, *Complicating Culture*, BOSTON REV., Oct/Nov. 1997, at 30, 31.

329. See, e.g., Iversen, *supra* note 44, at 518–19 (describing how Mormon polygyny was both feminist and anti-feminist).

330. See *supra* Section III.C.4.

331. Cf. JOHN STUART MILL, ON LIBERTY 104 (1986) (1859) ("No one has a deeper disapprobation than I have of this Mormon institution [of polygamy]; both for other reasons, and because, far from being in any way countenanced by the principle of liberty, it is a direct infraction of that principle, being a mere riveting of the chains of one half of the community, and an emancipation of the other from reciprocity of obligation towards them. Still, it must be remembered that this relation is as much voluntary on the part of the women concerned in it, and who may be deemed the sufferers by it, as is the case with any other form of the marriage institution; and however surprising this fact may appear, it has its explanation in the common ideas and customs of the world, which teaching women to think marriage the one thing needful, make it intelligible that many a woman should prefer being one of several wives, to not being a wife at all.").

332. See ANAPOL, *supra* note 127, at 28 ("Many people these days are fearful of choosing a polyamorous lovestyle because of concerns about exposing themselves to AIDS or to sexually transmitted diseases such as herpes . . .").

333. Cf., e.g., F.C.I. Hickson, P.M. Davies, A.J. Hunt, P. Weatherburn, T.J. McManus & A.P.M. Coxon, *Maintenance of Open Gay Relationships: Some Strategies for Protection Against HIV*, 4 AIDS CARE 409, 411, 414, 416 (1992) (reporting, in a study of 387 homosexually active men, that 72.7% of the men in nonexclusive relationships (who made up 56.3% of those in relationships) had "some agreement between the partners as to the nature of sex with third parties"

health may be particularly great.<sup>334</sup> Moreover, promises of sexual exclusivity in monogamous relationships may give monogamists more reason to have unprotected sex or to lie about their sexual behavior.<sup>335</sup> People in ostensibly monogamous relationships are caught in a bind if they contract infections; even if they want to protect their other half from the physical harm of contagion, they risk inflicting emotional harm and losing the relationship if they reveal their infected status, and thus, their sexual dalliances.<sup>336</sup>

The question of whether polyamory could have negative psychological effects on participants is hard to answer. Maura Strassberg has argued that polyamorous relationships may be coercive or oppressive, particularly when the relationships are closed (“polyfidelitous”) and involve more than three or four people.<sup>337</sup> But coercion and oppression, of course, afflict bilateral relationships as well as multiparty ones.<sup>338</sup> I have found little data the psychological effects

and the “most common type of rule amongst these couples concerned safer sex”).

334. See, e.g., Vexen Crabtree, *Human Sexuality: Poly*, at <http://www.vexen.co.uk/human/poly.html#pastd> (last updated Mar. 1, 2001) (“A person is not accepted into a poly group if they do not take issues like pregnancy and protection seriously. There is a very high awareness of the dangers of sexually transmitted diseases within poly groups . . .”).

335. See, e.g., David Wyatt Seal, Gina Agostinelli & Charlotte A. Hannett, *Extradynamic Romantic Involvement: Moderating Effects of Sociosexuality and Gender*, 31 SEX ROLES 1, 19 (1994) (observing that “most young adult heterosexuals believe that involvement in an ‘exclusive’ dating relationship gives them immunity from exposure to HIV/STDs,” leading them to frame “‘safe sex’ in the context of pregnancy prevention rather than disease prevention” and thus to use oral contraceptives and discontinue use of latex condoms); David J. Mack, Note, *Cleansing the System: A Fresh Approach to Liability for the Negligent or Fraudulent Transmission of Sexually Transmitted Diseases*, 30 U. TOL. L. REV. 647, 665 (1999) (reporting that a recent study of STD infection found that “because perceived risk is generally lower in monogamous relationships, married people are less likely than their single counterparts to use condoms” (citing Betsy Payn et al., *Men’s Behavior Change Following Infection with a Sexually Transmitted Disease*, 29 FAM. PLAN. PERSP. 152, 153 (1997))); see also Elizabeth Larsen, *Poly Sex for Beginners: Swinging Makes a Comeback Among GenXers*, UTNE READER, Nov./Dec. 1998, at 20, 20–21 (noting that “[m]any polyamorists make the point that, since their extramarital activities aren’t secrets, the likelihood of contracting an STD from their partner(s) is lower than that of many monogamous couples who may be unknowingly infected by a straying partner who never fesses up” and mentioning poly reports of “safe-sex circles” in which “each member is tested and new members are not admitted until a period of months go by and they still test negative” (internal quotation marks omitted)).

336. See, e.g., ANAPOL, *supra* note 127, at 28 (“A closed circle, whether of two or six or twenty, healthy, trusted partners can make polyamory just as ‘safe’ as monogamy, perhaps more so since the couple who have sworn to be monogamous may be more likely to lie about outside affairs and less likely to frankly discuss their sexual histories with prospective lovers than those who are openly polyamorous.”); Mack, *supra* note 335, at 661–62 (discussing the role of “secrecy” in the transmission of sexually transmitted diseases according to a recent report by the Sexuality Information and Education Council of the United States); see also McPherson v. McPherson, 712 A.2d 1043, 1044 (Me. 1998) (describing the lawsuit of a woman against her former husband for “infect[ing] her with a sexually transmitted disease he acquired through an extramarital affair”).

337. Strassberg, *supra* note 8, at 496–99, 508–09.

338. To illustrate the coercive possibilities of polyfidelitous relationships, Strassberg cites the example of the Kerista cult that existed in San Francisco from 1971 to 1991, in which certain participants tried to urge new members on one another through peer pressure, and the group punished certain members for disagreeable behavior by withholding sex from them. *Id.* at 497–

of open relationships. There are a few studies comparing open relationships and closed relationships among gay men, which show equal or greater relationship longevity in open relationships and mixed results on whether reported relationship satisfaction is different or the same;<sup>339</sup> these are, however, preliminary empirical efforts. Moreover, it is hard to know the possible effect of living in a nonmonogamous relationship in the context of a culture that frowns upon such relationships.

Strassberg also worries, like the judge in the Divilbiss case, that children will be damaged by exposure to polyamory.<sup>340</sup> Some people may well be concerned that polyamorous relationships are less stable or structured than monogamous ones and would thus cause harm to any children the participants might have. Of course, many people in polyamorous relationships may not have children, which would eliminate this concern. But for those who do, more information is necessary to evaluate the validity of the concern.<sup>341</sup> As with the concern about the effects on the participants, some participants in polyamorous relationships perceive those relationships as healthy for the children involved; others perceive the relationships as unhealthy.<sup>342</sup> Speculative arguments can be

502. Strassberg finds this situation to be more coercive and unhealthy than a monogamous one, as "the punished individual lost any possibility of sex," but the rest of the group members continued to be able to have sex with each other. *Id.* at 502. This reasoning, however, cuts both ways because members of monogamous couples have the power to make unilateral and unreasonable decisions to cut out sex for the other person, a decision that only harms the withholder if he or she values sex more than the negative emotion fueling the withholding. This is a coercive situation that may be avoided in polyamorous relationships, where one person's decision to withhold sex does not deprive another of the possibility of sex.

339. See, e.g., David Blasband & Letitia Anne Peplau, *Sexual Exclusivity Versus Openness in Gay Male Couples*, 14 ARCHIVES OF SEXUAL BEHAV. 395 (1985) (finding, in a study of forty gay male couples of which approximately 57.5% reported an open relationship and 42.5% reported a closed relationship, no differences between the open and closed relationships in reported affection, respect, love, or longevity); Lawrence A. Kurdek & J. Patrick Schmitt, *Relationship Quality of Gay Men in Closed or Open Relationships*, 12 J. HOMOSEXUALITY 85, 95–96 (Winter 1985/1986) (reporting, based on self-report measures by forty-nine gay male couples in open relationships and seventeen gay male couples in closed relationships, that *inter alia* the couples in open relationships lived together significantly longer than those in closed relationships, that the couples in closed and open relationships reported equal satisfaction on some measures (respect/perceived similarity, agreement, satisfaction with affection and sex, and shared activities), and that the couples in closed relationships reported greater satisfaction along several measures (greater affiliative/dependent need, more favorable attitude toward the relationship, and less tension in the relationship)).

340. See Strassberg, *supra* note 8, at 509–20; see also Westley, *supra* note 84, at 72 (arguing that stability and nurturing of a monogamous family benefit children and thereby help create an effective labor force).

341. See Strassberg, *supra* note 8, at 559–60. There is one study of the extent to which parents in open relationships disclose their relationship details to their children, which concludes that most parents do not fully inform their children of their involvements. See James Watson & Mary A. Watson, *Children of Open Marriages: Parental Disclosure and Perspectives*, 5 ALTERNATIVE LIFESTYLES 54 (1982).

342. For a discussion of factors that may affect the well-being of a child in a polyamorous family, see Strassberg, *supra* note 8, at 511–17 (discussing an interview with a psychologist who felt she was harmed because her parents were "swingers" who engaged in casual sex with many different people, including some who sexually abused her (citing Ryam Nearing, *But What About*

made either way.

For instance, relationships might be less stable because there are more participants or because participants are open to other relationships. On the other hand, openness to other possibilities could prevent relationships from ending because of outside attraction or sex and might generally permit a flexibility that allows a relationship to survive through changing needs and desires. In terms of child-rearing approaches, polyamory might seem loose and unstructured, but the aspirations articulated by polyamorists include some structuring concepts like consent and honesty, and, as discussed earlier, some polys are highly attentive to boundaries.<sup>343</sup> In terms of attention to children, some might worry that polys would be too engaged with one another to care adequately for the children. On the other hand, more hearts and hands might contribute positively to the care of children; along these lines, some polys have suggested that polyamory provides the “village” that Hillary Clinton and others have said it takes “to raise a child.”<sup>344</sup> What harm means in this context, whether it might occur, and what the policy consequences might be are all difficult questions. Without clarifying information, people may well be concerned about children in these situations. Since many people never have children and discussions of polyamory typically do not center on children, however, I would posit that possible effects on possible children are not foremost in most people’s minds when they react negatively to the idea of polyamory.

Fourth, and relatedly, some argue that polyamory is incompatible with real love. This objection comes in two principal forms: those in polyamorous relationships cannot love one another equally or they cannot love one another enough. But comparisons to other types of relationships suggest that there is no obvious reason that relationships involving more than two are necessarily unequal. For instance, as discussed in Part II, although people sometimes speak of having a best friend, friends are generally thought able to love more than one friend equally. Friendships may take different forms without necessarily being valued disproportionately. Similarly, few people object to the idea of parents’ having multiple children on the ground that the parents won’t be able to love two or more children equally. Rather, parents are generally thought able to love multiple children the same amount, even if reality does not always reflect that ideal.

Moreover, even if some friends or children are loved more than others, it is not clear that the other friends or other children are not loved enough. Indeed,

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*the Kids?*, 24 *LOVING MORE MAG.*, 10, 10–13 (Winter 2001))). For a description of interviews with parents in alternative relationships, including polyamorous relationships, who characterize their children’s development as healthy, see PATRICK CALIFIA, *When the Playroom Becomes a Nursery: S/M-Fetish People Who Choose to Parent*, in *SPEAKING SEX TO POWER: THE POLITICS OF QUEER SEX* 46, 50–53 (2002).

343. See *supra* Section III.C.

344. Strassberg, *supra* note 8, at 560 & n.549 (citing Lady Alia-anor Ravenhart, *Help! I’m Going to Have a Baby! Part Two*, 9 *LOVING MORE MAG.*, 10, 11 (Spring 1997)).

friendship is generally presumed not to be exclusive, even though most people have varying levels of closeness to different friends. As discussed earlier, feeling jealousy about a friend's other friends is generally not considered a sign of true friendship.<sup>345</sup> On the contrary, where such jealousy exists, indulging it by insisting that a friend drop other friends would seem antithetical to the generosity and other-regarding feelings expected of friends. Among siblings, though jealousy about parental love may even be common, the legitimacy of parents' having multiple children is not called into question on this basis. Parents with multiple children are typically deemed able to love their children enough, even if they do not in every case love them in identical ways or even identical amounts. Thus, while some people might prefer monogamy because they feel that romantic love is uniquely defined by twoness, and thus reject the relevance of these analogies for themselves, this personal feeling does not seem an adequate objection to relationships formed by *other* people who have a different view of love, namely, a view in which romantic love shares certain properties of other types of relationships such as friendship.

Fifth, polyamory may tap into anxieties about other social taboos. For instance, Judith Butler has suggested that a deep anxiety about incest underlies our response to all sexual and familial taboos.<sup>346</sup> The judge's comments in the Divilbiss case indicate that he could not escape the image of all three partners in bed together—a practice that was not part of their relationship—and of the child in bed with the three of them.<sup>347</sup> Whether or not incest is the taboo into which

345. See *supra* text accompanying notes 41–48.

346. Butler writes:

Consider that the horror of incest, the moral revulsion it compels in some, is not that far afield from the same horror and revulsion felt toward lesbian and gay sex, and is not unrelated to the intense moral condemnation of voluntary single parenting, or gay parenting, or parenting arrangements with more than two adults involved (practices that can be used as evidence to support a claim to remove a child from the custody of the parent in several states in the United States). These various modes in which the oedipal mandate fails to produce normative family all risk entering into the metonymy of that moralized sexual horror that is perhaps most fundamentally associated with incest.

JUDITH BUTLER, *ANTIGONE'S CLAIM* 71 (2000).

347. Over the protests of April Divilbiss's attorney that the three members of this triad were not actually sleeping together, but rather, April was sleeping with each man separately, the judge persisted in asking:

THE COURT: Well, at some point in time when the child walks into the bedroom and there is mother in bed with two guys, now what is the child going to say about that?

Transcript, In the Matter of A.M., No. K1719 (Juv. Ct., Memphis and Shelby County, Tenn., Apr. 16, 1999). And the judge could not escape the specter of incest:

THE COURT: Well, it hasn't been shown that the child is in bed with everyone but the child is in the same household. And if the child is in the same household and seeing this going on, at some point in due time, the child is going to become aware of it.

*Id.* So somehow the idea of the child seeing all of them in bed together is intimately bound up with the possibility that "the child is in bed with everyone." Though one can read the judge to be asserting merely that the child need not be in bed with them to walk in on them, the implication of his legal rhetoric—"it hasn't been shown that . . ."—suggests the possibility that one *could* show it, and that one might have reason to try to show it. The form of his statement evokes a classic form

many other taboos collapse, as Butler suggests, one could hypothesize about why incest might haunt discussions of intimate group sex within a family. Classically, parents are two, and children may be more than two. Our only model for permissible sexual relations within a nuclear family is the parents. For this reason, the idea of sex among three or more family members may evoke the idea of siblings—the horizontal family relationship that can involve more than two—rather than parents. In this way, sex within polyamorous families might prompt an image of sibling incest. But this is, perhaps to a greater extent than the other concerns, mere speculation.

Anxieties about homosexuality and bisexuality, on the other hand, bear a more concrete relationship to the response to polyamory. Mutual sex among three or more people necessarily involves some homosexual or bisexual relations, since any group of people larger than two involves at least two of the same sex. Sex between two people is either different-sex or same-sex, heterosexual or homosexual. Sex among three people (or more)—where all three sleep together or each of them sleeps with each of the others—cannot be strictly heterosexual, since there are only two sexes.<sup>348</sup> Thus, an obvious part of the resistance to polyamory among straight people is disapproval or lack of interest in same-sex sex. Gays need not have the same resistance to the idea of polyamory since polyamory can be exclusively gay. (As “monosexuals,” however, gays presumably share with straights a lack of interest in multiparty sex among men and women together.<sup>349</sup>) The gay or bisexual element in some

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of prosecutorial closing statement, “While it hasn’t been shown that the defendant knifed his wife to death, a bloody knife was found next to her body with his fingerprints all over it.” The form of the statement answers the question it implies. We may thus read the judge’s comments here to suggest that incest is the endpoint feared most in the transgression of “normal” family boundaries. This revulsive turn occurs even in a polyamorous family that resists the image of group sex.

348. If all three are one sex, then there is same-sex sex; if two are one sex and the third is another sex, then there is some same-sex sex and some different-sex sex, including what might be called bisexual behavior. The principle is both obvious and not obvious, as indicated by its presence in the familiar children’s riddle: If you have thirty socks in a drawer, twenty black and ten white, what is the maximum number of socks you must pull out of the drawer to guarantee a matched pair? The answer is, of course, three.

349. A closer look at this aspect of the response to polyamory may illuminate a phenomenon of gender politics, “bisexual erasure.” Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353 (2000). A comparison between two simple models of group sex points toward different perceptions of male and female bisexuality. In the situation of group sex involving one man and two women, I would posit that outsiders are more likely to assume that the women are engaging in the threesome for the man’s sake; outsiders often assume the man is getting more out of it. In part because people often do not believe people are *really* bisexual, they are more likely to assume the women are straight, and having sex with each other because the man wants it. (Not surprisingly, pornography created for straight males reflects and reinforces this assumption.) By contrast, in a scenario of group sex among one woman and two men, I think outsiders would be more inclined to assume that the men are actually gay, but not yet acknowledging their homosexuality, and the woman is an excuse for them to have sex with each other. Thus, bisexual erasure resolves itself in favor of heterosexuality in the case of (potentially bisexual) women, whereas in the case of (potentially bisexual) men, bisexual erasure results in homosexuality. This peculiarity might be explained by assumptions about power and desire; men are assumed to have more of both. In both situations, the men are seen to be getting what they



polyamorous relationships may thus help explain why some outsiders do not want to become polyamorous. It does not, however, explain why they would not want other people to be so. Any gap between the status of gays or bisexuals, on the one hand, and polyamorists, on the other, must be due to something other than the homosexual component of some polyamory.

As with the other reasons discussed in this Section, feelings about homosexuality may be a factor in some people's response to polyamory. These different factors warrant further discussion, which I hope to help prompt, but these factors do not add up to the whole of the response. Something else is going on. As I argue in the next Section, thinking about homosexuality does help us understand the driving force behind the response to polyamory after all. But it is the theory of homosexuality, rather than the practice, that points us toward the missing piece.

### B. *The Problem of the Universalizing View of Polyamory*

This Section takes its cue from insights into sexuality developed in the context of homosexuality. In particular, the conceptual distinction between "universalizing" and "minoritizing" views of sexual identity, posed by sexuality theorist Eve Kosofsky Sedgwick, helps to pinpoint a crucial problem for polyamorists.<sup>350</sup>

Sedgwick defines a "minoritizing" view of homosexuality as the view that "there is a distinct population of persons who 'really are' gay."<sup>351</sup> By contrast, a "universalizing" view of homosexuality holds "that apparently heterosexual persons and object choices are strongly marked by same-sex influences and desires, and vice versa for apparently homosexual ones . . ."<sup>352</sup> The concept of

want sexually from the situation.

350. In her recent article, Maura Strassberg uses the same term—"universalizing"—to invoke a distinct idea taken from a different theoretical context: Hegel's theory that monogamous families prepare individuals to identify with a kind of universal rationality represented by the state, rather than with their particular subjective experience. See Strassberg, *supra* note 8, at 555.

351. EVE KOSOFSKY SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* 85 (1990).

352. *Id.* Earlier in the book, Sedgwick defines the terms in a more tortuous fashion:

[I will be discussing] the contradiction between seeing homo/heterosexual definition on the one hand as an issue of active importance primarily for a small, distinct, relatively fixed homosexual minority (what I refer to as a minoritizing view), and seeing it on the other hand as an issue of continuing, determinative importance in the lives of people across a spectrum of sexualities (what I refer to as a universalizing view).

*Id.* at 1. Sedgwick offers her minoritizing/universalizing axis as an alternative model to the essential/constructed view of sexual identity. *Id.* at 40. The essential/constructed axis distinguishes between hardwired—or "essential"—ideas of identity and culturally determined—or "constructed"—ideas of identity. Thus, an essentialist view of homosexuality holds that some people are born with the trait of homosexuality, and that these people have a homosexual identity, regardless of their time in history or place in the world. By contrast, in the constructionist view of homosexuality, people are not born gay; rather, gay identity, as well as straight identity, is a product of cultural context and environment. See, e.g., Daniel R. Ortiz, *Creating Controversy: Essentialism and Constructivism in the Politics of Gay Identity*, 79 VA. L. REV. 1833, 1836 (1998) ("Essentialism in this debate represents the belief that gayness is an intrinsic property, one that

minoritizing and universalizing discourses of identity encourages a focus on the ways that this aspect of identity is pervasively important in the lives of many people, even those who do not identify as sexual minorities. Rather than focusing our attention exclusively on some narrow idea of biologically essential identities—or some superficial assessment of identities as constructed and therefore deconstructable—the minoritizing/universalizing axis prompts us to ask: “‘In whose lives is homo/heterosexual [or nonmonogamous/monogamous] definition an issue of continuing centrality and difficulty?’”<sup>353</sup> Sedgwick’s categories, therefore, urge a focus on the discourses and perceptions surrounding a particular identity category, rather than on the search for any inherent truth of sexual identities.<sup>354</sup>

Sedgwick argues that “[m]ost moderately to well-educated Western people in this century seem to share a similar understanding of homosexual

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does not vary across history and culture. . . . Constructivism, on the other hand, represents the belief that gayness is a property that has meaning only within certain times and cultures. Identity categories, constructivists believe, are social creations. They result from social belief and practice, are themselves complex social practices, and may be evaluated in terms of whose interests they serve.”). These terms arise out of feminist debates about whether various sex and gender characteristics are, on the one hand, hardwired or, on the other hand, culturally produced. The terms have also been applied to—and much disputed in—gay contexts. Disputants argue about whether gay identity is essential or constructed, but they also take issue with the terms themselves, contesting even whether “essential” and “constructed” are useful ways of understanding and speaking about sexual orientation. *See, e.g., infra* note 353.

In addition, some scholars have used the terms “mutability” and “immutability” to characterize similar concepts in debates over footnote four of *Carolene Products* and the criteria for suspect class status. *See, e.g.,* Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. REV. 915, 932 (1989); Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of “Don’t Ask, Don’t Tell,”* 108 YALE L.J. 485, 509 (1998).

353. SEDGWICK, *supra* note 351, at 40. More technically, Sedgwick notes that the terminology of essentialist vs. constructivist tends to conflate distinct conceptual questions. In her words, the essential/constructed terminology conflates “ontogeny” with “phylogeny.” In other words, essentialist/constructivist debates blur the question of how individual sexual identities are formed—i.e. how an individual becomes gay or straight—with the question of how the cultural idea of a sexual identity is formed—i.e. how understandings of sexual identity are formed. *Id.*

Daniel Ortiz agrees that the terms blur the distinction between questions of historical development (what Sedgwick calls the phylogeny question) and individual development (what Sedgwick calls the ontogeny question and Ortiz calls the “nature/nurture” question). Ortiz also identifies a third set of questions incorporated into that debate: the question of “determinism” versus “voluntarism.” The determinism/voluntarism question “concerns the extent to which people choose their sexual orientation.” Ortiz, *supra* note 352, at 1837.

354. *See* SEDGWICK, *supra* note 351, at 40. Sedgwick notes the pervasiveness of the essential/constructed debate, then explains her choice instead to frame her work through the minoritizing/universalizing distinction. *Id.* at 40. Sedgwick’s choice of terms, in the gay context, is avowedly a political one, since she sees the essentialist/constructivist discourse as fueled by an implicit or explicit anti-gay politics, even in “ostensibly or authentically gay-affirmative contexts.” *Id.* at 43 (“If I had ever, in any medium, seen any researcher or popularizer refer even once to any supposed gay-producing circumstance as the *proper* hormone balance, or the *conducive* endocrine environment, for gay generation, I would be less chilled by the breezes of all this technological confidence.”).

definition,”<sup>355</sup> one that is marked by “a radical and irreducible incoherence.”<sup>356</sup> That is, Sedgwick claims that most people hold minoritizing and universalizing views of homosexuality simultaneously. For example, many people think that there is a distinct minority of people who are immutably gay, but many of these same people also do not want their children exposed to gay role models for fear that it could make their children gay. In this sense, I agree with Sedgwick about the incoherence in views of homosexuality. But I would also posit that the contemporary view of homosexuality is highly minoritizing relative to the general view of polyamory.

Unlike homosexuals, who are understood by many to possess a distinct and unalterable identity, polyamorists are rarely seen as having a distinct identity. In the words of Jonathan Rauch:

Do homosexuals actually exist? I think so, and today even the Vatican accepts that some people are constitutively attracted only to members of the same sex. By contrast, no serious person claims there are people constitutively attracted only to relatives, or only to groups rather than individuals. Anyone who can love two women can also love one of them. People who insist on marrying their mother or several lovers want an additional (and weird) marital option. Homosexuals currently have no marital option at all. A demand for polygamous or incestuous marriage is thus frivolous in a way that the demand for gay marriage is not.<sup>357</sup>

Similarly, Andrew Sullivan claims, “Almost everyone seems to accept, even if they find homosexuality morally troublesome, that it occupies a deeper level of human consciousness than a polygamous impulse.”<sup>358</sup> Without directly assessing the truth-value of their allegations about gays versus polys, both Rauch and Sullivan reflect the divergence in popular perceptions of the depth of these sexual identities. Gay identity is viewed by many to be a deeply rooted element of identity; poly identity is seen to be so superficial as to be frivolous. Because a desire to be involved with more than one person is not perceived to “occup[y] a deep[] level of human consciousness,”<sup>359</sup> nor to be a “constitutive[] attract[ion],”<sup>360</sup> polys are generally not seen as a discrete group of individuals. There is little sense of a distinct group of people who “really are” poly.

Rather, the desire to be sexually involved with more than one person, or with someone other than an existing partner, is viewed as nearly universal. To

355. *Id.*

356. *Id.*

357. Jonathan Rauch, *Marrying Somebody*, in SAME-SEX MARRIAGE: PRO AND CON, *supra* note 10, at 286.

358. Sullivan, *supra* note 19, at 279. Sullivan neatly avoids the question of bisexuality here too.

359. *Id.*

360. Rauch, *supra* note 357, at 286.

translate Sedgwick's definition of universalizing homosexuality into an observation about universalizing polyamory: "[A]pparently [monogamous] persons and object choices are strongly marked by [nonmonogamous] influences and desires . . ." <sup>361</sup> The universalizing account of nonmonogamy may seem obvious: Of course most people *want* to sleep with others; they just resist that impulse. From this perspective, polyamory may seem, like bisexuality, to be a form of greed or indulgence. <sup>362</sup>

Much thinking and writing from within poly communities also sounds in a universalizing register. Most notably, the idea of radical honesty <sup>363</sup> is universalizing about people's involvement in nonmonogamous activity, through serial monogamy and adultery. The poly ethic of honesty posits that many more people engage in nonmonogamous behavior than own up to it. From this perspective, polys seem less a distinct minority than outspoken representatives of the masses. Poly thinking thus shifts scrutiny to monogamy, asking how it is constructed and why people lie about their nonmonogamous behavior and desires.

The idea of privileging love and sex <sup>364</sup> also seems to offer benefits to anyone willing and able to experience them. Rather than proposing that some small subset of people might grow and enrich their lives through further sexual and loving relationships, the poly commitment to experiencing love and sex seems a credo of expansiveness, a manifesto of living that has no obvious stopping point or confinement to those who espouse it. Moreover, the poly ethic of self-possession offers a resounding critique of the strictures of monogamy—of its jealousy, possessiveness, and patriarchy—a critique that implicates mainstream institutions. <sup>365</sup>

Deborah Anapol boldly captures the universalizing challenge inherent in much poly talk:

The fact is that most of us *are* polyamorists at heart whether we are willing to admit it to ourselves or not. It is no accident that "serial monogamy," which is not really monogamy at all, is currently the most common relationship form in our culture. Serial monogamy can be viewed as being one step closer to who we really are. Unlike lifelong monogamy, it allows us to express our polyamorous nature while maintaining a monogamous fiction in which our multiple mates are separated by linear time. For some people this marriage-divorce-

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361. SEDGWICK, *supra* note 351, at 85; *cf. supra* text accompanying note 352 (quoting Sedgwick's phrasing, i.e., that "apparently heterosexual persons and object choices are strongly marked by same-sex influences and desires").

362. *See, e.g.,* Yoshino, *supra* note 349, at 374, 420 (describing the stereotype of the greedy or promiscuous bisexual); *see also supra* text accompanying note 183 (quoting the judge in the *Divilbiss* case disparaging April for deciding "I can have my cake and eat it too").

363. *See supra* Section III.C.2.

364. *See supra* Section III.C.5.

365. *See supra* Section III.C.4.

remarriage cycle remains the best solution.

But divorce increasingly appears to be more stressful and disruptive than first thought. . . . Where infidelity or the desire for broader sexual expression is the primary cause for dissolution of a marriage, surely we can find more imaginative alternatives than divorce. . . .

. . . The point is that, ultimately, the clash between our nonmonogamous nature and our monogamous tradition must begin to be seen as a legitimate reason to develop new forms of relationships. . . .

. . . *Polyamory, a viable alternative for those who wish to expand their social horizons to include multipartner relationships, is a concept whose time has come.*<sup>366</sup>

This is classic universalizing language, and it challenges people to admit their own transgressions and violations of the law of monogamy, and to embrace an alternative open to everyone. Anapol's position is interesting because it locates polyamory as somehow essential, but essential in most everyone. In a gay context, this might be akin to saying that homosexuality is hardwired into everyone.

Notably, Anapol initially seems to blur the distinction between nonmonogamy and polyamory by suggesting that everyone might be a "polyamorist[] at heart." Arguably, though, she expresses herself in this way for rhetorical impact. By the end of the passage, polyamory reemerges as a practice distinct from other forms of nonmonogamy—such as "cheating"—because she describes "polyamory" as a "viable alternative" involving "multipartner relationships." This is consistent with the distinction I drew at the end of Part III, that polyamory is a subset of nonmonogamy distinguished primarily by its devotion to certain principles, such as honesty and privileging sexual and loving experiences over jealousy.

Nonetheless, as Anapol points out, polyamorists have something in common with much of the population: an impulse towards nonmonogamy. One might contrast the prevalence of the capacity to imagine nonmonogamy—to experience desire for someone other than one's primary partner—with the capacity to imagine homosexuality. Arguably, many more people have nonmonogamous fantasies than have homosexual fantasies. Even according to Alfred Kinsey's findings, which have been widely criticized for overstating the extent of homosexual desire and activity because of problems such as sample bias, 50% of males reported no same-sex desires or experience after the onset of adolescence,<sup>367</sup> and 72% of females reported no same-sex desires at all.<sup>368</sup> By

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366. ANAPOL, *supra* note 127, at viii–ix (emphasis in original).

367. ALFRED KINSEY, WARDELL B. POMEROY & CLYDE E. MARTIN, *Homosexual Outlet, in SEXUAL BEHAVIOR IN THE HUMAN MALE* 610, 650 (1948).

368. ALFRED KINSEY, WARDELL B. POMEROY, CLYDE E. MARTIN & PAUL H. GEBHARD, *Homosexual Responses and Contacts, in SEXUAL BEHAVIOR IN THE HUMAN FEMALE* 446, 453, 493

contrast, somewhere between 25% and 75% of Americans have engaged in adulterous sex, as discussed earlier.<sup>369</sup> The number of people who have felt nonmonogamous desires is, no doubt, much greater.

Indeed, it seems a fair assumption that almost everyone has at some time felt desire for more than one person. There certainly may be some small subset of people who have never experienced desire for anyone other than their current partner (if they have one). Nevertheless, the prevalence of serial monogamy (as indicated by divorce rates) suggests that it is an extremely rare person who cannot imagine feeling desire for more than one person, since he can at least think of two people that he has desired in sequence. Sexual variation is arguably infinite, so there may well be some people who exhibit supermonogamous desires par excellence—people who have desired one and only one person in their entire lives. However, it also seems fair to assume that such people are extremely rare.

In this light, polys would seem to have many potential allies because many people could seemingly empathize with at least some aspect of polys' desires. Although many people may not actually want multiple sexual partners in *love*, most can presumably empathize with the aspect of poly desire that means more than one *sexual* partner. The sheer ubiquity of nonmonogamous desire, and the prevalence of nonmonogamous behavior, could mean a larger constituency and more allies for pro-poly politics. I want to argue, however, based on certain lessons from gay theory and politics, that the universalizing possibilities suggested by Anapol's words form a basic stumbling block to public recognition of poly relationships.

Rather than empathizing with others who share one's traits, people often fear or shun the people they could become, particularly when the common traits are stigmatized.<sup>370</sup> This difficulty may be understood through the figure of the self-hating Jew, black, or homosexual.<sup>371</sup> Similarly, the principle behind "homophobia" is that the presence of homosexuality in one's self can create the fear of actual homosexuals.<sup>372</sup> Pervasive homophobia may therefore be

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tbl. 131 (1953).

369. See *supra* notes 106–09.

370. See, e.g., Yoshino, *supra* note 352, at 512.

371. *Id.*

372. See, e.g., Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 260 n.231 (1994) (quoting Iris Marion Young as saying that "[h]omophobia is one of the deepest fears of difference precisely because the border between gay and straight is constructed as the most permeable; anyone at all can become gay, especially me, so the only way to defend my identity is to turn away with irrational disgust," and arguing that homophobia only produces this kind of fear in people whose identity depends upon "a certain kind of gender order, one in which sexual penetration connotes the dominance of the male over the female" (quoting IRIS M. YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 146 (1990)); Jeffrey G. Sherman, *Love Speech: The Social Utility of Pornography*, 47 STAN. L. REV. 661, 677 n.89 (1995) (explaining that "homophobia and homohatred ought more properly to mean self-fear and self-hatred, rather than hatred of homosexuality. Some would argue that the notion of substituting 'self-hatred' for 'homophobia' is not so far from wrong, since expressions of

understood as a sign of the pervasiveness of same-sex fantasies or desires. Thus, one lesson from gay politics is that the universal potential of an identity trait may engender distance rather than empathy, resistance rather than support.

In addition, the difficulty of organizing and generating support for an "invisible" group has been a longstanding obstacle for gays. The challenge of identifying invisible gay allies, much less convincing them to be oppositional rather than to hide in the closet, has inspired political fantasies of all gays turning blue.<sup>373</sup> That is, if all gays were blue, then gays would have the ability—and the need—to seek solidarity and to end the prisoner's dilemma of the closet.<sup>374</sup> The invisibility of gays may also contribute to a lack of empathy from nongays, or a lack of avowed support from gay-friendly nongays, because those who support gays may be mistakenly deemed gay in a way that supporters of a race- or sex-based group can expect not to be.<sup>375</sup> The impulse to shy away from those who are like oneself, rather than forming allegiances based on commonality, may also be seen in the different attitudes toward homosexuality and bisexuality. Bisexuals share with heterosexuals the common ground of a desire for the opposite sex, yet bisexuals are more marginalized than homosexuals.<sup>376</sup> If one pictures a straight white politician who has the option of supporting the political agenda of African-Americans, gays, or bisexuals, he would have the most reason to fear being mistaken for a bisexual, and thus, the most reason to fear supporting the bisexual agenda, although he seems to have the most in common, along a salient identity axis, with the bisexuals.

Debates about whether homosexuality and heterosexuality, as we understand them, have been present throughout history implicitly reflect the extent to which we now understand this aspect of personality to be deeply

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homophobia may be a device for cloaking or denying one's own homosexuality."); *id.* at 685 (describing Robert Bauman as "[o]ne of the saddest and most conspicuous exemplars of the hypocrisy and self-destructiveness of a furtive, nonintegrated sexuality" and explaining that Bauman was "at one time a conservative congressman from Maryland [who] had an antigay voting record and an inclination to make such public statements as, 'I would not want my children taught or influenced by gay people,' until his arrest for propositioning a sixteen-year-old male prostitute brought his legislative career to an abrupt end").

373. *See, e.g.,* LARRY GROSS, *CONTESTED CLOSETS: THE POLITICS AND ETHICS OF OUTING* 49 (1993) (quoting Nancy Walker, *Yanking Them Out*, *GAY COMMUNITY NEWS*, May 14, 1983, at 5 ("I have often wished that all gay people would turn blue at the same moment and thereby put an end to our oppression. . . .")), *quoted in* Kenji Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*, 96 *COLUM. L. REV.* 1753, 1802 n. 221 (1996).

374. *See* Yoshino, *supra* note 373, at 1802.

375. *See, e.g.,* Halley, *supra* note 352, at 973 (noting that "one's mere participation in political action to alter laws affecting gays and lesbians can precipitously earn one a public homosexual identity"); Yoshino, *supra* note 373, at 1807 ("Finally, just as the closet makes it unclear that gays are gay, it also makes it unclear that straights are straight. Because gays can masquerade as straight, every person who holds himself out as 'straight' is suspect.").

376. *See* Yoshino, *supra* note 349. The question of common ground does cut both ways; as Yoshino has pointed out, heterosexuals also share with homosexuals the common ground of being monosexuals. The connection between bisexuals and heterosexuals is, I think, more immediately obvious.

rooted. A historical-constructivist view of homosexuality posits that our contemporary idea of homosexuality is a relatively recent invention. Most closely associated with the historian Michel Foucault, historical constructivism is the idea that during the late nineteenth century certain medical and legal discourses created our modern belief that people have a sexual orientation determined primarily and deeply by the sex of the people they desire. Foucault colorfully called this nineteenth-century transformation a “perverse implantation,”<sup>377</sup> which moved western culture from seeing the sodomite as a “temporary aberration” to viewing the homosexual as “a species.”<sup>378</sup> Lest anyone think that this constructivist view of homosexuality is a fringe theory, the Supreme Court’s recent decision in *Lawrence v. Texas* officially acknowledged it and arguably relied on it to show why *Bowers v. Hardwick*<sup>379</sup> warranted reversal.<sup>380</sup> As Ed Stein has pointed out, the historical contingency of *recognition* of homosexual and heterosexual identities does not necessarily indicate that the identities themselves are not essential.<sup>381</sup> Nonetheless, theories of the relatively recent vintage of homosexuality make an essential division between heterosexuality and homosexuality less rather than more likely. Additionally, as Kenji Yoshino has argued, because gays are not necessarily seen to possess an essential, unchangeable gay identity, they may be asked to assimilate in more ways than other minority groups, such as those marked by race or sex.<sup>382</sup>

But while the constructivist account posits “the mutability of homosexuality”<sup>383</sup> the constructivist concept of perverse implantation also brings into relief our rather deep (essentialist) intuition that we know what a homosexual is—i.e., that a homosexual is a person who innately desires people of his or her own sex. So while “homosexuality as we conceive of it today” is no doubt “a space of overlapping, contradictory, and conflictual definitional forces,”<sup>384</sup> as Eve Sedgwick would have it, the contradictions in our definition of homosexuality are not apparent to the naked eye. Instead, authors of the key texts in the history of sexuality have had to dig up evidence that earlier eras did

377. MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY* 36 (Robert Hurley trans., Random House 1978) (1976). “The Perverse Implantation” is the name of the chapter in which Foucault describes the transition from the sodomite, as a “temporary aberration,” to the homosexual, as “a species.” *Id.* at 43.

378. *Id.*

379. *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by Lawrence v. Texas*, 123 S. Ct. 2472 (2003).

380. *See Lawrence*, 123 S. Ct. at 2478–80 (“[A]ccording to some scholars the concept of the homosexual as a distinct category of person did not emerge until the late 19th century.”).

381. *See* EDWARD STEIN, *THE MISMEASURE OF DESIRE* 100–04 (1999).

382. *See* Kenji Yoshino, *Covering*, 111 *YALE L.J.* 769, 875–79 (2002). By saying race or sex, I do not mean to suggest that people are marked only by one of these axes. *See* Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 *STAN. L. REV.* 1241 (1991).

383. Yoshino, *Suspect Symbols*, *supra* note 373, at 1827.

384. SEDGWICK, *supra* note 351, at 45.



not share our beliefs about homosexuality, our idea that there is a class of persons who are homosexual,<sup>385</sup> in order to counterbalance the widespread belief in the transhistorical essence of homosexuality.

The task of demonstrating polyamory's constructed aspects has not been undertaken, an unsurprising fact in light of the gap between views of homosexuality and of polyamory. Polyamory has not undergone a Foucaultian perverse implantation. Instead, as the Sullivan and Rauch comments portray so starkly, polyamory is not generally viewed as an identity at all.<sup>386</sup> Polyamorous instincts are widely seen to be universal or nearly so, while specifically polyamorous people are not widely understood even to exist as a category of individuals, much less an essential one.<sup>387</sup>

Thus, many of the problems faced by gay rights advocates, relative to race rights advocates, would likely be multiplied for anyone who tried to gain poly rights.<sup>388</sup> As Joy Singer observes, "seeking broad societal tolerance for and acceptance of poly lifestyles appears to be more difficult than it was for the gay movement . . . [because] our message just hits too much 'closer to home' for the largely heterosexual, married opinion leaders who run the country . . ." <sup>389</sup> Because "most people may in fact be 'pre-poly,'" <sup>390</sup> Singer says, for them to acknowledge the viability of polyamory is to imperil their self-conception, and poly issues therefore "seem much more threatening" than gay or lesbian issues.<sup>391</sup> Singer's statement that "most people" may be "pre-poly" is, of course, a perfect example of the universalizing challenge of some poly talk.

Moreover, polys have another, related, problem. Not only might an outsider

385. See, e.g., Mary McIntosh, *The Homosexual Role*, 16 SOC. PROBS. 182 (1968) (positing the seventeenth-century origin of the modern homosexual); Randolph Trumbach, *London's Sodomites: Homosexual Behaviour and Western Culture in the Eighteenth Century*, 11 J. SOC. HIST. 1 (1977-78) (claiming the eighteenth-century origin of the modern homosexual); Robert Padgug, *Sexual Matters: On Conceptualizing Sexuality in History*, RADICAL HIST. REV., Spring/Summer 1979, at 22 n.28 (arguing, with Foucault, for the late-nineteenth-century origins of the modern homosexual); Jeffrey Weeks, *Movements of Affirmation: Sexual Meanings and Homosexual Identities*, RADICAL HIST. REV., Spring/Summer 1979, at 164 (same argument as Padgug, *supra*); DAVID M. HALPERIN, *Is There a History of Sexuality?*, in THE LESBIAN AND GAY STUDIES READER 416 (H. Abelove et al. eds., 1993) (same argument as Padgug, *infra*).

386. See *supra* text accompanying notes 357-58.

387. In addition, whether polyamory is best conceived as a category, as a spectrum, or on some other model is an open question. See *infra* text accompanying notes 411-12. As the discussion below suggests, polyamory may be understood as having some distinguishable components—such as one's own desire for more than one sexual partner versus one's tolerance (or even desire) for one's partner's having additional partners. See *infra* text accompanying notes 392-95, 404-06.

388. See *supra* note 316.

389. Singer, *supra* note 111, at 5.

390. *Id.* Singer also proposes that "many could be seen as being 'poly' under the European model." *Id.* The "European model" appears to be her term for polyamory that is not acknowledged as such by the parties: "with an unspoken (or even spoken) agreement that each, or at least the wife, will 'look the other way' at extramarital affairs while maintaining the marriage." *Id.*

391. *Id.*

to polyamory worry that *she* is poly because the desire for nonmonogamy is so widespread; an outsider might worry that her *partner* is, or could become, polyamorous.<sup>392</sup> The next Part will discuss calculations that individuals may be making in their own lives to balance nonexclusive desires and feelings of jealousy.<sup>393</sup> But for purposes of this discussion of outsider opposition to polyamory and polyamorists, it is important merely to note that many people may fear not only a nonmonogamous impulse in themselves, but also, or perhaps more so, in their partners. The mere possibility of her partner's interest in polyamory could cause someone to treat the idea of polyamory as absurd and avoid discussion that might increase its legitimacy.

Relatedly, the norm of compulsory monogamy can be useful to those who wish to have it both ways.<sup>394</sup> If someone wants to be nonmonogamous but wants his partner to be monogamous, then in many cases, his only way to achieve that goal is to pretend to embrace monogamy but dishonestly to practice nonmonogamy.<sup>395</sup> In other words, he can get what he wants only by cheating. Thus, cheaters may have an investment in disparaging the idea of polyamory.

In light of the above discussion, the rhetorical positioning of multiparty marriage at the end of the same-sex marriage slippery slope makes sense. The monogamous aspirations of the same-sex marriage campaigners fit well with the nation's deep cultural commitment to the fantasy of monogamy and its equally trenchant resistance to recognizing monogamy's frequent failure.<sup>396</sup> The prevalence of the fantasy and the reality of nonmonogamy suggests, however, that the rhetorical slippery slope masks the real proximity of nonmonogamy to mainstream reality. For polyamory's practitioners, this paradox of prevalence stands in the way of mainstream social or political support.

### C. *Alternatives and Implications*

Alongside its universalizing aspect, polyamory has a minoritizing strand in

392. For the sake of clarity and brevity, here as in the rest of the article, the examples sometimes involve males and sometimes females; nothing is intended by the selection of the pronoun in a given example.

393. See *infra* Section V.A.

394. Cf. J. Hughes, *Monogamy as a Prisoners Dilemma: Non-Monogamy as a Collective Action Problem* (January 1992), <http://hackvan.com/pub/stig/life/Monogamy-as-Prisoners-Dilemma.html> (suggesting that the greatest overall utility could be gained by widespread nonmonogamy, but that each individual may achieve the greatest personal utility by having multiple simultaneous partners, each of whom is monogamous with him or her).

395. An exception occurs if he is partnered with someone who does not wish to have other partners but does not care if he does. In Part III.B.2, Eddie describes Amber as having that approach to her relationship. See *supra* text accompanying note 196.

396. Familiar as they are with the political problems of universalizing identity categories, though, most gay-rights advocates would be reluctant to make common cause with such a differently threatening minority identity. To note this strategic perspective is not to say that same-sex marriage advocates are anything other than entirely ingenuous in their desire to enter the core institution of compulsory (for some) monogamy.

its contemporary writings. Polys recognize that only a minority of people seek honest, open, and autonomous nonmonogamy in the way that polys do, and as discussed earlier, polys value knowledge about one's own desires in this regard. But this type of minoritizing perspective is unlikely to reassure an outsider that the group is discrete, since this perspective may seem to ascribe false consciousness or cowardice to people who might otherwise be universally similar. In fact, this kind of minoritizing may actually be the most radical form of universalizing, along the lines of Deborah Anapol's claims that most (or all) of us "really are" polyamorous "at heart."<sup>397</sup>

In contrast to the universalizing quality of mainstream discourse (and of some poly writings), a certain strand of poly thought is deeply minoritizing. Some poly writings discuss polyamory as if it is hardwired. A statement such as the following is not unusual in the pages of *Loving More Magazine*: "I've been Bi and Poly since around the age of 13, and always had more than one relationship going on as a teenager. . . . [M]onogamy is just not my nature."<sup>398</sup> Similarly, Eddie Simmons traced his poly identity to his early years: "When I go and think back on my childhood, I begin to think I was probably polyamorous then . . . . Instead of [a] best friend, I had several best friends . . . ."<sup>399</sup> One contributor to *Loving More Magazine* writes, "The other major source of objections to polyamory is from those who are intrinsically polyamorous, but have partnered with a monogamous mate and have pledged, perhaps unwillingly, to be monogamous."<sup>400</sup> Another contributor, who initially presents polyamory as a "choice," ultimately seems instead to view it as deep-seated aspect of identity:

Once a person decides: "I am polyamorous;" or "I am monogamous," they can find partners and lifemates who in turn have practiced this kind of self-examination and made a genuine choice one way or the other. . . . It's better to abort a red-hot love affair early on with someone who does not share your fundamental orientation than to spend the rest of your lives together in bitter conflict over this desperately important issue. . . . I mean, I may still fall madly in love with a man who is decidedly gay, but I will learn quickly to rechannel my affections into more appropriate directions and you can bet your boots I will not

397. See *supra* text accompanying note 366.

398. The Dragon Bear Family, *supra* note 283, at 15 (quoting the portion labeled "Jeff's Side").

399. See Simmons Interview, *supra* note 188.

400. Zell & Zell, *supra* note 300, at 26 (quoting from the portion labeled "Oberon," and interpreting the two main objections to come from fear—in "people who are intrinsically monogamous"—that their partners might want nonmonogamy if that were an option, and resentment—in "those who are intrinsically polyamorous, but have partnered with a monogamous mate and have pledged, perhaps unwillingly, to be monogamous"—that others are doing what they want to do) (emphasis omitted).

propose marriage to him!<sup>401</sup>

In light of this poly's analogy between polyamory and homosexuality, her description of the choice to be poly looks more like a choice about how to experience and express one's true poly identity. These writings reflect the view that there are some people who "really are" poly.<sup>402</sup> Moreover, this view is sufficiently common in poly circles that its opposite—the view that while relationships can be poly, people cannot—is designated an "alternate point of view" on the alt.polyamory "frequently asked questions (FAQ)" page.<sup>403</sup>

This vision of poly identity as essential may follow from ideas about jealousy as essential. From this perspective, an essential poly identity may be determined by the absence of jealousy. Polys sometimes reflect on the different amounts of jealousy in different people. For example, the alt.polyamory FAQ page says, "Some people seem to have no jealousy; it's as if they didn't get that piece installed at the factory. Others, including some long-term polyamorists, feel jealousy, which they regard as a signal that something needs investigation and care, much as they would regard depression or pain."<sup>404</sup> At times, the idea of a hardwired absence of jealousy is explicitly tied to an idea of hardwired poly identity. Eddie explained the relative levels of intrinsic polyyness among his family members through their relative amounts of jealousy. After explaining that he thinks he was polyamorous even as a child because he had several best

401. *Id.* (quoting from the portion labeled "Morning Glory").

402. *Cf. supra* text accompanying note 351.

403. Matthesen, *supra* note 130. Matthesen quotes the following anonymous posting as an "alternate" view:

There aren't polyamorous and monogamous people; there are polyamorous and monogamous relationships. The same person may at various times be happy in both monogamous and polyamorous relationships at various times in his/her life. What is right depends on you and your feelings, and the feelings of those you are involved in relationships with. You may at some times be involved in a relationship that is monogamous, and that may be the right thing for the people in that relationship; at other times, you may be in a relationship which works better as part of a polyamorous network of relationships. In any case, the important thing is probably to act kindly and responsibly, and to communicate clearly with intimate partners and potential partners about these issues. Don't deny your feelings or the feelings of those that you care about. Get in touch with how you and those you care about really feel, rather than how society wants you to feel, or how you think it would be logical to feel, or how you've been told polyamorous people (or monogamous people) should feel. Then behave in ways which are honest, and which make you, and the people you care about, and the people they care about, happy and fulfilled. If this results in you having more than one intimate relationship at the same time, or being involved in a relationship with more than two people, those who are big on categorizing and labeling people will label you a "poly person."

*Id.* (quoting from the portion of the website labeled "How can I tell if I am polyamorous?", at <http://www.polyamory.org/> (last visited Apr. 26, 2004)).

404. *Id.* (quoting the portion labeled "What about jealousy?"). The website continues, "Jealousy is neither a proof of love (and this is where polyamory differs from possessive or insecure monogamy) nor a moral failing (and this is where polyamory differs from emotionally manipulating one's partner(s) into relationships for which they are not ready)." *Id.*

friends, he observes:

[T]he jealousy wasn't a big piece. . . . Some of us do and some don't [experience jealousy] . . . . [It's a] grey scale. I think Adam came hard-wired [as poly], even more so than me. Amber didn't; she deals with jealousy. Mike has learned . . . through experience he's discovered . . . . [He's] in the middle.<sup>405</sup>

From this perspective, then, individuals can be described in terms of fixed levels of jealousy, which in turn determine fixed levels of polyness.<sup>406</sup> It is important to emphasize that the idea that poly is defined by a lack of jealousy is just one strand of poly writing; as discussed earlier, much poly writing focuses on ways to overcome jealousy, work through it, and supplement or replace it with feelings of compersion.<sup>407</sup> Nonetheless, we see signs here of an essentializing view of polyamorous identity, and the idea that such fixed polyness exists only in certain people leads to a minoritizing discourse of poly identity.

The suggestion of an essential poly identity presents intriguing possibilities for a politics based on an ingenuous or a strategic essentialism<sup>408</sup> through which polys could try to build an image of themselves as a discrete minority. Convincing the mainstream nonmonogamists that polyamorists are a recognizable group with a distinct identity might be polys' best chance of overcoming the effects of the paradox of prevalence.

Several conceptual and practical problems undercut this possibility, however. First, this vision of poly identity may not be essential enough. Gays are frequently considered at best the outer limit of a spectrum of immutability or essential identity, and even a constructivist view considers homosexuality to have undergone the "perverse implantation" discussed above,<sup>409</sup> which fixed

405. See Simmons Interview, *supra* note 188.

406. Of course, there is no theoretical reason why jealousy and the desire for nonmonogamy should be on the same axis. Someone could lack jealousy but also lack the desire for nonmonogamy, or possess both jealousy and the desire for nonmonogamy. See *infra* Section V.A. Polys tend to combine them, I think, because most people prefer to place the same limits on their partners that they place on themselves.

407. See *supra* text accompanying notes 310–315. As discussed earlier, compersion is a poly word for taking pleasure in a partner's pleasure, as a preferable alternative or supplement to feeling jealousy.

408. See, e.g., DIANA FUSS, ESSENTIALLY SPEAKING: FEMINISM, NATURE & DIFFERENCE xiv, 18–19, 30–32 (1989); GAYATRI CHAKRAVORTY SPIVAK, *Subaltern Studies: Deconstructing Historiography*, in IN OTHER WORLDS: ESSAYS IN CULTURAL POLITICS 197, 205–07 (1987); see also FUSS, *supra*, at 118 ("How are we to negotiate the gap between the conservative fiction of experience as the ground of all truth-knowledge and the immense power of this fiction to enable and encourage student participation? . . . 'Essentially speaking,' we need both to theorize essentialist spaces from which to speak and, simultaneously, to deconstruct these spaces to keep them from solidifying."); cf. Sara Danius & Stefan Jonsson, *An Interview with Gayatri Chakravorty Spivak*, in BOUNDARY 2, at 24, 35 (1993) (quoting Spivak as asserting that "as a phrase, I have given up on" strategic essentialism because it "became the union ticket for essentialism," but equivocating as to whether she has given up on it "as a project").

409. See *supra* text accompanying notes 377–87.

homosexuals with a perceived pathology in the eyes of sexology and, ultimately, the broader culture. Polys have undergone nothing like this perverse implantation, nor is it feasible (or presumably desirable) to recommend that they pursue one.<sup>410</sup>

Second, this view of polyamory may not be minoritizing enough. The jealousy-poly continuum looks more like a sexual-orientation spectrum that recognizes a blurring of categories and a wide middle range of bisexuality. Eddie's "grey scale" of jealousy—and thus of polyamory—is reminiscent of Kinsey's sexual continuum<sup>411</sup> and ideas of universal bisexuality.<sup>412</sup> Like bisexuality, polyamory founded on this idea of a continuum is unlikely to reassure its putative outsiders that they are safe from the threat of falling into this state that they deem undesirable.

Third, the impulse to settle upon one view of polyamory—minoritizing or universalizing—may be worth resisting for theoretical and political reasons. While elaborating the potential benefits of political organizing around acts rather than identities in the aftermath of *Bowers v. Hardwick*, Janet Halley has also suggested that marginalized groups may draw strength from a "multiplicity of strategies."<sup>413</sup> Conceptual ambiguity about the origins and scope of homosexuality and bisexuality has in some ways been an obstacle for sexual-orientation-based rights claims, but it has also been the source of important intellectual and political activity.

Finally, and perhaps most importantly, this approach may not be radical enough—it may go against the meaning of polyness for many polys. The poly philosophies outlined at the beginning of the article do pay a great deal of attention to individual growth and experience, but they also articulate visions for others, and for the broader culture, and part of their power on all levels comes from their transformative vision.<sup>414</sup> This is why goals such as marriage are apparently not desirable to a sizable minority of polys, particularly if they come

410. Related to this, some polys have taken the kind of political stand reflected in certain gay and pro-gay writings—that it simply does not matter whether the identity is essential or constructed. See, e.g., Moon Dragon, *Born Poly?*, at [http://www.polyamorysociety.org/Born\\_Poly.html](http://www.polyamorysociety.org/Born_Poly.html) (last visited Feb. 15, 2004) ("I may, or may not, be born poly, but I'll die one.").

411. Cf. Yoshino, *supra* note 349, at 356–57 (discussing "the view—powerful in modern American culture from at least the publication of the Kinsey studies onward—that sexual orientation arrays itself along a continuum from exclusive heterosexuality to exclusive homosexuality" (citing KINSEY, POMEROY, MARTIN & GEBHARD, *supra* note 368)).

412. Cf. MARJORIE GARBER, *VICE VERSA: BISEXUALITY AND THE EROTICISM OF EVERYDAY LIFE* 16–18 (1995); PAULA C. RUST, *BISEXUALITY AND THE CHALLENGE TO LESBIAN POLITICS: SEX, LOYALTY, AND REVOLUTION* 1 (1995).

413. Janet E. Halley, *Reasoning About Sodomy: Act and Identity in and After Bowers v. Hardwick*, 79 VA. L. REV. 1721, 1770–71 (1993) ("Any attempt to exploit the rhetorical possibilities created as *Hardwick* becomes part of our legal and extra-legal culture and should embrace the multiplicity of strategies adopted by the Court. Anti-homophobic strategy should look both to identities and to acts as conceptual locations for opposition.").

414. See, e.g., *supra* text accompanying notes 363–66.

at the expense of a more radical vision.<sup>415</sup>

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Many in the mainstream share with polys the desire for more than one sexual partner. This leads them to resist discussions or acceptance of polyamorists and their lifestyle. But does this mean that most everyone wants to be polyamorous? To think directly about what people want for themselves, we have to separate some different possible aspects of polyamory and monogamy and to pose some different questions about what kinds of choices people may (or may not) be making in their own lives. This is the starting point for the next Part.

## V.

### DISPOSITIONS: SEXUAL AND LEGAL

The paradox of prevalence focuses largely on perceived identities: how polyamorous identity is generally understood and why it is considered by most to be beyond the realm of political possibility. To think about how law may be actually shaping each of us with regard to monogamy and polyamory, however, we must consider what these practices might look like at the level of desire or disposition. That is, if we try to imagine desire itself separate from the normative conception of desire, we can think more distinctly about how law might be shaping those desires.<sup>416</sup> In order to frame a provisional discussion of the proper role of law with regard to monogamy, this Part first considers the possible components of two contrasting identity possibilities: what we might call—so as not to confuse them with the practices of monogamy and polyamory—“mono” and “poly” dispositions. To promote discussion about monogamy and its alternatives, the article then concludes with a thought

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415. The slight data on poly views on marriage suggest that 32% oppose civil group marriage, while 68% support it. See Ryam Nearing, *Poly Political Animals Speak*, *LOVING MORE MAG.*, Winter 1996, at 22 (reporting on a “political quiz,” which received over two hundred responses).

Many [respondents] expressed a desire to get the government out of the bedroom and people’s intimate lives, except in the case of child welfare, but they also indicated that as long as marriage benefits are available for hetero couples, they should also be there for those in other forms of intimate relationships.

*Id.* The article about the survey primarily printed individual responses, rather than numerical or statistical results. Those individual responses printed largely tracked that summary, with tepid support for legalization of group marriage, if something more radical—like the abolition of marriage—is unavailable in this society. *Id.* at 22–23. The other key numerical observation offered is that “[t]he three highest priority legal issues as ranked by our respondents were: medical rights for poly partners; nondiscrimination in employment, and zoning which allows for non-related people to live together.” *Id.* at 22.

416. I express no opinion here on whether desire could actually exist independent of discourse; I posit only that we can usefully try to *think* about desire as a feeling separate from how a culture or community categorizes that desire.

experiment imagining how certain laws might themselves be used to promote discussion about some of these issues.

*A. A Dispositional Model of Poly and Mono Desire*

The first purpose of this Section is to try to imagine what a complete *desire* for polyamory or complete *desire* for monogamy might look like. Put another way, how might we conceive of the most “open” (poly) and most “closed” (mono) sexual dispositions? “Disposition” here refers to an identity defined by the desires of the participants, rather than, for instance, their behavior or their self-identification.<sup>417</sup>

Tables 1 and 2 present one way to think about extreme poly and mono dispositions. The rows of each table are defined by the behavioral axes regulated by criminal adultery and bigamy laws. As discussed in Part III, polyamory may be seen as the intersection of two types of transgression: a transgression of norms and laws requiring exclusivity in sexual relationships (regulated by adultery laws) and of norms and laws prescribing the numerosity of domestic sexual relationships (regulated by bigamy laws).<sup>418</sup> So the first row concerns whether someone desires sexual exclusivity (one sexual partner or more than one sexual partner), and the second row concerns whether someone desires domestic twoness (one domestic partner or more than one domestic partner).<sup>419</sup>

The two columns, “for oneself” and “for one’s partner(s),” recognize the possible distinction between one’s desires with regard to oneself and one’s desires with regard to one’s partner(s).<sup>420</sup> For instance, along the exclusivity axis, a person may desire more than one sexual partner for himself, but he may desire only one sexual partner for his partner. Or, along the numerosity axis, a person may want only one domestic partner for herself, but she may want more than one domestic partner for her partner perhaps because she does not want to have to fulfill all the needs of her partner.

A few caveats are important. First, these charts are not meant to define polyamory or monogamy, but rather to show what particular extreme versions of

417. See STEIN, *supra* note 381, at 45 (defining “the *dispositional view* of sexual orientation . . . [as the view that] a person’s sexual orientation is based on his or her sexual desires and fantasies and the sexual behaviors he or she is disposed to engage in under ideal conditions”). As Stein points out, there are significant epistemological and methodological problems in trying to gather empirical data on people’s sexual dispositions. See *id.* at 210–11. My purpose here is only to use the dispositional model as a way to think about people’s desires with regard to mono and poly.

418. See *supra* text accompanying notes 157–58.

419. These may well be two quite different types of desire; an interesting avenue for inquiry would be to think about the properties, antecedents, and development of these different wants and desires.

420. Because the primary purpose of these tables, at least in this article, is to discuss people’s disposition towards monogamy or an alternative model, I often speak of one partner as the exclusive case and multiple partners as the nonexclusive case, even though exclusivity can be a property of relationships among multiple partners.



each, from the perspective of disposition, might look like. Second, I do not mean these charts to suggest that the relevant desires are fixed in people, that they are knowable, or that they exist independent of discourse and social practices. Rather, the charts try to capture a hypothetical snapshot of current people under current norms if we had access to their desires with respect to sexual and domestic partners. Indeed, this exercise aims to help us imagine what aspects of desire are more or less malleable under various norms. Third, this approach views polyamory entirely through the lens of monogamy's norms, casting it as the nexus between two transgressions of monogamy. There are of course many ways to view polyamory, as discussed in Part III, and this is merely one perspective. Fourth, this approach does not take account of people who themselves want no sexual or domestic partners at all or who, out of spite, discomfort, or something else, want their partner to have no sexual partners at all. Finally, this characterization does not answer the question of what constitutes "sex" for purposes of exclusivity or nonexclusivity. As suggested earlier, actual physical contact, and particularly genital contact, is typically considered to be a more acceptable prompt for jealousy than nonphysical friendship.<sup>421</sup> But relationships can take many forms, as can jealousy. What is perhaps most relevant for many relationships is what the other partner would consider to be sex for purposes of jealousy.

Table 1: Extreme Poly Disposition (most "open" intersection of desires)

	For oneself	For one's partner(s)
Sexual Exclusivity (targeted by adultery statutes)	A) Poly sexual desire with regard to oneself: desire for more than one sexual partner	B) Poly sexual desire with regard to one's partner(s): desire for one's partner(s) to have sexual experiences beyond oneself, i.e., the opposite of jealousy, or compersion
Domestic/Romantic Numerosity (targeted by bigamy statutes)	C) Poly partnering desire with regard to oneself: desire for more than one ongoing domestic/romantic partner	D) Poly partnering desire with regard to one's partner(s): desire for one's partner(s) to have more than one ongoing domestic/romantic partner, i.e., more than oneself

421. See *supra* Section II.A.1.

Table 1 presents one idea of an extreme poly disposition. We can use this table to imagine an individual whose desires tip in the poly direction in each of the four boxes. In Box A, which concerns the question of exclusivity for oneself, this individual desires more than one sexual partner for herself, perhaps out of a desire for sexual variety or because she finds many people sexually attractive. In Box B, which concerns exclusivity with regard to one's partner, she desires her partner to have more than one sexual partner. That is, the person with a complete poly disposition wants her partner to have sex with people in addition to her. Factors contributing to this desire might be sexual excitement at the idea of her partner's having sex with someone else<sup>422</sup> or the emotion of compersion, the poly term for the opposite of jealousy, for empathetic pleasure in one's partner's sexual satisfaction.<sup>423</sup>

In Box C of Table 1, where the numerosity row intersects with the self column, the completely poly-disposed individual would desire more than one ongoing domestic or romantic partner. She might want more than one partner because, for instance, she likes having multiple interlocutors, prefers pooling domestic resources, enjoys processing, or feels her needs are better met by multiple people rather than one person. Finally, in Box D, numerosity with regard to one's partner, the poly-disposed individual would want her partner to have more than one domestic or romantic partner, perhaps because she prefers that her partner have more than one person to fulfill her needs. The distinction between Box C and Box D might also be understood—through the metaphor of traditional polygamy—as the difference between how a person might feel about being the one woman in a polyandrous relationship (Box C) or about being one of several women in a polygynous relationship (Box D). In sum, Table 1 presents a portrait of a completely open, completely poly, disposition. It is hard to imagine that a person with this disposition would be happy in any relationship other than a polyamorous one, in the sense of a relationship open to multiple sexual partners and multiple domestic partners.<sup>424</sup>

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422. Or, relatedly, a feeling of pride or flattery in a partner's sexual attractiveness or "prowess."

423. *See supra* text accompanying note 315.

424. In addition, consistency across rows may indicate a disposition along a particular axis. For example, a person with strong affirmative responses in Boxes A and B, such that she desires additional sexual partners for herself and her partner, is likely to be content only in a sexually open relationship. A person with strong affirmative responses in Boxes C and D, who desires additional domestic partners for himself and his partner, is likely to be happy only in a domestic living arrangement of multiple people. (It is an interesting question whether a family with children or other dependents might in some way satisfy the latter desire.)

Table 2: Extreme Mono Disposition (most "closed" intersection of desires)

	For oneself	For one's partner(s)
Exclusivity	A) Mono sexual desire with regard to oneself: desire for one and only one sexual partner	B) Mono sexual desire with regard to one's partner(s): desire for one's partner(s) to have sexual experiences with only oneself, i.e., jealousy at the idea of one's partner's having sex with others or perhaps at the idea of a partner's desiring others
Numerosity	C) Mono partnering desire: desire for one and only one ongoing domestic/romantic partner	D) Mono partnering desire with regard to one's partner(s): desire for one's partner(s) to have only one ongoing domestic/romantic partner, i.e., just oneself

Table 2 presents the opposite disposition: complete mono desire. In Box A, an individual with this disposition desires sex with one and only one person. Many reasons are plausible. He might experience sexual satisfaction only through an exclusive sexual bond, he might obtain such tremendous sexual satisfaction from exclusive sexual intimacy that he does not desire anyone else, he might be romantically consumed by one particular person, or he might have tremendous nervousness that is reassured only by one particular person. In Box B, this individual also desires that his partner have only one sexual partner: him. His desire for the other person only to have him (which might broadly be called jealousy) might be rooted in, for example, anxiety about losing the partner or being compared to others, a desire to spend all his time with the partner and a corresponding wish that the partner never be otherwise occupied, or embarrassment at the idea of his partner having other sexual partners because observers would assume he was being betrayed.

Along the numerosity row, in Box C he would want only one domestic or romantic partner, perhaps because he feels that all his needs are met by one person, or does not want to divide his resources or energies among multiple people. Finally, in Box D, this mono individual would want his partner to have only him as an ongoing domestic or romantic partner. He might want the person always to be available to address his needs; he might want to feel loved more

than anyone else in his partner's world. This is a portrait of a completely closed, completely mono, disposition. It is hard to imagine a person with this disposition being happy in anything other than a completely monogamous couple.<sup>425</sup>

In light of the number of people who commit adultery,<sup>426</sup> and the presumably greater number who desire it, it seems fair to assume that most people are more on the poly side (Table 1) for Box A. By contrast, the prevalence of jealousy would suggest very few people are in Box B of the completely poly table (Table 1), and instead most probably place themselves in Box B of the completely mono table (Table 2). That is, most people may desire multiple sexual partners for themselves, but desire a partner who is exclusively sexual with them. The rarity of poly relationships also suggests that for both Box C and Box D—the desire for one domestic partner for oneself and for one's partner, respectively—most people are on the mono side (Table 2). In sum, viewing current desires at face value, we may provisionally conclude that most people seem likely to place themselves in Table 1 (completely poly) for Box A, but Table 2 (completely mono) for Boxes B, C, and D.

Thus, it seems that most people find themselves with neither a completely poly nor completely mono disposition. A sort of "bi" disposition in this regard might be understood as conflicting boxes between tables, as described above, or as a bi-directional desire in one or more boxes, or, alternatively or also, as a flexibility or indifference in one or more boxes. Thus, most people possess some sort of mix of desires, with the largest number perhaps meeting the profile described above: a poly-type desire for multiple sexual partners for oneself, but a mono-type desire for one's partner to have only one sexual partner, and mono-type desires along the numerosity axis for both self and partner.

People with mixed impulses with regard to sexual exclusivity and numerosity might choose to enter either monogamous or nonmonogamous relationships for any number of reasons. People might choose to embrace monogamy as a goal (perhaps even if they are in danger of slipping up occasionally) because while they might prefer nonexclusive sexual possibilities for themselves and, due to jealousy, exclusive commitment from their partners, in the end they would prefer exclusive sexual commitment for both over nonexclusivity for both. In other words, jealousy trumps sexual desire for

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425. As with Table 1, consistency across the rows in Table 2 may also be significant. See *supra* note 424. For example, a person with affirmative responses in Boxes A and B (the exclusivity row), but negative responses in Boxes C and D (the numerosity row), wants sexual monogamy for herself and her partner, but multiple domestic relationships for herself and her partner. This person presumably will be happy only in a sexually exclusive relationship, but will also presumably want to live with more people than her partner. As noted above, one wonders if living in a house with children or other dependents might partially or fully satisfy this multi-partnering urge. On the other hand, a person with affirmative responses in Boxes C and D, but negative responses in Boxes A and B, will presumably have a strong desire for a sexually open relationship, but for a domestic partnership of only two.

426. See *supra* text accompanying notes 106–09.

additional partners. Thus, in the absence of finding a partner who wants to be sexually exclusive and have a partner who is nonexclusive, such a person favors exclusivity for herself and her partner.

If many people are in this situation, then they might feel that a widespread societal commitment to monogamous norms and behavior would help them solve a collective action problem for all those who want that compromise. But this approach assumes that jealousy is fixed and would not diminish in the face of different norms and possibilities surrounding sexual nonexclusivity. This proposition is far from certain.<sup>427</sup> Moreover, if so many want exclusivity, collective action should not be a particular problem even in a world of less restrictive norms; social clubs and identity names (such as “monogamist” or, more specifically, “exclusivist” or “dualist”) might be generated to help the many people with this preference find each other. The same might be said for people who might prefer monogamy as a kind of precommitment strategy because they have nonmonogamous desires but prefer monogamous rules and behavior because of certain beliefs about morality or concerns about possible emotional pain stemming from more sexual or romantic relationships. Those preferring this precommitment approach could find each other through the type of channels and techniques currently used by most individuals to find those with whom they are compatible in a whole range of ways.

Perceived risk might also be a factor in some people’s decisions about monogamy. Concern about risk might be understood as a component of what we call jealousy, or as an independent form of rational calculation. Either way, some people might feel that having outside sexual experiences—or a partner’s having outside sexual experiences—creates a greater risk of losing the partner. They may therefore interpret an agreement to have sexual experiences outside the relationship as a sign that one or both partners lack concern about losing each other and thus feel less love than those who commit to exclusivity. (This logic may explain why people sometimes experience pleasure when learning that a partner is jealous: they may experience the jealousy as a sign that the partner is risk averse about losing them.)

But there is also a different theory of risk: if a relationship does not permit outside experiences, then one or both partners may grow agitated, feel confined, feel bored, feel resentful, stop having sex, stop growing, or face similar undesirable consequences. Such risks are more apparent if we imagine the outside experiences as nonsexual, i.e., as relationships that typically do not violate monogamy’s law, such as friendships. If two partners promised not to have any friends outside of the relationship, or dropped all their friends because

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427. There is limited empirical work suggesting that a person may feel less jealousy in response to a partner’s “extradyadic” sex if the first person has also engaged in extradyadic sex at some point. In addition, the first person, particularly if female, may experience less disappointment if her partner has engaged in extradyadic sex previously. See Bram P. Buunk, *Sex, Self-Esteem, Dependency, and Extradyadic Sexual Experience as Related to Jealousy Responses*, 12 J. SOC. & PERS. RELATIONSHIPS 147, 152 (1995).

emotional exclusivity made one or both partners feel more special, they would presumably, from a practical perspective, decrease the chances that one of them would fall in love with someone else, since they would not be interacting with anyone else. But the relationship could become cloying and limiting, the partners might grow resentful or bored, and might eventually break out of this bind by leaving. They might even do this by sneaking around to find companionship outside the relationship. In addition, any new friendship would need to be secret, and this very secrecy might, by creating frisson and guilt, lead to a shift of loyalties.<sup>428</sup> In other words, under a no-friends rule, simply having a friend in addition to the partner could generate anxiety, drama, and secrets from the partner. But if friends were permitted, as they are in most relationships, then the picture looks rather different.

For some, then, concerns about the risks of sex outside the relationship may trump concerns about the risks of exclusivity. Given a choice between exclusivity and nonexclusivity rules, then, these individuals will presumably choose exclusivity. For some others, however, concerns about the risks of exclusivity may trump concerns about the risks of outside sexual partners. Given the two options, these individuals will presumably choose nonexclusivity. As discussed earlier, some may also choose cheating to try to capture the best of both worlds.<sup>429</sup>

In light of the above discussion, neither monogamy nor polyamory necessarily seems an unreasonable choice, depending on individual or partner dispositions, feelings, and priorities. That said, this talk of choices about how to behave in the face of mixed desires suggests that people are actively choosing to live one lifestyle or the other. I suspect, however, that contemporary norms decrease the availability of true choice. The next Section will consider the current and ideal role of law in shaping those norms.

### *B. The Role of Law: A Thought Experiment*

Law contributes to the norm of compulsory monogamy in many ways. Most obviously, in many states, the criminal law penalizes married people who engage in nonexclusive sexual behavior, through adultery laws, and also married people who try to marry or cohabit with additional partners, through bigamy laws.<sup>430</sup> Moreover, the marriage law in all fifty states prevents multiple parties from marrying one another, and no U.S. jurisdiction's domestic partnership laws permit multiple partners to register.<sup>431</sup> And, whether appropriate or not under

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428. Cf. Kipnis, *supra* note 110, at 40–43.

429. See *supra* text accompanying notes 394–95.

430. See *supra* notes 50–51.

431. With one possible exception, I have seen nothing to indicate that polyamorous relationships, as distinguished from traditional polygamy with its one-sided acceptance of only polygyny, are featuring prominently in the political landscape of any country. Martha Ertman notes that the city of Cork, Ireland, considered a bill that would extend “domestic partnership

applicable custody laws, the power of the state has been used to separate a mother from her child based on her polyamorous relationship, as the *Divilbiss* case demonstrates.<sup>432</sup> People living in polyamorous relationships worry about losing their jobs due to discrimination based on their relationships,<sup>433</sup> and no statute or principle has been held to protect individuals from such job discrimination. Zoning laws, limiting the number of unrelated persons who may reside together, may shape people's choices about their family arrangements.<sup>434</sup> Each of these legal issues is complex and warrants its own article. Nonetheless, in the remainder of this article, I turn to one of the more discrete and explicitly coercive forms of legal intervention into decisions about monogamy: criminal prohibitions on adulterous conduct.<sup>435</sup>

An obvious legal implication of the analysis thus far—which acknowledges the prevalence of nonmonogamous sexual behavior and desires and takes seriously polyamory as a viable relationship practice for some—is that adultery laws should be repealed. Although these laws target only a small part of the sexual, loving universe that polyamory comprises, they embody as an absolute rule the normative presumption that underlies monogamy's law: the idea that sexual jealousy is a constitutive part of romantic love. The existence of these laws threatens to interfere with people's choices to adopt a lifestyle other than monogamy, and thus with any true "choice" between monogamy and nonmonogamy.<sup>436</sup> And there are a number of reasons that we might prefer a

provisions beyond couples to include polyamorous affiliations, reasoning that intimate partnerships sometimes have more than two partners just as business partnerships do." Ertman, *The ALI Principles*, *supra* note 26, at 116 (citing Jan Battles, *Cork Opens Door to Gay Couples*, SUNDAY TIMES (London), Feb. 6, 2000).

432. See *supra* Section III.B.1.

433. See *supra* note 316.

434. See *supra* note 415; *cf.* *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (plurality opinion).

435. Bigamy laws are a more complicated issue. Because multiparty marriage is not legal, much of the behavior bigamy laws target is fraud—possibly on the other spouse but certainly on the state. As noted earlier, there are five states that criminalize bigamous cohabitation, see *supra* note 158, which does not necessarily contain any fraudulent intent, but the laws arguably aim to capture Mormons who marry and divorce several wives in order to create a *de facto* polygamous marriage and thereby circumvent the bigamy laws. See, e.g., Ryan D. Tenney, *Tom Green, Common-Law Marriage, and the Illegality of Putative Polygamy*, 17 *BYU J. PUB. L.* 141 (2002) (discussing the prosecution of a polygamist Mormon under bigamy and common-law marriage statutes).

436. There are two things to note here. First, as I discuss below, adultery statutes are not generally enforced; this fact partially prompts this inquiry into whether they should be amended to incorporate a notion of consent and then enforced or simply allowed to fall into desuetude. Second, adultery laws may not directly affect gay people's lives since gay people cannot marry and, at least under some state laws, same-sex extramarital sex does not constitute adultery, see Anne Saunders, *New Hampshire Supreme Court: Gay Sex Cannot Be Adultery*, ASSOCIATED PRESS, Nov. 7, 2003. As same-sex couples approach legalized marriage, however, such proscriptions may soon apply. *Cf.*, *supra* text accompanying notes 55–58 (discussing the use of the term "exclusive" in *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003)). Although adultery statutes are not the most pressing legal concern for polys, it is worth noting that in a context in which gay sex is relevant to adultery, a relationship such as Eddie Simmons's, see

world in which people *choose* monogamy or *choose* open relationships or polyamory, at least to a greater extent than they do now. For example, the preceding discussion of differing dispositions suggests that some individuals may be happy only in a poly or a mono relationship context. If people could choose either monogamy or one of its alternatives, rather than being urged into automatic promises of monogamy, there might be fewer ugly, painful betrayals. More people who value sexual nonexclusivity or a larger domestic circle might find one another, rather than bonding with unlike individuals, at times under false pretenses. It might be easier to be confident that one's monogamous partner really wants monogamy, if that partner has seen viable alternative relationship models and turned them down in favor of monogamy.

This last point might be understood as similar to the contemporary situation with regard to homosexuality, in which we are less likely than ever before to think that homosexuals and bisexuals may be lurking secretly everywhere, because there are fewer reasons for gays and bis not to come out under current historical conditions.<sup>437</sup> Because the set of poly desires is so complex and potentially contradictory,<sup>438</sup> the outness model goes only so far in describing polyamory and polyamorous desires. It seems likely, though, that if more people accepted alternatives to monogamy, there would be greater openness on the part of those who valued sexual nonexclusivity or multiparty domestic arrangements more than or instead of the contrary monogamous values. No doubt there would still be cheaters and people who felt trapped by circumstance. But cheating might be less painful for some if the world did not assume that the extramarital activity was the betrayal of a sacred promise, or if the parties did not establish sexual fidelity as the foundational promise of their relationship.<sup>439</sup> A world in which both monogamy and its alternatives were viable options would be a complex world, but this newly complex world might well have virtues to rival the current privileging of monogamy, with its sometimes contradictory fantasies and realities. Whether or not the state should actively encourage polyamory and open relationships as viable relationship models, the state should arguably stop using the coercive power of the criminal law to discourage alternatives to monogamy.

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*supra* Section III.B.2, could be subject to prosecution. Given the law's penchant for singling out marginal individuals for prosecution, Eddie's family might have reason to fear being a prime target.

437. The historical frame of this assertion is the last 150 years, the period of the modern "homosexual" experience. *See supra* text accompanying notes 377–82. As to whether it makes sense to think about tolerance or intolerance of homosexual identities prior to that time, I express no opinion here.

438. *See supra* Section V.A.

439. The emotion behind jealousy may arguably be due in part or in full to the meaning ascribed to promises of monogamy. If a person says explicitly or implicitly that the most hurtful thing his partner could do to him is to have sex with someone else, then it is hard to know what part of his hurt over his partner's cheating is due to the outside sexual behavior and what part is due to the partner's knowingly doing what had been established as the "most hurtful thing."



Thus, the obvious next step would seem to be to repeal the adultery laws that exist in nearly half the states.<sup>440</sup> These adultery laws are rarely enforced,<sup>441</sup> but they always present the possibility of enforcement,<sup>442</sup> 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.<sup>443</sup> 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.<sup>444</sup> 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

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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 . . . .”<sup>445</sup> 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.<sup>446</sup> 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.”<sup>447</sup> 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.<sup>448</sup> 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.<sup>449</sup> There might be reason to wonder, in any particular case, if consent given to a spouse's extramarital sex is freely given.<sup>450</sup> 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.<sup>451</sup> 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.<sup>452</sup> 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*,<sup>453</sup> adultery may be understood as “an abuse of an institution the law protects,”<sup>454</sup> 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,”<sup>455</sup> 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

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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,<sup>456</sup> 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<sup>457</sup> 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.<sup>458</sup>

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

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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.<sup>459</sup> 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.<sup>460</sup> 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.”<sup>461</sup> 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.<sup>462</sup> 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.<sup>463</sup>

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),<sup>464</sup> 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).<sup>465</sup>

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.<sup>466</sup> As a legal matter, adultery is typically of little consequence in the criminal domain.<sup>467</sup> 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

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](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”).

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.<sup>468</sup> 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.<sup>469</sup> 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.<sup>470</sup> 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.<sup>471</sup> 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.<sup>472</sup> 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

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

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.<sup>476</sup> 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.”<sup>477</sup> 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.<sup>478</sup> 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.”<sup>479</sup> 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.<sup>480</sup> 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.<sup>481</sup>

A nonnormative statute also comports with an analysis of the parties’ likely “propensity to contract around.”<sup>482</sup> 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.<sup>483</sup> Thus, a statute that assumes nonexclusivity and

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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.<sup>484</sup>

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.<sup>485</sup> 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.<sup>486</sup> Moreover, after *Lawrence*,

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

the constitutionality of criminal adultery statutes is uncertain.<sup>487</sup> Ultimately, then, the criminal law should probably extricate itself from this realm.<sup>488</sup>

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,<sup>489</sup> 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,<sup>490</sup> 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

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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 . . . .”<sup>491</sup> 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.

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